

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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U.S. ARMY ADJUTANT GENERAL .
PUBLICATIONS CENTER, .
ST. LOUIS, MISSOURI, .

Respondent .

and .

Case No. 7-CA-40543

AMERICAN FEDERATION OF GOVERNMENT .
EMPLOYEES, AFL-CIO, LOCAL 2761, .

Charging Party/Union .

.....

Howard S. Bishop, Jr. and
Major Edelbert F. Phillips,
For the Respondent

Daniel Minahan,
For the General Counsel
Federal Labor Relations Authority

William Cole,
For the Charging Party/Union

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

On June 6, 1984, a charge of unfair labor practices was filed by the Union against Respondent. The Regional Director of Region VII of the Federal Labor Relations Authority (hereinafter, the Authority) investigated and, on July 31, 1984, filed the complaint initiating this proceeding.

The complaint alleges, in paragraphs 9 (a) and (b), that on or about May 30, 1984, Respondent changed established procedures by which the Union utilized the photocopy machine and internal mail system, without providing the Union with adequate prior notice and an opportunity to bargain over the changes. At the hearing, Respondent amended its answer to admit these factual allegations. See Tr. 5.^{1/} Respondent denies that these acts constituted violations of Sections 7116(a)(1) and (5), as alleged.^{2/}

A hearing on the issues was held on September 17, 1984, in St. Louis, Missouri. The parties appeared, adduced documentary evidence, and examined witnesses. Briefs were filed on November 13, pursuant to an order entered on October 16, upon an unopposed motion of the General Counsel. Based upon the record made in this case, my observation of the demeanor of witnesses, and the briefs, I enter the following findings of fact and conclusions of law, and recommend the entry of the following order.

Findings of Fact

1. At all times material herein, the Union is and has been a labor organization and Respondent, an agency, within the meaning of Sections 7103(a)(4) and (3) of the Statute.

2. The Union has been, and is now, the exclusive representative of about 150 employees assigned to duty at the facility of Respondent, also referred to herein as the Center or USAAGPC. The Center stocks such items as technical documents, testing materials, and recruiting publicity for the United States Army.

^{1/} "Tr." refers to the transcript. Other abbreviations to be used herein are as follows: "G.C. Exh." refers to the exhibits of the General Counsel. "G.C. Br." refers to the brief of the General Counsel, and "R. Br." to that of the Respondent. The parties' unopposed motions to correct the transcript are granted and, on page 82, line 5, the word "wouldn't" is changed to "would."

^{2/} Section 7116 of the Statute provides, in pertinent part, that:

(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; [or] . . .

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

3. At all times material herein, the Center and the Union have been parties to a collective bargaining agreement. The agreement was signed in 1981 and has expired. All past practices under it are still in effect. Article 9 provides that "the Union may distribute literature through USAAGPC internal distribution system provided it meets the criteria of pertinent regulations" (G.C. Exh. 3, p. 7, Art. 9, Section 3) and that "the Union will be furnished access to the copy machine . . . when available" (G.C. Exh. 2, p. 7, Art. 9, Section 5).

4. Lt. Colonel Joseph O. York had been the Commanding Officer of the Center for 14 months as of the date of the hearing. His Executive Officer is Major James K. Pualoa. Both are management officials or supervisors, within the meaning of Sections 7103(10) and (11) of the Statute, and agents of Respondent.

5. From 1978 to May 30, 1984, four union officers had a key to copying facilities of the Center and used them daily for representational purposes. They used them in full view of high management officials.

6. From 1978 until May 30, 1984, the four union officers picked up the mail from the Union's slot in a distribution box maintained by the Center. They placed items in other slots as well. Only items to be mailed out of the Center were sealed in envelopes. The Union received its bi-weekly dues allotments from its slot. None were ever stolen or lost. The slots were not locked. The Union made daily use of the slots. They were used in full view of the Center's 17 supervisors. At one time, the Center's Commander and its Executive Officer gave the Union permission to use the slot;^{3/} and this permission was never effectively revoked.^{4/}

^{3/} The President of the Union so testified. See Tr. 26. No past Commander or past or present Executive Officer testified. Accordingly, I credit the testimony of the President, who was a creditable witness who seemed sure of the facts.

^{4/} The present Commander of the Center was Respondent's only witness. He did not seem too sure of the practice. He testified that he gave permission to the Union to make distribution "on a case by case basis" (Tr. 51) and, "to [his] knowledge" the Union was not permitted to place things in the distribution box, and was "supposed to turn the distribution over to someone in the distribution center to be -- to be placed in the appropriate box" (Tr. 72). He testified that there had been past "problems with people" trying to put things in and take things out of the slots, and that was why the past Commander put doors on the slots (Tr. 71). He also admitted that the Union was never told, in writing, to stay away from the slots or "boxes" (Tr. 72); and he apparently never gave the mailroom supervisor a direct order to keep the Union's officers away from the distribution box. See Tr. 83.

7. On May 30, 1984, the Center changed the procedure by which mail distribution was picked up and by which documents were photocopied. The Center moved its mail distribution box from an open area into a room with restricted access. The Center also set up a new copying machine in that room, in replacement of the old copier which was previously located in the open area. The new copier is a "beyond the state-of-the-art" one (Tr. 64). Training to use it "would take probably a couple of days" (Tr. 65). The President of the Union used it for a month while it was being tried out on an experimental basis. Instructions for its use are on the copier. All copying is now done by the Mail and File Clerk, who is a member of the bargaining unit, but not a member of the Union. Requests for copying are placed in an incoming box and handled as soon as practicable. Priority requests have to be approved by the Chief of the Administrative Services Branch. Completed jobs are placed in the appropriate slot for pick-up. All mail distribution is also made by the Mail and File Clerk. Individuals may not remove or place any correspondence in the slots. Also working in the so-called Distribution Center are a Receptionist, an Administrative Clerk, and a Supervisor -- all bargaining-unit employees. The Distribution Center "should be manned during duty hours at all times," according to the Center's Commander (Tr. 57).

8. In addition to the copier and distribution boxes, the Distribution Center contains an electronic mail machine and the postal accountability system. Secret and classified material comes into this room for distribution and is hand carried to the Commander.

9. The Center announced these changes in a Disposition Form dated May 31, 1984. The Union was not provided prior notice or an opportunity to bargain over these changes. These changes affected all employees. However, this case only concerns the effect of the changes on union officials performing representational duties. Lt. Colonel York explained that he did not postpone the changes pending negotiations with the Union "because of the contracts that were involved and everything and the personnel coming on board and the minimal impact we felt that was going to be involved" and because he did not "feel that there was a need to negotiate" (Tr. 79).

10. On May 31, 1984, the Union's President walked to the room where the copier and mail slots are located and was refused access when he tried to enter. He was informed that new procedures had been implemented and was given a copy of a memorandum issued the same day. The memorandum, addressed only to supervisors, announced that effective May 30, 1984, only the Mail and File Clerk in the Distribution Center was allowed to make copies and pick up or distribute mail. The Distribution Center was placed off limits to unauthorized personnel, including the Union. Since that time, no representative of the Union has been allowed to enter the room where the copier and mail slots are located.

11. Requiring the Union to submit its documents to the Mail and File Clerk for copying compromises the confidentiality of those documents. The

Union copies such material as grievances, bargaining proposals and notes of conversations with employees or supervisors; and it needs to safeguard these materials from anyone, whether in or out of the bargaining unit, who is not directly involved with the material. The Mail and File Clerk operating the copier is not a union member; and it is essential for this employee to look, if only briefly, at the material copied. Even if one watches the Mail and File Clerk run copies, it is impossible for someone standing outside the room to see the number of copies selected, or to see the copies as they are discharged out of the machine. Prior to the hearing, a document which the Mail and File Clerk copied for the Union (notes of a conversation with a supervisor) was, somehow, obtained by the Commander, who became "very upset" with the President of the Union about it. The Union cannot prove that the Mail and File Clerk disclosed the document to the Commander. But it is the potential for this kind of disclosure that the Union was able to eliminate by performing its own copying.

12. In one instance since the change in procedures, a grievance delivered to the Mail and File Clerk for distribution never reached the Commander. Proper delivery of a grievance is particularly important at the Center since the collective bargaining agreement provides for an automatic stay of disciplinary actions pending grievance and arbitration proceedings.

13. The Mail and File Clerk who is responsible for copying and mail distribution is not always available. This leaves a Union official wishing to copy items or drop off mail with the choice of waiting for the Mail and File Clerk, and using his or her official time allotment, or leaving the material in a basket at the door. The basket is open; and anyone passing in the hallway can reach in and take items from the basket.

14. Respondent restricted access to the new copy machine in order to safeguard the machine from damage caused by operator errors and to prevent unauthorized copying. It restricted access to the distribution system to safeguard the information contained in the documents in distribution. The new copier and the change of procedures have made operations generally more efficient, from Respondent's point of view.

15. On May 31, 1984, the Union wrote to Lt. Colonel York to protest the unilateral changes made in the past practices of allowing the Union "self-service use" of the internal mail and copier, and to request bargaining (G.C. Exh. 5). This request was ignored.

Discussion and Conclusions

The General Counsel has established, by a preponderance of the evidence,^{5/} that Respondent violated Sections 7116(a)(1) and (5) of the

^{5/} This is the statutory burden of proof. See Section 7118(a)(7) and (8) of the Statute.

Statute when it changed the established procedures by which the Union utilized the photocopy machine and the internal mail system, without providing adequate prior notice or an opportunity to bargain over the procedures which management officials of the agency would observe in exercising its management rights, and appropriate arrangements for employees adversely affected by the exercise of such rights.

Respondent admits that the changes were made unilaterally and posits three defenses, only the first of which has any validity -- namely that the restrictions placed on the Union's access to the mail distribution boxes and copying machine was an exercise of its right to determine its internal security practices, under the Statute, and therefore the substance of the decision was not negotiable. See R. Br. 4-8; findings 8, 9 and 15; and Section 7106 of the Statute.^{6/} The evidence shows that the Center determined that its internal security would be improved by restricting access to the new copier and by limiting access to its Distribution Center in which secret and classified material is handled. See findings 8 and 14, above.

The term "internal security practices" used in Section 7106(a)(1) includes plans "to safeguard [an agency's] physical property against internal or external risks [and] to prevent improper or unauthorized disclosure of information" See American Federation of Government Employees, AFL-CIO, Local 32, 14 FLRA 6, 9 (1984). On this ground the Authority has held to be nonnegotiable: a union proposal that its officers may enter all work areas, even those restricted in order to

6/ Section 7106 of the Statute provides, in pertinent part, that:

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency -- . . .

(1) to determine the . . . internal security practices of the agency

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating -- . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

protect the privacy of taxpayers by guarding against the unauthorized disclosure of tax information (National Treasury Employees Union, 7 FLRA 275, 276 (1981)); a union proposal that employees be allowed to obtain supplies from a locked supply room to which only authorized personnel had keys in order to protect supplies from defalcation and ensure their availability (National Treasury Employees Union, Chapter 52, 9 FLRA 685, 686 (1982)); and a union proposal that all employees be given keys to a roof door which the agency had locked to secure its physical property (American Federation of State, County, and Municipal Employees, AFL-CIO, Local 2910, 15 FLRA 612, 613 (1984)).

But while the Center did not have to bargain over the substance of the changes it made, it did have to bargain over the procedures to be observed in exercising its management rights and appropriate arrangements for employees adversely affected by the exercise. See Section 7106(b)(2) and (3), quoted in footnote 6, above.

As to Section 7106(b)(2), Respondent argues that union proposals might directly interfere with the management right to determine its internal security practices. See R. Br. 6-8. The problem here is that management never gave the Union a chance to propose any procedures. Compare Department of Health, and Human Services, Social Security Administration, Southeastern Program Service Center, Birmingham, Alabama, 5 FLRA 400, 401 (1981), a decision under Executive Order 11491 (the precursor of the Statute in controlling labor relations in the Federal sector) in which the Authority found unilateral implementation of new guidelines for evaluating trainees an unfair labor practice so long as the union could have offered any negotiable proposals. It is far from clear, here, that the Union could not have come up with some procedure that would not directly affect the Center's exercise of its management right to determine its internal security practices.

As to Section 7106(b)(3), Respondent argues that the restrictions placed upon the Union's access to the mail distribution box and copying machine had a minimum impact on conditions of employment. See R. Br. 8-11, citing U.S. Government Printing Office, 13 FLRA 203, 205, which held that "an agency is not required to notify the exclusive representative of its employees every time it decides to exercise a management right under section 7106 of the Statute [and] where the exercise of a management right has not changed conditions of employment so as to have an impact on bargaining unit employees and such impact cannot reasonably be foreseen, management's failure to have provided prior notice thereof to the exclusive representative will not be found to have violated section 7116(a)(1) and (5) of the Statute" (*id.* at 205, fn. 4). To the contrary, this record demonstrates that the practice now in effect, as to the copier, has more than a de minimis impact upon the bargaining unit, and the ability of its exclusive representative to represent it. Investigation of grievances and development of contract proposals require discretion and confidentiality. Those requirements cannot be met when

Union officers must submit, for copying, documents such as grievance investigation notes, grievances, and draft contract proposals to a clerk who is not even a member of the Union. The availability of the clerk is also a problem. There has been at least one time when he has not been there; and then the Union officer must waste official time waiting for him to return, or risk removal or disclosure of its material left in a basket at the door.

As to the intervention of the clerk in the mail distribution system, difficulties are also posed for the Union and the employees it represents. The Union can no longer be sure whether a document is placed in the proper slot. In the past, a grievance delivered to the clerk for distribution never reached the Commander of the Center; and the employee lost the right to an automatic stay of a disciplinary action. This is more than a de minimis impact.

In view of the above conclusions, and order to be recommended hereinafter, other issues raised by the parties need not be resolved.

As to the order to be recommended, the General Counsel seeks an order to cease and desist from further violations; to bargain; and to post an appropriate notice to employees. These orders are all proper and will be recommended.

The General Counsel also seeks an order to restore the status quo ante (see G.C. Br. 15-17), as to which Respondent objects. See R. Br. 11-13. Both agree that the criteria set forth in Federal Correctional Institution, 8 FLRA 604, 606 (1982) are to be applied when an agency has failed to engage in so-called impact-and-implementation bargaining pursuant to Sections 7106(b)(2) and (3). Applying those criteria here, I conclude that such an order is appropriate because: (1) prior notice was not given to the Union concerning the changes; (2) the Union requested bargaining as soon as it found out about the changes, and its request was ignored; (3) the agency did not act negligently or unknowingly, but in the belief that there was no need to negotiate and it did not want any delay; (4) the confidentiality of union documents are subject to compromise and important union documents are subject to being mishandled under the new procedures; and (5) the remedy sought by the General Counsel should not significantly disrupt or repair the efficiency and effectiveness of Respondent's operations. As to (5), the General Counsel does not seek to have the copier or the mailboxes moved. It merely seeks to regain access to the copier and the mailboxes by four union officers. Since four employees staff the Distribution Center, it should not be difficult to secure any secret or classified material that happens to be in the room and to assure that mail is not mishandled by the Union, when one of the union officers is in the Distribution Center. Since the clerk who runs the copier would often be available when one of the union officers was using it, the clerk could oversee its safe operation. In any event, instructions for running the copier are on the machine.

Ultimate Findings and Recommended Order

Respondent violated Section 7116(a)(1) and (5) when it implemented changes in past procedures for providing access of the Union to its copier and mailboxes, without providing prior notice to the Union and an opportunity to bargain over implementation procedures and the impact on adversely affected employees.

Accordingly, and pursuant to 5 CFR 2423.29 and 5 U.S.C. 7118, it is hereby ORDERED that the U.S. Army Adjutant General, Publications Center, St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Changing the established procedures by which the American Federation of Government Employees, AFL-CIO, Local 2761 uses official facilities, such as the photocopy machine and the internal mail system, without first giving adequate notice to Local 2761 and affording it the opportunity to bargain over implementation procedures and the impact upon adversely affected employees.

(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 Disposition Form dated May 31, 1984, subject Distribution Center Operation, to the extent that it is applicable to the use of the photocopy machine and the internal mail system by officers of Local 2761.

(b) Bargain, upon request of Local 2761, concerning implementation procedures and the impact upon adversely affected employees of any changes proposed in the procedures by which Local 2761 may use the photocopy machine and the internal mail system.

(c) Post at its facilities, 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 of the Publications Center, St. Louis, Missouri, and shall be posted and maintained by him for sixty (60) consecutive days

thereafter in conspicuous places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 CFR 2423.30, notify the Regional Director of Region VII, Federal Labor Relations Authority, 1531 Stout Street, Suite 301, Denver, Colorado 80202, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply herewith.



ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: March 28, 1985
Washington, D.C.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the established procedures by which the American Federation of Government Employees, AFL-CIO, Local 2761, uses official facilities, such as the photocopy machine and the internal mail system, without first giving adequate notice to Local 2761 and affording it the opportunity to bargain over implementation procedures and the impact upon adversely affected employees.

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

WE WILL rescind Disposition Form dated May 31, 1984, subject Distribution Center Operation, to the extent that it is applicable to the use of the photocopy machine and the internal mail system by officers of Local 2761.

WE WILL bargain, upon request of Local 2761, concerning implementation procedures and the impact upon adversely affected employees of any changes proposed in the procedures by which Local 2761 may use the photocopy machine and the internal mail system.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 of the Federal Labor Relations Authority, Region VII, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224 or FTS 8-564-5224.