OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

AIR FORCE LOGISTICS COMMAND,
WARNER ROBINS AIR LOGISTICS CENTER, ROBINS AIR FORCE BASE, GEORGIA
Respondent

and

Case No.
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 AT-CA-40803
Charging Party

C.R. Swint, Jr., Esq. For the Respondent

Sherrod Patterson, Esq. For the General Counsel
Before: ELI NASH, JR. Administrative Law Judge

DECISION

Statement of the Case

The instant unfair labor practice Complaint arises from a charge filed on July 11, 1994, by the American Federation of Government Employees, Local 987 (herein called the Union) against Air Force Logistics Command, Warner Robins, Georgia (herein called the Respondent). The Complaint issued on December 21, 1994 alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to negotiate on provisions for unplanned, unscheduled overtime assignments.(1)

A hearing was held on the matter in Atlanta, Georgia at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Timely briefs were filed by the parties and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and from my evaluation of the evidence I make the following:

Findings of Fact

The collective bargaining agreement at issue here was executed in 1982. The total agreement resulted from negotiations between the Respondent and the Union which began sometime around 1979. When a new Union president Herb Shipley was elected in late 1981, he directed Glenn Hobbs, who was a Union vice-president of maintenance in charge of negotiations, "to go ahead and get the thing negotiated and signed-off." At that time, John W. Adkins, at all material times was a labor relations officer and management's representative in negotiations for the 1982 agreement. During the negotiations which took place in late 1981 and early 1982 Hobbs and Adkins were the primary negotiators for the agreement although occasionally others did participate. Hobbs testified that the lack of a procedure for selecting employees for unplanned overtime was by design. He stated further:

And as long as we had the agreement that I could go to him at any time with any problems concerning unplanned overtime and get it rectified, I didn't see any need to negotiate anything on that.

Adkins testified with regard to the selection procedures for unscheduled, unplanned overtime, "the agreement was there would be no procedure." He also revealed that both sides felt that following a selection procedure for unplanned overtime was undesirable and that problems would be handled on a case-by-case basis.

The record is clear that discussions about selection procedures for unplanned overtime certainly took place during negotiations. "Unplanned" overtime is any overtime that is not "planned within the meaning of Article 5, Section B or "call back" overtime as described in Article 5, Part II, Section C of the Agreement. Unplanned overtime thus generally consists of short term overtime announced on weekdays on short notice. Included in the negotiations between Adkins and Hobbs was the subject of selection procedures for unplanned overtime. Since Hobbs and Adkins were unable to come up with a workable method for unplanned overtime selection, Hobbs reported the problem to Shipley, who directed him not to tie management's hands on unplanned overtime. For this reason, the agreement contained no selection procedures for such overtime, and this was purposefully done by both parties. The absence of a provision for unplanned overtime selection left it to management's discretion to select employees for such overtime, which was the result intended by the parties. This omission from the contract was understood by the parties to foreclose future negotiations on the subject until the contract was renegotiated. In addition, there was a "handshake" or "gentleman's" agreement that if management abused its right to select employees for unplanned overtime, Hobbs could bring the matter to Adkins' attention on a case-by-case basis. This was not intended to be a legally binding agreement or an agreement to negotiate in the future, but instead a pact to act in good faith with one another.

The collective bargaining agreement includes, *inter alia*, a comprehensive provision for overtime which, in pertinent part, reads as follows:

I. General:

Section B: 1. Planned overtime (that is week-end overtime announced by noon Thursday) will be offered to those employees at the lowest organizational element with current working experience on the specific work to be accomplished on overtime. If the Employer elects to change the area of consideration for planned overtime, the impact of this determination must be negotiated. Overtime will be distributed as fairly and equitably as possible among the employees.

Section C: In all areas except where Aircraft overtime procedures apply, it is agreed that if an employee has declined to work overtime for a period of five (5) consecutive times that the supervisor will not again ask the employee to work overtime and will show the employee declining until the employee has signed a request to again be considered for overtime work. When requested by the employee, management will furnish such a form.

Section D: Employees shall be charged for all overtime worked. All overtime worked or declined shall be properly posted to unit overtime records as soon as possible, normally [sic] no later than the close of business on the third regular duty day following the completion of overtime worked. Overtime worked by personnel on TDY shall be posted to their records not later than the end of the first full pay period after returning from TDY.

Section E: No employee shall be placed in a nonpay status during the regular shift hours in his basic workweek in order to compensate or offset hours worked outside his regular work shift or basic workweek.

Section F: Employees who are required to work overtime in excess of four (4) hours immediately following their regular duty work shift shall be allowed a one-half hour lunch period without compensation, if requested by the employee. Employees may elect to continue working to the end of the overtime period without a lunch break. Those not electing a lunch break may consume a snack while continuing to work in such work areas where permissible.

Section G: Employees assigned to weekend overtime work will be notified not later than Thursday noon of each week for planned overtime. Employees assigned to work all other overtime will receive at least two hours advance notice, if possible. When two hours notice cannot be given to employees being drafted, reasonable explanation will be given to the affected employees when requested.

Section H: Overtime work requirements that change prior to implementation, (deviations from work scheduled on Thursday) will be identified as soon as possible and the proper work group changes made on the day, swing, or owl shifts.

Section I: An employee improperly passed for an overtime assignment will be made whole by a remedy of money damages unless management provides substantiating evidence that the employee's silence has contributed to the error. In these instances, the only remedy will be for the employees to retain their standing on the overtime register.

Section J: Employees will not be assigned specific tasks or work for the purpose of avoiding equitable consideration/distribution of overtime.

Section K: Personnel transferred or reassigned will carry their carry their accumulative time to their new assignment if available. If not available, employees newly assigned, borrowed, detailed or TDY will be credited with the amount of time equal to the high person in the appropriate unit of current duty.

Section L: Overtime records will be established on January 1 each year. Employees will be placed on the new listing in inverse order of total overtime hours for the previous year. The new list will reflect zero hours for each employee. Old overtime records will be retained for 60 days.

II. Overtime Procedures - Aircraft Division

Section B: The Aircraft Production Branch will solicit volunteers for planned overtime in the following manner. (Any other organization which desires in the future to implement this procedure may do so by mutual agreement between the parties.)

a. Management will make available at unit level a weekly volunteer "sign-in" sheet whereby employees (within the unit) who wish to work planned overtime may make such desires known.

b. "Sign-in" sheets will be posted each Monday by 0900 (or first workday thereafter) and will be closed to volunteers noon Wednesday.

c. Employees who "sign-in" for overtime will be considered in accordance with current procedures (i.e., qualified employees with the lowest overtime hours within the unit will be considered first).

d. Employees who do not "sign-up" for overtime will be considered as having been asked and declined, unless the employee has more total hours than the highest employee selected to work.

e. Employees who "sign-up" for overtime and not selected will not be charged with having worked or declined for record purposes.

f. Volunteer "sign-in" sheets will be filed and maintained at unit level and, upon request, will be made available to the unit's AFGE representatives on the same basis as other overtime records.

Section C: An annual list of journeyman mechanics volunteering for call-in overtime work will be obtained from each branch by skill and posted in Maintenance Control. The initial volunteers will be listed from top to bottom by low time on the overtime records at the time of submission. Date and name of the person calling will be noted by the name of the person last reached. When the calling list is used again, the next name on the list will be contacted first. No new volunteers will be accepted until the new annual list is prepared. Declinations will not be recorded for this type call-in work.

Since the 1982 negotiations, at least two arbitrations involving Article 5 have taken place. In both instances, the arbitrators found that unplanned overtime matter was not expressly part of the agreement.

In the matter is Arbitration Between Warner Robins Air Logistics Center, Department of the Air Force and American Federation of Government Employees, Local 987, FMCS No. 85K/10718, William D. Ferguson, Arb., July 11, 1985, the Arbitrator concluded:

> The arbitrator has been unable to find any reference in the Article to unplanned overtime or anything about procedures relating to unplanned overtime. The article repeated [sic] speaks to planned overtime which clearly implies that there is also unplanned overtime. Why should there be a distinction between planned and unplanned overtime unless that distinction makes a difference in the manner of handling overtime? If unplanned overtime is assigned, distributed, worked, charged, etc. in the same manner as planned, then it appears that the parties have made a distinction without a difference. To so construe their language is to basically eliminate the distinction. On the other hand, it would be entirely consistent with the language used to interpret Article 5 with providing the procedures for planned overtime only, except for call-in overtime in the Aircraft Division (though not in the other divisions), and leaving unplanned overtime to be dealt with on the basis of past practice.

In the matter in Arbitration Between American Federation of Government Employees, Local 987 and Warner Robins Air Logistics Center, Department of the Air Force, FMCS No. 84K/21401, Horace W. Rice, Arb., October 29, 1984, the Arbitrator concluded that the "Agreement seems to be silent as to the definition of "unplanned overtime," and that "the contract does not expressly mandate a procedure for selecting employees for [unplanned] overtime." He added:

> [W]e were certainly confronted with a contract provision that did not cover the subject of unplanned overtime.

Although the contract does not specifically mention unplanned overtime, there are numerous provisions within Article 5 of that document which deal with it. Even the current Union president, Jim Davis, seems to agree with this conclusion. For instance, the first sentence of Section A (dealing with the right to require employees to work overtime unless certain conditions are present) applies to planned or unplanned overtime.

Section D (dealing with how overtime will be charged and recorded) applies to unplanned overtime. Adkins testified that this Section acts as a policing mechanism to ensure that management does not abuse its right under the contract to select employees for unplanned overtime. He also said that unplanned overtime is generally less desirable than planned overtime because it is for short periods and arises on short notice. For that reason, employees prefer planned weekend overtime because it is generally longer and more notice is given. Yet, unplanned overtime that is worked counts against an employee's cumulative overtime. An employee who is favored by his supervisor by being given unplanned overtime would eventually lose out on the more desirable weekend overtime to someone with lower cumulative overtime hours. Furthermore, Section D has been specifically interpreted to apply to unplanned overtime. Likewise, Sections E, F, K and L of the agreement also apply to unplanned overtime. As can be seen from the language of the agreement itself, Section F speaks almost entirely to unplanned overtime because it deals with situations where an employee is required to work at the end of his or her shift. By definition, this must be unplanned overtime because planned overtime (the obverse of unplanned) is weekend overtime. Thus, the contract is filled with provisions that govern or limit management's assignment of unplanned overtime work though there is no provision for selecting volunteers to work such overtime.

In May 1994, the Union sought to negotiate unplanned overtime. The Respondent declined, saying that the matter was governed by the existing agreement.

Discussion and Conclusions

The sole issue to be decided is whether Respondent had an obligation to bargain over selection procedures for unplanned overtime or whether that matter is encompassed within the existing labor agreement, so that there is no duty to bargain.

Respondent contends that the contract does, in fact, have provisions requiring the excusal of employees from working such overtime (Article 5, Section A), for counting and recording unplanned overtime (Section D), and for lunch breaks during unplanned overtime (Section F). As already noted, the contract contains numerous provisions governing and restricting management's right to assign unplanned overtime. There is no provision for selecting volunteers to work unplanned overtime, and it is this alone that the Union wishes to negotiate. In addition, Respondent asserts what must be drawn from the evidence presented is that this omission (*i.e.*, a procedure for selecting volunteers) was a deliberate act by the parties to the agreement. The testimony of Hobbs and Adkins, who were the only individuals involved in the negotiations leading up to the agreement, is that they intended for management not to be restricted in the selection of employees to work unplanned overtime. They considered the issue, but couldn't come up with a workable plan. Since the Union was eager to get an agreement, Shipley instructed Hobbs not to tie management's hands on unplanned overtime. Thus, the agreement that was reached contained no provision regulating such selections, and it was intended by both parties that this omission would allow management to use its discretion.

The General Counsel believes that baragining over procedures for assigning unplanned, unscheduled overtime has not been foreclosed and that the Union has not wavied its right to baragin such procedures. I disagree with the General Counsel.

The law applicable to this dispute is found in *Social Security Administration, Douglass, Arizona*, 48 FLRA 383 (1993); *Marine Corps Logistics Base, Barstow, Arizona*, 48 FLRA 102 (1993); *U.S. Department of*

Health and Human Services, Social Security Administration, Baltimore and AFGE, Council 220, 47 FLRA 1091 (1993). The test in those cases does not require that "the matter is expressly contained in the collective bargaining agreement". Furthermore, examination of the case does "not require an exact congruence of language . . ." but, the Authority will find the condition met where it is clear that "a reasonable reader would conclude that the provision settles the matter in dispute."

Thus, where the collective bargaining agreement does not expressly encompass a subject, the Authority will then deter-mine if the matter is "so commonly considered to be an aspect of what is set forth in the contract" that it is "inseparably bound up with and thus plainly an aspect of a subject expressly covered" by the provision of the agreement in question. Where such is the case the negotiations are presumed to have foreclosed further bargaining, regardless of whether it is expressly articulated in the provision. Further, the Authority held that in making these determinations it ". . . will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining. . . ."

Where the parties entered into an agreement which has gone unchanged since 1982, there is ample reason to sympathize with the Union, but application of the foregoing test to the facts of the instant dispute makes it obvious that the parties' agreement foreclosed future negotiations on the subject of unplanned overtime. In the first place, any reasonable reading of the overtime article demonstrates that it was meant to be comprehensive. It contains detailed procedures for planned overtime, call back overtime, and even unplanned overtime, albeit without a procedure for selecting volunteers. What the Union now desires to negotiate, a procedure for selecting volunteers for unplanned overtime, is inextricably woven in with overtime procedures for overtime generally, therefore, under any reasonable reading one could only conclude that the parties should have contemplated that it would foreclose negotiations on any item of overtime, including selecting volunteers for unplanned overtime. Secondly, it is unnecessary to rely on the foregoing assumption since the evidence plainly discloses that the parties did, in fact, intend that the issues of unplanned overtime are disposed of by the agreement. The uncontroverted testimony of Hobbs and Adkins firmly established that it was, in fact, negotiated and an agreement reached not to restrict management's discretion in making selections for unplanned overtime. Accordingly, this record makes it clear that the test in the above cited case has been met and that Respondent has no duty to bargain herein.

The argument that unplanned overtime could not be covered by the existing agreement because it is not expressly mentioned therein, must also be rejected. The arbitrators in cases submitted for consideration each found that the matter was not "expressly" contained in the collective bargaining agreement. This apparently was the issue presented to them and, it was the issue that each decided. Neither had the benefit of the Authority's most recent guidance in the area. The arbitrators simply based their findings on whether or not the matter was verbalized in the agreement. Long after the arbitrators findings, the Authority expanded its consideration in determining whether a matter is "covered by" the agreement to include any matter "inseparably bound up with and thus plainly an aspect of a subject expressly covered" by the provision of the agreement in question. It is, therefore, enough if the matter is an aspect of what is contained in the agreement such that the parties should have contemplated would foreclose future negotiations. Here, the subject is the selection process for unplanned overtime. This is but a singular facet of overtime generally and, indeed, of unplanned overtime, both of which are addressed in the agreement. Additionally, the uncontested evidence is that the parties contemplated that the agreement would foreclose future negotiations on the subject of unplanned overtime. Both negotiators, Hobbs and Adkins, testified that their specific intent was to foreclose further negotiations on the matter and the omission of a provision on unplanned overtime selection procedures from the agreement was the mechanism by which they carried out this purpose. Moreover, around June 7, 1994, Judson L. Rigsby, Jr. from Respondent's Civilian Personnel Division notified the Union that the

language of the contract was specifically written to allow "flexibility in the assignment of overtime that does not fit the specific contractual definition of planned overtime." The above noted evidence persuades the undersigned, that the parties contemplated that the agreement would foreclose future negotiations on the subject of unplanned overtime.

In concluding, one other case commenting on a Union's mid-term demand which was found covered by the parties' master labor agreement is worthy of note. Thus, in *Sacramento Air Logistics Center, McClellan AFB and AFGE, Local 1857*, 47 FLRA 1249 (1993), the Authority dismissed the complaint where the Union sought to negotiate a procedure for the presentation of performance awards and the posting of awards information. There Respondent also refused to negotiate, claiming that the proposal was covered by the agreement. The Authority noting that although the agreement did not expressly provide for the presentation of performance awards and the posting of awards information, nonetheless concluded that the Union's demand to bargain over those issues touched on, "matters that are plainly aspects of subjects expressly covered by that agreement." The holding of this case as well as the previously cited "covered by" cases makes it clear that a party does not have the right to bargain matters that are aspects of matters previously agreed to. It makes sense that a party should not be able to agree to a contract provision, then turn around and seek to negotiate something that is already part of that provision, although not expressly dealt with in the agreement. In this case, the parties agreed to a comprehensive overtime procedure in 1982, which governed assorted types of overtime, including unplanned overtime. In view of the above, it is the opinion of the undersigned, that the Union now seeks to negotiate over the volunteer selection procedures for unplanned overtime, which is an aspect of the collective bargaining agreement and, is inextricably bound up with the agreement and, therefore, a subject that is already covered by the collective bargaining agreement negotiated in 1982.

Accordingly, it is found that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by refusing to negotiate on provisions for unplanned, unscheduled overtime assignments.

For the reasons stated above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in Case No. AT-CA-40803, be and it hereby is, dismissed.

Issued, Washington, DC, November 20, 1995

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ELI NASH, JR.

Administrative Law Judge

1. Respondent's answer to the Complaint was amended on March 8, 1995.