

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

. . . . .  
DEPARTMENT OF THE AIR FORCE .  
832D COMBAT SUPPORT GROUP .  
LUKE AIR FORCE BASE, ARIZONA .  
Respondent .  
and . Case No. 8-CA-80396  
AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, .  
LOCAL 1547, AFL-CIO .  
Charging Party .  
. . . . .

Major Phillip G. Tidmore  
For the Respondent

Gerald M. Cole, Esquire  
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER  
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges, in substance, that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally changing the working conditions of unit employees by banning smoking inside all buildings of Respondent's facilities without first completing bargaining with the Union over the substance of the change and/or the impact and implementation of the change.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Phoenix, Arizona. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

#### Findings of Fact

Prior to May 1988, the policy on employee smoking at Luke Air Force Base was to permit employees to smoke anywhere on the base including inside buildings except near hazardous materials. On May 3, 1988, Union Vice-President Robert Cvengros had a meeting with Labor Relations Officer Joanne Elrod and was notified of a new policy prohibiting smoking in any government building or vehicle to be effective May 15, 1988. 1/ Cvengros informed Ms. Elrod that the Union would want to negotiate the new policy, and Ms. Elrod stated at that time that she did not want to negotiate building by building, that she wanted one base-wide policy.2/ Cvengros suggested a specific smoking area on the hospital's first floor and inside one of the hangars. Elrod said she would check out the hospital area and commented on the hangar. Cvengros indicated that he didn't care if employees took additional smoke breaks outside, but did feel they should be able to smoke indoors during their regularly scheduled breaks. Elrod did not agree. Cvengros stated he would study the draft policy and provide the Union's input.

On May 9, 1988, Elrod contacted Cvengros regarding when he could submit the Union's proposal. They agreed he would submit it on May 10th, 1988. Elrod asked Cvengros what the Union was going to propose. Cvengros stated that the Union was considering ways that employees could continue to smoke inside, such as staggered breaks. Elrod said that this was not feasible due to the number of non-smokers and workload problems. Cvengros told Elrod that the Union's main concern was that non-smokers would complain about smokers getting

---

1/ Cvengros testified this meeting occurred on May 2, 1988. Elrod's recollection was more precise concerning the date.

2/ Elrod testified that the suggestion to go through the base building by building may have been made by Cvengros at a meeting held on May 12, 1988.

"smoke breaks." Elrod said that management didn't expect such complaints as long as smokers did not abuse their privilege.

On May 10, 1988, Cvengros hand delivered a letter to Ms. Elrod, specifically requesting that the ban on smoking not be implemented until more practical ways were sought to solve the problem. The Union stated that it would help research the issue to benefit smokers, nonsmokers, management, and the Union alike. The letter commented that there was no need to ban smoking in all buildings; the Union had never had a complaint; breaks outside would affect productivity; and any problem which arose could be dealt with by the first level supervisor or on an individual basis.

On May 12, 1988 Cvengros and Elrod met for two hours.<sup>3/</sup> The meeting was set up by Elrod. Elrod stated that, contrary to the Union's belief, smoking was a problem which had to be dealt with, supervisors had received many complaints about smoking in work areas, many employees already had to smoke outside, and this would not interfere with productivity levels. Elrod indicated the employees would continue to have the option of where to take their rest break. Elrod noted that the Union had earlier stated it wanted a base-wide smoking policy and now it did not. Both individuals commented on how employees smoked and worked outside. Cvengros proposed that they go through the base and negotiate building by building. Elrod rejected this proposal and replied that they should come up with a consistent base-wide policy that would prohibit indoor smoking. Cvengros asked if they should negotiate the number of cigarette smokers could smoke in a day's time. Elrod said they should let the individual supervisor and employee work that out. Cvengros raised two specific areas for indoor smoking. One was a room on the first floor of the hospital and the other the paint shop. Elrod stated that conditions next to the hospital room did not make it a feasible smoking area, and unless all employees of the paint shop smoked, it could not be designated a smoking area either. Elrod told Cvengros that the Union could come to her after the policy was implemented and discuss any specific work area that could be made into a smoking area and she would pursue the matter. Cvengros stated that

---

<sup>3/</sup> Cvengros did not recall the meeting. Gerry Berger, an employment relations specialist, corroborated Elrod's testimony that the meeting took place. She overheard some of the conversation.

although all of these options had been discussed, the Union did not feel the change was necessary and proposed that the policy not be implemented.

Elrod did not consider Cvengros' proposal not to implement the new smoking policy "a substantive proposal to [assist] us in implementing a base policy," as it would deny the agency the right to implement a policy to provide consistent treatment for employees. She was prepared to negotiate "substantive" proposals to modify the policy, such as staggered breaks, number of cigarettes, number of minutes. She did not declare impasse and considered that Respondent could implement without any agreement if there was a need to provide consistent treatment for employees.

Elrod informed Cvengros that the policy would be implemented as planned. She understood that all matters had been discussed and, thus, that they had negotiated the base smoking policy.

On May 13, 1988 Cvengros submitted another letter to Elrod concerning the smoking policy to make clear the Union's desire to negotiate. The letter set forth a list of "input" items into the new policy, such as "B. Staggered break times, C. Divide break room, D. Provide separate break rooms, E. Designated areas, F. Leave up to the individual supervisor" and stated that the Union was ready to negotiate. The letter also stated that this letter and the previous letter did not constitute negotiations, but merely represented Union feelings. Cvengros received no response to the letter.

The new policy banning smoking inside buildings or vehicles became effective on Sunday, May 15, 1988. Employees can no longer smoke inside buildings or vehicles, but must go outside to smoke. Outside smoking areas are designated by commanders through the building custodian. Limited exceptions may be made for certain morale, welfare, and recreation facilities through the Commander, Base Hospital.

Cvengros learned of the change on Monday, May 16, 1988 when news of its implementation appeared on computer screens. This was the target date for implementation. No exigency existed at the time implementation began.

On May 18, 1988, Cvengros attended a meeting with the Base Commander, Colonel David Peebles. Also present was Ms. Elrod, and Union President James Gratz. Although the

meeting was for other purposes, the new smoking policy was mentioned. Colonel Peebles stated he wanted to congratulate the Union on negotiating the smoking policy. Cvengros and Gratz began laughing, and one of them asked, "What negotiations?" The Colonel turned to Ms. Elrod and asked if it had been negotiated. She said it had been discussed.<sup>4/</sup> Cvengros raised building 985 as an example where a smoker's break room could be negotiated. Colonel Peebles said that organizations could submit through channels proposed smoking areas if they had a sufficient basis for doing so. Elrod stated she had previously told Cvengros that he could submit such requests to her for forwarding to the Base Hospital for decision. Colonel Peebles asked Elrod to check out building 985 at Cvengros' request, and she agreed to do so. Elrod subsequently reported at a June 14, 1988 monthly Union-Management meeting that due to the location and poor ventilation of the break rooms in building 985 the Union's request could not be granted.<sup>5/</sup>

#### Discussion, Conclusions and Recommendations

The issue presented is whether Respondent met its obligation under the Statute to bargain with the Union concerning its decision to establish a smoke-free environment at its facilities.

The General Counsel asserts that Respondent unilaterally implemented the policy without completing bargaining with the Union. The General Counsel contends that the record clearly reveals that Ms. Elrod would not deviate from Respondent's intention to implement a base-wide no-smoking policy; the Union's proposal not to implement was fully negotiable; impasse was not declared; the Union's last request of May 13, 1988 made clear its continuing desire to negotiate; and no emergency mandated the implementation on May 16, 1988.

---

<sup>4/</sup> Ms. Elrod did not recall any statement by Colonel Peebles to the Union about having negotiated the smoking policy. I credit the testimony of Cvengros and Gratz in this respect.

<sup>5/</sup> Cvengros and Gratz testified that Colonel Peebles said the matter would be negotiated building by building, if necessary, and that Elrod would take care of it. I credit Elrod's version which is consistent both with the procedure for exceptions set out in the by-then-implemented policy effective May 15, 1988 and with Elrod's subsequent report concerning the matter as reflected in the minutes of the June 14, 1988 monthly meeting.

Respondent defends on the basis that it met its obligation to bargain by meeting and bargaining with the Union on May 3, 9, and 12, 1988. Respondent contends that the Union sought only to bargain on impact and implementation; its proposal not to implement was no proposal at all; a proposal which has a direct and significant effect on vital interests of non-unit employees is non-negotiable; and the Union's May 13, 1988 letter was submitted at the eleventh hour prior to implementation and constituted a waiver of its right to bargain.

The Authority has consistently found that proposals concerning the implementation of an agency's smoking policy involve conditions of employment of bargaining unit employees. Therefore, Respondent was obligated to bargain about its decision to establish a total ban on smoking within its facilities, particularly proposals concerning the designation of smoking areas and that the previous smoking policy remain in effect pending agreement on the new policy. Department of Health and Human Services, Public Health Service, Health Resources and Services Administration, Oklahoma City Area, Indian Health Service, Oklahoma City, Oklahoma, 31 FLRA 498, 507 (1988) (Public Health Service); National Treasury Employees Union, Chapter 250, et al, 33 FLRA 61 (1988).

Where an agency has an obligation to bargain, the Authority has held that agency management may implement such changes in established conditions of employment only if (1) the parties have reached agreement as to negotiable proposals, (2) there is no timely invocation of the services of the Federal Service Impasses Panel after impasse following good faith bargaining (unless implementation is consistent with the necessary functioning of the agency), or (3) the union has waived its bargaining rights. See, for example, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466 (1985); Office of Program Operations, Field Operations, Social Security Administration, San Francisco, Region, 9 FLRA 73 (1982); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). Here the parties had not reached agreement, there was no impasse about which to request the services of the Panel, and no waiver is apparent.

Respondent flatly rejected the Union's request to negotiate building by building, which proposals were also clearly negotiable under Public Health Service, supra, and, as revealed by Ms. Elrod's testimony, Respondent clearly did not intend to negotiate anything less than a "consistent" base-wide policy that would ban all indoor smoking. Such

factors reflect a desire on Respondent's part to reach an agreement on its terms, and they do not demonstrate a willingness to engage in collective-bargaining as mandated by the Statute. Cf. Veterans Administration, Washington, D.C., 32 FLRA 855, 871 (1988).

Respondent repeatedly stated that consistent treatment was necessary for all employees, and asserts that any proposal which has a direct and significant effect on the vital interests of non-unit employees is non-negotiable. Respondent's argument is not supported by recent Authority precedent. In American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 33 FLRA 335 (1988) the Authority announced that when determining the negotiability of a bargaining proposal it would not examine the effect of the proposal on non-unit employees or positions. Rather, the Authority held a proposal would be found to be within the duty to bargain under the Statute if it (1) vitally affects the working conditions of unit employees, and (2) is consistent with applicable law and regulations. As noted, the Authority has previously determined that proposals concerning the implementation of an agency's smoking policy involve conditions of employment of bargaining unit employees. See National Treasury Employees Union and Internal Revenue Service, Indianapolis District, 30 FLRA 32 (1987); American Federation of Government Employees, Local 2324, AFL-CIO and Department of the Army Headquarters, 1st Infantry Division, Fort Riley, Kansas, 27 FLRA 33 (1987); National Association of Government Employees, Local R14-32 and Department of the Army, Fort Leonard Wood, Missouri, 26 FLRA 593 (1987).

Contrary to Respondent's argument, the Union's proposal (on May 10, 1988, that the ban on smoking not be implemented until more practical ways were sought to solve the problem, and, on May 12, 1988, that management not implement the new smoking policy) constituted a proposal to bargain on the decision to establish a new smoking policy. This proposal was a fully negotiable substantive proposal. It, in effect, proposed that the existing smoking policy remain in effect. U.S. Department of Justice, Kennedy Center, Federal Correctional Institution, Bureau of Prisons, 29 FLRA 1471 (1987), petition for review denied sub. nom. American Federation of Government Employees, AFL-CIO, Local 2441 v. Federal Labor Relations Authority, 864 F.2d 178 (D.C. Cir. 1988). The submission of additional implementation proposals on May 13, 1988 together with a new request to negotiate demonstrates that the request to keep the old policy in effect was made, as had been stated on May 10,

pending agreement on the new policy. The Authority has held such a proposal to be fully negotiable. Public Health Service, supra.

There was no "impasse" within the meaning of 5 C.F.R. § 2470.2(e)(1) (1988) which contemplates the use of efforts to reach agreement by direct negotiations and by the use of mediation on other voluntary arrangements for settlement before parties can declare themselves at impasse. Even if the parties were at impasse, the Union did not have a reasonable opportunity to invoke the processes of the Federal Services Impasses Panel. The negotiations ended on Thursday, May 12 and the policy was made effective Sunday, May 15. A period of two days to invoke the Panel, including only one common workday (Friday), does not constitute such a reasonable opportunity. U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 132-133 (1982).

The record does not support Respondent's argument that the Union's May 13, 1988 letter was submitted at the eleventh hour and constituted a waiver of the right to bargain. The Union had previously submitted a timely request to bargain and the parties had met on May 12, 1988 without reaching agreement. The Union submission of additional proposals the very next day, May 13, 1988, together with a new request to negotiate was a logical next step.

There is no evidence that an overriding exigency existed which required immediate implementation. A delay in implementation in order to permit the parties to negotiate fully would have been consistent with the Statute. As noted, the Authority has held that the duty to negotiate in good faith under the Statute requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment, during the term of a collective bargaining agreement, absent, as here, a clear and unmistakable waiver. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). In this instance, this means a reasonable opportunity to complete bargaining before implementation. 22 Combat Support Group (SAC), March Air Force Base, California, 25 FLRA 289 (1987); Department of the Treasury, U.S. Customs Service, Region I, Boston, Massachusetts, 16 FLRA 654, 666 (1984); Bureau of Government Financial Operations Headquarters, 11 FLRA 334, 345 (1983).

It is concluded that a preponderance of the evidence establishes that Respondent's unilateral implementation of the base-wide no-smoking policy without completing bargaining with the Union over the substance of the change and its

impact and implementation constituted an unfair labor practice within the meaning of section 7116(a)(1) and (5) of the Statute, as alleged. Public Health Service, supra.

The General Counsel requests a status quo ante remedy. Such a remedy is appropriate where, as here, management has unilaterally changed a negotiable condition of employment. Effectuation of the purposes and policies of the Statute require a return to the status quo ante in order not to render meaningless the obligation to bargain. Public Health Service, supra.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Department of the Air Force, 832d Combat Support Group, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions for unit employees by establishing a base-wide no-smoking policy, without first completing bargaining with the American Federation of Government Employees, Local 1547, AFL-CIO, herein called the Union, the exclusive representative of certain of its employees, to the extent consonant with law and regulations, on the decision to effectuate such a policy and its impact and implementation.

(b) In like or related manner interfering with, restraining or coercing 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:

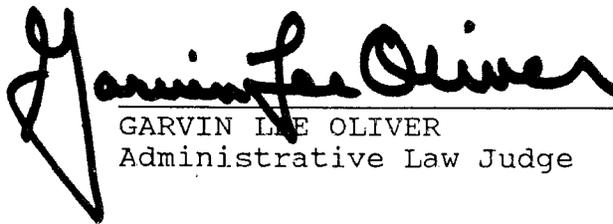
(a) Rescind the no-smoking policy implemented on May 16, 1988.

(b) Notify the Union of any intended changes in smoking policy and, upon request, negotiate to the extent consonant with law and regulations on the decision to effectuate such a policy and its impact and implementation.

(c) Post at its Luke Air Force Base, Arizona facilities, where bargaining unit members represented by the American Federation of Government Employees, Local 1547, AFL-CIO, are located, 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 Commanding Officer 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.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, Los Angeles, California, 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., May 30, 1989



---

GARVIN LEE OLIVER  
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF  
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in working conditions of bargaining unit employees by establishing a Base-wide no-smoking policy, without first completing bargaining with the American Federation of Government Employees, Local 1547, AFL-CIO, herein called the Union, the exclusive representative of certain of our employees, to the extent consonant with law and regulations, on the decision to effectuate such a policy and its impact and implementation.

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

WE WILL, rescind the no-smoking policy established on May 16, 1988, at Luke Air Force Base, Arizona.

WE WILL notify the Union in advance of any intended changes concerning a smoking policy and, upon request, negotiate to the extent consonant with law and regulations on the decision to effectuate such a policy and its impact and implementation.

\_\_\_\_\_  
(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 VIII, whose address is: 350 South Figueroa Street, 3rd Floor, Room 370, Los Angeles, CA, 90071, and whose telephone number is: (213) 894-3805.