

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

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DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION
(BALTIMORE, MARYLAND) AND
SOCIAL SECURITY
ADMINISTRATION, JAMESTOWN,
NEW YORK DISTRICT OFFICE
(JAMESTOWN, NEW YORK)
Respondent
and
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 3342
Charging Party
.....

Case No. 1-CA-70309

Wilson Schuerholz
For the Respondent
Gerard M. Greene, Esq.
For the General Counsel
Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on September 29, 1987 by the Regional Director for the Federal Labor Relations Authority, Region I, a hearing was held before the undersigned on December 1, 1987 at Buffalo, New York.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a charge filed on June 16, 1987 by the American Federation of Government Employees AFL-CIO, Local 3342, (herein called the Union)

against Department of Health and Human Services, Social Security Administration (Baltimore, Maryland), and Social Security Administration, Jamestown New York District Office, (Jamestown, New York), herein called the Respondent.

The Complaint alleged, in substance, that on or about June 19, 1987 Respondent unilaterally changed conditions of employment at the Jamestown, New York District Office without notifying the Union and affording it an opportunity to bargain as to the change and/or the impact and implementation thereof. The alleged change concerned (a) requiring claims representatives to notify their supervisor when taking a break, and (b) requiring all other employees to notify their supervisor when taking a break at other than their scheduled break period - all as a refusal to bargain in good faith and in violation of section 7116 (a)(1) and (5) of the Statute.

Respondent's Answer, dated October 20, 1987, denied the aforesaid allegations and the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein American Federation of Government Employees, AFL-CIO, (AFGE), has been the exclusive representative of a consolidated nationwide unit which includes all nonprofessional employees who are employed by Respondent at its Jamestown, New York District Office.

2. At all times material herein the Union has been recognized as the agent of AFGE for the purpose of representing employees in the said bargaining unit who are employed by Respondent at its Jamestown, New York District Office.

3. At all times material herein AFGE and Respondent were, and still are, parties to a collective bargaining

agreement which includes the employees at the Jamestown, New York District Office. Said agreement provides in Article 10, Section G,^{1/} that "a rest period of fifteen (15) minutes duration will be allowed each employee twice during each 8-hour day. . . ."2/

4. The Jamestown, New York District Office employs 20 unit employees which includes 8 Claims Representatives, 3 Service Representatives, 4 Development Clerks, 2 Data Review Technicians, 1 Administrative Aide, 1 Field Representative, and 1 Data Transworker or Teletypist. Hours of work are 8:30 - 5:00 p.m.

5. The said employees fall into two groups: (a) Title 2, which handles social security, retirement, disability, and survivor benefits, (b) Title 16, which handles the supplemental security income program. There are 4 Claims Representatives in each group.

6. Since at least 1980 Claims Representatives (CRs) could take their 15 minute breaks at whatever time they chose and the breaks were not scheduled. These employees were not required to report to management. Further, since such date all other employees (non-CRs) had scheduled 15 minute break periods at certain times in the morning and afternoon. These employees, who had scheduled breaks, were supposed to notify their supervisor if they went on a break at a different time. Record testimony reflects, however, that this requirement was not strictly enforced and was the subject of "benign neglect."

7. Michael Bennett assumed the position of District Manager at the Jamestown office on September 1, 1986. On June 5, 1986^{3/} Bennett called into his office Paul Demler, local Union representative, to discuss employee break periods. Bennett stated he was not disturbed over the break procedures, but oftentimes a supervisor did not know when an employee was not in the office or on his break; that manage-

1/ Joint Exhibit 1.

2/ Rest periods are referred to in the record as "breaks" or "break period."

3/ Unless otherwise indicated, all dates hereinafter mentioned occurred in 1986.

ment had a right to know where employees were at a given time. Respondent's manager said he wanted to make some minor changes: that the CR's report to their supervisors when going on breaks, and that the non-CRs report to their supervisors when they plan to change their scheduled breaks. Bennett stated he didn't want to go through a procedure which required implementing a prior FSIP determination.^{4/}

Demler told the manager that he saw a problem requiring CRs to report to their supervisors when going on a break. Bennett responded that it should not pose any objections since the Union provided for a notice in prior negotiations over breaks. Demler commented that the notice matter was a trade off in prior negotiations. With respect to the non-CRs, the Union representative advised Bennett that he saw no problem in their reporting to the supervisor when changing their scheduled breaks provided there was no interference in their breaks. Demler agreed to poll the employees re the proposed change and get back to management.

8. On June 17 Demler spoke to Bennett and advised him that he had polled the employees. Demler stated that he had no problem with the requirement that non-CRs report to a supervisor when rescheduling breaks. However, there was a problem in requiring the CRs to report to their supervisors when going on a break since there had been no difficulty in the past. Demler stated that this change was not acceptable. The manager mentioned he might have to consider implementing or resurrecting the FSIP decision.

9. Bennett called a staff meeting on June 19 which was also attended by Demler. The manager stated he was going to implement tighter controls over employer breaks. He said that if non-CRs missed break periods due to work related delays, they could report to their supervisors or any official, tell him the reason and take the break immediately provided there was no business exigency in the office. As

^{4/} In 1983 the parties negotiated over proposals to change the break policy at the Jamestown office. It resulted in an impasse which was submitted to the Federal Service Impasses Panel. A Decision and Order was rendered by FSIP on January 11, 1985 that the parties should: (a) withdraw their proposals, (b) incorporate in their agreement that all unit employees be allowed to schedule rest periods on a bi-weekly basis with supervisory approval. Respondent dropped its proposal and no changes were then implemented.

to CRs, Bennett stated they must report to their supervisors when they wanted to take a break since there had been evidence of employees abusing that privilege. Further, he said that an employee who failed to abide by the new procedure would be subject to charges of AWOL, forced annual leave, or other disciplinary action. Demler told the staff this new policy was not favored by the Union.

10. Later on the same day, June 19, Demler delivered to Bennett a written request to bargain as well as the Union's proposal re breaks by the employees. (G.C. 2).

11. Under date of July 19 Bennett replied in writing to Demler, stating that management has no obligation to negotiate. He stated that it was important for management to know where employees are to avoid abuse of break periods; that it was necessary for employees to report to their supervisors under the prescribed circumstances. Bennett commented that the controls do not alter the way in which office employees take their breaks and that the change is de minimis.

Conclusions

The issue for determination herein is as follows: whether the failure by Respondent to negotiate with the Union in respect to the implementation of a policy requiring (a) CRs to notify their supervisors when taking a break, (b) other employees (non-CRs) to notify their supervisors when taking a break at other than their scheduled times, was violative of section 7116(a)(1) and (5) of the Statute.

Prior decisions by the Authority have held that the establishment of specified break (or rest) periods for employees is a condition of employment. Thus, an agency is obligated to bargain in regard to scheduling or changing such break or rest periods. American Federation of Government Employees, Local 3342, AFL-CIO and Department of Health and Human Services, Social Security Administration, 19 FLRA 1100; U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 19 FLRA 290.

In asserting that break policy is a condition of employment concerning which management must negotiate as to any changes thereof, General Counsel cites several cases dealing with this issue. Thus, the Authority has determined that a decision to change break times was not a management right, and like working hours, was negotiable. An agency was therefore obligated to bargain re the changes as well as their impact and implementation. U.S. Army Reserve Components

Personnel and Administration Center, St. Louis, Missouri,
19 FLRA 290. See also American Federation of Government
Employees, Local 3342, AFL-CIO and Department of Health and
Human Services, Social Security Administration, supra, where
the agency was required to negotiate a union proposal that
there be no set break schedule for any employee in any
position within the District Office.

Different considerations are, however, presented in the
case at bar. Respondent herein did not change the break or
rest periods for either the CRs or the other field employees.
They remained the same. The changes it effectuated called
for the CRs to notify the supervisor when going on a break,
and for the non-CRs to provide a reason to the supervisor
when changing scheduled breaks.^{5/} The basis for this change,
as explained by Bennett, was to enable supervisors to know
where the employees were and whether the public was being
served. There was no attempt by management to alter the
number of breaks per day or to change the times. The CRs
could still, as in the past, take their breaks as they saw
fit, but were required to notify the supervisor beforehand.
In respect to the non-CRs, they could still reschedule their
breaks but were obliged to advise the supervisor the reason
for the rescheduling.

Imposing an obligation on an agency to bargain in regard
to these requirements would, in my opinion, interfere with
management's rights under section 7106(a)(2)(A) and (B) of
the Statute. Note is taken that in American Federation of
Government Employees, AFL-CIO, Local 2052, and Department of
Justice, Bureau of Prisons, Federal Correctional Institution,
Petersburg, Virginia, 30 FLRA 837, the union proposed for
negotiation a clause prohibiting a supervisor from asking an
employee to provide a reason for sick leave usage. The
Authority held this proposal was outside the duty to bargain.
It concluded that the proposed clause interfered with
management's right to direct employees, assign work and
discipline them. The employee would, under that provision,
be able to immunize himself from discipline for failure to
account for an absence. In much the same view, I conclude
that Respondent's requiring non-CRs to give the reason for
rescheduling breaks is not negotiable; that it is a
management right which, if denied, would interfere with the

^{5/} The record reflects that the Union had no objection to
requiring, as in the past, that non-CRs report to the
supervisor when rescheduling a break period.

direction and discipline of those employees. Likewise, in directing and assigning employees, as well as exercising discipline, Respondent is enforcing its rights under the Statute in requiring the CRs to report to the supervisors before going on their daily breaks. Any other conclusion removes employees from control by the employer and immunizes the individuals from discipline for abuse of their conduct. Thus, I conclude that Respondent did not violate the Statute by failing to bargain re the decision to make these two changes.

It is also contended by Respondent that there is no obligation to bargain re the impact and implementation of the two new requirements. The impact of such change is alleged to be de minimis.

In making a determination as to whether a change is de minimis, the test is whether it has a reasonably foreseeable impact upon employees. One of the criteria considered in this regard is the possible loss of benefits to employees. In the instant case the penalties to be imposed by Respondent upon employees who fail to report to the supervisor are (a) being placed on AWOL, (b) being forced to take annual leave, (c) other disciplinary action. These disciplinary actions by management could clearly result in a loss to an employee who fails to conform to the new requirements since he could suffer monetarily or in job security. The adverse effect is reasonably foreseeable since management is intent upon maintaining some control of the breaks and has implemented the new policy. See U.S. Customs Service, 19 FLRA 1155 where a change resulted in a loss of overtime earnings for certain employees, and the Authority held that such a change had a reasonably foreseeable impact upon employees in terms of potential reductions-in-force, reductions in overtime and other changes in assignments. The penalties to be imposed herein for failure to notify a supervisor when taking breaks, or rescheduling breaks in the case of the non-CRs, have a reasonably foreseeable impact upon the unit employees that is more than de minimis. In that posture, Respondent was obliged to bargain with the Union on the procedures to be observed in effectuating such changes and regarding the appropriate arrangements for employees who have, or may be, adversely affected by the implementation of these changes.

Having found that Respondent violated section 7116(a)(1) and (5) of the Statute by implementing the changes requiring CRs to notify their supervisor upon taking their daily breaks, and requiring non-CRs to notify their supervisor when rescheduling their daily breaks and informing the

supervisor of the reason therefor, without bargaining with the Union as required, it is recommended that the Authority issue the following order to effectuate the purposes and policies of the Statute.^{6/}

It is also recommended that the allegations in the Complaint that Respondent unilaterally made and implemented such changes without bargaining with the Union as to the decision to implement the changes be dismissed.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Health and Human Services, Social Security Administration (Baltimore, Maryland) and Social Security Administration, Jamestown, New York District Office (Jamestown, New York) shall:

1. Cease and desist from:

(a) Unilaterally changing condition of employment of bargaining unit employees at the Jamestown, New York District Office by implementing a policy requiring claims representatives to notify their supervisor when taking a break period, and requiring all other employees, upon notifying their supervisor of a desire to change a scheduled break period, to provide their supervisor with a legitimate reason for such action, without first notifying the American Federation of Government Employees, AFL-CIO, Local 3342, the

^{6/} The undersigned finds that a status quo ante remedy is warranted under the circumstances herein. Such a determination is in line with the rationale adopted in Federal Correctional Institution, 8 FLRA 604, balancing the nature and circumstances of the violation against the degree of disruption likely to result by such a remedy. The record finds no support for concluding that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the Respondent's operations. This is apparent in view of management's admitted neglect in enforcing any notification requirement by employees. Moreover, despite no showing of willfulness on Respondent's part in failing to discharge its bargaining obligation, the size of the unit would support the conclusion that the stated remedy would not interfere with the daily activities of Respondent.

recognized bargaining representative of its employees, and affording it an opportunity to negotiate on the procedures to be observed in any further implementation, and appropriate arrangements for employees who have been, or may be, adversely affected by the implementation of any such changes.

(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 Statute:

(a) Rescind the change in respect to break periods whereby claims representatives are required to notify their supervisor when taking a break period and whereby all other employees are required, upon notifying their supervisor of a desire to change a scheduled break period, to provide their supervisor with a legitimate reason for such action.

(b) Reinstate the practice in respect to break periods whereby claims representatives may take a break period without notifying their supervisor, and whereby all other employees are not required, upon notifying their supervisor of a change in a scheduled break period, to provide the supervisor with a legitimate reason for changing the break period.

(c) Notify the American Federation of Government Employees, AFL-CIO, Local 3342, the recognized bargaining representative of its employees, of any proposed change with respect to requiring claims representatives to notify their supervisor when taking their break periods, and requiring all other employees, upon notifying their supervisor of a desire to change a scheduled break period, to provide their supervisor with a legitimate reason for changing the break period, and, upon request, negotiate with such representative as to the procedure to be observed in effectuating such changes and regarding appropriate arrangements for adversely affected employees.

(d) Post at its facility at Jamestown, New York, 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 District Manager, Social Security Administration, Jamestown, New York District Office, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin

boards and 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, 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, D.C., July 29, 1988

A handwritten signature in cursive script, reading "William Naimark", written over a horizontal line.

WILLIAM NAIMARK
Administrative Law Judge

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 unilaterally changing condition of employment of bargaining unit employees at the Jamestown, New York District Office by implementing a policy requiring claims representatives to notify their supervisor when taking a break period, and requiring all other employees, upon notifying their supervisor of a desire to change a scheduled break period, to provide their supervisor with a legitimate reason for such action, without first notifying the American Federation of Government Employees, AFL-CIO, Local 3342, the recognized bargaining representative of its employees, and affording it an opportunity to negotiate on the procedures to be observed in any further implementation, and appropriate arrangements for employees who have been, or may be, adversely affected by the implementation of any such changes.

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

WE WILL rescind the change in respect to break periods whereby claims representatives are required to notify their supervisor when taking a break period and whereby all other employees are required, upon notifying their supervisor of a desire to change a scheduled break period, to provide their supervisor with a legitimate reason for such action.

WE WILL reinstate the practice in respect to break periods whereby claims representatives may take a break period without notifying their supervisor, and whereby all other

employees are not required, upon notifying their supervisor of a change in a scheduled break period, to provide the supervisor with a legitimate reason for changing the break period.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 3342, the recognized bargaining representative of its employees, of any proposed change with respect to requiring claims representatives to notify their supervisor when taking their break periods, and requiring all other employees, upon notifying their supervisor of a desire to change a scheduled break period, to provide their supervisor with a legitimate reason for changing the break period, and, upon request, negotiate with such representative as to the procedure to be observed in effectuating such changes and regarding appropriate arrangements for adversely affected employees.

(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 I, whose address is: 10 Causeway Street, Room 1017, Boston, Massachusetts 02222-1046, and whose telephone number is: (617) 565-7280.