UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE JACKSON DISTRICT OFFICE JACKSON, MISSISSIPPI Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2357 Charging Party	Case No. AT-CA-02-0154

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 10, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

PAUL B. LANG
Administrative Law Judge

Dated: February 6, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: February 6, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
JACKSON DISTRICT OFFICE
JACKSON, MISSISSIPPI
Respondent

and Case No. AT-CA-02-0154

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2357
Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-18
WASHINGTON, D.C.

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE JACKSON DISTRICT OFFICE JACKSON, MISSISSIPPI Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2357 Charging Party	Case No. AT-CA-02-0154

Cheryl R. Dunham, Labor Relations Specialist
For the Respondent

Charles S. Painter, Union President
For the Charging Party

Paige A. Sanderson, Esquire
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 2357 (the Union), against the U.S. Department of Agriculture, Food Safety and Inspection Service, Jackson District Office, Jackson, Mississippi (the Respondent), on December 26, 2001, and amended on April 29, 2002. On July 26, 2002, the Regional Director, of the Atlanta Region, Federal Labor Relations Authority, issued a Complaint and Notice of Hearing alleging that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the

Statute), by implementing mandatory changes to the work schedules of bargaining unit employees without affording the Union an opportunity to bargain over impact and implementation of the changes.

A hearing was held in Birmingham, Alabama on October 23, 2002, at which the parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Respondent and the General Counsel filed timely briefs. 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

Positions of the Parties

General Counsel

It is the position of the General Counsel that the Respondent failed in its statutory duty to bargain collectively when it implemented temporary changes in the work schedules of certain bargaining unit employees in order to enable them to attend mandatory "Next Step" training. Not only did the schedule changes in themselves amount to a change in conditions of employment, they also caused certain employees to lose shift differentials in pay and to suffer the disruption of personal arrangements such as for child care. Even though the change in the work schedules was for one week, it had more than a *de minimis effect*, thereby triggering the Respondent's duty to bargain.

The General Counsel also maintains that the Union properly requested bargaining by means of a telephone call from Charles Painter, Union President, to Jerry Traylor, Respondent's Assistant District Manager. It was not necessary for the Union to request bargaining at the national level because the collective bargaining agreement allowed for the parties to negotiate supplemental agreements on the regional level. When the Respondent abolished the regions the authority to negotiate passed to the districts.

In further support of its position, the General Counsel argues that there is no meaningful difference between "consultation" as defined in the collective bargaining agreement and "bargaining" as defined in the Statute, and as contemplated by the collective bargaining agreement.

The Respondent

The Respondent maintains that the collective bargaining agreement limits the authority to negotiate to the national level. Supplemental agreements may be negotiated at the regional level. Below the regional level the parties may deal with issues solely by means of consultation.

The authority of the parties to negotiate below the regional level was not affected by the elimination of the Respondent's regional organization. The parties did not negotiate changes to the unambiguous language of the collective bargaining agreement.

The Respondent met its obligation to consult with the Union concerning the temporary change of work schedules on account of the "Next Step" training. The Union was informed that the training could not be rescheduled, but that problems would be addressed on a case-by-case basis. The Respondent also argues that the Union does not have national consultation rights because it does not meet the criteria for national consultation as set forth in the Statute.

The Respondent maintains that, in view of the foregoing factors, it did not commit an unfair labor practice as alleged because the Union did not request bargaining at the proper level.

Findings of Fact

In October 1984, the National Joint Council of Food Inspection Locals, American Federation of Government Employees (the Union's parent organization) and the Office of the Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture (of which the Respondent is a part) entered into a collective bargaining agreement (Resp. Ex. 1). That agreement was replaced by a successor agreement on October 1, 2002. Article VI, Section B, of the agreement[1] states:

> Authority to Negotiate at Subordinate Level:
>
> The Parties at the level of exclusive recognition are vested with authority to enter into negotiated agreements binding on the respective Parties. Additionally, the Parties at the regional level may negotiate supplemental agreements. Only the National Basic Agreement and subordinate Regional

[1] All references to the collective bargaining agreement will be to the agreement of 1984. The successor agreement was not offered in evidence and is not relevant to the issues in this case.

> Agreements will have precedential value. Below the regional level, the Parties shall deal with issues through consultation discussions.
>
> (Resp. Ex. 1 at 39)

Article VI, Section G sets forth the following definition:

> Definition of Consultation:
>
> For the purposes of the Agreement, consultation is defined as any oral or written dialogue between management and union officials on matters of mutual interest.
>
> Consultation, unlike negotiation, does not involve joint decision-making, and the consultation process need not necessarily result in agreement between management and union officials.
>
> (Resp. Ex. 1 at 43-44)

In 1986 the Food Safety and Inspection Service abolished its regional offices and created 18 districts. There is no evidence that the parties arrived at new language regarding the level at which supplemental agreements could be negotiated.[2]

On or about June 2001, the Union first learned that the Respondent was planning to conduct a series of Next Step work meetings. The purpose of the meetings was to discuss new regulations regarding the Hazard Analysis and Critical Control Point program which had been implemented pursuant to the Pathogen Reduction Act. At that time Dr. Mariano Loret de Mola, Respondent's District Director, informed Painter that the work meetings had not yet been scheduled.

Painter eventually learned of the schedule when he saw it posted on a bulletin board. Each of the five Next Step

[2] Painter testified that, following the reorganization, the district offices took the place of the regional offices for the purpose of negotiating supplemental agreements. However, he admitted that he had no formal document to either support or rebut that contention. No such document was introduced into evidence. On page 3 of the General Counsel's Post-Hearing Brief he states that, "the parties entered into several transition memoranda, one of which gave the local Union President the authority to consult with the District Director." (G.C.'s Brief at 3; Tr. 44, 105).

meetings was scheduled for eight hours on successive days during the first, or day, shift. At that time Painter became concerned over the effect of the schedule on bargaining unit employees who were on the second or third shifts. They would be forced to forgo their shift differentials and might encounter problems with child care and other personal matters.

Shortly thereafter Painter received a telephone call from Jimmy Roberts who stated that he was calling on behalf of de Mola to discuss the Next Step training schedule. Painter expressed his concerns and suggested that the work meetings take place at the times when employees were regularly scheduled to work. Roberts stated that the material was boring and that it might put employees to sleep. Painter then requested that Roberts convey his concerns to de Mola and see if the schedule of meetings could be adjusted. Roberts said that he would do so. Painter later telephoned Roberts and was told that de Mola had stated that the meeting schedule had been set and could not be changed.

Painter then telephoned Traylor and requested bargaining concerning the training. Traylor informed Painter that the Respondent could not bargain over the training material. On July 3, 2001 by email, Painter informed de Mola that the Union was solely concerned with the scheduling of the training rather than with the training itself and again expressed the hope that the meetings could be rescheduled to accommodate the needs of employees on the second and third shifts. On July 10, 2001 by email, de Mola informed Painter that he would address employees' concerns on a case-by-case basis. Painter replied that a case-by-case approach would be difficult for him because of his own work schedule and again requested that the Respondent bargain over the training schedule. The evidence indicates that the Respondent repeatedly informed the Union that bargaining was only authorized at the national level. After further exchanges of this type, the Respondent implemented the original training schedule.

There is a conflict of testimony as to whether the Next Step training was mandatory. Painter testified that de Mola informed him that the training was voluntary, but that Painter expressed his disbelief because of the promulgation of the schedule and the unilateral nature of the shift changes to accommodate the schedule. According to de Mola the Respondent had an attendance goal of 80%. However, 78 bargaining unit employees (roughly 64%), out of a total

of 121, did not attend.[3] De Mola also testified that employees were not told that the training was mandatory and that local offices were instructed not to force employees to attend. De Mola instructed Traylor to pass the word to immediate supervisors to try to accommodate employees with scheduling problems.

In view of the foregoing evidence, I find as a fact that the Next Step training was not mandatory and that, while employees might have been encouraged to attend, a significant number of bargaining unit employees did not do so and suffered no adverse consequences.

Discussion and Analysis

The outcome of this case is largely dependent on a determination of the meaning of the collective bargaining agreement. The Authority has held that, in ascertaining the meaning of specific portions of an agreement, an administrative law judge is to follow the standards and principles applied by arbitrators and by federal courts. *Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina*, 57 FLRA 495, 498 (2001). In *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993), it was recognized that, "courts are bound to enforce lawful labor agreements as written[.]" Extrinsic evidence of past practice may only be considered to resolve ambiguous contract language. *Quick v. NLRB*, 245 F.3d 231, 247 (3d Cir. 2001).

The meaning of the pertinent contract language is clear. Negotiations are only to be conducted at the national or regional levels. Although the contract might have been modified after the Respondent eliminated the Regional offices, such modification did not occur. As a result, negotiations could be carried out only on the national level after the Respondent's reorganization. Below the regional level the parties, such as the Union and the Respondent, were limited to consultation. The term consultation is specifically defined in the collective bargaining agreement as being generally consistent with the agency-wide consultation rights described in §7117(d)(2) of the Statute. Unlike the Statute, the collective bargaining agreement specifically states that consultation "need not necessarily result" in an agreement.

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[3] There is no evidence of any disciplinary or other adverse action that was taken against any employee who did not attend the training.

The General Counsel's argument that there is no substantive difference between negotiation and consultation flies in the face of the language of §§7103(12) and 7114(b) of the Statute. Simply stated, negotiation or collective bargaining is a structured process that leads to an agreement which either party may insist be reduced to writing. Consultation, as defined in the collective bargaining agreement and contemplated by §7117(d) of the Statute, is a vehicle for the exchange of information and views. The Respondent's response to the Union's expressions of concern over the scheduling of the Next Step training, while obviously unsatisfactory to the Union, fulfilled the Respondent's contractual duty with regard to consultation.[4]

The position of the General Counsel in this regard is not improved by the testimony of Painter to the effect that the Union reached agreement with the Respondent on several occasions. Nothing in the language of the contract is inconsistent with the concept of an agreement resulting from consultation. As stated above, consultation differs from negotiation in that it may, but need not, result in an agreement.[5] Furthermore, there is no evidence to suggest that, regardless of Painter's testimony to the contrary, the Respondent directly or indirectly misled the Union into assuming that it could negotiate at the district level. Painter, as a Union official, is assumed to have been aware of the unambiguous language of the agreement.

In view of the foregoing, I find that the Respondent did not violate §7116(a)(1) and (5) of the Statute as alleged, and recommend that the Authority adopt the following Order:

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[4] The Union had no statutory right to consultation at the District level. The Statute affords unions the right to consultation on an agency-wide basis under certain specifically defined circumstances. The Union did not request agency-wide consultation and the General Counsel does not allege that it did so.

[5] The Authority has recognized the distinction between negotiation and consultation as early as *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma*, 3 FLRA 512, 522 (1980) and as recently as *United States Department of the Interior, Bureau of Indian Affairs, Southwestern Indian Polytechnic Institution, Albuquerque, New Mexico*, 58 FLRA 246, 249 (2002).

ORDER

It is hereby ordered that the Complaint be, and hereby is, Dismissed.

Issued, Washington, DC, February 6, 2003.

PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-02-0154, were sent to the following parties:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: FEBRUARY 6, 2003
WASHINGTON, DC