FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF JUSTICEFEDERAL BUREAU OF PRISONSFEDERAL DETENTION CENTEROAKDALE, LOUISIANA
Respondentand AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1007 Charging Party

Case No. DA-CA-00621

Tiffany A. Foreman, EsquireJohn M. Bates, Esquire For the General Counsel
Steven R. Simon, EsquireTyrone Clements For the Respondent Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

On July 31, 2000, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of its Dallas Region, issued an unfair labor practice complaint, alleging that the Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Oakdale, Louisiana (Respondent/Employer), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by implementing a new smoking policy for employees before the employees' exclusive representative, the American Federation of Government Employees, Local 1007 (Union), had an adequate opportunity to negotiate concerning the new policy. The Respondent filed its Answer on August 4, 2000, denying that it committed any unfair labor practice.

A hearing in this case was held in Alexandria, Louisiana, on December 14, 2000, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered. I conclude, in agreement with the General Counsel, that the Respondent violated section 7116(a)(1) and (5) of the Statute in its premature implementation of a new smoking policy.

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 Federal Bureau of Prisons (BOP) maintains two correctional facilities in Oakdale, Louisiana: the Federal Detention Center (FDC) and the Federal Correctional Institution (FCI). The American Federation of Government Employees (AFGE), Council of Prison Locals, is the exclusive representative of a nationwide unit of BOP employees, and the parties have executed a Master Agreement for that unit. AFGE Local 1007 serves as the Council's agent, primarily to service the employees at the Oakdale FDC, while AFGE Local 3957 services primarily employees at the Oakdale FCI.

In 1997, President Clinton issued an Executive Order requiring agencies to establish smoke-free workplace policies in interior spaces owned and leased by the Federal government. While the details of implementation were left to each agency, the general policy of the Executive Order was to prohibit smoking in most interior spaces, while allowing agencies to permit smoking in designated interior locations that are enclosed and exhausted directly to the outside. In the fall of 1999, management at the Oakdale FCI and FDC finally got around to developing such a policy, and on September 20 Warden Martha Jordan drafted letters notifying both employees and inmates that she intended to implement no-smoking rules in the near future. Local 1007 was given a copy of both letters, and on September 29 Union President Donald Turner notified management that he wanted to negotiate concerning the no-smoking policy for employees.

The Union and management held an initial bargaining session on October 19, 1999, at which the Union expressed some of its concerns about the proposed policy. Since all of the designated smoking areas were outside, the Union wanted to be sure that these areas had adequate shelter and protection from inclement weather; moreover, the Union suggested some areas within the facilities that might be ventilated to permit smoking, such as a counselor's office and the officer's station. The Union was particularly concerned about guards who are assigned to the housing units, because those units are locked at night, and the employees cannot go outside from about 8:30 p.m. to 6:00 a.m. Since the proposed policy did not designate any indoor smoking areas, these employees would be prohibited from smoking during that entire time period. Nothing was agreed upon at the October 19 meeting, and management stated that it wanted to conduct a study concerning the feasibility of ventilating various indoor areas for smoking. It was agreed that the parties would meet again after these issues had been investigated further. A management representative drafted minutes of the meeting, which were later reviewed and approved by the Union President.

After the October 19 meeting, the Employer published a complete draft of its proposed smoking policy, dated November 1, 1999, but it did not implement the policy for staff at that time. Between October 1999 and February 2000, the Union made several inquiries as to when negotiations would resume, but management was unable to conduct another meeting until February 22, 2000. At this bargaining session, most of the discussion focused on the plight of smokers who work in restricted areas and cannot go outside. The Union suggested that these employees be relieved to take smoking breaks, but management indicated that that was not feasible. The parties also discussed indoor locations that could be ventilated for use as smoking areas, but it appears they had little additional factual information on which to base their discussions than they had at the October session. Although the minutes of the February 22 meeting indicate that "a feasibility study on the Housing Units and the Control Center . . . showed there are areas that could be vented to provide a smoking area for staff[,]" the minutes do not identify these areas, and the minutes further reflect that the parties agreed on February 22 to table the issue to "further investigate areas that could be designated as smoking areas." (G.C. Exh. 7(a) at 2).[(1)] In this regard, Human Resource Manager Dwight Greene, the Employer's lead negotiator, agreed to walk through the facilities with Thomas Fredericks, Union Steward, in order to mutually identify and discuss the feasibility of various indoor smoking areas.

The Union and management never did conduct the walk-through of the facilities, however. According to Mr. Greene, the feasibility study was completed by Rick Batten, Facilities Manager, within a few days of the February 22 meeting. Mr. Batten met with the warden and walked around the facility with her, and he reported to her concerning the feasibility and cost of ventilating different areas, and Warden Jordan decided that no indoor area could be designated as a smoking area. Based on the warden's decision, Mr. Greene felt there was no use conducting a walk-through with the Union, and the Employer instead notified the Union in writing that it had decided to implement the proposed smoking policy without further changes. In a memo dated March 31, 2000, Warden Jordan stated that management had "fully considered the Union's concerns and finds the concerns do not override a management need to comply with the President's Executive Order . . . ." She informed the Union that the proposed policy for employees would go into effect in 14 days, unless the Union "initiate[d] an appropriate appeal or pursue[d] the issue to impasse by following 5 C.F.R. part 2424 to settle a negotiable dispute." (G.C. Exh. 8(a)).[(2)]

At no time after receiving the warden's March 31 memo did the Union seek mediation or arbitration or file a request for assistance with the Federal Service Impasses Panel (the Panel). Instead, Union President Turner spoke with the Regional Director of the Bureau of Prisons in early April and protested management's cessation of bargaining and declaration of impasse. The BOP official made no promises to Mr. Turner, but shortly thereafter, management contacted him to arrange another meeting.

The Union met with Employer representatives on April 11, 2000, but it appears that the parties spent most of the 15-minute meeting arguing over procedural matters rather than the substance of the Employer's smoking policy. Mr. Turner objected to the warden's declaration of impasse and implementation of the policy at a time when he believed the parties were still investigating the feasibility of creating indoor smoking areas and other issues. He also advised management that he felt the parties should have established ground rules for negotiations at the outset, and that he wished to do so now. He further advised management that he wanted a national officer of AFGE, Jim Turner, to become the Union's spokesman in the smoking negotiations, in light of the problems in resolving the issue up to that time.

In other respects, the Union and Employer accounts of the April 11 meeting are starkly contradictory. While Mr. Turner testified that Brenda Bell, management's new spokesperson[(3)], agreed to contact Jim Turner about setting ground rules and conducting further negotiations on the smoking policy, Ms. Bell testified that she refused to restart the negotiations in order to set ground rules, that she never agreed to call Jim Turner, and that she advised Donald Turner that the negotiations had reached an impasse. Minutes of the April 11 meeting were drafted by a management official (G.C. Exh. 10(a)), but unlike the minutes of the first two meetings, there is no signature line for the Union on this document. Donald Turner stated that management did not give him a copy of the minutes after the meeting, but Ms. Bell insisted that he was given a copy. Mr. Turner further insists that the April 11 minutes are inaccurate in many respects and do not properly reflect the discussions at the meeting.[(4)]

No further discussion of the smoking policy took place between the Employer and the Union after the April 11 meeting. Ms. Bell did not attempt to contact the national AFGE officer, Jim Turner, and Jim Turner apparently did not contact her either. The Union chose not to pursue the issue before the Panel, and on May 10, 2000, the Employer notified the Union that the smoking policy would take effect immediately.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel argues first that the smoking policy proposed by the Employer involves conditions of employment of bargaining unit employees and is therefore substantively negotiable. Accordingly, it asserts that the Employer could not implement the smoking policy until bargaining had been concluded, unless a bargaining impasse had been reached. Citing FLRA case law and tracing the course of bargaining on the Employer's smoking policy, the General Counsel argues that an impasse in negotiations was never reached. Rather, it says, the Employer prematurely declared an impasse at a time when further discussions might have been fruitful. Thus the implementation of the policy violated section 7116(a)(1) and (5) of the Statute. As a remedy, the General Counsel seeks a *status quo ante* bargaining order, requiring the Employer to rescind the smoking policy and resume negotiations with the Union. Since the smoking policy was substantively negotiable, it is argued that the guidelines set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982)(*FCI*), are not applicable; rather, counsel asserts that a *status quo ante* remedy is presumptively appropriate. *Department of the Air Force, Warner Robins Air Logistics Center*, *Robins Air Force Base, Georgia*, 52 FLRA 225, 246 (1996)(*Warner Robins*).

The Respondent argues that the parties engaged in "exhaustive bargaining" on October 19 and February 22, and that the Employer conducted an "extensive" study of the feasibility of ventilating indoor smoking areas in

the prison. When the study concluded that indoor smoking could not be feasibly ventilated, and the Union "would not budge from indoor smoking", the parties had reached an impasse, a fact that was formally noted by the Employer on March 31, 2000. At that point, the Union was on notice that the Employer had declared an impasse, and it was up to the Union to pursue impasse resolution procedures under the Statute. The Employer refrained from implementing the policy 14 days after the March 31 memo, and it further explained its position to the Union at the April 11 meeting that impasse had been reached. The Employer waited an additional month, and it finally implemented the policy on May 10, when it was clear the Union would not pursue impasse resolution procedures. Even if an unfair labor practice occurred, the Respondent argues that it would be improper to order the smoking policy rescinded, because of "life safety concerns" that would be posed, in a prison environment, by permitting guards to smoke while inmates could not.

Analysis

The starting point in evaluating an employer's bargaining conduct is to identify the nature and extent of its obligation to bargain. In this case, the Respondent was proposing to modify its smoking policy for unit employees. The Authority has long held that an agency's smoking policy for employees is a condition of employment affecting employee working conditions, and that the substance of such a policy must be negotiated with the employees' exclusive representative. *Warner Robins*, 52 FLRA at 242; *U.S. Department of the Air Force, 832d Combat Support Group, Luke Air Force Base, Arizona*, 36 FLRA 289, 298 (1990)(*Luke AFB*); *Department of Health and Human Services, Public Health Service, Health Resources and Services Administration, Oklahoma City Area, Indian Health Service, Oklahoma City, Oklahoma*, 31 FLRA 498, 507 (1988), *enforced sub nom. Department of Health and Human Services, Indian Health Service, Oklahoma City v. FLRA*, 885 F.2d 911 (D.C. Cir. 1989). The Respondent does not seem to dispute this principle; indeed it undertook to negotiate with the Union before implementing its new policy. The dispute here focuses on the timing of the policy's implementation.

It is also a well-established principle that an agency may not implement a change in conditions of employment until the bargaining process has been completed. As the Authority recently stated, citing its decision in *Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 18 FLRA 466, 468 (1985)(*BATF*), "an agency is required to delay making proposed changes to working conditions not only while bargaining is ongoing, but also after an impasse in bargaining has been reached, during impasse procedures." *United States Immigration and Naturalization Service, Washington, DC*, 55 FLRA 69, 72-73 (1999)(*INS I*). Applying the statutory duty of an employer to bargain, in conjunction with the impasse resolution procedures of section 7119 of the Statute, the Authority requires an agency to give appropriate notice to a union that it considers bargaining at an impasse and that it intends to implement the proposed change. *U.S. Customs Service*, 16 FLRA 198, 200 (1984)(*Customs*). If the union then requests assistance from the Panel in a timely manner, *BATF* requires the agency to further delay implementation until the Panel has acted. Conversely, if the union has been given a reasonable opportunity to invoke the Panel's procedures and fails to do so, the agency is free to implement the change. *Customs*, 16 FLRA at 200. As noted in *INS I*, however, the agency acts at its peril in claiming any of these exceptions, if the defense asserted by the agency to its implementation is found not to apply. *INS I*, 55 FLRA at 73.

In accordance with these principles, the Respondent asserts that it delayed implementation of the new smoking policy until it had negotiated with the Union, and until those negotiations had reached an impasse. At that point, the Respondent notified the Union in its March 31, 2000 memo that it intended to implement its proposed policy in 14 days, unless the Union pursued the appropriate impasse resolution procedures. In fact, the Respondent notes that it agreed to meet with the Union a third time, on April 11, 2000, and that it further delayed implementation until May 10. Thus, it argues that the Union was on due notice of the Respondent's belief that an impasse had been reached, and that when the Union chose not to file a request for the Panel's assistance, the Employer was free to implement the policy as it did.

I would agree with the Respondent's position if I agreed that negotiations had truly reached an impasse prior to implementation. For instance, I agree with the Respondent that its March 31 memo put the Union on notice that management felt the negotiations had reached impasse, even though the memo does not explicitly use such language. That memo recites the history of bargaining on the smoking policy, summarizes the Union's concerns about the policy, and concludes that "Management . . . finds the concerns do not override a management need to . . . protect Federal Employees from environmental tobacco smoke." The memo concludes that management will implement the policy in 14 days, unless the Union "pursue[s] the issue to impasse." Although the Respondent's citation of 5 C.F.R. part 2424 was inappropriate to the circumstances of this case, in that part 2424 deals with negotiability disputes rather than impasse resolution procedures (parts 2470 and 2471), the memo adequately conveys the Respondent's position that bargaining had concluded and that implementation would occur. The 14-day period for the Union to "pursue the issue to impasse" was also, in my view, a "reasonable opportunity" for the Union to seek Panel assistance.

The fallacy in the Respondent's case, however, is that an impasse in the negotiations never occurred. After reviewing all of the testimony and documents concerning the course of bargaining on the smoking policy, it is my opinion that the Respondent cut short the negotiations prematurely, at a time when it had told the Union that it was still investigating the feasibility of the Union's proposals. The Respondent, or more accurately the warden, then summarily concluded that the Union's proposals were not feasible and declared that bargaining was over. Although the Respondent "declared" an impasse on March 31, no actual impasse existed, either at that time or on May 10, when it finally implemented the smoking policy. Therefore, the Respondent had not satisfied its bargaining obligation when it implemented the change in conditions of employment.

FLRA case law, the Statute, and applicable regulations do not offer an exact definition of "impasse." The only specific definition is contained at 5 C.F.R. § 2470.2(e) of the Panel's regulations. That section defines impasse, for purposes of the Panel's procedures, as:

that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

Some decisions of FLRA administrative law judges have cited this language in unfair labor practice cases as a basis for determining whether impasse has occurred; some have suggested that impasse cannot occur unless the parties have sought mediation of their dispute.(5) But the Authority subsequently made it clear that the definition of "impasse" in the above-cited regulation is applicable only to issues before the Panel and cannot be applied to the context of unfair labor practices. *U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions*, 54 FLRA 630, 636-37 (1998)(*FDA*). Moreover, "impasse" has different meanings in different legal and factual contexts; thus, determination of whether impasse has occurred requires a case-by-case analysis of the parties' negotiations. *Id.*

In the context of evaluating whether impasse justifies the implementation of a proposed change, case law generally defines impasse as "that point in negotiations at which the parties are unable to reach agreement." *Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky*, 17 FLRA 896, 897 (1985). Applying this general principle to specific facts, the Authority has examined the entire course of negotiations. In *Los Angeles AFB*, for instance, the judge reviewed the parties' bargaining sessions and concluded that at no time had the parties' positions become so fixed that "no further negotiations would be productive[.]" 38 FLRA at 1504. He further noted that the parties had continued to discuss counterproposals made by the other, and that the "record does not reflect particular disagreements as to the terms or an unwillingness to modify them." *Id.* at 1503 (emphasis in original). The analysis of the judge and the Authority in *Davis-Monthan Air Force Base, Tucson, Arizona*, 42 FLRA 1267, 1278-80 (1991), adopts similar guidelines in finding that no impasse had been reached.

The key question in all such cases is not whether bargaining has "failed" to produce an agreement (indeed, the failure to reach agreement is usually a given), but whether additional bargaining (in which the good faith of both parties is presumed) might produce an agreement. In answering that question, it is important to evaluate whether the parties have thoroughly discussed the disputed issues and all ways of reaching a compromise on those issues. In the case at hand, the evidence demonstrates that the Employer declared an end to bargaining just when the parties had first obtained the factual information necessary to explore the possibility of compromise.

At the time Warden Jordan sent the March 31 memo, the parties had met only twice to discuss the smoking policy. Both of those meetings, on October 19, 1999 and February 22, 2000, ended on basically the same note: in discussing possible locations for indoor smoking, the Employer indicated an intent to conduct a "feasibility study" of this problem. The exact nature and extent of this study was never articulated to the Union - that is, it was never made clear whether this study would be written or verbal, what variables were considered relevant to the "feasibility" of ventilating a room, or what budgetary constraints would affect a project's feasibility - but the record is clear that both management and the Union were looking for specific facts on which to base their discussions of specific indoor locations for smoking. Although the minutes of the February 22 meeting indicate that the feasibility study had been conducted for the Housing Units and Control Center, the testimony of both management and Union witnesses makes it clear that the "study" performed prior to February 22 was extremely narrow in scope: apparently Mr. Batten had identified the bathrooms as potential smoking areas, as well as possibly some other unidentified locations. But neither Mr. Batten nor any other person had yet obtained any specific information to reflect the cost or any other variable affecting the "feasibility" of making the changes necessary to convert an area to a smoking room. Thus, on the key issue of indoor smoking, the parties were no better off in February than they had been the previous September: they still lacked the essential facts necessary to make an informed decision and to engage in reasoned bargaining.

The record does reflect that some progress in negotiations had been made by the end of the February meeting. While the Union had expressed concern at the October meeting about the adequacy of the outdoor shelters (gazebos) to be

constructed for smoking, this concern seems to have been allayed, because the issue was not raised at the February meeting, and management apparently went ahead and built the gazebos. The parties also reached agreement on a minor, technical change in the language of the policy. But the key unresolved issue was the plight of employees assigned to restricted indoor posts at night, where they would be unable to go outside to smoke, even on their breaks. The main suggestion offered by management on this issue during the two bargaining sessions was to ventilate the bathrooms (or according to Mr. Batten, to install "smoke eliminators" there). But as the Union noted, the Executive Order, which had triggered the prison's review of its smoking policy, did not permit the use of common areas such as bathrooms for smoking. While the Respondent has cited the Union's response on this matter as an apparent example of management's interest in accommodating employees and of the Union's intransigence, I view management's continued suggestion of using bathrooms for smoking as late as February 22 (six months into the bargaining process) as an example of its inability to understand the very Executive Order that was the basis of the negotiations.

Therefore, the main reason that the parties had been unable to agree on a smoking policy by February 22 was the lack of a "feasibility study" concerning the ventilation of indoor areas of the prison. Management had said at the October 19 meeting that it would conduct such a study before the next meeting. Despite persistent nagging by the Union about scheduling a second meeting, it took the Respondent four months to schedule the next meeting, and when it took place, the essential aspects of the feasibility study still had not been performed. At the February 22 meeting, Human Resource Manager Greene agreed to conduct a "walk-through" of the housing and control areas with a Union representative at a later time, and the meeting was adjourned on this note.

Despite this promise, the Respondent did not conduct a walk-through with the Union, and despite six months of talking about a feasibility study, it appears that the actual study was little more than a shoot-from-the-hip verbal report by Facilities Manager Batten to the warden estimating the costs to ventilate various areas. In his testimony, Mr. Greene (after some equivocation) stated that the feasibility study was completed within a day or two after the February 22 meeting. Mr. Batten testified that his report to the warden was not in writing, that he was already very busy and didn't have much time or money to devote to the study, and that he gave the warden "a couple of options" after he had "reviewed the prints, talked to different line staff about some options and costs." (Tr. at 129). Then, without further consulting the Union or even conducting the promised walk-through with the Union, the warden acted as final arbiter of the bargaining issues and issued her March 31 memo, cutting off negotiations and declaring impasse.

It is clear from the record that the Respondent's issuance of the March 31 memo was arbitrary and left the Union totally in the dark as to what factors had persuaded the warden that indoor smoking was not feasible. Contrary to the Respondent's argument, it had not engaged in "exhaustive bargaining" with the Union, and the much-hyped feasibility study was superficial rather than "extensive." The warden attempted to explain her reasons in her testimony at the hearing, but the Union certainly did not have the benefit of that explanation during bargaining. The warden herself never participated in the negotiations, and it is clear from the record that she, and she alone, evaluated the many factors that she considered relevant in evaluating the "feasibility" of designating indoor areas for smoking. She decided what cost was too costly, what rooms were too important to be set aside for smoking, etc. The Union was promised such information at the end of the first bargaining session and at the end of the second bargaining session, but the Union never did receive it, even in the warden's memo of March 31. All it was told on March 31 was that the Union's "concerns do not override a management need to comply with the President's Executive Order . . . ." This summary decision was not a substitute for bargaining.

There is no doubt, therefore, that an impasse had not been reached on March 31. Despite its stated intent to implement the smoking policy on April 14, however, the Employer waited until May 10 to do so. In the intervening time, a third meeting between management and the Union was held on April 11. Did the April 11 meeting bring the parties to an impasse? The answer again is no.

Nothing occurred at the April 11 meeting to demonstrate that further discussions would be futile. On the contrary, the record suggests that a thorough discussion of the Employer's feasibility study would likely have identified areas on which agreement could be reached. No such discussion of the feasibility study occurred at the April 11 meeting, or at any other meeting, however. The record reflects that the April 11 meeting was a mere formality, in which no substantive bargaining occurred. The meeting lasted only 15 minutes, and most of it was occupied in arguing over the need to set ground rules and the Union's intent to bring in a national official to the negotiations. Although management apparently cited Mr. Batten's feasibility study at the April 11 meeting as demonstrating the infeasibility of creating any indoor smoking areas, it is clear that the details of the study were not discussed. Union officials were never permitted to hear from Mr. Batten directly about the details of his study, to walk around the facility with him, or to raise additional suggestions concerning the feasibility of indoor smoking.

The testimony of Mr. Greene and Warden Jordan makes it clear that they believed that there was no purpose in conducting a walk-through with the Union once Mr. Batten's report convinced the warden that indoor smoking was not feasible. But it is that very conclusion, made unilaterally by the warden, that should have been subject to discussion and exploration with the Union. Management used the April 11 meeting simply to inform the Union that the warden had already made up her mind, and that the Union's only choice was to accept the warden's decision or pursue impasse resolution procedures. However, it is my view that if the Employer had allowed the Union to discuss the feasibility study in depth with Mr. Batten and to walk through the prison with management officials, the parties could have significantly narrowed, if not resolved, their areas of disagreement. I conclude, therefore, that no bargaining impasse had been reached when the

Respondent implemented its smoking policy on May 10, 2000, and that the Respondent violated section 7116(a)(1) and (5) by doing so.

Remedy

As explained above, I have concluded that the Respondent improperly implemented a smoking policy, which was substantively negotiable, before it had completed bargaining with the Union. The General Counsel seeks a *status quo ante* remedy for this violation, specifically that the smoking policy be rescinded until the parties have properly negotiated a new policy. The Employer argues that rescinding the smoking policy applicable to employees would cause problems with inmates subjected to the smoking by guards, and that the risk of inmate unrest in a prison constitutes "special circumstances" mitigating against a *status quo ante* remedy.

In cases where an agency unlawfully fails to engage in "impact and implementation" bargaining before implementing a change, the Authority considers a variety of criteria in evaluating the need for a *status quo ante* remedy. *FCI*, 8 FLRA at 604. However, when an agency's refusal to bargain concerns substantively negotiable conditions of employment, the Authority has held that the *FCI* case-by-case criteria are not applicable; instead, it has ruled that a *status quo ante* remedy is appropriate as a matter of course, "in the absence of special circumstances." *Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California*, 36 FLRA 509, 511 (1990); *see also*, *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 855 (1999)(*FCI Bastrop*); *Warner Robins*, 52 FLRA at 246; *Long Beach Naval Shipyard, Long Beach, California*, 17 FLRA 511, 514 n.6 (1985).

I recognize that a federal correctional institution such as the Respondent has "special security concerns" that are of "paramount importance" and must be considered in fashioning an appropriate remedy. *See*, *FCI Bastrop*, 55 FLRA at 856-57. I note that while the discussion of remedies in *FCI Bastrop* took place in the context of the *FCI* balancing criteria (which do not presumptively prefer a *status quo ante* remedy as in the current case), the security concerns of a prison are a "special circumstance" that should be taken into consideration in fashioning a remedy. Nonetheless, the burden is on the Respondent to demonstrate, "based on record evidence",(6) that rescinding the smoking policy for employees would pose a substantial risk of inmate disruptions or some other severe security breach, and I conclude that the record here does not support such a finding.

The testimony concerning the danger of rescinding the smoking policy is speculative at best, and it is not sufficient to outweigh the need to impose a meaningful remedy that will make employees whole for the Employer's premature suspension of bargaining. In essence, Warden Jordan testified that if the Employer was required to rescind its employee smoking policy, guards will be smoking in restricted areas in the presence of inmates who are prohibited from smoking. The disparity, she argues, will exacerbate inmate unrest. This suggestion, however, overlooks the fact that the prison had immediately implemented its new smoking restrictions on inmates in September 1999, while the policy was not imposed on employees until May 2000. Thus the Respondent had created the very danger which it now seeks to avoid; but the warden did not cite any examples of security breaches or unrest that occurred during the seven months in which inmates, not employees, were prohibited from smoking. The warden's testimony also overlooks the fact that there are many rules imposed on prisoners that are not applicable to employees. The record does not establish that the disparity in application of this rule, above all others, presents unique and severe security risks. S*ee*, *FCI Bastrop*, 55 FLRA at 856. I therefore conclude that, in order to meaningfully remedy the Respondent's unilateral imposition of the employee smoking policy, a *status quo ante* remedy is appropriate.

Based on the foregoing, I recommend 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 Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Oakdale, Louisiana, shall:

1. Cease and desist from:

(a) Unilaterally changing the working conditions of bargaining unit employees by establishing a new smoking policy, without first completing negotiations with the American Federation of Government Employees, Local 1007, 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 smoking policy that was implemented on May 10, 2000, pursuant to Institution Supplement OAD 1640.03, dated March 31, 2000, and return to the policy that was in effect prior thereto.

(b) Notify the American Federation of Government Employees, Local 1007, of any proposed changes in the smoking policy and, upon request, negotiate to the extent required by the Statute concerning the decision to effectuate such a policy and its impact and implementation.

(c) Post at its facilities in Oakdale, Louisiana, where bargaining unit employees represented by the American Federation of Government Employees, Local 1007, 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 Warden, 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.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 10, 2001.

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RICHARD A. PEARSON

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 Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Oakdale, Louisiana, 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 change workings conditions of bargaining unit employees by implementing a new smoking policy without providing the American Federation of Government Employees, Local 1007, 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 the smoking policy issued on May 10, 2000, pursuant to Institution Supplement OAD 1640.03, and return to the policy which was in effect for employees prior to May 10, 2000.

WE WILL, notify the American Federation of Government Employees, Local 1007, of any proposed changes in the smoking policy and, upon request, negotiate to the extent required by the Federal Service Labor-Management Relations Statute concerning the decision to effectuate such a policy and its impact and implementation.

_____

(Respondent/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, Dallas Regional Office, Federal Labor Relations Authority, whose address is:

525 S. Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214)767-4996.

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1. There are discrepancies in the testimony of the witnesses as whether the feasibility study had been performed prior to the February 22 meeting, but the consensus appears to reflect that, at most, only a part of

the study had been done. Mr. Greene initially testified that the feasibility study had been completed prior to February 22, and that it showed that ventilating any indoor areas would be too costly (Tr. at 99). However, he later corrected this, asserting that the study at that time had only been performed for ventilating the bathrooms, not any other areas (Tr. at 103). The Union and management negotiators agreed at the February 22 meeting, however, that the Executive Order did not permit the use of bathrooms as smoking areas. Union President Turner testified that management stated at the February 22 meeting that "some" areas had been found which could be ventilated, but that management didn t identify these areas. Captain Daniel Ortega testified for the Employer that management told the Union at the February 22 meeting that "they would take a look at the ventilation issue." (Tr. at 136). In other words, the negotiators (both Union and management) were just as ignorant on February 22 as they had been on October 19 about the feasibility of ventilating other indoor sites.

2. Mr. Greene testified very vaguely that he may have met personally with a Union representative on or about March 31 to explain the warden s conclusions (Tr. at 105, 108), but I find that such a discussion never occurred. The Union negotiator did not mention anything about such a discussion, and there are no minutes or other record of such a meeting. It is my finding that after the Employer drafted the March 31 memo, it simply gave the Union a copy of the memo without any verbal discussion of the reasons for its conclusions.

3.Mr. Greene had left Oakdale to take another position with the Bureau of Prisons shortly before the April 11 meeting, and Ms. Bell was the Acting Human Resource Manager.

4. I find that these "minutes" were not distributed to the Union for review and approval, as the minutes of the prior two meetings had been, and that the circumstances of the drafting of this document undermine its credibility. If the document was given to Mr. Turner at all at the time of drafting (a fact that I doubt occurred), it was not for his concurrence, but for his information only. The document, rather than serving as an objective description of the meeting, appears to have been prepared for the purpose of using it against the Union and to buttress management s claim that the negotiations had reached impasse. Therefore, I give the document only very limited credibility for instance, I credit its indication that the meeting began at 10:45 a.m. and ended at 11:00 a.m., a fact that suggests that very little actual bargaining occurred.

5. See, e.g., U.S. Department of the Air Force, Space Systems Division, Los Angeles Air Force Base, California, 38 FLRA 1485, 1501 (1991)(Los Angeles AFB); Luke AFB, supra, 36 FLRA at 300; U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 132 (1982). Compare such language to that of the judge in Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 217, 230 (1984), which closely reflects the Authority s rationale in FDA.

6.U.S. Department of Justice, Immigration and Naturalization Service, 55 FLRA 892, 906 (1999)(INS II). As in the FCI Bastrop case, INS II involves the FCI balancing criteria, which are more lenient to agency respondents than the standard for fashioning a remedy when an agency unilaterally implements a substantively negotiable change.