UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

INDIAN HEALTH SERVICE, CROWNPOINT COMPREHENSIVE HEALTH CARE FACILITY, CROWNPOINT, NEW MEXICO Respondent	
and NAVAJO NATION HEALTH CARE EMPLOYEES, LOCAL 1376 Charging Party	Case No. DE-CA-60209

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 **MARCH 24, 1997**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: February 19, 1997
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: February 19, 1997

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: INDIAN HEALTH SERVICE, CROWNPOINT COMPREHENSIVE HEALTH CARE FACILITY, CROWNPOINT, NEW MEXICO

Respondent

and Case No. DE-CA-60209

NAVAJO NATION HEALTH CARE EMPLOYEES, LOCAL 1376

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

INDIAN HEALTH SERVICE, CROWNPOINT COMPREHENSIVE HEALTH CARE FACILITY, CROWNPOINT, NEW MEXICO Respondent	
and NAVAJO NATION HEALTH CARE EMPLOYEES, LOCAL 1376 Charging Party	Case No. DE-CA-60209

Mr. Gerald W. Jochem
For the Respondent

Bruce E. Conant, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On September 29, 1996, the Regional Director for the Denver Region of the Federal Labor Relations Authority, pursuant to a charge filed on December 7, 1995 by the Navajo Nation Health Care Employees, Local 1376, Laborers' International Union of North America (herein called the Union) issued a Complaint and Notice of Hearing alleging that the Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico (herein called Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) on or around October 1, 1995 when the Respondent implemented a change in the work schedule for employees of its laboratory to allow for 24-hour coverage on October 1,

1995 after having received a request to negotiate concerning the matter from the Union and without having completed negotiations.

A hearing was held in Albuquerque, New Mexico, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed timely post hearing briefs which have been carefully considered.[1]

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

At all relevant times herein, the Union was the exclusive representative of a bargaining unit of professional employees located at Respondent's Crownpoint facility. The Crownpoint facility adjoins the Navajo reservation and is the only medical facility within approximately 66 miles. The facility provides outpatient and inpatient services including an emergency room which operates 24 hours per day. Nonnative American employees live in housing provided by the Government in two areas close to the medical facility as no other housing is available in the area.

At all relevant times herein, there was a collective bargaining agreement in effect between the Union and Respondent covering the professional bargaining unit. Among the members of the professional bargaining unit were approximately eight medical technicians who worked in Respondent's laboratory. The eight medical technicians were licensed professional employees, each capable of performing

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[1] The General Counsel filed a motion to strike Respondent's post hearing brief, because according to it, Respondent did not demonstrate any extraordinary circumstances. Moreover, the situation here is totally unlike Indian Health Service Unit, OALJ 97-10 where no such circumstances were shown. I take official notice of the severe weather conditions which isolated the Navajo reservation, making it difficult if not impossible to mail Respondent's brief in the required time period. **Data Suggests Long-Term Change Toward Heavy Weather Worldwide**, The Washington Post, January 21, 1997 at A3 Col.1. In the circumstances, since Respondent had no control over the adverse weather conditions, in my view it should not be penalized for the one day's tardiness.

any of the laboratory tests or procedures done in the laboratory.

Prior to April 1995[2], medical technicians were paid for being on standby during periods when the laboratory was closed. This practice required that the medical technician be available to respond to any emergency within 15 minutes. Sometime in April, Respondent eliminated the standby status for the medical technicians, instead placing them on an on-call status which required the technicians to respond to emergencies within a period of 45-60 minutes, but authorizing payment only for the time that they actually worked during the callback period.

Medical technician Robert Vega sought the help of Diane Huling, the Union's representative over the change in practice. Huling objected to Respondent's Clinical Director Arnold Loera. She also sought a meeting to discuss the issue with Loera, but the union was not included in any meetings held concerning the change. Eventually, the Union filed a grievance concerning this change which was rejected by Respondent as untimely. Although Huling explained that the employees were concerned about their loss of income from the elimination of standby pay, management refused to offer any settlement of the grievance.

Sometime around September 12, Gwen Duran, the laboratory supervisor, in a memorandum to all laboratory employees sought volunteers for the "upcoming new schedule," which involved a 24-hour operation of the laboratory. The following day, a memorandum was sent to Vega, as a Union steward by Duran and Loera informing the Union of the planned new work schedule, that was to be implemented on a trial basis for one month only. The next day, Loera and Duran distributed a detailed work schedule for the period October 1-28, to employees of the laboratory.

Vega after consulting with the Union's attorney, sent a memorandum on September 14, requesting bargaining and objected to what the Union viewed as implementation of the new schedule, without bargaining. Respondent replied, on September 14, agreeing to meet on September 19 and requesting the Union's bargaining proposals in advance of that meeting. In addition, the memorandum warned that, "One way or another the scheduled shift change will happen and there will be no delay in starting the new shifts." Since he had not received the memorandum until September 18, Vega requested a delay until the following week September 25, in order to prepare for the meeting.

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[2] Unless noted otherwise, all dates hereafter are 1995.

Respondent agreed to a delay until September 25, but again requested specific bargaining proposals and reiterated, " . . . without any interruption in 'direct patient case' the schedule shift change will happen and there will be no delay in starting the new shifts on October 1, 1995." Vega acquiesced and sent written proposals to Duran concerning the shift change. In the proposals, Vega submitted that the changed could not be implemented without negotiations and suggested that there were alternative schedules that would result in reduced callback expenses. Further, he mentioned the goal of all employees having "a fair share of differential pay and rotation of shifts." He also raised an issue of union representation at the meeting, submitting a list of four employees the Union wanted to attend the meeting. Ultimately, the Union was represented at the meeting by Vega and Laverne Abeita. Likewise, Respondent had two representatives at the meeting, Loera and Duran.

Vega recalled that the meeting lasted less than 20 minutes with Loera talking for about 14 minutes, and explaining why he [Loera] decided to implement the 24 hour/ day schedule and the advantages which he expected the change to bring. Vega recalled that the meeting ended suddenly, as Loera realizing that he had another commitment said that he [Loera] had to leave and could not spend any more time with them because he had to go back to work. Vega further testified that, at the end of the meeting, he expressed his dissatisfaction that they had not discussed the Union's proposals or resolved any of the issues raised by the schedule change. Vega while conceding that he did not tell Respondent that the Union did not agree to the change on September 25, he concluded that this was what he meant by stating, "nothing had been negotiated."[3]

Respondent's witness, Duran recalled that the meeting lasted somewhere between 30-40 minutes. She also remembered that "most of" the Union's proposals were discussed. Duran did not recall however, whether the Union's proposal that each employee is given a fair share of differential pay and different shifts were discussed. On the other hand, she did remember that the Union representatives agreed, at the meeting, to the new schedule on a trial basis. Duran thus seemed satisfied that the Union had gotten a shot at its positions in the meeting.

Loera recalled a 45 minute meeting, but he also never saw the Union's proposals which Respondent had twice

[3] Abeita did not testify.

requested. While recalling that the meeting started with the Union expressing concerns about the proposed change, Loera testified that the session progressed in a relatively cordial and calm manner and that, as the session ended, they were "all on the same page." Loera remembered his participation in the meeting as having spent a "significant amount of time" giving the Union representatives the "background" to the change. If he had not seen the Union's proposals and did not see them during this seemingly abbreviated bargaining meeting, the question remains how this meeting could constitute any meaningful bargaining as required by the Statute.

Immediately following the September 25 meeting, Vega summarized his impression of Loera's position during the meeting as, "I hear you, but we will continue as planned!" Duran also made typed notes of the meeting which indicated that the new schedule would be implemented on October 1 "without any delay in direct patient care" and stating further, that the ". . . idea of a 24-hour coverage was supported by . . . Loera."

The new schedule was implemented on October 1. There was no further meeting between the parties on this matter. The new schedule was continued until January 7, 1996 when it was rescinded.[4]

Vega testified that the schedule changes caused him an estimated loss of two to three hundred dollars per month. Furthermore, he estimated that other medical technologists who had been assigned to work weekends gained income. These losses were in addition to the earlier losses suffered when the medical technologists lost standby pay in April 1995.

Conclusions

The General Counsel's position is that a totality of the circumstances in this case reveals that the Respondent did not engage in good faith bargaining over the shift changes in this matter. The General Counsel noted that after the Union requested to meet, prior to the meeting, Respondent had already solicited "volunteers" for each of the shifts required and had distributed a detailed schedule for the 30-day trial period to each employee involved, informing them that the changes would be implemented on October 1. Also the General Counsel notes actions prior to the meeting which it considers an indicium of bad faith such as the setting of date, time and location of the meeting as

[4] The Union was notified of this change by memorandum dated December 7, 1996.

well as the selection of represen-tatives. While recognizing that these matters standing alone would not prove bad faith bargaining, it is urged that they be considered as a part of Respondent's scheme to avoid bargaining.

Respondent views the matter as one of credibility thereby, contending that it properly notified the Union of the change and that it discussed the issues and proposals raised by the Union at the September 25 meeting. Further, it contends that the Union agreed to implement the change and that it took no action between September 25 and the effective date of implementation October 1. Respondent would thus rely on inaction by the Union as it did not request services of the Federal Services Impasses Panel prior to the October 1 implementation date of the changes.

Even using the Respondent's witnesses version of what occurred at the meeting, no meaningful bargaining took place and, it therefore appears that Respondent did engage in bad faith bargaining in violation of the Statute. Loera's testimony was that he spent a considerable amount of his time at the meeting explaining the background of the proposed change. He also testified that he had not seen the Union's written proposals. Regretfully, such honesty destroys Respondent's defense. Loera's testimony, in my opinion supports a finding that the Union was presented with a *fait accompli* here and there was no bargaining. *See, Department of Labor, Washington, D.C.*, 44 FLRA 988, 1007 (1992). If this were the case, it was futile for the Union to present any proposals since Respondent had no intention of considering proposals other than what it aimed to put in place and therefore, any Union proposals were simply meaningless.

A closer look at the meeting reveals that Loera talked only about "background" and Duran apparently said little or nothing. By his own account, Loera had not read the Union's proposals nor does it appear that Loera addressed any of the Union's concerns about the change at this meeting. Although Loera testified that at the end of the meeting they were "all on the same page," the record does not reveal to the undersigned that the Union had agreed to any change. Nor does Duran's notation in her memorandum of the meeting, that the
". . . idea of a 24-hour coverage was supported by . . . Loera" reveal any agreement by the Union. Given Respondent's warnings prior to the September 25 meeting that "One way or another the scheduled shift change will happen and there will be no delay in starting the new shifts" and, further that the changes would be implemented ". . . without

any interruption in 'direct patient case' the schedule shift change will happen and there will be no delay in starting the new shifts on October 1, 1995", it is not difficult to see this meeting as "merely an informational briefing to the Union concerning [Respondent's] plans and not collective bargaining." *See Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington,* 14 FLRA 644, 672 (1984). While Duran testified that Vega and the Union had the opportunity to discuss "most of" the Union's proposals she did not seem to have a grasp of what those proposals were. Loera obviously did not care what the proposals were, as he had never seen them. Although one would assume that Loera as Respondent's highest official at the meeting, would have some familiarity of the Union's proposals and would be the one to consider their impact, it is clear that his role in the meeting was merely to make the Union aware of the reasons why the change was needed and not to engage in any meaningful discussion about the proposed changes or seek agreement. *Federal Aviation Administration, supra.* Accordingly, in the total circumstances of this case, it is concluded and found that Respondent failed to engage in good faith bargaining with respect to the shift change involved herein, and therefore violated section 7116(a)(1) and (5) of the Statute.5

It is therefore recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico, California shall:

1. Cease and desist from:

(a) Implementing changes to terms and conditions of employment without providing the Navajo Nation Health Care Employees, Local 1376, with advance notice and the opportunity to negotiate concerning the change, to the extent required by the Federal Service Labor Management Relations Statute. Discriminating against unit employees

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Based on the foregoing, it is unnecessary in my view to make a specific finding with regard to whether this matter included the implementation of a change different from that negotiated by the parties or whether there was adequate notice of a change different from the one negotiated on September 25.

for engaging in activities protected under the Statute, such as detailing employees to temporary positions because they engage in activity protected under the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured to them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Promptly take action to make whole any bargaining unit employee for any salary differential or other compensation lost during the period when the unnegotiated schedule change was in effect.

(b) Post at the Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico copies of the attached Notice to All Employees on forms furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Chief Executive Officer, Crownpoint Comprehensive Health Care Facility, and they shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the these Notices are not altered, defaced, or covered.

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

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ELI NASH, JR.
Administrative Law Judge

Dated: February 19, 1997
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico 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 implement changes to terms and conditions of employment without providing the Navajo Nation Health Care Employees, Local 1376, with advance notice and the opportunity to negotiate concerning the change, to the extent required by the Federal Service Labor Management Relations Statute. Discriminating against unit employees for engaging in activities protected under the Statute, such as detailing employees to temporary positions because they engage in activity protected under the Statute.

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

WE WILL promptly take action to make whole any bargaining unit employee for any salary differential or other compensation lost during the period when the unnegotiated schedule change was in effect.

_____
(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 provision, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado, 80204, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. DE-CA-60209, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Bruce E. Conant, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
1244 Speer Blvd., Suite 100
Denver, CO 80204-3581

Mr. Gerald W. Jochem
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Mr. Robert D. Purcell
International Representative
Laborers' International Union
of North America
620 Sunbeam Avenue
Sacramento, CA 95814

Dated: February 19, 1997
Washington, DC