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

ARMY AND AIR FORCE EXCHANGE SERVICE, McCLELLAN BASE EXCHANGE, McCLELLAN AIR FORCE BASE, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO Charging Party	Case No. 9-CA-80257

James S. Sable, Esquire
For the General Counsel

Luther G. Jones, III, Esquire
For the Respondent

Mr. John V. Salas
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

This case concerns an agency's duty to engage in face-to-face bargaining over ground rules for the negotiation of a local agreement to supplement a national master agreement. Specifically, the issue presented is whether, in the circumstances of this case, the agency was required to accede to the demand of the local affiliate of the national union to meet for ground rules discussions in the locality to be covered by the supplemental agreement. The Complaint alleges that the Respondent (AAFES) refused to bargain with the Charging Party (the Union) regarding ground rules, in violation of section 7116(a)(1) and (5) of the Federal

Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5). The answer admits that AAFES is an agency under the Statute, and, although it denies the paragraph of the complaint that includes the allegation that the Union requested bargaining, there is no dispute over the fact that such a request was made as alleged or over the duty of AAFES to bargain with the Union over the ground rules. The dispute is solely over whether AAFES fulfilled that duty.

A hearing was held on August 9, 1988, in Sacramento, California. All parties were permitted to present their positions, to call, examine, and cross-examine witnesses, and to introduce evidence bearing on the issues presented. The General Counsel submitted a post-hearing brief. The Respondent relied on an oral argument made on the record.1/

On the basis of the entire record, the brief, and from my observation of the witnesses and evaluation of the evidence, I make the following findings of fact, conclusions, and recommendation.

Findings of Fact

The American Federation of Government Employees (AFGE), the parent organization of the Union, is certified as the exclusive representative of a consolidated unit of AAFES employees located at military bases throughout the United States and abroad. AFGE and AAFES are parties to a Master Agreement which provides for the negotiation of supplemental agreements, covering a limited number of local matters.

The Union requested bargaining for a supplemental agreement covering AAFES' McClellan Air Force Base facility, and submitted proposals for ground rules for such negotiations. AAFES responded promptly with counterproposals for ground rules. Union Business Agent Anne Mueller spoke with Sue Gileo, AAFES' personnel manager for McClellan Air Force Base, in Sacramento, California, about setting up a meeting to iron out differences between the parties' proposals. Gileo told Mueller that she did not think management would

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1/ Counsel for the General Counsel filed a Motion to Correct Transcript. The motion is granted. I have noted another error in the transcript: at page 79, line 7, "AFGE" should be "AAFES."

want to meet, and suggested that the Union try to simplify its proposals. Mueller responded that "the Union would be willing to do that, assuming that management would move on some of their proposals as well."

Apparently, the conversation ended there. Mueller then contacted Sherman Warady of the Federal Mediation and Conciliation Service (FMCS), informing him that there was an impasse and that management would not meet in person to discuss the ground rules. As a result of Mr. Warady's efforts, Ms. Mueller received a call from John Massey, an AAFES labor relations specialist stationed in Dallas, Texas. Massey told Mueller that he was the management negotiator for supplemental agreement negotiations covering McClellan Air Force Base and 15 other base exchanges. Massey then suggested that they attempt to negotiate the ground rules by mail. Mueller insisted that face-to-face negotiations would expedite matters. Massey agreed to a meeting at McClellan, which he would attend, alone, for management, and which he said he expected to conclude in two days. Mueller stated that she would be negotiating without the bargaining unit members of the Union's official negotiating committee.2/

Massey traveled to Sacramento for a negotiating meeting with Mueller scheduled for August 13, 1987. Mueller was ill, however, and was unable to meet him that day. They agreed to meet on the following day, a Friday. When Massey arrived at the meeting, he was surprised to see a second Union business agent, Charles Pettingell, with Mueller. Massey told them that he thought he would be negotiating one-on-one with Mueller, and that he would not negotiate alone with both of them. Mueller explained that she was not authorized to negotiate alone. Massey asked whether Pettingell could negotiate alone, but Mueller said that as the Union's chief negotiator, she had to be there.

At some point the option of Massey's enlisting another management representative arose, but, according to Massey, everyone of suitable stature was unusually busy and therefore unavailable on such short notice. Massey refused to continue the meeting, so Mueller asked him when he would be able to return to McClellan to negotiate the ground rules. Massey

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2/ Massey testified that Mueller was more specific in that she stated that she would be negotiating alone. There is no need to resolve this dispute. As discussed below, I am persuaded that Massey believed Mueller would be alone.

answered that he would not return, because of the expense of having traveled to Sacramento and spent two days without accomplishing anything. According to Mueller, Massey stated that, "we're just going to have to do this through the mail or by some other means, because AAFES is not going to pay for me to come back to negotiate the ground rules." This testimony was essentially uncontradicted, and I find that it substantially reflects Massey's final position on that occasion. The meeting ended with the Union representatives accusing Massey of refusing to negotiate and rejecting the alternative of negotiating by mail.3/

In the following months the Union initiated two attempts to use conference calls, in which a FMCS mediator was to participate, to get the ground rules negotiations back on track. These attempts failed because of scheduling conflicts and missed communications. On February 9, 1988, the Union made another written demand for bargaining, specifying face-to-face negotiations at McClellan Air Force Base. The Union addressed this letter to the manager of the McClellan Air Force Base Exchange, who, in turn, referred it to Massey in Dallas. Massey did not respond until July 1988, after the complaint in this case issued. During the interim, he was involved in negotiations with AFGE and other unions concerning supplemental local agreements and other agreements, and performed other labor relations duties. He engaged in face-to-face bargaining at several of the locations involved in his recent negotiations.

Discussion and Conclusions

In Department of Defense Dependents Schools, 14 FLRA 191, 193 (1984), the Authority made the following observations about ground rules negotiations:

3/ The alleged refusal to bargain which is the subject of this case is placed by the complaint on and after February 18, 1988. The events described above, occurring more than six months prior to the filing of the charge on which the complaint is based, cannot form the basis for the alleged violation. Section 7118(a)(4) of the Statute; United States Department of Labor, 20 FLRA 296, 297-98 (1985). However, these earlier events, described in evidence admitted without objection, may be used to shed light on the true character of events occurring within the six-month limitation period of section 7118(a)(4). See Machinists Local 1424 (Bryan Mtg. Co.) v. NLRB, 362 U.S. 411, 416 (1960).

> The negotiation of ground rules involves the bilateral participation of the parties and is part of the good faith negotiating process leading to agreement. In performing their mutual obligation to bargain in good faith, the parties ordinarily would need to make certain preliminary arrangements such as the scheduling of the time, place, length and agenda of the meetings. This is a necessary step in meeting "at reasonable times and convenient places" as required by section 7114 of the Statute. [Footnote omitted.] The fact that some parties mutually agree to set such preliminary arrangements apart and call them ground rules negotiations does not separate them from the collective bargaining process and the parties' mutual obligation to bargain in good faith.

AAFES denies that it has been unwilling to bargain. Its position is essentially that, just as the Union was entitled to propose face-to-face negotiations at McClellan, AAFES was not required to capitulate to that proposal, but was entitled to force the Union to negotiate over the time and place of the ground rules negotiations. AAFES argues that Massey's refusal to return to McClellan was a bargaining proposal, and a legitimate one, since he had made the effort once, to no avail. He did not make a practice of refusing on-site face-to-face bargaining with AFGE locals, as evidenced by his engaging in such bargaining throughout the nation. The Union's proper remedy, AAFES argues, was to bargain to impasse on the issue of the time and place for ground rules negotiation, and, if necessary, bring the dispute to the Federal Service Impasses Panel.

This position has a certain internal logic, as well as some plausibility. Counsel for the General Counsel, in fact, lends partial support to the AAFES position by characterizing the Union's demand for face-to-face negotiations at McClellan as a bargaining proposal, and by citing a Federal Service Impasses Panel case where the union achieved its immediate goal of face-to-face ground rules negotiations by bargaining to impasse and seeking relief from the Panel. Consumer Product Safety Commission, Southwest Region, Dallas, Texas, Case No. 86 FSIP 91 (Aug. 15, 1986). However, notwithstanding the availability of the Impasses Panel route, I am convinced that AAFES' duty, under section 7114(b)(3) of the Statute, "to meet at reasonable times and convenient places as frequently as may be

necessary, ..." obligated it to accede to the Union's demand for face-to-face bargaining at McClellan. I believe that AAFES' position, although it purports to advance the cause of bargaining as the preferred means of resolving disputes, would actually impede a central goal of collective bargaining which Congress envisioned in enacting the Statute, that of reaching a negotiated "settlement of disputes between employees and their employers involving conditions of employment." Section 7101(a)(1)(C).

The statutory scheme is after all, one of compulsory bargaining. There is no dispute over the existence of a duty to bargain here. Given that, and, irrespective of the fact that ground rules bargaining is subject to the same rights and obligations as bargaining over substantive provisions, there is an irreducible core of preliminary matters which must be considered to be a mandatory starting point for all negotiations. This irreducible core includes the "meet at reasonable times" requirement of section 7114(b)(3).

I am not aware that the Authority has confronted this provision directly.4/ Attention may properly be given, therefore, to interpretations of the same language as found in the National Labor Relations Act (NLRA), section 8(d), 29 U.S.C. § 158(d).

To place this inquiry in the context of AAFES' contention that the mode of bargaining is negotiable, it may be profitable first to take a broader look at the traditional concept of compulsory bargaining under the NLRA. Section 8(d) was added as part of the Taft-Hartley amendments, in order to define for the first time the collective bargaining in which the parties were required to engage. But even before section 8(d) was added, there was some degree of common understanding concerning what was compulsory and what was negotiable. That the parties would meet was axiomatic. The area of controversy and uncertainty was always the question of how far the duty to bargain went beyond the mere meeting with the other party. That was the question of what came to be called the duty to bargain in good faith. Before

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4/ Cf. Department of the Air Force, Griffiss Air Force Base, Rome, New York, 25 FLRA 579, 596 (1987) ("The Statute provides for meetings to take place between the parties as part of the collective bargaining process," and the respondent could not condition negotiations on receiving written proposals from the union.)

the concept of such a duty evolved, the relevant distinction was said to be between that which occurred up to the time the parties met and that which occurred when they met. In an often-quoted explanation of the original mandate of collective bargaining, given during the debates on the bill which became the NLRA, the Chairman of the Senate Committee on Education and Labor said:

> When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, 'Here they are, the legal representative of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.5/

The second part of this formulation has not endured.6/ The first part has. The National Labor Relations Board has held that "to meet at reasonable times" requires face-to-face meetings. The Westgate Corp., 196 NLRB 306, 313 (1972); Alle Arecibo Corp., 264 NLRB 1267, 1273 (1982). This is not mindless literalism. For, as I see it, it does not necessarily preclude a party from showing that, in a particular instance, a face-to-face meeting is inappropriate or demonstrably unnecessary. This would involve a substantial burden of persuasion, however, because of the strong tradition of face-to-face negotiations for all stages of collective bargaining.

With the advance of communications technology, it may be that some day it will not be atypical for labor negotiations to occur by some sort of audio-visual conference. The law should be capable of responding with an appropriately flexible interpretation of a "meeting". Meanwhile, however, it is appropriate to interpret the Statute in the light of current labor-management practices. See Fibreboard Corp. v. NLRB, 379 U.S. 203, 211 (1964).

5/ 79 CONG. REC. 7660 (1935) (statement of Senator Walsh).

6/ See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 482-83 (1960); Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 138 (1958).

AAFES has made no showing that would warrant relief from the usual requirement, which in this case means face-to-face bargaining at McClellan Air Force Base. The parties have long since exchanged written proposals which leave differences susceptible of elimination by face-to-face meetings. Massey's previous unsuccessful trip to McClellan was, viewed in retrospect, an unfortunate waste of time, but the circumstances that produced that result were unusual and, in my judgment, not to be blamed on anyone. It provides no excuse for refusing to try again.7/ Granted that the cost of negotiating at McClellan falls more heavily on AAFES than on the Union, that is because AAFES has chosen to use Massey as its negotiator instead of a local official. Since the negotiations ultimately concern local matters, there has never been a question of negotiating elsewhere. Indeed, AAFES never even suggested such an alternative.

I therefore conclude that AAFES' months-long failure to respond to the Union's demand for on-site negotiations at McClellan constituted a refusal to negotiate in violation of Section 7116(a)(1) and (5) of the Statute, and I recommend that the Authority adopt the following remedial order.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Authority and section 7118 of the Statute, the Authority hereby orders that Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California shall:

1. Cease and desist from:

(a) Refusing to bargain over ground rules proposed by the American Federation of Government Employees, Local 1857, AFL-CIO, concerning the negotiation of a Local Supplemental Agreement to the Master Agreement between Army and Air Force Exchange Service and the American Federation of Government Employees, Local 1857, AFL-CIO.

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

7/ Section 7114(b)(3) of the Statute includes the requirement to meet "as frequently as may be necessary."

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

(a) Bargain in good faith with the American Federation of Government Employees, Local 1857, AFL-CIO, the exclusive representative of its employees, over ground rules for a Local Supplemental Agreement.

(b) Post at its Sacramento, California, 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 an authorized representative of the Respondent, 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 IX, 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.

Issued, Washington, D.C., February 8, 1989

Jesse Etelson

JESSE ETELSON
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 refuse, upon request, to negotiate with the American Federation of Government Employees, Local 1857, AFL-CIO, (AFGE) regarding ground rules for a Local Supplemental Agreement to the Master Agreement between Army and Air Force Exchange Service and the American Federation of Government Employees, AFL-CIO.

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 the request of AFGE negotiate in good faith with AFGE regarding ground rules for a Local Supplemental Agreement to the Master Agreement between Army and Air Force Exchange Service and the American Federation of Government Employees, Local 1857, AFL-CIO.

Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California
(Agency)

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 IX, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103, and whose telephone number is: (415) 995-5000.