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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION AND SOCIAL SECURITY ADMINISTRATION FIELD OPERATIONS, REGION II Respondents	
and	Case No. 2-CA-80212
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

E. A. Jones III, Esquire
For the General Counsel

Patricia A. Randle, Esquire, and
Maria Maldonado
For the Respondent

Ana Angelet
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

When a union official and employee of the Respondent who, by agreement, spent all of his working hours performing union business on official time, transferred from one branch office to one in another district, the Respondent refused to provide him with certain equipment it had provided him with in the first branch office to conduct union business. This case presents the issue of whether there was a past practice of providing that equipment which (1) became a condition of employment and (2) obligated the Respondent to continue the practice in the office to which the union official trans-

ferred. An unfair labor practice complaint alleges that, in violation of Section 7116(a)(1) and (5) of the Federal Service Labor-Management Statute (the Statute), the Respondent unilaterally changed working conditions by terminating the practice of providing the president of Local 2608 of the Charging Party, American Federation of Government Employees, AFL-CIO (AFGE) with two partitions and a self-correcting typewriter. The Respondent in essence denies that there was a "past practice" which rose to the level of a condition of employment, and asserts that, even if there was, any such practice was limited to the organizational subdivision in which it was established and did not survive the transfer of the Local 2608 president out of that branch and district.

This case was heard in Hato Rey, Puerto Rico, on November 1, 1988. 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 and the Respondent submitted post-hearing briefs.

On the basis of the entire record, the briefs, my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

A. Background

AFGE is the certified exclusive presentative of a nationwide unit of certain employees of the Social Security Administration, of which Respondent Region II is a constituent part. AFGE has delegated its authority to represent field employees of the Social Security Administration to its National Council of Social Security Administration Field Operations Locals (the Council), which, in turn, has given authority to AFGE Local 2608 to act as its agent in representing approximately 500 employees throughout Puerto Rico.

Pedro Romero, the president of Local 2608, was employed in the bargaining unit at the Respondent's Aguadilla Branch Office. The Aguadilla Branch Office is within the Respondent's Mayaquez District, covering part of the island of Puerto Rico, which district is part of Area VIII, covering all of Puerto Rico and the Virgin Islands. Area VIII is part of Respondent's Region II.

Romero, earlier the president of a smaller local, was, by agreement, given increasing blocks of official time to perform union representational business. In 1986 he became president of the newly-merged Local 2608. Since then he has been a full time union representative on official time.

B. The Equipment Provided

From the time that Romero began spending a substantial amount of time on union business, he was provided with extra space (apart from the facilities he needed for his duties as an employee), a separate desk, and a telephone, all for union business. There is no dispute about the continued supplying of these.

In late 1983, Romero requested a typewriter for union business. He followed up with a series of letters to management officials which resulted in his being provided a manual typewriter. Unsatisfied, Romero continued his correspondence, taking the matter to the level of Region II, where it was kicked back down to the Area VIII office. The gist of Romero's case for upgrading his manual typewriter appears to have been that a number of new IBM typewriters (which were electric and self-correcting) had been received in the Aguadilla Branch Office, and that at least one of them was as yet unassigned to office employees. See Respondent's Exhibits 5-12. While Romero apparently received no positive response to his correspondence, the ultimate disposition of his requests for one of the IBM typewriters is in dispute.

What is clear is that either in 1984 or in early 1985, Romero obtained access to the IBM Selectric III typewriter that had not been assigned to any individual employee, to use for union business. According to Romero, the Aguadilla branch manager with whom he had been dealing to obtain one of the IBM's eventually provided him with one, through one of the branch supervisors, who told Romero it was for his exclusive use.1/ The Respondent's witnesses testified that

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1/ Respondent presented no witnesses to the circumstances surrounding Romero's original acquisition of the use of the IBM typewriter. However, as the Branch manager retired in 1985 and the supervisor cited by Romero transferred to another office in 1986, and in the absence of a request by Counsel for the General Counsel, I do not draw an adverse inference from the Respondent's failure to call them as witnesses.

at least beginning in 1985, when they arrived in the Aguadilla Branch Office, Romero's use of the typewriter in question was not exclusive and that on several occasions it was necessary to request Romero to return it for temporary use by another employee or supervisor, or to leave it in a neutral area for use by others. Romero never resisted such requests.

The Aguadilla Branch Office moved to a new building in the beginning of 1987, and the typewriter moved with it. Romero continued to enjoy the use of the typewriter to the same extent as he had in the old Aguadilla office. Conflicting testimony regarding the location of the typewriter when it was not in actual use is difficult to resolve because the witnesses were not always clear as to whether they were referring to the old or the new Aguadilla office. To the extent that it sheds light on the exclusivity of the Union's use, it would appear that, at least in the new Aguadilla office, the typewriter was usually kept in an area outside of but close to the area set aside for Union business.2/

I am not persuaded that there was ever an express understanding as to exclusivity of use, one way or the other. Romero had standing permission to use it for union business, and it became the accepted fact that Romero was its primary user. On occasion, what might be termed a potential conflict arose out of Romero's failure to return the typewriter to "its place of origin." Apparently, no actual conflicts developed which required a resolution of priority of use, as between Romero's and the office's need at any particular time.

In 1985, when the Aguadilla Branch office was still in its old location, Luz Perez was assigned there as branch manager. She determined that there was a need for some free-standing partitions, and requested them from her superior, the district manager of the Mayaquez District. The district manager provided her with four partitions, but, according to Ms. Perez, told her he was only lending them and would need them back.

Two of the four partitions took care of the immediate needs that had concerned Perez, and she stored the other two

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2/ This is based on my interpretation of the testimony of Francisco Siaca and that of Romero on rebuttal (Tr. 188, 229).

temporarily. They eventually were used to separate the area Romero used for union business from the rest of the office, but how that came about is in dispute.

According to Romero, Perez told him there were some extra partitions that the Mayaquez office had given to the Aguadilla Branch, and that he could pick out the ones he liked best for use around his union desk. Romero insists that he was not told the partitions were on loan. Ms. Perez testified that the two partitions in question went into use one at a time. First, she had one of the partitions placed between Romero's union desk and the office photocopy machine to ameliorate the problems caused by the proximity of these two stations at which separate conversations often occurred. Some months later, according to Perez, the second partition was placed between the union desk and the desk of an office employee who complained about union business conversations interfering with his work. Perez did not testify that she informed Romero that the partitions were on loan.

The result, in either case, was that from at least the early part of 1986 to the 1987 relocation of the Aguadilla Branch Office, Romero occupied a mostly enclosed area.3/ At some point, no later than the approximate date of the office relocation, Romero placed on the outside of one of the partitions letters which formed the words, "UNION OFFICE." This arrangement continued in the new Aguadilla office. Perez testified that she had previously agreed to return the partitions to Mayaquez as soon as the move was completed but that she kept them temporarily for fear that a pile of boxes that Romero had brought with him and placed inside the enclosure would topple over.

C. The Alleged Termination of the Practice

Romero requested to be transferred to another branch office.4/ While the record does not reveal which office he requested, he was granted and accepted a transfer to the Hato Rey Branch Office, in the San Juan District. The San

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3/ For the reasons given below, I find it unnecessary to resolve the credibility dispute regarding the origins of the alleged practice.

4/ He continued to be an employee of the Social Security Administration, albeit on 100 percent paid released time for union business.

Juan District is, like the Mayaquez District, part of Area VIII. Romero moved into the Hato Rey office in September or October 1987. He testified that just before he left the Aguadilla office, Branch Manager Perez told him not to worry about the mover taking the partitions and the typewriter along with other union equipment that was being transported to Hato Rey, because he would get those items when he reported to that office. Perez denies having any such conversation with Romero.5/

Romero asked the Hato Rey branch manager for partitions and a self-correcting typewriter. The branch manager told him that they were not available. When Romero persisted in his request, the branch manager informed him that an attempt would be made to provide these items, and eventually Romero received an electric typewriter that was not self-correcting, but no partitions. Romero processed his request for the partition and for a self-correcting typewriter to the Region II level. In the final response he received, a letter from an assistant regional commissioner, he was informed that: "Management is not obligated and will not be providing you with either a self-correcting typewriter or ordering partitions for your exclusive use."6/

Discussion and Conclusions

The subject of this case is not the Respondent's substantive duty to provide the Union with a self-correcting typewriter and partitions in the Hato Rey office. It is only whether the Respondent was obligated to provide those items until it bargained to impasse over its right to withhold them, possibly with final resolution of the underlying substantive dispute by the Federal Service Impasses Panel, where, indeed, the matter could ultimately rest whatever the outcome of this case.7/

5/ For reasons set forth below, I find it unnecessary to resolve this credibility dispute.

6/ For purposes of the discussion to follow, I am content to regard this as a final rejection of Romero's request for partitions as well as for a self-correcting typewriter.

7/ I am not averse to engaging in the intellectual exercise necessary for the resolution of this interesting legal issue, nor to enjoying some days of gainful employment in attempting to fulfill that task. Other taxpayers, however,
(Footnote 7 continued)

The Authority's general guidelines applicable to "past practice" cases were set forth concisely in Norfolk Naval Shipyard, 25 FLRA 277, 286 (1987):

> It is well established that parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment may not be altered by either party in the absence of agreement or impasse following good faith bargaining. Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 413 (1980). Past practices generally include all conditions of employment not specifically covered in the parties' collective bargaining agreement which are followed by both parties, or followed by one party and not challenged by the other party over a period of time. Past practices may also include the actual practice being followed, regardless of the contractual agreement. In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time with the agency's knowledge and express or implied consent. Internal Revenue Service and Brookhaven Service Center, 6 FLRA No. 127 (1981); Department of the Navy, supra. Essential factors in this regard are that the practice must be known to management, responsible management must knowingly acquiesce, and such practice must continue for some significant period.

To complete the precedential framework for analysis, an independent inquiry must be made as to whether a past practice, sufficient in every other way to form the basis of

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(Footnote 7 continued)

might not be amused by the expenditure of many thousands of dollars to litigate a unique controversy which could have been resolved by the interested parties through the application of a little imagination, flexibility, and nominal expenditure to reach a temporary working arrangement that would have permitted a more timely and efficient settlement of the substantive bargaining dispute.

a bargaining obligation, concerns a conditions of employment. Department of the Treasury, Internal Revenue Service (Washington, D.C.); and Internal Revenue Service Hartford District (Hartford, Connecticut), 27 FLRA 322, 324 (1987). Finally, the Authority has long recognized a Union's use of agency facilities as a negotiable matter, National Treasury Employees Union and Internal Revenue Service, Denver District, 24 FLRA 249, 252 (1986), and a condition of employment. Lowry Air Force Base, Denver, Colorado, 29 FLRA 566, 571 (1987).

I am satisfied that the practices arose in the old and new Aguadilla branch offices, and ripened into conditions of employment, of providing to the Union (1) access to a self-correcting typewriter and (2) a means to insulate the "Union office" to some degree from the main business floors of the branch offices. This insulation was accomplished by the use of two partitions, but I believe it is more accurate to describe the condition of employment as a certain degree of privacy than as a fixed number of partitions of a particular size.

It is the nature of a practice and not the manner in which it was established that makes it capable of ripening into a condition of employment. A noncontractual condition of employment may come into existence either by virtue of an informal understanding or by the continuation of a practice that just "growed" (like Topsy in Uncle Tom's Cabin) and became part of the reasonable expectations of the respective parties. See Norfolk Naval Shipyard, supra. Therefore, one may credit the specific motivations asserted by Perez in providing the partitions, and her uncommunicated knowledge that they were only on loan from the Mayaquez District Office, and yet find that they became part of an established union "office" which attained the status of a condition of employment within the Aguadilla Branch Office. Similarly, whatever circumstances may have accompanied Romero's being given access to a typewriter, his long-term use of it in the Aguadilla Branch Office became in itself the source for the establishment of a condition of employment. I am persuaded that the Respondent could not lawfully have withdrawn those benefits without first bargaining to impasse with the Union.

The question that remains, however, is whether the past practices encompass the providing of equivalent equipment at the location to which Romero transferred, the transfer having been made in response to his request. This aspect of the transfer is potentially significant because, had the Respondent transferred Romero on its own initiative and then

refused to provide the equipment at the new location, it would be at least arguable that it would have unlawfully done indirectly what it could not do directly. The situation of a management-instigated transfer, however, is not presented here.

The past practices at issue were initiated by management at the level of the Aguadilla Branch. There is sufficient evidence of knowledge by responsible officials of the Mayaquez District to make it arguable that the District acquiesced in and is bound by the practices. No higher level of authority approved them, nor did it need to in order to permit their ripening into conditions of employment that were protected from unilateral change. When Romero voluntarily moved out of the jurisdiction and geographical area of the Mayaquez District, however, the practices did not necessarily follow him.8/ Whether they did or not is the difficult question on which this case ultimately hinges.

I conclude that they did not. The obligation undertaken by the Respondent at the lower level, but, in my view, binding on the Respondent at all levels, was to provide the equipment that had become available in the Aguadilla Branch Office until it bargained to impasse on their removal. However, the Respondent did not remove the equipment. Rather, it refused to extend the practices to the providing of the same or equivalent equipment at a new location where it had never been provided before and where it was not currently available. Making such equipment available at a new location, while perhaps not a major new undertaking, would have been something beyond what was provided in the past. And it is through such a narrow lens that questions of past practice must be viewed.

This narrow focus may seem unduly legalistic. But the issue to be decided here must be delineated from other issues which one might be tempted to incorporate into the case. The issue is not, of course, what would be fair. Harder to swallow, the issue is not even what would be most sensible. Nor is there much room for interpretation of the past practice. For this is where the identification of a past practice differs from the parsing of a contract, express or implied-in-fact. Where a condition of employment is established by agreement, the primary focus is on the

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8/ If Perez, who had no authority outside her branch, did assure Romero he would receive the equipment in Hato Rey, such assurance would have no probative value.

words used to embody the so-called "meeting of the minds." Only if the words used formally by the parties are not clear enough are informal words (bargaining history) and actions (practices under the contract) resorted to. On the other hand, where the condition of employment is established by a practice, the practice itself is the sole source of illumination, and the exercise of defining it is much more one of observation than of rationalization.[9/] One is not concerned primarily with what the parties had in mind but with what they did.

In this case, the Respondent made available to the Union some equipment that it had in the Aguadilla Branch Office.[10/] Regardless of whether or not the providing of equivalent equipment in a different office would be burdensome, the act of making it available there would be something new or additional.[11/] Failure to provide it was not a unilateral change, and no bargaining obligation attached to the Respondent's decision not to extend the practices as requested. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

The complaint in this proceeding is dismissed.

Issued, Washington, D.C., June 16, 1989

JESSE ETELSON
Administrative Law Judge

9/ In a certain sense, defining a practice is to interpreting a contract as tracing a "realistic" painting is to creating one.

10/ The situation would be different and perhaps dispositively different if equivalent spare equipment had been available in the Hato Rey office and the Respondent still refused to permit the Union to use it. However, I do not pass on that.

11/ The same could not be said concerning the transporting of the typewriter and the partitions from the old Aguadilla office to the new. That was done as part of the Respondent's moving of the entire office. Aside from other considerations, a failure to include this equipment in the Aguadilla move would have meant abandoning it or arranging for moving it elsewhere. Rejection of these alternatives was not the same as taking affirmative steps for the Union's convenience.