

Bn-00373

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER

COATESVILLE, PENNSYLVANIA
Respondent

Case No. BN-CA-00373

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
LOCAL R3-35, SEIU, AFL-CIO

Charging Party

Cynthia A. Williams, Esquire For the Respondent

Edward J. Smith, Esquire For the Charging Party

Richard D. Zaiger, Esquire Alfred Gordon, Esquire For the General
Counsel, FLRA

Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint, as amended, alleges that the 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 implementing the Facilities Engineering Service Policy #30-2000, when it held a training class on safety in trenches which was attended by bargaining unit employees, or, in the alternative, Respondent implemented a decision to hold a training class to be attended by bargaining unit members, without providing the Charging Party (Union) an opportunity to negotiate to the extent required by the Statute.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the

Statute.

For the reasons explained below, I conclude that the Respondent violated the Statute as alleged.

A hearing was held in Philadelphia, Pennsylvania.⁽¹⁾ The Respondent, Union, and the General Counsel were represented by Counsel and afforded a 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.⁽²⁾ 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 Association of Government Employees, SEIU, AFL-CIO (NAGE) is the certified exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the Department of Veterans Affairs. The Union is an agent of NAGE for purposes of representing bargaining unit employees at the Respondent's Medical Center in Coatesville, Pennsylvania. The Union represents approximately 900 employees.

Mark D. Bailey, Sr., serves as the President of the Union, a position he has held for 12 years. However, Mr. Bailey has been removed from service as an employee of the Respondent and has had his access to Respondent's facility severely limited. Because of these limitations, the parties have arranged on previous occasions to hold negotiations at the Coatesville Memorial Community Center at 9th and Chestnut Streets in Coatesville, Pennsylvania.

NAGE and the Department of Veterans Affairs entered into a Master Agreement (contract) on April 28, 1992. (Jt. Exh. 1) Bailey was on NAGE's national negotiating team for the Master Agreement and is a signatory to that contract. Article 11, Section 2, of the parties Master Agreement concerns procedures for bargaining and contains the following language:

- A. The Employer shall notify the Union prior to the planned implementation of a proposed change to conditions of employment. The notice shall advise the Union of the reason for the change and the proposed effective date.
- B. The Union shall have fifteen (15) calendar days from the date of notification to request bargaining and to forward written proposals to the Employer except in emergency situations where a 15 day notice

would not be practicable.

- C. If the Union does not request bargaining within the time limit, the Employer may implement the proposed change(s).
- D. Upon timely request by the Union, bargaining will normally commence within ten (10) calendar days, unless otherwise agreed upon by the parties. (Jt. Exh. 1 at 8-9).

On March 10, 2000 the Respondent sent to the Union a draft copy of the Facilities Engineering Service Policy #30-2000 entitled Trenching and Excavation. (Jt. Exh. 12 & 13). The stated purpose of this policy was to establish "procedural guidance and safety requirements for trenching and excavation operations . . ." (Jt. Exh. 13 at § 1). Prior to this time, the Respondent did not have a written policy on trenching and excavations, and the Respondent had not provided training to employees or supervisors on trenching and excavations in at least the last 20 years. (Tr. 52-53, 66-67). With regard to training, the draft policy states:

FES supervisors or designees will be responsible for ensuring that the excavation or trench is safe and in compliance with 29 CFR 1926, Subpart P and shop supervisors will be designated as "competent persons" after the completion of excavation training. (Jt. Exh. 13 at 2).

The Union responded to this new draft policy with ground rules proposals and bargaining proposals dated March 19, 2000. (Jt. Exh. 14 & 15). Each of these documents contains a proposal that the parties agree to an off-site meeting place to conduct face-to-face negotiations due to management's decision to bar the Union president from the facility. (Jt. Exh. 14 at IV; Jt. Exh. 15 at C). Five out of the Union's six bargaining proposals addressed the Union's concern that bargaining unit employees receive, and get credit for attending the appropriate training, and that the Union be given the opportunity to observe and/or participate in this safety-related training. (Jt. Exh. 15 at A(1)-(5); Tr. 32, 37-38). The Respondent did not respond to the Union's proposals. (Tr. 32-33).

George R. Pearson, Chief of Human Resources Management Services, testified that, upon receipt of the Union's request to negotiate, he was advised that the draft policy was taken almost verbatim from the Code of Federal Regulations (C.F.R.). Therefore, Pearson advised management that "if it's in the CFR already, there's no need to bargain over that language[.]" According to Pearson, the draft policy was not implemented, and the training that was subsequently given was conducted under the authority of 29 C.F.R. § 1910.146 *et seq.* and 29 C.F.R. § 1926.650 *et seq.* (Tr. 75-76, 96-101; Jt. Exh. 17).

The Respondent provided a training class on safety requirements for trenching and excavations on April 26, 2000. (Tr. 67). As noted, this was the first time the Respondent had ever provided such training. The

Respondent required certain bargaining unit employees to attend, including one work leader (Tr. 56, 67).

At the conclusion of the April 26, 2000 training class, Respondent's Safety Officer distributed copies of the Facilities Engineering Service Policy #30-2000 to the attendees. The Safety Officer explained that the document he distributed was the Respondent's policy on trenching and excavations and instructed them to follow it from that point forward. (Jt. Exh. 13; Tr. 68-69).

Since the training program was conducted, bargaining unit employees Donald J. Pilon and Thomas McNerny, neither of whom attended that training, have been instructed to carry out trenching projects. Although these employees brought questions and concerns to their supervisor (who attended the training session), they received no guidance on safety or procedures. (Tr. 57-59).

Discussion and Conclusions

The General Counsel contends that the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing the Facilities Engineering Service Policy #30-2000 when it held a training class on safety in trenches which was attended by bargaining unit employees, or, in the alternative, Respondent implemented a decision to hold a training class to be attended by bargaining unit members, without providing the Union an opportunity to negotiate to the extent required by the Statute.

Respondent contends that it did not implement the Policy or change conditions of employment by holding a training class as training was required by 29 C.F.R. § 1910.146(d)(8) and (g). Respondent also asserts that management's right to assign work pursuant to section 7106(a)(2)(B) includes the right to assign employees to job-related training during duty hours and the right to determine the type of training.

The determination of whether a change in conditions of employment occurred involves an inquiry into the facts and circumstances regarding the Respondent's conduct and employees' conditions of employment. *U.S. Department of Transportation, Federal Aviation Administration, Washington, DC and Michigan Airway Facilities Sector, Belleville, Michigan*, 44 FLRA 482, 493 n.3 (1992).

The record reflects that Respondent made a change in conditions of employment. Respondent never had a written trenching and excavation policy and had not trained employees on trenching and excavations in at least 20 years. However, since preparing the Facilities Engineering Service Policy #30-2000 the Respondent provided a training class to

certain employees as required by the Policy. In addition, Respondent's Safety Officer handed out copies of the Policy at the April 26, 2000 training session and instructed employees to follow it. Contrary to the Respondent's contention, the training requirements listed in 29 C.F.R. § 1910.146 deal with permit-required confined spaces, not excavations. As Counsel for the General Counsel points out, in its comments on the final rule regarding permit-required confined spaces, OSHA stated that "these areas (trenches, ditches, excavation, and liked areas) will not normally meet the definition of 'permit-required confined space' and will not, therefore, usually be subject to final § 1910.146." 58 Fed. Reg. 4462, 4535-36 (1993).

Under section 7116(a)(1) and (5) of the Statute, prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 81 (1997).

It is well established that the right to assign work under section 7106(a)(2)(B) of the Statute includes the right to train, or not to train, employees. *National Treasury Employees Union and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 539, 587 (1997); *American Federation of Government Employees, Local 3407 and U.S. Department of Defense, Defense Mapping Agency, Hydrographic-Topographic, Washington, DC*, 39 FLRA 557, 560 (1991). It is equally well established, on the other hand, that there is a duty to bargain consistent with section 7106(b)(2) and (3) of the Statute with respect to the procedures management will employ in exercising such right and respecting appropriate arrangements for employees who may be adversely affected by the changes where the changes have a more than *de minimis* effect on conditions of employment. *National Federation of Federal Employees, Local 29 and U.S. Department of the Army, Engineering District, Kansas City, Missouri*, 45 FLRA 603, 611 (1992); *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-08 (1986).

The record establishes that the change had an impact or reasonably foreseeable impact on bargaining unit employees. Requiring employees to learn and follow new safety procedures and requiring some of them to attend training constitutes more than a *de minimis* change in working conditions. A very important aspect is that the policy and training affects the safety of bargaining unit employees. The record reflects that the Union and some bargaining unit employees who have had to work on excavations were not afforded information regarding the safety-related training. See *American Federation of Government Employees, Local 1345 and U.S. Department of the Army, Headquarters, Fort Carson*, 48 FLRA 168, 185-88 (1993) (Proposal 10).

It is concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged, by implementing the Facilities Engineering Service Policy #30-2000 when it held a training class on safety in trenches which was attended by bargaining unit employees, or, in the alternative, Respondent implemented a

decision to hold a training class to be attended by bargaining unit members, without responding to the Union's bargaining request or proposals or otherwise providing the Charging Party an opportunity to negotiate to the extent required by the Statute. Where a Respondent fails to respond at all to a Union's request to bargain before implementing a change in working conditions, the Respondent "cannot rely on the purported nonnegotiability of the Charging Party's proposals as a defense to its failure to bargain with the Charging Party over any aspect of the proposed change." *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 902 (1999).

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

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Coatesville, Pennsylvania, shall:

1. Cease and desist from:

(a) Changing working conditions of unit employees by implementing the Facilities Engineering Service Policy #30-2000 or otherwise holding a training class on safety in trenches and excavations without providing the National Association of Government Employees, Local R3-35, SEIU, AFL-CIO, the agent of the exclusive representative of its employees, an opportunity to negotiate to the extent required by the Federal Service Labor-Management Relations Statute.

(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) Rescind the implementation of the Facilities Engineering Service Policy #30-2000, entitled Trenching and Excavations, and notify all affected employees that the policy is no longer in effect.

(b) Notify, and upon request, bargain to completion with the National Association of Government Employees, Local R3-35, SEIU, AFL-CIO, concerning any revision of the Facilities Engineering Service Policy #30-2000, or any other new policy which changes the conditions of employment of bargaining unit employees, to the extent required by the Federal Service Labor-Management Relations Statute.

(c) Upon request, bargain with the National Association of Government Employees, Local R3-35, SEIU, AFL-CIO, over its proposals submitted on or about March 19, 2000, related to the training of employees regarding trenching and excavations, to the extent required by the Federal Service Labor-Management Relations Statute.

(d) Post at its facilities at the Coatesville Medical Center where bargaining unit employees represented by the National Association of Government Employees, Local R3-35, SEIU, AFL-CIO are located, 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 Chief Executive 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Regional Office, 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 12, 2001.

GARVIN LEE OLIVER

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Authority has found that the U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Coatesville, Pennsylvania, violated the Federal Service Labor-Management Relations

Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT change working conditions of bargaining unit employees by implementing the Facilities Engineering Service Policy #30-2000 or otherwise holding a training class on safety in trenches and excavations without providing the National Association of Government Employees, Local R3-35, SEIU, AFL-CIO, the exclusive representative of our employees, with notice and an opportunity to negotiate to the extent required by the Federal Service Labor-Management Relations Statute.

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

WE WILL rescind implementation of the Facilities Engineering Service Policy #30-2000, entitled Trenches and Excavations, and notify all affected employees that the policy is no longer in effect.

WE WILL notify, and upon request, bargain to completion with the National Association of Government Employees, Local R3-35, SEIU, AFL-CIO, to the extent required by the Federal Service Labor-Management Relations Statute concerning any revision of the Facilities Engineering Service Policy #30-2000, or any other new policy which changes the conditions of employment of bargaining unit employees.

WE WILL upon request, bargain with the National Association of Government Employees, Local R3-35, SEIU, AFL-CIO, to the extent required by the Federal Service Labor-Management

Relations Statute over its proposals submitted on or about March 19, 2000, concerning the training of employees performing trenching and excavations.

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(Respondent/Agency)

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 provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110, and whose telephone number is: (617)424-5730.

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