decision

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424

GENERAL SERVICES ADMINISTRATION .

TUSCON, ARIZONA .

Respondent .

.

and

. Case No. 98-CA-10496

NATIONAL FEDERATION OF FEDERAL .

EMPLOYEES, LOCAL 81 .

Charging Party .

Deborah Finch Representative of the Respondent
Fred Huerta Representative of the Charging Party
Lisa Clare Lerner-Miller Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by unilaterally reorganizing office space and changing work assignments and procedures without first notifying the Charging Party and providing it an opportunity to bargain over the impact and implementation of the changes.

Respondent's answer admitted that Respondent had moved a desk and issued a memorandum without advance notice to the Charging Party, but denied any violation of the Statute.

A hearing was held in Tucson, Arizona. The Respondent, Charging Party and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The National Federation of Federal Employees (NFFE) is the exclusive representative of a nationwide unit of employees of the General Services Administration, Washington, DC, appropriate for collective bargaining, including employees at Respondent's facilities in Tucson, Arizona. The Charging Party is an agent of NFFE for representing employees at Respondent's Tucson facilities.

Gary Analora, Area Utilization Officer (AUO), GS-l2, a supervisor, works with Carol J. Decker, Property Utilization Technician, GS-7, and Shirley Beene, Property Utilization Specialist, GS-l2, in Respondent's Tucson facility. Prior to approximately August 5, l99l, Analora and Decker shared a l2 foot by thirty foot and four inch office. Decker had the first third, the third nearest the door, Analora had the center third, and the last third was a break room. Beene worked in an adjoining office.

Prior to August 5, l99l, Analora and Beene discussed with Decker the possibility of Beene moving into the office. Decker objected to the idea. She had previously submitted other plans to Analora for utilization of the space, but Decker and Beene had objected to them.

From about July l0, l99l until August 5, l99l Decker was on a detail outside the office. During this period Analora moved the break room out of the office and moved Beene in. He secured two matching desks for Decker and Beene so that they would match his own desk. Decker had previously used a one pedestal desk (drawers on one side only). The new desk was a two pedestal (drawers on both sides). He put Decker's desk in the middle since she had complained of drafts in her old location. The new location put her desk directly in front of the water cooler and a few feet from the hall entrance to the men's room. Analora also removed Decker's cork board on which she kept quick-reference materials for her work and relocated the chairs for visitors. Decker no longer had a visitor chair by her desk.

Analora felt that the new arrangement would improve the appearance of the office as well as the working relationships. He concluded that moving the furniture would not violate the Union contract. In this regard, the l988 National Agreement between GSA and the Union provided, in part, as follows:

Article 9

NEGOTIATIONS

. . .

Section 4. Regional and Local Negotiations

. . .

C. The Union will be advised at the local level of proposed changes in personnel policies,

practices, and working conditions initiated by local managers or initiated at a higher level but only affecting the local level (i.e. a reduction-in-force). Negotiations resulting from such changes will be conducted by the Local Parties.

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Article 31

EMPLOYEE SPACE

Section 1. Space Redesigns

The Employer will engage in negotiations as appropriate with the Union when redesigning space occupied by employees and will consider union views if redesign is caused by technological requirements necessary for performance of work.

Section 2. Space Assignment

Assignment of space will be as equitable as possible given that portion of the total office space that is required for work stations and should take into account the specific duties assigned to an employee.

Section 3. Space Relocation

The Employer will notify the Union prior to undertaking any major moves (entire Branch or larger organizational unit) of bargaining unit employees.

Decker returned from her detail on August 5, l99l. She did not like the new office arrangement. The two pedestal desk made it difficult to use her typewriter since both sides of the desk now contained drawers. She had previously used one free side to swivel around to the typewriter. She objected to being positioned between the other two employees. This placed her desk directly behind the water fountain and a few feet from the hallway entrance to the men's room. She claimed that being located behind the water fountain meant that "anybody who wants a drink puts their rear end right in your face" and, as the door to the hallway was kept open, she was embarrassed by being able to observe the entrance to, and hear sounds from, the men's room. She missed the quick reference material on her cork board which aided her work. Customers visiting her no longer had a place to sit next to her desk.

Upon Decker's return from the detail, Analora presented her with a memorandum stating, "The following changes in office procedures are in effect as of this date[.]" The memorandum contained ll paragraphs and concluded with the statement, "I will notify you of additional changes as they occur from time to time." The parties agree that paragraphs two and nine did not make any changes. The other paragraphs are set forth below with findings as to the material changes, if any, established by the record.

l. Lunch is not to be eaten at your desk. You are to select a 1/2 hour uninterrupted lunch period between 11:00 a.m. and 1:30 p.m. Unless otherwise notified by you as to your preference by 4:00 p.m. on 8/5/91, your lunch period will be 12:00 p.m. to 12:30 p.m. Turn the phone answering machine on during your lunch break. When leaving the office for lunch, sign out on the message board.

Prior to August 5, l99l, Decker was not required to eat lunch on a set schedule, avoid her work area at lunch time, or sign out when departing the office.

Decker had previously been instructed not to go to lunch until the mail delivery had been made, sometime between l2 and 2 p.m., and had been reprimanded for once going to lunch and missing the delivery. Decker was concerned about how she was to receive the mail deliveries and what she should do if she was eating lunch elsewhere in the building and a customer requested services. About a week after the change, Decker advised Analora that she did not want to take the same lunch period everyday. Analora did not respond to her comment.

2. You are to take phone messages for both AUO's, Shirley and myself on a SF 63 Memorandum of Call. It is to be completely and legibly filled out including your initials, date and time. Leave the forms on the center of our desks weighted down or hand them to us upon our return to the office.

Prior to this change, Decker had recorded telephone messages on self-sticking paper rather than on the SF 63. Decker was concerned that she was to record messages "completely," because often individuals did not give all the information called for on the Memorandum of Call. However, it was only intended that she continue to completely and legibly record all the information she had been given.

3. Weekly reports and/or monthly reports for both AUOs will be your responsibility. They are to be completed in a timely manner and the entire report including copies of the SF 122's and SF 123's will be provided to the AUOs for review and approval.

Prior to this change, Decker had not prepared the weekly and monthly reports for Beene and had not attached copies of the SF l22's and SF l23's. The additional preparation for Beene would only take 5 or l0 minutes a week. Decker did not object to attaching the copies.

4. Your delegated authority for approving SF 122's and SF 123's is with my permission only on a case by case basis. All transfers and donations will be approved by Shirley or myself unless specific permission is granted to you by myself either directly or by phone.

Prior to this change, Decker, for seven and one-half years, had routinely approved property transfers and donations in the absence of the Area Utilization Officer. Analora was absent part of almost every day and sometimes for a week. This change, requiring approval by Analora or Beene, unless special permission was granted on a case by case basis, represented a significant change in Decker's duties. Analora subsequently granted special permission in accordance with the instructions on October l8, l99l, and, on December ll, l99l, clarified the instructions by further authorizing Decker to approve orders if the order had been faxed in, in any unusual emergency, or if a hand carried transfer was brought in for approval.

5. You are to date stamp all documents received in the office by whatever means using the date stamp machine. Advise me when the machine requires adjustment.

Decker testified that the problem with this instruction was that they had never had a time stamp machine before she left and only Analora had the key with which to make date changes. She was fearful that any mistake in dates could affect her performance.

I credit Analora's testimony that the office acquired the date stamp before Decker's detail; that no key was required to change the date; and that, if the machine failed to work properly, pen and ink changes were always acceptable.

6. Your duties include typing of any and all correspondence for both AUO's, Shirley and myself.

Decker's position description provided that she was to type a variety of correspondence and "do all the clerical work of the office." However, for approximately eight years Decker had not done the typing for the Property Utilization Specialist.

This instruction represented a change which Analora concluded was within Decker's job description. The record does not reflect how much typing this would involve for Decker, or how much of her work day would

be devoted to typing for Beene.

7. On a daily basis you are to review and distribute the mail appropriately, forward to Sales all reports past the Surplus release date, file all documents in appropriate files or binders.

Prior to this instruction, Decker had forwarded reports and filed documents on an as needed rather than daily basis.

8. If you are aware or have reason to believe transfers or donations are improperly approved by acquiring agencies, advise me. Do not initiate direct contact yourself to question agency officials' authority. I will take that responsibility.

Decker's position description provided that she, "Examines document for accuracy and authorized signatures" and "Checks incoming documents to assure proper information, authority, and reportability of property declared excess. Contacts submitting office for clarification or correction." In the past, prior to August 5, l99l, Decker had been responsible for ensuring that documents were correct, that the receiving party was authorized to possess the property, and that the documents bore an authorized signature. She maintained a file of delegations from agencies of signature authority and checked incoming documents against that file. She spent two to three hours per day pursuing corrections to documents by initiating direct contact with agencies, explaining any problem, and obtaining corrections.

Analora initiated the change because of complaints he received in February or April l99l concerning an incident when Decker had contacted an agency and was not as tactful as he felt she should have been in questioning the signature authority. Prior to this incident, he had not had any complaints about her contacts.

9. At all Spot Bid Sales conducted by GSA where you are required to attend, your specific work assignment unless otherwise advised, will be that of official high bid amount recorder and guardian of the accepted bid card. Appropriate instructions will be provided at each sale.

Decker testified that it was impossible for her to be the guardian of the accepted bid card because the bid card had to be relinquished to the typist and then to the cashier. This is all that was intended by this instruction. Analora simply referenced the usual practice whereby the high bid recorder takes the bid card, which is the basis of a legal contract, to the typist and later to the cashier to perform certain duties.

No Notice to Union

The Union was not notified in advance of either the rearrangement of the office furniture or the August 5, l99l notice to Decker.

On August 6, l99l, Decker advised the Union of these matters. On the same date, Fred Huerta, President of Local 8l, telephoned Mr. Analora and stated that the Union should have been advised ahead of time. Analora replied that there was no need to consult or negotiate with the Union. He refused to negotiate with Huerta.

In the past, in November l99l, Huerta was notified of a proposed move of GSA employee desks in the Federal Building, located about a mile from Decker's office. He addressed the issue of telephone outlets and an agreement was reached.

Discussion and Conclusions

The General Counsel contends that Respondent violated section 7116(a)(1) and (5) of the Statute by reorganizing the office space and changing work assignments and procedures without first notifying the Union and affording it an opportunity to bargain over the impact and implementation of the changes. Counsel for the General Counsel argues that the changes in the work area and in Decker's job duties' were more than de minimis, gave rise to a duty to bargain, and the Union did not waive its statutory right to bargain through the contract.

Respondent defends on the basis that the changes in the office area affected only two employees in a unit of more than 4,000, were de minimis, and that Article 31, Section 3 of the parties' collective bargaining agreement waives bargaining on such matters except for major moves. With respect to the items in Supervisor Analora's memorandum of August 5, 1991, Respondent claims that very few items constituted changes and any changes were de minimis.

There is no dispute that the matters involved conditions of employment. Where an agency in exercising a management right under section 7106(a)(1) of the Statute changes conditions of employment of unit employees, the statutory duty to negotiate under section 7106(b)(2) and (3) comes into play if the change results in an impact upon unit employees or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 203 (1983).

In Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) (SSA), the Authority reassessed and modified the de minimis standard previously used to identify changes in conditions of employment which require bargaining. The Authority stated that in order to determine whether a change in conditions of employment requires bargaining, it would carefully examine the pertinent facts and the circumstances presented in each case. The Authority further stated that in examining the record, principal emphasis would be placed on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on the conditions of employment. The Authority also stated that equitable considerations would be taken into account in balancing the various interests involved, that the

number of affected employees and the parties' bargaining history would be given limited application; and that the size of the bargaining unit would no longer be a consideration.

Applying the SSA standard here, the nature and extent and the reasonably foreseeable effects of Respondent's reorganization of its office space and change in seating assignments was more than deminimis and gave rise to a duty to bargain. The two pedestal desk made it more difficult for Ms. Decker to reach and use her typewriter. She no longer had a cork board with quick reference material, or a convenient visitor chair for customers to aid her work. It was also reasonably foreseeable that the location of her desk close to the water fountain and the men's room would raise objections and affect employee morale.

As the Authority stated in U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Fitchburg, Massachusetts District Office, 36 FLRA 655, 668 (1990), in finding that a change in seating assignments of four employees and one employee's loss of access to a window was more than de minimis,

> [T]he location in which employees perform their duties, as well as other aspects of employees' office environments, are 'matters at the very heart of the traditional meaning of 'condition of employment.' Library of Congress v. FLRA, 699 F.2d 1280, 1286 (D.C. Cir., 1983). Further employees' and management's competing interests in office space present the sort of questions collective bargaining is intended to resolve.' National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service, 35 FLRA 398, 414 (1990).

Respondent's position, that Article 31, Section 3 of the parties' agreement waives bargaining on such matters is rejected. Section 3, Space Relocation, provides, "The Employer will notify the Union prior to undertaking any major moves (entire Branch or larger organizational unit) of bargaining unit employees." This provision, on its face, refers to major moves or relocations and, by implication, would not require notice of minor moves, such as that of a section or unit of employees. It does not, on its face, address the matters involved here, that of changing an office configuration by relocating a break area, obtaining different desks, and changing seating assignments to accommodate an additional employee. No evidence of the bargaining history concerning Article 31, Section 3 was presented which would otherwise demonstrate that these matters were covered by the parties' agreement or the Union clearly and unmistakably waived its interest in the matter. On the contrary, the provisions of the contract that most closely refer to the matters in issue reinforce management's obligation to bargain. Article 31, Section 1, Space Redesigns, provides that, "The Employer will engage in negotiations as appropriate with the Union when redesigning space occupied by employer. . . ." and Article 9, Section 4.C. provides for notice and bargaining between the Union and management at the local level concerning proposed changes in personnel policies, practices, and working conditions initiated by local managers.

With respect to the items in Supervisor Analora's memorandum of August 5, 1991, I agree with Respondent that the facts discussed above demonstrate that the changes in Decker's duties, set out in paragraphs 3, 4, 6, 7, 8, and 11, concerning (1) taking telephone messages on SF 63's, (2) preparing weekly reports for Ms. Beene, the Property Utilization Specialist, (3) using a date stamp, (4) typing for Ms. Beene, (5) forwarding reports and filing on a daily basis, and (6) being the guardian of the bid card at sales, were substantially the same as her usual clerical duties; were, therefore, de minimis; and did not give rise to an obligation to bargain.

On the other hand, the changes set out in paragraphs 1, 5, and 10, requiring Ms. Decker to (1) take a set lunch period away from her desk and sign out on a message board, (2) limiting her authority to approve property transfers and donations in the absence of the Area Utilization Officer, which she had routinely approved before for several years in his absence, and (3) prohibiting Decker from directly contacting agencies to assure that documents bore authorized signatures, which she had spent a large part of her day doing before for several years, had an effect or reasonably foreseeable effect on conditions of employment which was more than de minimis and gave rise to an obligation to bargain.

The latter two changes took away some of Decker's more responsible and time consuming duties and could lead to a downgrading of her position. The institution of a rigid lunch hour for Decker could significantly affect Decker and the rest of the staff as it was Decker's responsibility to process the mail. Decker was the only individual in the office for significant portions of each work day and, under existing arrangements, mail was not delivered if the office was empty.

It is concluded that Respondent violated section 7116(a)(1) and (5) by unilaterally reorganizing office space and changing the above work assignments and procedures which had more than a deminimis impact without notifying the Union and affording it an opportunity to bargain over the impact and implementation of the changes.

The General Counsel requests a status quoante remedy. The evidence shows that Respondent acted willfully, provided no notice to the Union in advance of the changes which had a more than de minimis impact on the unit employee involved, and rebuffed the Union's request for post-implementation bargaining. There is no evidence that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. Accordingly, after balancing these factors pursuant to Federal Correctional Institution, 8 FLRA 604, 606 (1982), I conclude that a statusquo ante remedy is appropriate and warranted to best effectuate the purpose and policies of the Statute.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the General Services Administration, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in the working conditions of bargaining unit employees by reorganizing office space and changing work assignments and procedures without first notifying the National Federation of Federal Employees, Local 81, the agent of the exclusive representative of certain of its employees, and affording it an opportunity to bargain to the extent consonant with law and regulation.

(b) In any like or related manner, interfering with, restraining or coercing 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 Federal Service Labor-Management Relations Statute:

(a) Upon request of the National Federation of Federal Employees, Local 81, rescind the changes to the office space implemented on or about August 5, 1991 and paragraphs 1, 5, and 10 of Gary Analora's memorandum of August 5, 1991.

(b) Notify the National Federation of Federal Employees, Local 81, the agent of the exclusive representative of certain of its employees, of any intended changes in the conditions of employment of bargaining unit employees and, upon request, bargain to the extent consonant with law and regulation.

(c) 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 Area Utilization 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, San Francisco Region, Federal Labor Relations Authority, San Francisco, California, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, March 1, 1993

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GARVIN LEE OLIVER

ministrative 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 unilaterally implement changes in the working conditions of bargaining unit employees by reorganizing office space and changing work assignments and procedures without first notifying the National Federation of Federal Employees, Local 81, the agent of the exclusive represen-tative of certain of our employees, and affording it an opportunity to bargain to the extent consonant with law and regulation.

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, upon request of the National Federation of Federal Employees, Local 81, rescind the changes to the office space implemented on or about August 5, 1991 and paragraphs 1, 5, and 10 of Gary Analora's memorandum of August 5, 1991.

WE WILL notify the National Federation of Federal Employees, Local 81, the agent of the exclusive representative of certain of our employees, of any intended changes in the conditions of employment of bargaining unit employees and, upon request, bargain to the extent consonant with law and regulation.

_____

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, San Francisco Region Office, 901 Market Street, Suite 220, San Francisco, CA 90071, and whose telephone number is: (415) 744-4000.