

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

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VETERANS ADMINISTRATION .  
MEDICAL CENTER, LEAVENWORTH, .  
KANSAS .  
Respondent .  
and .  
AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, .  
AFL-CIO, LOCAL 85 .  
Charging Party .  
. . . . .

Case No. 7-CA-70076

Maurice D. Copp, Esq.  
For Respondent  
  
Helen Wilber  
For Charging Party  
  
Cathy A. Auble, Esq.  
For General Counsel of the FLRA  
  
Before: SAMUEL A. CHAITOVITZ  
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV § 2410 et seq.

A charge against the Veterans Administration Medical Center, Leavenworth, Kansas (herein called the Medical Center)<sup>1/</sup> was filed by American Federation of Government Employees, AFL-CIO,<sup>2/</sup> Local 85, (herein called AFGE Local 85) was filed on November 7, 1986 and amended on January 16, 1987. Based upon the foregoing the General Counsel of the FLRA, by the Regional Director of Region VII of the FLRA, issued a Complaint and Notice of Hearing alleging that the Medical Center violated Section 7116(a)(1) and (5) of the Statute by changing the hours of work and break schedule of a unit employee without bargaining with AFGE Local 85 concerning the substance, impact and implementation of the changes. Medical Center filed an Answer denying it had violated the Statute.

A hearing was conducted before the undersigned in Leavenworth, Kansas. Medical Center, AFGE Local 85 and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post-hearing briefs were filed and have been full considered.

Based upon the entire record in this matter,<sup>3/</sup> my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

#### Findings of Fact

The AFGE Local 85 is an affiliate and agent of AFGE, the exclusive representative of a VA nationwide consolidated bargaining unit which includes, among others, Medical Center's nonprofessional employees. Among the unit employees represented by AFGE local 85 are those employees in the Medical Center's Housekeeping Department which is part of Building Management Service.

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<sup>1/</sup> Veterans Administration, Washington, D.C. will hereinafter be referred to as VA.

<sup>2/</sup> American Federation of Government Employees, AFL-CIO will hereinafter be referred to as AFGE.

<sup>3/</sup> General Counsel of the FLRA filed a Motion to Correct the Transcript. No opposition was filed. Accordingly, the Motion is granted and the corrections set forth therein, and attached hereto as an Appendix, are hereby made.

By letter dated October 7, 1986, Housekeeping Aid Foreman Brenda Willming informed AFGE Local 85 President Helen Wilber that, effective November 2, 1986, the tour of duty of Building 122 Housekeeping Aids Eric Wells and Kenneth Price would be changed from a 6 a.m. - 2:30 p.m. shift to a 7 a.m. - 3:30 p.m. shift. The reason given by Willming for this change was to promote the efficiency of the service.

The AFGE Local 85 responded by letter dated October 8, 1986 and entitled "Negotiations Request." In that letter, AFGE Local 85 stated that it wanted to negotiate this proposed change before implementation. In a letter dated October 10, 1986, Willming agreed "to negotiate the change." Thereafter, Willming and the AFGE Local 85 exchanged letters regarding the precise date on which the parties would meet to negotiate the proposed change. In her October 27, 1986 letter, Willming specified for the first time that she would negotiate the impact of the change.<sup>4/</sup>

On October 30, 1986, the parties met to negotiate the proposed change. Present were Wilber, AFGE Local 85 Vice President Pam Kane, Willming, and Chief of Building Management Service Dennis Penberthy. Penberthy opened the meeting by announcing that the purpose of the meeting was to discuss the proposed change in Building 122. Wilber asked for the specific reasons were for that change. Wilber explained that AFGE Local 85 didn't have too much to negotiate at that point because they didn't know the rationale for proposing the change. Penberthy stated that the October 7, 1986 letter contained all the specifics which the union was going to get. Wilber again asked if she could have more information about why Respondent was proposing the change, because the AFGE Local 85 wanted to negotiate the substance of the change. The Medical Center representatives replied that the change would promote the efficiency of the service. Wilber asked how specifically would the change

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<sup>4/</sup> In the meantime, Price submitted a memorandum to Willming dated October 20, 1986 which requested that his hours be changed from a 6 a.m. - 2:30 p.m. shift to a 7 a.m. - 3:30 p.m. shift. The reason for Price's request was that he wanted to work the same hours as his wife, who is also one of Medical Center's employees and who works from 7 a.m. - 3 p.m.

promote the efficiency of the service. The Medical Center representatives replied that the decision was based on their feelings that things would work out better due to the change. Wilber replied that AFGE Local 85 couldn't negotiate feelings and that she needed something more concrete. Penberthy asked what the parties were doing at the table, as the union was not prepared to negotiate. Wilber responded that AFGE Local 85 was as prepared as it could be with what little information they had.

Once again, Wilber asked for specific reasons for the change. Penberthy stated that he had been advised that he did not have to be specific. Wilber repeated her request for specifics, and Penberthy replied that he was at the meeting to discuss impact and implementation only. At this point, Kane spoke up, saying that AFGE Local 85 was present to negotiate substance, impact and implementation. Penberthy disagreed, stating that he wanted to hear only the impact items.<sup>5/</sup> Kane then asked if it would not be more efficient to pick up the linen and the trash, as well as to run the floor autoscrubber early in the morning, and Willming replied that these duties were being done by the employees on the 7 a.m. - 3:30 p.m. shift. Willming reported for work at 7 a.m., so she did not know what the employees did between 6 a.m. and 7 a.m. Either Willming or Penberthy said that the affected employees would continue doing housekeeping duties as they had been doing. Penberthy then said that if the AFGE Local 85 did not have any impact and implementation matters to present, it was negotiating in bad faith. Wilber replied that AFGE Local 85 was not negotiating in bad faith, and that all she wanted to know was the specifics so AFGE Local 85 could negotiate appropriately. Penberthy responded by saying that there was no sense to continue the meeting and that AFGE Local 85 was giving up its right to negotiate. Wilber said that AFGE Local 85 was not giving up its right to negotiate and that, once Medical Center provided the specifics, the parties would set another meeting to continue negotiations. The meeting then ended, having lasted about

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<sup>5/</sup> At hearing, Penberthy testified that he understood the meeting's purpose to be confined to impact and implementation negotiations.

15 minutes. At no time during the meeting did AFGE Local 85 present written proposals to the Respondent.6/

Immediately thereafter, Wilber and Kane went to the union office and prepared a letter to Penberthy regarding the bargaining session. The letter, which was entitled "Negotiations, Tour of Duty Change I&I\*Substance," recounted AFGE Local 85's attempts during the meeting to learn why Medical Center proposed to make the change, and the only response being that it was a feeling that the change would result in more efficiency. The letter requested that Medical Center provide the requested specifics so the AFGE Local 85 could negotiate and, until such time, that Medical Center delay implementing the change. After having received no response the AFGE Local 85 mailed the unfair labor practice charge in this case on November 3, 1986, and served a copy of the charge that same day on Medical Center. Penberthy finally responded by letter dated November 5, 1986 in which he announced that the change would be implemented November 16, 1986. The letter claimed that Medical Center had provided available information and noted that, in spite of this, AFGE Local 85 had not been willing to discuss the impact of the change. The letter concluded by saying that any impact items should be submitted to him in writing.

Employee, Wells had been on light duty due to a back injury which he had sustained in August 1986. Since there was no light duty work available in the Housekeeping Department, he had been assigned to take measurements of veterans living quarters and to work in the Laundry until December 9, 1986, when he returned to work in Building 122. Wells worked the 6 a.m. - 2:30 p.m. shift in Housekeeping.7/

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6/ There was substantially no dispute as to what occurred at the meeting, except whether any AFGE Local 85 representative mentioned Wells' outside job and the need to discuss lunch and break times. Where there was such a disagreement, I credit the testimony of Willming and Penberthy. Their versions were more credible and consistent with other circumstances. Further it is consistent with Wells' testimony that he didn't discuss these matters with Kane or Wilber until early November.

7/ While he was on light duty, he worked a 7 a.m. - 3:30 p.m. shift because there was no 6 a.m. - 2:30 p.m. shift available for light duty work.

During his light duty, he was carried on the Housekeeping Department schedule, even though he was working elsewhere.

On November 3, 1986, Willming gave Wells a note, advising him that his shift would change effective November 16, 1986 to 7 a.m. - 3:30 p.m. When Willming delivered the note, Wells said that he had a second job and he wanted to know why Willming was making this change. Willming replied that there was no reason and that, because she did not need three or four people on the 6 a.m. - 2:30 p.m. shift, she was changing Wells' hours. Since November 16, 1986, Wells has worked the 7 a.m. - 3:30 p.m. shift. His morning break is now from 9 a.m. to 9:10 a.m., instead of from 8 a.m. to 8:10 a.m., and his afternoon break is now from 2 p.m. to 2:10 p.m., instead of from 1:30 p.m. to 1:40 p.m. Due to the change in hours of work, Wells lost his second job which involved janitorial work at a packing plant and paid him about \$500 monthly. Also due to the change in his hours, Wells could no longer pick his son up from school during inclement weather, so he has to pay his father, who has to leave his own job to pick up Wells' son, at a rate of about \$40.00 per month.

Throughout the correspondence between the parties about the change, the phrase "tour of duty" was used. At the hearing the officers of AFGE Local 85 testified that they used the phrase to refer to any change in the hours of work of employees, and that the phrase "hours of work" meant the times at which employees started and quit working. One AFGE Local 85 official testified that she understood the phrases "tour of duty," "hours of work," and "starting and quitting times" to be synonymous, and that the reason AFGE Local 85 used the phrase "tour of duty" in its correspondence was to continue using the subject as identified by the Medical Center so that there would be no confusion about which correspondence they were answering.

The parties local supplemental agreement addresses hours of work at Article 12 but is silent as to permanent changes in the times that employees report to work and leave work. The national agreement does not address tours of duty, hours of work, or starting and quitting times.

Both Willming and Penberthy in their testimony characterized the change as a reassignment of Wells to an established tour of duty. The 6 a.m. - 2:30 p.m. shift in Housekeeping was not abolished due to the change, as one Housekeeping Aid continues to work that shift. Further Wells, in his new hours, continues to do the same work under

the same supervision. The employees who reported at 6 a.m., before the change, worked along side the employees who reported at 7 a.m., under the same supervision and performing the same duties.

### Discussion and Conclusions

It is well settled that starting and quitting times of employees on an established shift are conditions of employment and an agency violates the Statute by not affording its employees' exclusive representative opportunity to negotiate on the decision to change the starting and quitting times. U.S. Customs, 9 FLRA 116 (1982); Internal Revenue Service, Los Angeles District, 10 FLRA 653 (1982); Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA 857 (1985); and Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota, 23 FLRA 122 (1986).

The FLRA has also concluded that the establishment of a new shift or tour of duty is negotiable only at the election of the agency because it involves "numbers, types and grades of employees or position assigned to any organizational subdivision, work project or tour of duty" within the meaning of Section 7106(b)(1) of the Statute. U.S. Customs, supra; National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1984); Department of the Air Force, Scott Air Force, Illinois, supra; and Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota, supra.

These distinctions drawn by the FLRA are very subtle. Cf National Treasury Employees Union v. FLRA, 732 F.2d 703 (1984). In the instant case I conclude that the VA Medical Center changed Wells' starting and quitting times and did not assign him to a new or different shift. In so concluding I rely on the facts that Wells continues to perform the same duties, to work with the same shift employees he had worked with previously and under the same supervisor. He was merely directed to come in later so that he would work the exact same hours as other members of the shift rather than arriving and leaving an hour earlier, with different shift members.<sup>8/</sup> At the October 30 meeting, and in the subsequent

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<sup>8/</sup> These had not been two separate shifts. Rather some members of the shift worked from 6 a.m. to 2:30 p.m. and others worked from 7 a.m. to 3:30 p.m. They all worked together under the same supervisor.

correspondence, VA Medical Center made it quite clear it refused and would not negotiate concerning the decision to change Wells' starting and quitting times.

In light of the forgoing conclusion VA Medical Center was obligated to negotiate with AFGE Local 85 concerning the decision changing Wells' starting and quitting times. VA Medical Center's refusal to do so violated its obligation as set forth in Section 7116(a)(1) and (5) of the Statute. U.S. Customs, supra; Internal Revenue Service, Los Angeles District, supra; and Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota, supra.<sup>9/</sup>

Having found and concluded that VA Medical Center violated Section 7116(a)(1) and (5) of the Statute, I recommend that the FLRA issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration Medical Center, Leavenworth, Kansas shall:

1. Cease and desist from:

(a) Instituting any change in the starting and quitting times of its employees without affording the American Federation of Government Employees, Local 85, AFL-CIO, the exclusive bargaining representative of its employees, the

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<sup>9/</sup> Having so concluded I need not decide whether VA Medical Center refused to bargain about the impact and implementation of the change in Wells' starting and quitting times because to bargain about the impact and implementation would have been premature and would have been included in the bargaining about the decision itself. However, if the FLRA were to conclude VA Medical Center was not obligated to negotiate concerning the decision to change Wells' starting and quitting times, then clearly it was obligated to bargain about the impact and implementation of that change. However Medical Center did not fail to discuss the impact because it was not raised at the October 30, 1986 meeting by the AFGE Local 85 representatives.

opportunity to negotiate with respect to any proposed changes thereto.

(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) Upon request reestablish the previous starting and quitting times for employee Eric Wells and afford the American Federation of Government Employees, Local 85, AFL-CIO, the opportunity to negotiate with respect to any proposed changes thereto.

(b) Post at its facilities in the Veterans Administration Medical Center, Leavenworth, Kansas 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 Medical Center Director, or a designee, 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.

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

  
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SAMUEL A. CHAITOVITZ  
Administrative Law Judge

Dated: February 25, 1988  
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 institute any change in the starting and quitting times of our employees without affording the American Federation of Government Employees, Local 85, AFL-CIO, the exclusive bargaining representative of our employees, the opportunity to negotiate with respect to any proposed changes thereto.

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, upon request, reestablish the previous starting and quitting times for employee Eric Wells and afford the American Federation of Government Employees, Local 85, AFL-CIO, the opportunity to negotiate with respect to any proposed changes thereto.

\_\_\_\_\_  
(Activity)

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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224.