OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

HAWAII FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO

Respondent

and Case No. SF-CO-31298

NAVY PUBLIC WORKS CENTER, PEARL HARBOR, HAWAII

Charging Party

Benjamin T. Toyama

For the Respondent

John R. Pannozzo, Jr., 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. section 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority, herein the Authority, by the Regional Director for the San Francisco Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(b)(1) and (8) of the Statute when Respondent failed and refused to meet with the Charging Party, herein sometimes the Agency, to select an arbitrator and proceed to arbitration concerning a grievance filed by the Charging Party. Respondent, herein sometimes the Union, filed an Answer

to the Complaint in which some of the allegations of the Complaint were specifically denied and the remainder, which were not specifically addressed by the response, are deemed to be admitted.[1]

Subsequently, counsel for the General Counsel filed a Motion for Summary Judgment and supporting documents, including correspondence between the parties and affidavits, and a brief in support of the Motion for Summary Judgment with the Regional Director for the San Francisco Regional Office. The Regional Director thereafter transferred the matter to the Office of Administrative Law Judges for ruling pursuant to section 2423.22(b) of the Authority's Rules and Regulations. By Order dated August 25, 1994, Chief Administrative Law Judge John H. Fenton notified all parties to this proceeding that any additional pleadings or briefs the parties desired to file must be filed by September 9, 1994, at which time the record would be closed. No additional documents have been received. Based upon my review and evaluation of the entire record before me, including the correspondence between the parties and the affidavits, I make the following:

Findings of Fact

The General Counsel has alleged in the Complaint and Respondent admits the following:

1. The Hawaii Federal Employees Metal Trades Council, AFL-CIO is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4).

2. The Navy Public Works Center, Pearl Harbor, Hawaii is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

3. The charge was filed by the Charging Party with the Authority's San Francisco Regional Director on June 28, 1993.

4. A copy of the charge was served on the Respondent.

5. During the time period covered by this Complaint, these persons occupied the positions opposite their names:

Richard Uyehara -- President

Benjamin Toyama -- Contract Administrator

6. During the time period covered by this Complaint, the persons named in paragraph 5 were acting on behalf of Respondent.

7. Respondent is the certified exclusive representative of a unit of employees appropriate for collective

bargaining at the Charging Party's Pearl Harbor, Hawaii facility.

The Complaint alleges but Respondent denies the following:

8. The Charging Party and Respondent are parties to a collective bargaining agreement covering employees in the unit described in paragraph 7, which agreement includes a grievance and arbitration procedure.

9. On April 9, 1993, the Charging Party filed a grievance against Respondent.

10. On May 24, 1993, after Respondent refused to respond or issue a written decision on the grievance, the Charging Party invoked the arbitration provisions of the negotiated agreement.

11. Since May 24, 1993, and continuing to date, Respondent has failed and refused to meet with the Charging Party to select an arbitrator as required by the negotiated agreement and has refused to proceed to arbitration.

Additional Findings, Discussion and Conclusions

Counsel for the General Counsel contends the Union's refusal to utilize the arbitration provisions of the collective bargaining agreement constitutes a failure and refusal to comply with the provisions of section 7121 of the Statute and thereby violates section 7116(b)(1) and (8) of the Statute.

The Union has not filed a reply brief or response to the Motion for Summary Judgment nor has it in any way challenged the assertions made in the sworn affidavits supplied by counsel for the General Counsel in support of his case. The Union's case, therefore, rests upon its specific denial of the assertions made in paragraphs 8, 9, 10 and 11, above.

As to paragraph 8, above, the Union's response to the Complaint states: "The grievance procedure does not cover grievances filed by the Charging Party for the reasons they filed the grievances." As to paragraph 9, above, the Union's response states: "The issue was not a grievance and not appropriate under the grievance procedure." Paragraph 10 was denied, with the added remark, "A grievance was not filed", and paragraph 11 was simply denied.

Affidavits and copies of correspondence in the record herein reveal the following events which gave rise to these proceedings:

By letter of February 5, 1993, the Agency notified the Union that it proposed to issue changed regulations governing the subject of sexual harassment, a copy of which was enclosed. On February 15 the Union

responded to the notification by enclosing counter-proposals and indicating who the Union's negotiator would be and suggesting that he be contacted regarding arrangements concerning negotiations. On March 25 the Agency contacted the Union regarding commencing negotiations concerning the proposed sexual harassment policy and the Agency informed by the Union that it was necessary to negotiate ground rules for negotiations on the subject. Procedures governing ground rules for negotiations are set forth in Article II, Section 4 of the parties' expired collective bargaining agreement, which provides:

Section 4

a. It is agreed that the establishment of new or revised activity directives relating to conditions of employment affecting employees in the unit and for which there is an obligation to consult and bargain shall be accomplished by presenting a draft of the proposed directive to the Union and permitting a sufficient time (not more than ten working days from receipt) for study and submission of proposals. The Union agrees that, should it fail to submit proposals within the prescribed time, the Employer may then proceed to implement the proposal without the obligation to negotiate. If the Union submits proposals, negotiations will commence within five (5) working days from receipt of the Union's proposals, unless the parties agree to a later date. Should negotiations take place, normal conduct of negotiations govern, including third party proceed-ings. The foregoing does not preclude the Employer from implementing policies and procedures at any time it is deemed necessary to insure effective and efficient operations as mandated by 7101(b) of the Act. The Union will be promptly notified of any such actions and the reasons therefore, and the Union may submit such matter as a grievance under Article XIX, Grievance Procedure, Section 8.

b. At the department levels, changes in conditions of employment for which there is an obligation to consult and bargain, whether or not as the result of written policy or procedures, may be made known to the appropriate Steward and/or Union Official. If the Steward or other Union Official submits proposals, the procedures and time limits concerning the obligation to consult and bargain are as set forth in Section 4.a. above. Upon concurrence of the Steward or other Union Official, or if no written proposals are received within five working days, the change may be implemented and there is no further obligation to consult and bargain.

c. The time limits in 4.a. and 4.b. above may be extended by mutual consent of the parties.

By letter dated April 9, 1993 the Agency presented the Union with a grievance alleging the Union was violating the parties' established procedures for conducting mid-term negotiations, taking the position that ground rules for mid-term bargaining were well established by the collective bargaining agreement and approximately 20 years of practice. The Agency also called the Union's attention that Article XIX, Section 8 of the parties' collective bargaining agreement, which deals with the processing of grievances between the Union and the Agency, requires the parties to meet within 15 days to attempt to resolve the grievance. The letter also gave the Union notice that if it did not enter negotiations on the sexual harassment proposed regulations by April 16, the Agency would feel free to implement the regulation. Article XIX, Section 8 provides:

Section 8. Grievances between the Union and the Employer shall be processed under the following procedures:

a. Any grievance of the Union will be submitted in writing to the Commanding Officer, Navy Public Works Center, with a copy to the CCPO Labor Advisor.

b. Any grievance of the Employer shall be submitted in writing to the Union Contract Administrator.

c. Within fifteen (15) calendar days after receipt by either Party of the written grievance, the Union Contract Administrator and the Commanding Officer, or their designated representative(s), will meet to discuss the grievance in an attempt to resolve the grievance informally. The Union and the Employer anticipate that most grievances will be settled at this informal level.

d. If the grievance is resolved at the above informal meeting(s) the resolution will be put in writing and signed by the Contract Administrator and the Commanding Officer, within ten (10) calendar days following the final informal meeting. Such signing terminates the grievance.

e. If the informal efforts in c. above fail to resolve the grievance, a written decision will be rendered by the Party receiving the grievance no later than fifteen (15) calendar days following the final informal meeting.

f. If such decision is unacceptable to the other Party, such Party may, within twenty (20) calendar days from the date of the decision, invoke arbitration in accordance with Article XX, Arbitration.

g. Time limits stated above may be extended by mutual agreement.

On April 15, 1993, the Union's representative Benjamin Toyama informed the Agency that the Union was denying the Agency's grievance and that the Agency did not have a grievance. By letter dated that same day, the Agency notified the Union of the requirement of the collective bargaining agreement that the parties meet to attempt resolution of the grievance and that absent resolution, the Union was obliged under the agreement to provide a written response within 15 calendar days.

Toyama was also orally informed by the Agency that the grievance was viable because the Union refused to negotiate the sexual harassment regulation. On April 20 Union representative Toyama informed an Agency representative that he had "thrown out Article II of the contract and did not have to negotiate anything" and again stated that the Agency did not have a grievance.

By letter dated April 20, 1993, Union representative Toyama, among other things, reiterated his position stating:

". . . you (do) not have a grievance because the Union unilaterally withdrew the provisions of the contract a long time ago. If there are no provisions of the contract violated, then there is nothing to grieve. You don't have a grievance."

On May 24, 1993 the Agency notified the Union it was invoking arbitration of its grievance and, among other things, designated a representative to meet with the Union for the purpose of selecting an arbitrator. On June 9 an Agency representative inquired of Union representative Toyama whether the Union was proceeding to arbitration on the matter at issue and Toyoma denied having any knowledge of the grievance. At no time thereafter has the Union indicated a willingness to proceed to arbitration on the grievance.

In Hawaii Federal Employees Metal Trades Council, AFL-CIO, et al., Case Nos. SA-CO-20804 and SA-CO-20807, OALJ 94-38 (April 26, 1994), (Hawaii FEMTC), a case in which I presided as the Administrative Law Judge, a final order of the Authority issued on June 9, 1994 since no exceptions were taken to my decision. The Union herein and the Agency were parties to that proceeding (Case No. SA-CO-20807), which involved an issue virtually identical to the issue presented herein. In that case the Union had repudiated Article II, Section 4 of the collective bargaining agreement and the Agency filed a grievance over the matter and invoked arbitration after the Union refused to discuss the grievance. When the Union refused to proceed to arbitration, the Agency filed an unfair labor practice charge against the Union. The Union took the position that Article II, Section 4 was a permissive subject of bargaining, which provision expired when the agreement previously expired, as opposed to a mandatory subject of bargaining. In that decision, among other holdings, I held, as I now hold here: that the terms and conditions of employment in expired collective bargaining agreements which involve mandatory subjects of bargaining remain in effect until renegotiated or modified in a manner consistent with Statutory requirements. Federal Aviation Administration Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C., 14 FLRA 644 (1984) and The Adjutant General, State of Ohio and American Federation of Government Employees, AFL-CIO, Ohio Council of Air National Guard Locals No. 127, Local 3470), 17 FLRA 957 (1985); the contractual grievance-arbitration machinery, as a mandatory condition of employment, survived the expiration of the agreement. Department of the Air Force, 35th Combat Support Group (TAC), George Air Force Base, California, 4 FLRA 22 (1980); and the law is clear that issues involving the question of repudiation of a collective bargain-ing agreement may be resolved in a grievance-arbitration proceeding. American Federation of Government Employees, Local 1457, AFL-CIO, 39 FLRA 519, 527-528 (1990) (AFGE Local 1457).

I further held in Hawaii FEMTC, and hold here, that questions of whether the subject matter at issue is arbitrable are for the arbitrator to decide, and a party may not refuse to become a part of the grievance-arbitration process because of a belief that the matter at issue is not subject to the process without violating the Statute. AFGE Local 1457. This holding encompasses claims by a party that a matter is not negotiable. Social Security Administration and National Council of SSA Field Operations Locals (NCSSAFOL), American Federation of Government Employees, AFL-CIO (AFGE), 25 FLRA 238, 239-240 (1987) and Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988).

In Hawaii FEMTC I concluded:

". . . arbitration was invoked by the Charging Parties, who were parties to a viable collective bargaining agreement, and Respondent, the other party to the collective bargaining agree-ment, refused to participate in the arbitration proceedings, as required by section 7121 of the Statute, without any justification recognized by the Authority (citation omitted). In these circum-stances I conclude that by such conduct Respondent violated section 7116(b)(1) and (8) of the Statute as alleged. See Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C., 10 FLRA 316 (1982) and AFGE Local 1457."

In the case herein, the Union essentially claims that the issue which gave rise to the grievance filed by the Agency was not appropriate for consideration under the grievance machinery and the Union appears to continue to challenge whether ground rules for negotiations as set forth in Article II, Section 4 of the collective bargaining agreement still were binding on the parties. As found previously in Hawaii FEMTC, the grievance-arbitration procedures in the parties' expired collective bargaining agreement, as a mandatory subject of collective bargaining, continued in effect and continues to bind the parties after the agreement expired. Further, the law is clear that the question of whether a matter constitutes a legitimate grievance within the meaning of a grievance procedure in a collective bargaining agreement is a matter which is appropriate for resolution by an arbitrator.

In these circumstances I find and conclude that the Charging Party and Respondent are parties to a collective bargaining agreement covering employees in the unit described in numbered paragraph 7 above, which agreement includes a grievance and arbitration clause, and that since May 24, 1993, and continuing to date, Respondent has failed and refused to meet with the Charging Party to select an arbitrator, as required by the negotiated agreement, and has refused to proceed to arbitration as alleged in the Complaint. I further conclude that Respondent Union's refusal to meet with the Charging Party to select an arbitrator, as required by the collective bargaining agreement, and proceed to arbitration on the grievance filed by the Charging Party on April 9, 1993, violated section 7116(b)(1) and (8) of Statute as alleged in the Complaint. Accordingly, counsel for the General Counsel's motion for summary judgment is granted and it is hereby recommended that the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Hawaii Federal Employees Metal Trades Council, AFL-CIO, shall:

1. Cease and desist from:

(a) Refusing to proceed to arbitration on the grievance filed by the Navy Public Works Center, Pearl Harbor, Hawaii on April 9, 1993.

(b) In any like or related manner, interfering with, restraining or coercing its 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, proceed to arbitration regarding the grievance filed by the Navy Public Works Center, Pearl Harbor, Hawaii on April 9, 1993.

(b) Post at its business offices and its normal meeting places, including all places where Notices to members and employees of the Navy Public Works Center, Pearl Harbor, Hawaii, are customarily posted, 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 President of the Hawaii Federal Employees Metal Trades Council, 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.

(c) Submit signed copies of the Notice to the Navy Public Works Center, Pearl Harbor, Hawaii, for posting in conspicuous places where unit employees represented by the Hawaii Federal Employees Metal Trades Council are located. Copies of the Notice should be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Federal Labor Relations Authority, San Francisco Regional Office, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 28, 1994

SALVATORE J. ARRIGO

Administrative Law Judge

NOTICE TO ALL MEMBERS AND EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR MEMBERS AND EMPLOYEES THAT:

WE WILL NOT refuse to proceed to arbitration on the grievance filed by the Navy Public Works Center, Pearl Harbor, Hawaii on April 9, 1993.

WE WILL NOT in any like or related manner, fail or refuse to comply with our obligations under the Federal Service Labor-Management Relations Statute.

WE WILL upon request, proceed to arbitration in accordance with the terms of our collective bargaining agreement, on the grievance filed by the Navy Public Works Center, Pearl Harbor, Hawaii on April 9, 1993.

_____

(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, San Francisco Regional Office, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: (415) 744-4000.

Dated: September 28, 1994

Washington, DC

1. Section 2423.13(b) of the Authority's Rules and Regulations provides:

(b) *The answer:* (1) Shall specifically admit, deny, or explain each of the allegations of the complaint unless the respondent is without knowledge, in which case the answer shall so state; or (2) Shall state that the respondent admits all of the allegations in the complaint. Failure to file an answer or to plead specifically to or explain any allegation shall constitute an admission of such allegation and shall be so found by the Authority, unless good cause to the contrary is shown.