UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondent	
and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL F-88 Charging Party	Case No. CH-CA-70577 (55 FLRA No. 159)

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 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 28, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

ELI NASH, JR.
Administrative Law Judge

Dated: January 28, 2000
Washington, DC

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

MEMORANDUM DATE: January 28, 2000

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

and Case No. CH-CA-70577

(55 FLRA No. 159)

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS
LOCAL F-88

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 Bench 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 00-15
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondent	 Case No. CH-CA-70577
and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL F-88 Charging Party	(55 FLRA No. 159)

Warren A. Buckler, Jr.
For the Respondent

Greg A. Weddle, Esquire
Susan L. Kane, Esquire
For the General Counsel

Before: Eli Nash, Jr.
Administrative Law Judge

DECISION AND ORDER ON REMAND

On September 30, 1999, the Authority remanded the instant matter to the undersigned "to determine whether the Union made a valid request to bargain and, if it did, whether the
Respondent improperly failed to bargain with the Union." The Authority also determined that since the General Counsel's position in the case is that "the parties established a practice of informal bargaining, inconsistent with the contract" it would be relevant in evaluating Respondent's defense that the Union had not made a written request to bargain, to address whether a contract interpretation issue similar to that found in *U.S.*

Department of Housing and Urban Development, Rocky Mountain Area, Denver, Colorado, 55 FLRA 571, 572 n.5 (1999)(*HUD*) might apply in this case.

The facts in this case are set out fully in the recommended decision. I rely on those facts in considering the matter on remand.

Conclusions

The record does not support Respondent's defense that the Union's failure to make a written request to bargain relieved it of the obligation to bargain. The Authority noted in *HUD* that in certain circumstances it would not foreclose the possibility of finding that local management could establish a binding practice contrary to the terms of a nationwide agreement. *HUD*, 55 FLRA at 572 n.5. This may be such a case. Here, the facts show that Wilcoxon was encouraged by local management officials to bargain informally with the Union. Thus, the parties, for years, bargained certain fire station matters in an informal manner. Such bargaining rarely, if ever, required a written request by the Union to initiate bargaining. As discussed more fully hereafter, the parties in this case established a binding practice of informal negotiations without written requests to bargain.

In *Internal Revenue Service, Washington, DC*, 47 FLRA 1091, 1103 (1993)(*IRS*) "when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly." However, in *IRS* the Authority went on to say:

> [O]nce the General Counsel makes a <u>prima</u> <u>facie</u> showing that a respondent's actions would constitute a violation of a statutory right, the respondent may rebut the General Counsel's showing of a <u>prima</u> <u>facie</u> case. This may be done by establishing by a preponderance of the evidence that the parties' collective bargaining agreement allowed the respondent's actions. . . Furthermore, in determining the meaning of the

> collective bargaining agreement, the administrative law judge should consider, as necessary, any alleged past practices relevant to the interpretation of the agreement. 47 FLRA at 1110-11.

Thus, a respondent must prove by a preponderance of the evidence that its action was allowed by the collective bargaining agreement and the evidence must be considered in light of any practice the parties might have and in this case, the prior history.

1. *The Parties Disregarded Any Contractual Requirement for Written Bargaining Demands by Verbally Negotiating Changes in Conditions of Employment Over an Extended Period of Time*

The record reveals that Darrell Wilcoxon became Fire Chief in November 1990, that Chief Wilcoxon was encouraged by Respondent to have an "open door policy." It is undisputed that during Wilcoxon's tenure, ninety percent of the parties' negotiations were conducted orally and informally. Furthermore, it is clear that Brian Normile, Respondent's Labor Relations Officer, knew of this practice before he sent the June 18, 1997, letter announcing the termination of the fire station smoking practice. Thus, Normile was aware of the practice when Johnson voiced the Union's opposition to the change and when Johnson asked Normile if fire station smoking could continue during periods of inclement weather and when Johnson told him that the Union was willing to negotiate a change in the location of smoking in the fire stations. In any event, Normile was certainly aware of the practice of oral negotiations on the day Respondent terminated fire station smoking. Chief Jimmy McKay was also aware of the past practice of verbal negotiations. In a meeting between McKay and Richard Pence, McKay disclosed that he "like[d] to have things in writing, and that [the parties] would pursue more like official procedures as opposed to a more indirect, open policy that [McKay] understood that Chief Wilcoxon had."

As previously noted, the parties established a practice of bargaining matters orally without regard to the language of Article 12, Section 5, a modification to the terms of the contract which became a past practice. *U.S. Patent and Trademark Office*, 39 FLRA 1477, 1482-83 (1991).

Accordingly, it is found that Respondent failed to prove by a preponderance of the evidence its affirmative defense that the Union's failure to submit a written as opposed to verbal bargaining demand resulted in a waiver of the Union's bargaining rights in this matter.

Finally, since Respondent clearly informed the Union that it was unwilling to bargain the decision to end the smoking practice at the fire stations, it is found that Respondent cannot now rely on the Union's failure to submit a written demand to bargain since it would have been futile. In this regard, it appears that whether the Union requested bargaining in writing or orally would have made no difference. *Blue Grass Army Depot, Richmond, Kentucky*, 50 FLRA 643, 653 (1995).

2. *The Collective Bargaining Agreement Did Not Prevent the Development of Inconsistent Practices Which Affect their Bargaining Obligations*

In the opinion of the undersigned, Respondent did not prove by a preponderance of the evidence as an affirmative d efense that Article 34, Section 4: "any waiver or breach of any condition of this CLA by either party shall not constitute a precedent in the future enforcement of any or all terms and conditions herein," excused its actions in this case. Under present case law Respondent has the burden of proving that this provision allowed it to unilaterally terminate fire station smoking. *IRS*, 47 FLRA at 1110-11. Judge Etelson considered this exact clause in *Naval Submarine Base, Groton, Connecticut*, Case No. 1-CA-10082, ALJDR No. 99 (1991), and noted that there is a distinction between the possible effect of this clause in a proceeding *based on the contract*, and a waiver of the statutory obligation to bargain a change in past practice. Respondent presented no evidence in this regard, making it appropriate to draw an adverse inference that there was no evidence available to support such a defense. *See United States Department of Justice*, *Immigration and Naturalization Service*, 51 FLRA 914, 926 (1996).

3. *Even Without the Inconsistent Practice of Verbal Negotiations, the Collective Bargaining Agreement Does Not Require that the Union Submit a Written Request to Bargain in Order to Avoid Unilateral Action*

Even absent the seven year past practice of verbal negotiations, the parties' collective bargaining agreement specifies the circumstances under which the Union would waive its right to bargain over a change. Article 12, Section 5(e) states, in pertinent part:

> Failure of the Union to request negotiations within the time limits shall constitute a non-request for negotiations and the Employer may implement its change(s).

Consequently, under the collective bargaining agreement, absent a *timely* request, the Union would waive its right to bargain. Although the contract elsewhere states that the request to bargain will be in writing, the particular provision releasing Respondent from its bargaining obligation requires only that the Union's request be timely. It is not only an arguable interpretation, but a more reasonable interpretation of the parties' contract, that a verbal request to bargain might breach the contract, but not waive the Union's *statutory* right to bargain. Furthermore, it is unreasonable to interpret this clause as applying when Respondent, as in this case, did not recognize that it had any duty to bargain about the decision to make the change.

Respondent offered no evidence of prior unilateral actions taken by it based on the Union's failure to submit a written request to bargain and thereby, failed to meet its burden of proof. Based on an undisputed seven year practice of verbal negotiations, there certainly must have been some evidence to support such a defense. Respondent's failure to elicit any evidence on this point leads to the inference that the bargaining history and application would not support Respondent's actions.

Based on all the foregoing, it is found and concluded that the Union made a valid request to bargain and Respondent failed to bargain by terminating the practice of fire station smoking without providing the Union the opportunity to negotiate the change. Therefore, Respondent violated section 7116(a)(1) and (5) of the Statute.

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service

Labor-Management Statute, the U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in unit employees' conditions of employment, including changes in the practice of smoking inside fire stations without providing the International Association of Firefighters, Local F-88, with prior notice and the opportunity to bargain to the extent required by law.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify the International Association of Firefighters, Local F-88, in advance of any proposed changes in conditions of employment and provide the International Association of Firefighters, Local F-88, with prior notice and the opportunity to bargain to the extent required by law.

(b) Reinstate the practice of permitting employees to smoke in previously designated areas inside the fire stations.

(c) Post at its facilities where bargaining unit employees represented by the International Association of Firefighters, Local F-88, 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 Commander, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, 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, Chicago 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, January 28, 2000.

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 U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, has 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 unit employees' conditions of employment, including changes in the practice of smoking inside fire stations without providing the International Association of Firefighters, Local F-88, with prior notice and the opportunity to bargain to the extent required by law.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Statute.

WE WILL notify the International Association of Firefighters, Local F-88, in advance of any proposed changes in conditions of employment and provide the International Association of Firefighters, Local F-88, with prior notice and the opportunity to bargain to the extent required by law.

WE WILL reinstate the practice of permitting employees to smoke in previously designated areas inside the fire stations.

____
(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, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe Street, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312)353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, JR., Administrative Law Judge, in Case No. CH-CA-70577, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS**:
Greg Weddle, Esquire Susan L. Kane, Esquire Federal Labor Relations Authority 55 W. Monroe Street, Suite 1150 Chicago, IL 60603	P168-060-138
Warren Buckler, Jr., Esquire 88 ABW-JAL 5135 Pearson Road, Suite 2 Wright-Patterson AFB, OH 45433	P168-060-139
James Johnson, Representative IAFF, Local F-88 P.O. Box 1123 Fairborn, OH 45324	P168-060-140

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JANUARY 28, 2000
WASHINGTON, DC