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

VETERANS ADMINISTRATION (WASHINGTON, D.C.) and BROCKTON VETERANS ADMINISTRATION HOSPITAL, (BROCKTON, MASSACHUSETTS)	
Respondent	
and	Case No. 1-CA-50259
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO	
Charging Party	

Marilyn Zuckerman, Esq.
For the General Counsel

Alan L. Rosenman, Esq.
For the Respondent

Richard G. Remmes, Esq.
For the Charging Party

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This proceeding arises under the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.) and the Regulations issued thereunder (5 C.F.R. §2423.14 et seq.). It is based on a Complaint issued by the Regional Director, Region I, Federal Labor Relations Authority, Boston, Massachusetts, alleging that the Veterans Administration (Washington, D.C.) and Brockton Veterans Administration Hospital, (Brockton, Massachusetts), (herein the Respondent) violated 5 U.S.C. 7116(a)(1) and (5) by discontinuing the practice of providing surplus coffee (along with milk and

sugar, which is no longer at issue), to employees in the Dietetic Service without providing the National Association of Government Employees, SEIU, AFL-CIO (herein the Union) with an opportunity to negotiate over the decision.

Findings of Fact

For seventeen years the employees in Dietetic Service of Brockton Veterans Administration Hospital were allowed to drink surplus coffee with milk and sugar. The surplus coffee was consumed solely by the employees and management during the ten minute breaks following the patients' breakfast and lunch from which the coffee was left over.

By memorandum dated January 5, 1985, to the Union, from Angelicia Espinosa, Chief of Dietetic Service, the Respondent proposed to discontinue the practice. Counsel for the Union, Richard G. Remmes, replied, requesting that the proposal not be implemented until the completion of negotiations. On February 8, 1985 Espinosa sent a notice to the Union stating that she would be available on February 19, 1985 at 10:00am to bargain only on the impact and implementation of management's decision. She further stated that the serving of free coffee violated V.A. Regulation M-1, Part 1, Chapter 2, Change 1, August 24, 1983. The February 19, 1985 meeting resulted in management maintaining that this was an illegal practice and proposing alternatives while the Union requested that things remain at the "status quo." On March 29, 1985, the change was implemented.

The Union promptly filed a negotiability appeal and an unfair labor practice charge, electing to pursue its appeal pursuant to section 2424.5 of the Regulations.1/ On

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1/ That regulation reads as follows:

> **§ 2424.5 Selection of the unfair labor practice procedure or the negotiability procedure.**
>
> Where a labor organization files an unfair labor practice charge pursuant to Part 2423 of this subchapter which involves a negotiability issue, and the labor organization also files pursuant to this part a petition for review of the

(footnote continued on next page)

August 19, 1986 the Authority issued its negotiability decision (National Association of Government Employees, Local R1-25 and Veterans Administration Medical Center, Brockton, Massachusetts, 23 FLRA No. 34, 23 FLRA 266), rejecting the Agency's contention that providing surplus coffee was contrary to the law, but concluding that Respondent had no duty to bargain because the Union did not meet its burden of proof in showing that the proposal concerned a condition of employment. To meet the burden, the Authority stated, "specific information as to how the disposal of the coffee is related to the work situation of employees or the work relationship is needed," such as "details as to whether consumption was tied to their status as employees as opposed to being a privilege afforded to any member of the public present at the facility at the time the surplus coffee was available." Id at 268.

(footnote continued from previously page)

> same negotiability issue, the Authority and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended. Such selection must be made regardless of whether the unfair labor practice charge or the petition for review of a negotiability issue is filed first. Notification of this selection must be made in writing at the time that both procedures have been invoked, and must be served on the Authority, the appropriate Regional Director and all parties to both the unfair labor practice case and the negotiability case. Cases which solely involve an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed under this part.

Seven months after this decision, General Counsel issued the instant Complaint, alleging that Respondent violated its duty to bargain by unilaterally ending the coffee consumption custom on March 29, 1985.

Discussion and Conclusion

General Counsel asserts that the prior negotiability decision does not bar later resort to the unfair labor practice procedures respecting the same controversy. It notes that Sections 2423.5 and 2424.5 of the Regulations do not preclude the use of both procedures, but only the simultaneous use of both. Thus, a union is required to select its initial path, and "further action under the other procedure will ordinarily be suspended." General Counsel further contends that the negotiability determination is not an obstacle to this prosecution because the Authority did not in fact, consider the merits of the proposal and determine that it did not involve a condition of employment. To the contrary, the Authority's determination was nothing more than a finding that there was insufficient evidence that the proposal concerned an employment condition.2/

Respondent, unsurprisingly, takes issue with the General Counsel's contention that the Negotiability Decision did not constitute a decision on the merits. Noting that the parties to such a proceeding have the burden to establish a record supporting the propositions advanced, it contends that the findings and conclusions drawn from that record are a disposition on the merits of the controversy. It then asserts that the General Counsel may not relitigate, in the unfair labor practice arena, the very same issue. Respondent relies on National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Honolulu, Hawaii, 11 FLRA No. 17. There, in the reverse of the instant situation, the Authority dismissed as moot the union's negotiability appeal, where the union had elected to go forward with its unfair labor practice case and the Authority had found in

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2/ The Authority's Conclusion in its Negotiability Decision (23 FLRA 266, 269) was that,

> Because the record does not demonstrate that the proposal concerns a matter which is a condition of employment, we conclude that the Agency has no duty to bargain over it.

that proceeding that the disputed proposals were within the agency's duty to bargain. In reaching this conclusion, however, the Authority observed that the Agency had not raised in the negotiability case any matter which had not been raised in the unfair labor practice proceeding, thus suggesting that it might have entertained new evidence changing the result originally reached.

NLRB Union v. FLRA, 126 LRRM 3290, contains the only thorough discussion of the interface between the negotiability and the unfair labor practice procedures of which I am aware. There Judge Harry Edwards, speaking for the United States Court of Appeals, District of Columbia Circuit, rigorously analyzed the relevant statutory provisions, the legislative history and experience under the Executive Order, and characterized the connection between the two procedures or mechanisms as "profoundly ambiguous." There, the NLRBU sought changes in FLRA Regulations 2423.5 and 2424.5 which would recognize the right of a union to pursue unfair labor practice remedies where an agency refuses to bargain but does not take unilateral action. That is to say, the union sought recognition of private sector labor law, which makes it an unfair practice simply to refuse to negotiate over a matter which is found to be a mandatory subject of bargaining. The Court, given the lack of clear guidance from Congress, held that the Authority's contrary interpretation was "permissible." Thus, it is at least clear that unfair labor practice remedies are unavailable to unions in "pure" negotiability cases: those where the agency declines to bargain but does not indicate bad faith by taking action before the negotiability dispute has been resolved. The application of these Rules is otherwise left very murky.3/

The instant case is, of course, not a "pure" dispute, as the agency did not stay its hand. It thus presented an actionable unfair labor practice case on March 29, 1985, when unilateral action was taken. The reason given for the "expedited" negotiability procedures - that the parties may receive speedy guidance during their negotiations - would not seem to give support for the choice of that forum here, for its successful "prosecution," would not have yielded an

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3/ Although the Rules do not speak to the matter, it is also clear, as a result of decisional law, that it is an unfair labor practice to decline to negotiate concerning a subject which the Authority has already determined to be negotiable.

order that the Agency resume its practice of supplying employees with surplus coffee. Nor would resolution of the issue have facilitated ongoing bargaining, for none was underway. In short, nothing was to be gained by the route chosen, except a bargaining order which arguably could have been used for an abbreviated unfair labor practice hearing, if, as Respondent rather than General Counsel urges here, relitigation of the fundamental scope of bargaining issue was precluded.

Here the Union did not even gain the advantage about which I speculate above. Because it failed to make a record which persuaded the Authority that the coffee in question had become a term and condition of employment, it was found that the duty to bargain did not extend to that matter. Now the General Counsel asserts that such a decision was not dispositive of the unfair labor practice here, because that record was not complete, and the facts developed through the investigation and trial which are no part of a negotiability proceeding establish that consumption of coffee had become a firmly established employment condition.

Whatever Congress may have meant to accomplish, it would seem unlikely that it desired duplicate litigation over the very same factual controversy. While the Honolulu case leaves the mootness door ajar, it strikes me as strange to relegate the Authority's negotiability determination to the status of a ticket good for this day only. This is not to say that matter is closed forever so as to preclude the Union, in the next regular round of negotiations, from proposing that unit employees consume left over coffee as a sensible alternative to tossing it down the drain. But it would seem an abuse of the system and an affront to considerations of judicial economy, to disregard the Authority's determination that there was no duty to bargain in the circumstances, and proceed on an unfair labor practice which requires that the duty to bargain be shown to exist in the very same circumstances. Nothing has changed except the forum. Preclusion, in my judgment, should attach.4/

4/ It can be argued, of course, that the Rules, by providing that the unfair labor practice only be "ordinarily suspended" while the other matter is pursued, imply that it is appropriate here to resurrect it. That does not suggest to me that it is sensible to do so where the full course has been run and an essential ingredient in the complaint case has been found, on whatever kind of record the parties provided, not to exist.

In order to avoid a remand, should this recommended disposition be wrong, I hereby find that General Counsel has established that use of the coffee was a term of employment. It was a long and consistent practice. Finally, I reject Respondent's defense that the practice is illegal on the ground the Authority made a contrary determination in the negotiability decision.

Accordingly, I recommend that the Complaint be dismissed in its entirety.

Issued, Washington, D.C., July 25, 1988

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge