

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

ARMY AND AIR FORCE EXCHANGE
SERVICE, WACO DISTRIBUTION

CENTER, WACO, TEXAS
Respondent

and
AMERICAN FEDERATION OF GOVERNMENT

Case No. DA-CA-50351

EMPLOYEES, LOCAL 4042, AFL-CIO
Charging Party

Joseph T. Merli, Esq. For the General Counsel
Carlos E. Vergara, Esq. For the Respondent
Mrs. Alice Long For the Charging Party
Administrative Law Judge Before: ELI NASH, JR.

Decision

Statement of the Case

An unfair labor practice Complaint and Notice of Hearing was issued by the Dallas Regional Director in the instant matter on January 31, 1996. The complaint alleges that the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas (hereinafter called the Respondent) violated Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute) by unilaterally implementing a new "Personal Contract" form through its Employee Assistance Program nurse, which created a basis for potential discipline of unit employees.

A hearing in this matter was held in Waco, Texas. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel filed a post-hearing brief, which has been carefully considered. Respondent did not file a brief.

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

1. Respondent's mission is to supply goods to the various Army and Air Force post exchanges within Respondent's geographic area of responsibility. To assist employees in accomplishing this mission, Respondent maintains an Employee Assistance Program (hereinafter called the EAP). The EAP is

administered by Clara Jo Taylor, the Respondent's Occupational Health Nurse. Taylor is a supervisor or management official and agent of Respondent.

2. Sometime prior to January 3, 1995, Taylor drafted a document entitled "Personal Contract," to be used when an employee sought assistance from the EAP. Prior to this date, another form had been in use. The old form did not have any paragraph stating that the employee could be disciplined if the employee did not participate fully in the treatment program selected through the EAP. Before implementing the new form, Taylor discussed it with Respondent's attorney in Dallas. Taylor was not advised to negotiate the new form with the Union. After coordinating the new form with the attorney, Taylor incorporated the new language concerning disciplinary action, that is, the third paragraph, into the new form.

3. On January 3, 1995, Denise A. Busby, a bargaining unit employee, met with Taylor at the suggestion of her supervisor. Upon meeting with Taylor, Taylor told Busby that she had a form that she wanted Busby to read and sign. Taylor then handed Busby the new "Personal Contract" form. Taylor did not explain to Busby whether signing the form was voluntary or a requirement of the EAP. Busby assumed that she had to sign the form. Consequently, she signed it, handed it back to Taylor, and was referred to a counseling service for treatment.

4. The following day, Busby realized that she had made a mistake in signing the form because of the language concerning possible disciplinary action in the third paragraph. Therefore, Busby returned to Taylor and asked for the form back. However, Taylor refused to give Busby the form, telling Busby that the lawyers in Dallas had told Taylor that she was required to keep the form.

5. Alice Long, Union President, testified that another unit employee, Milton Jackson, also signed a personal contract promising to complete a treatment program coordinated through the EAP. However, Jackson chose to leave the program before its completion. According to Long, Joyce A. Breihof, Respondent's Distribution Center Manager, claimed that Jackson "broke his contract" because "he can't voluntarily leave that program" and "because the nurse felt like he had violated his agreement." Breihof "originally wanted to terminate him that day when he came back to work." Respondent implemented the new "Personal Contract" form without giving the Union prior notice or an opportunity to bargain.

Conclusions

Respondent does not deny the General Counsel's contention that Taylor, the EAP nurse is a supervisor or management official, at least for the purposes of the form in this case. Respondent asserts only that "the form is not a negotiable issue."

Section 7103(a)(14) of the Statute defines conditions of employment as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]" A determination as to whether a change concerns a condition of employment is based on the subject matter of the change and whether (1) that subject matter pertains to bargaining unit employees (2) there is a direct connection between the subject matter and the work situation or

employment relationship of unit employees. *See generally, Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986).

It has already been held that a proposal was negotiable requiring management to allow employees who accepted assistance through the EAP to be given a reasonable opportunity to improve their performance before being subjected to adverse action. *Library of Congress*, 11 FLRA 632 (1983).

The new "Personal Contract" document giving rise to the Union's charge in this case pertained to bargaining unit employees. Taylor drafted it, specifically adding the third paragraph, so that she could use it against, that is, apply it to, unit employees. She discussed the changes in this form with Respondent's attorney in Dallas, but was not advised to negotiate this new form with the Union. This document on its face presents the potential for disciplinary action and is directly connected to an employee's work situation or employment relationship. The "Personal Contract" herein, in my opinion, is no different from a "last chance agreement" since both documents form the basis for potential disciplinary action. The Authority has already found that an agency has a duty to bargain over last chance agreements. In *Wright-Patterson Air Force Base*, 36 FLRA 524 (1990), the Authority held that the agency had committed an unfair labor practice by, *inter alia*, "failing and refusing to bargain concerning 'Last Chance Agreements'." *See also Wright-Patterson Air Force Base*, 38 FLRA 309 (1990), where the Authority held that proposals concerning last chance agreements involve conditions of employment under the Statute to the extent that they are consistent with applicable laws and regulations.

In light of the foregoing, it is found and concluded that Respondent had a duty to give the Union prior notice and an opportunity to bargain before implementing the "Personal Contract" form which contained a new paragraph forming a basis for disciplinary action. Accordingly, it is found and concluded that a preponderance of the evidence established that Respondent violated Section 7116(a)(1) and (5) of the Statute by unilaterally implementing a new EAP form entitled "Personal Contract" which formed the basis for potential disciplinary action. Therefore, it is recommended that the Authority adopt the following:

Order

Pursuant to § 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and § 7118 of the Statute, the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions for bargaining unit employees by requiring employees who seek assistance from the Employee Assistance Program to sign a "Personal Contract" form which states that if the employee fails to participate fully in the EAP treatment program, resulting misconduct will lead to disciplinary action and possible discharge without first providing the American Federation of Government Employees, Local 4042, AFL-CIO, the exclusive representative of its employees, prior notice and an opportunity to bargain.

(b) In any like or related manner, interfere with, restrain, or coerce its employees in the exercise of the rights guaranteed 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) Provide notice and an opportunity to bargain to the American Federation of Government Employees, Local 4042, AFL-CIO, before implementing changes in working conditions including requiring employees who seek assistance from the EAP to sign a "Personal Contract" form which states that if the employee fails to participate fully in the EAP treatment program, resulting misconduct will lead to disciplinary action and possible discharge.

(b) Rescind the Employee Assistance Program "Personal Contract" form unilaterally implemented on or about January 3, 1995, remove all copies from employees' files, remove all disciplinary records from the files of any employee who was disciplined as a result of the unlawful implementation of the form, and make whole any employee who suffered loss of pay or other benefits as a result of disciplinary action initiated in connection with the form.

(c) Post at its facility in Waco, Texas 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 Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, D.C., September 24, 1996.

ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that **the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas**, 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 unilaterally implement changes in working conditions for unit employees by requiring employees who seek assistance from the Employee Assistance Program to sign a "Personal Contract" form which states that if the employee fails to participate fully in the EAP treatment program, resulting misconduct will lead to disciplinary action and possible discharge **without first providing the American Federation of Government Employees, Local 4042, AFL-CIO** herein called the Union, the exclusive representative of our employees, prior notice and an opportunity to bargain.

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

WE WILL provide notice and an opportunity to bargain to the American Federation of Government Employees, Local 4042, AFL-CIO, before implementing changes in working conditions including requiring employees who seek assistance from the EAP to sign a "Personal Contract" form which states that if the employee fails to participate fully in the EAP treatment program, resulting misconduct will lead to disciplinary action and possible discharge.

WE WILL rescind the EAP "Personal Contract" form unilaterally implemented on or about January 3, 1995, remove all copies from employees' files, remove all disciplinary records from the files of any employee who was disciplined as a result of the unlawful implementation of the form, and make whole any employee who suffered loss of pay or other benefits as a result of disciplinary action initiated in connection with the form.

(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 its provision, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-4996.