

UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF TEXAS
HOUSTON, TEXAS

Respondent

AND

Case No. DA-CA-90206

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3966

Charging Party

Carol L. Catherman, Esquire
For the Respondent

Jeanell Nero-Walker
For the Charging Party

Charles M. de Chateavieux, Esquire
For the General Counsel of the FLRA

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose under the Federal Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), 5 C.F.R. § 2423.1 *et seq.*

This proceeding was initiated by a charge filed and amended by the American Federation of Government Employees (AFGE), Local 3966 AFGE Local 3966/Union) against the United States Attorney's Office, Southern District of Texas, Houston, Texas (USAO/Respondent). The Regional Director of the Dallas Region of the FLRA, on behalf of the General

Counsel (GC) of the FLRA issued the Complaint and Notice of Hearing in the instant case alleging that the USAO, violated Section 7116(a)(1) and (5) of the Statute by unilaterally changing the conditions of employment of bargaining unit employees by implementing the relocation of its Brownsville office without providing the AFGE Local 3966 an opportunity to negotiate to the extent required by the Statute. USAO filed an answer denying that it had violated the Statute.

A hearing was opened in Houston, Texas, and after a day of hearing, was adjourned and then reopened at a later date. At the hearing all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, and to introduce evidence. USAO and GC of the FLRA filed timely post-hearing briefs which have been fully considered.

based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations:

Findings of Fact

A. Background

The USAO is an agency under section §7103(A)(4) of the Statute. AFGE Local 3966, is a labor organization under section 7103(A)(4) of the Statute and is exclusive representative of a unit of employees appropriate for collective bargaining USAO.

B. Move of USAO, Brownsville Branch

Plans were underway in 1998 to relocate the Brownsville branch office of the USAO to a federally-owned building then under construction. The General Services Administration (GSA), the federal agency which serves as the federal government's landlord and property manager, was supervising construction and coordinating design of the space allocated to the USAO. GSA oversees construction of new buildings and fixes deadlines for USAO input.

The USAO is one of many federal offices which occupy the new building, and was assigned space on the second floor. Management Analyst Gracie Deskin was the USAO employee most actively involved in coordinating the design of the new space with GSA.

When construction had reached a point that allowed management to provide the union with floor plans and

discuss details on the physical layout of the new office space, the Agency arranged a briefing for the union president on the new facilities. Mason arranged for Deskin to meet with Union President Jeanell Nero-Walker on October 9, 1998 to review and discuss floor plans for the new quarters.

Deskin reviewed the floor plans with Ms. Nero-Walker and answered her questions.

Nero-Walker raised two concerns during the meeting: 1) would there be available parking for bargaining unit employees and 2) was adequate square footage allocated for support staff offices. With respect to the latter, Nero-Walker seemed satisfied when Ms. Deskin showed her that the square footage allocated actually exceeded the minimum requirements.

With respect to the parking issue, Deskin supplied the information she had on the availability of parking at and around the new GSA building. There were no questions left unanswered at the end of the meeting, and Nero-Walker did not request a follow-up meeting.

Deskin described meeting to Mr. Mason in an e-mail dated October 9, 1998. After 6 days, being aware that the AFGE Local 3966 had concerns about parking which it might want to raise, Mason sent an e-mail dated October 14, 1998, advising Nero-Walker¹:

I understand from Gracie that you met with her last Friday, October 9, 1998, and she briefed you on the proposed relocation of the office in Brownsville.

Since you've had an opportunity to discuss and consider the move, please submit your proposals (if any) concerning this move, to me, no later than COB Thursday, October 15, 1998.

If you have any questions, please give me a call.

Tks,

Mike

Nero-Walker responded by e-mail 25 minutes later which stated

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E-mail is commonly used to communicate by USAO and AFGE Local 3966.

When I receive the input I requested from the bargaining unit employees from the Brownsville office I will submit proposals to you. I will not be held hostage to your time limit of having proposals ready by COB October 15, 1998.

Jeanell Walker

President/AFGE Local 3966

Subsequently, during October 1998, Nero-Walker, by e-mail, communicated with unit members in the Brownsville Office to solicit their concerns. She received responses during November 1998.

The Union and USAO continued to communicate concerning the Brownsville office relocation until mid December 1998. Nothing further regarding the submission of proposals passed between the Union and the Agency until December 16, 1998 when Nero-Walker sent an e-mail to Mr. Mason stating:

The week of December 1, 1998 you indicated to me that you would be meeting with Gracie Deskin and the contractor that will be building a parking lot across from the Federal building in Brownsville. What was the status of the meeting? When will the Brownsville office move?

I will be presenting you several proposals that are a concern to the bargaining unit employees in the Brownsville office.

Jeanell Walker
President/AFGE Local 3966

Mason responded by e-mail dated December 17, 1998 which stated:

This is in response to your e-mail of 12-16-98 concerning your submissions of proposals for the Brownsville office move, which is now scheduled for mid-February.

You met with Gracie Deskin on October 9, 1998 and received a briefing on the Brownsville move. In accordance with Article 5, Section 4 of the Negotiated Agreement, you were then asked to provide us with proposals by c.o.b. 10/15/98, seven calendar days after the briefing. You refused to provide proposals to us at that time.

Therefore per the provisions of the above article, we elect not to enter into negotiations with you over the Brownsville move.

We will, however, consult and confer with you over any recommendations you may have about the move.

If you have any questions, please feel free to contact me.

Mike
12-17-98

Nero-Walker responded by submitting a proposal to negotiate parking in a letter to Mr. Kelly dated December 17, 1998:

This letter is to notify you and your office, that...[the Union] is demanding to bargain the Brownsville Office move to the full extent of the law. I will be available to meet with you tomorrow December 18, 1998 at 2:00 p.m. in the administrative conference room. If you cannot meet with the Union tomorrow, please let me know so we can mutually select an alternate date to negotiate this matter.

UNION PROPOSAL(S)

1. PARKING - That parking be provided free for the bargaining unit employees.

The Union feels that a denial or refusal from your office to meet and negotiate the Brownsville Office move will result in a unilateral change and we will request the assistance of the Federal Labor Relations Authority to go in Federal District and issue a Restraining Order against the ...[USAO]...to halt the Brownsville Office move.

Mr. Richard Kelly, Administrative Officer or USAO,000 responded by e-mail on December 18, 1998, stating:

Jeanell, this is in response to your letter to me dated December 17,1 998 regarding the Brownsville office move.

As Mike Mason stated to you in his e-mail dated December 17, 1998, you were briefed on this move on October 9, 1998 and were then asked to provide proposals by close of business October 15, 1998. You

did not submit proposals until yesterday, December 17, 1998, when you requested to negotiate parking. Your submission is over two months past the established cut-off date.

Since the submission of your proposal is not timely, we will not reopen this matter for negotiations.

USAO then implemented the Brownsville Office move without bargaining with AFGE Local 3966.

C. The Contract

1. Terms

Article 5 Section 4 of the Collective Bargaining Agreement² between the Union and USAO provides, in pertinent part:

The Employer will notify the Union in writing of (1) proposed new or revised...conditions of employment...or (2) the need for negotiation on impact of the implementation of changes in laws, regulations, or the policies of higher level authorities...Presentation of the written notice to the Union's representative and written acknowledgment of receipt constitutes notification of the proposal. The Union is to notify the Administrative Officer or a designee in writing within seven days of notification of its agreement with, or its intent to negotiate on the proposal.... Negotiations shall begin at a mutually agreeable time and place no later than seven calendar days following the Union's notice of intent to negotiate.... Time limits in this section may be extended upon written mutual agreement.

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Although the CBA, effective in 1988, has expired, all parties agree that the Union and USAO are continuing to abide by the terms of the CBA until a new one has been agreed to.

2. Past Application

In the past, when notified of proposed changes by management, AFGE Local 3966 would notify USAO within seven days of its intent to bargain, and sometimes the Union would also enclose its proposals, sometimes it submitted its proposals after the seven day notice of intent to bargain, and sometimes would not submit proposals in advance and would deal with proposals when the parties met to negotiate. In fact in 1992, when the USAO in Houston was moved, Nero-Walker did not submit the Union's proposals within seven days of when the Union had been notified of the move, and the parties sat down more than seven days after the Union had notified USAO of its intent to negotiate and negotiated about the parties' concerns.³

Discussion and Conclusions of Law

A. Statute

Section 7116(a)(1) and (5) of the Statute Provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.

B. Obligation to Bargain

The Authority has consistently found that a change in office location gives rise to an obligation on the part of the agency to bargain over the procedures to be followed in implementing the relocation and appropriate arrangements for

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Nero-Walker's testimony is credited because it was specific, particular, and consistent with the circumstances. Also Nero-Walker's demeanor convinced me she was truthful.

employees affected by the move. *Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York*, 19 FLRA 328 (1985). In this case, the Authority found that the Agency had committed a violation of Section 7116(a)(1) and (5) of the Statute by relocating an office before it had completed bargaining over the appropriate arrangements and procedures where the lease had already been signed and the union had made proposals. In *Department of the Treasury, Internal Revenue Service, Dallas District*, 19 FLRA 979 (1985), the Authority found the Agency violated Section 7116(a)(1) and (5) of the Statute by implementing the relocation before completing bargaining over the appropriate arrangements and procedures where the lease had already been signed and the union had made proposals. The Authority, in finding bargaining violations over office relocations, has held that, the obligation to bargain over appropriate arrangements and procedures includes, among other things, such matters as the allocation of office space and that the union could propose its own floor plan for bargaining. *Department of Health and Human Services, Region IV, Office of Civil Rights, Atlanta, Georgia*, 46 FLRA 396 (1992) (*Department of Health and Human Services*). In *Department of Health and Human Services*, the Authority found that the Agency had violated section 7116(a)(1), (5) and (8) of the Statute by reducing office space before completing bargaining over the appropriate arrangements and procedures where the union had presented a proposed floor plan and made a remedial order requiring that walls that had been in place for two years be removed. Likewise, in *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 41 FLRA 1268 (1991) (ALJ Decision), the Administrative Law Judge found that the relocation of offices required bargaining over appropriate arrangements and procedures. The Authority has specifically found that the parking issues associated with an office relocation are negotiable. See, *Coordinating Committee of Unions and Department of the Treasury, Bureau of Engraving and Printing*, 29 FLRA 1436, 1440 (1987); and *United States of the Treasury, Internal Revenue Service, and United States Department of the Treasury, Internal Revenue Service, Houston District*, 25 FLRA 843 (1987). 4

Accordingly, in the subject case USAO was required to notify and, upon request, bargain with AFGE Local 3966 about

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In this regard, Counsel for USAO and Respondent's witness stated during the hearing that the Union's proposals relating to the appropriate arrangements and procedures for implementing the Brownsville office relocation were negotiable.

the impact and implementation of the move of the Brownsville Office, including parking arrangements.

3. AFGE Local 3966 Complied With The Collective Bargaining Agreement

In the case at hand, USAO argues that AFGE Local 3966 failed to abide by Article 5, Section 4 of the parties current CBA, because the Union did not submit its proposals concerning the Brownsville office relocation within seven days of the Union being notified of the Brownsville office relocation. In this regard, USAO's letter of December 18, 1998 stated that USAO would not bargain concerning the Union's proposals about the Brownsville Office move because the Union did not submit the proposals within seven days of notification of the move.

The GC of the FLRA contends that Article 5, Section 4 of the CBA provides that once AFGE Local 3966 is notified regarding a proposed change, the Union must notify the USAO within seven calendar days if it agrees with the change or it wishes to negotiate over the change.

USAO takes the position that there is an implied requirement in Article 5, Section 4, of the CBA that imposes a duty on AFGE Local 3966 to submit its proposals within seven calendar days of it being notified of a change.

On its face Article 5, Section 4, of the CBA states that after notification by USAO of a proposed change AFGE Local 3966 "is to notify the Administrative Officerin writing within seven calendar days of notification of its agreement with, or its intent to negotiate on the proposal." The language of this section states clearly and unambiguously that after notification of a proposed change the Union has to notify USAO within seven days of its agreement with the proposal or of its intent to negotiate about the change. Nowhere does it say or imply that the Union must also submit proposals within the same seven days, or even that it must submit proposals at all. The language of the section is clear and unambiguous.

Because the language of Article 5, Section 4 of the CBA is clear and unambiguous, I need not look at the collective bargaining history in order to determine the meaning of Article 5, Section 4. However, examining the testimony in the record, both direct examination and cross-examination, concerning the collective bargaining history, I conclude that the parties did not agree that the Union had to submit proposals within seven days of notification of a change. The

language of the CBA that the Union had to notify USAO concerning an intent to negotiate about a change, within seven days of notification of the proposed change, expresses the understanding reached by the parties during collective bargaining.⁵

Similarly, in light of the clear and unambiguous language of the CBA I need not look at how the parties had applied Article 5, Section 4. However the credited testimony of Nero-Walker establishes that, under Article 5, Section 4, sometimes the Union submits proposals with its notification of intent to negotiate, sometimes it submits proposals after its notification of intent to negotiate, and sometimes it does not submit any proposals before negotiations and proposals are raised and dealt with at negotiations.

In light of the foregoing, I conclude AFGE Local 3966 complied with Article 4 Section 5 of the CBA when it notified USAO its intent to negotiate within seven days of notification of the move of the Brownsville Office of.

As discussed earlier, USAO was obliged to bargain with AFGE Local 3966 about the impact and implementation of the move of the Brownsville Office, including parking arrangements. The Union complied with the requirements of the CBA and expressed its intent to negotiate. Accordingly USAO was not privileged to refuse to bargain about the Union's proposals and this refusal constitutes a violation of section 7116(a)(1) and (5) of the Statute.

4. USAO's Reasonableness Is No Defense

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Article 5, Section 4 of the CBA also provides that after notification of the Union's intent to negotiate the "negotiations shall begin at a mutually agreeable time and place no later than seven calendar days following the Union's notice of intent to negotiate." The record establishes that commencing the negotiations timely is a mutual obligation and, therefore, the Union did breach its contractual obligation by not timely commencing negotiations. Further, USAO did not contend that such a breach justifies its refusal to negotiate. In this regard it should be noted that if USAO wanted to expeditiously dispose of its bargaining obligation, it could have insisted on starting negotiations within seven days of the Union's notification of intent to bargain

USAO contends that if the agency reasonably interpreted Article 4, Section 5 of the CBA, it should not be held to have committed an unfair labor practice. In support of this position USAO cites *United States Dept. of Transportation, Federal Aviation Administration and Professional Airways_ Systems Specialists MERA, AFL-CIO*, 44 FLRA 482, 511, quoting *United States Marine Corps, Washington, D.C.*, 33 FLRA 105, 114 (1988). I conclude those cases are inapposite.

Rather, the Authority has stated in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) (*IRS*):

....We have formulated a new approach to these cases [where the underlying dispute is governed by the interpretation and application of specific provisions of the parties' collective bargaining agreement] that will carry out the purposes and policies of the Statute.

We now hold that 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 the administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.

In adopting this approach, we reaffirm our rejection of the "differing and arguable interpretations analysis, as that analysis was applied by the Authority.
IRS at 1103.

Accordingly, I reject USAO's defense that its interpretation of the CBA was reasonable and therefore a defense for its refusal to bargain with the Union. Thus, USAO violated section 7116(a)(1), and (5) of the Statute by refusing to bargain with the Union concerning the Union's proposals about the impact and implementation of the relocation of the Brownsville Office.

5. Remedy

The GC of the FLRA requests that USAO be ordered to retroactively bargain with AFGE Local 3966 about the impact and implementation of the relocation of the Brownsville Office and that the Notice to All Employees be signed by the

United States Attorney for the Southern District of Texas. I conclude that retroactive bargaining and the signing of the Notice by the United States Attorney are appropriate remedies.

Having found that USAO violated section 7116(a)(1) and (5) of the Statute, I recommend the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41 of the Authority's Regulations, and section 7118 of the Statute, the United States Attorney's Office, Southern District of Texas, Houston, Texas shall:

1. Cease and desist from:

(a) unilaterally implementing changes concerning changes in the terms and conditions of employment, including the location of any of the offices of the United States Attorney's Office, Southern District of Texas, Houston, Texas, without bargaining, to the extent consistent with law and regulation, with American Federation of Government Employees, Local 3966, the exclusive representative of its employees.

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

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

(a) Upon request, bargain to the extent consistent with law and regulation, with the American Federation of Government Employees, Local 3966, concerning any changes in the terms and conditions of employment of bargaining unit employees, including the relocation of the Brownsville Office, and, with respect to the Brownsville Office relocation, we will apply the agreement retroactively.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the Attached Notice To All Employees on forms to be furnished by the Federal labor Relations Authority. Upon receipt of such forms, they shall be signed by the United States Attorney for the Southern District of Texas, and posted and maintained for 60 consecutive days thereafter, in

conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC, March ,2000

SAMUEL A. CHAITOVITZ
Chief 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 United States Attorney for the Southern District of Texas, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

We hereby notify bargaining unit employees that:

WE WILL NOT unilaterally implement changes concerning in the terms and conditions of employment, including the location of any of the offices of the United States Attorney's Office, Southern District of Texas, Houston, Texas, without bargaining, to the extent consistent with law and regulation, with American Federation of Government Employees, Local 3966, the exclusive representative of its employees.

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

WE WILL upon request, bargain to the extent consistent with law and regulation, with the American Federation of Government Employees, Local 3966, concerning any changes in the terms and conditions of employment of bargaining unit employees, including the relocation of the Brownsville Office, and, with respect to the Brownsville Office relocation, we will apply the agreement retroactively.

(Activity)

Dated: _____

By: _____ (Signature) (US Attorney)