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

UNITED STATES DEPARTMENT OF LABOR, WASHINGTON, D.C. Respondent	
and	Case No. 7-CA-90315
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF FIELD LABOR LOCALS, LOCAL 1748 Charging Party	

Timothy Sullivan, Esquire
Nicholas J. LoBurgio, Esquire
For the General Counsel

Anita Eisenstadt, Esquire
Galen Yoder
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on March 15, 1989, by the American Federation of Government Employees, AFL-CIO, National Council of Field Labor Locals, Local 1748, (hereinafter called the Union or Charging Party), a Complaint and Notice of Hearing was issued on June 26, 1989, by the Regional Director for Region VII, Federal Labor Relations Authority, Denver, Colorado. The Complaint alleges that the United States Department of Labor,

Washington, D.C., (hereinafter called the Respondent), violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in discontinuing the furnishing of bottled water and water coolers for use by unit employees without completing bargaining with the Union over both the substance and/or the impact and manner of implementation of its actions.

A hearing was held in the captioned matter on August 23, 1989, in Kansas City, Missouri. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on September 26 and 25, 1989, respectively, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact[1/]

The Department of Labor's Kansas City Regional Office is located in the Federal Building at 911 Walnut Street, Kansas City, Missouri. The Department rents eleven floors in the building from the General Services Administration ("GSA"). The rent includes a charge for Kansas City water utilities.

During the summer of 1987, problems arose with the tap water supply. Mr. Gerald Dillon, Regional Administrator, Office of Assistant Secretary for Administration and Management ("OASAM"), contacted the building manager, GSA, and the city water department about the problem. He was concerned about the safety of employees and the deterioration of the water supply. Thereafter the Kansas City Water Department ran a number of tests on the water. The Kansas City Water Department tests indicated that there were higher levels of turbidity, discoloration and iron than was desirable. In July or August of 1987, management made

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1/ To the extent that the Statement of Facts in Respondent's post-hearing brief comports with the record evidence and my credibility determinations which are based upon an analysis of the testimony of the respective witnesses as well as my observation of their demeanor while on the witness stand, I have adopted same.

the decision, unilaterally and voluntarily, to furnish bottled water on an interim emergency basis until the water problem could be resolved. Management advised the Union, both orally and in writing, that the bottled water was provided as an interim measure until the tap water was restored to potability. Bottled water was initially furnished to only the first and fourth floors because the problem at first was limited to these lower floors.2/

GSA retained Mr. Joseph Graf, an industrial hygienist with the Public Health Service, to locate the source of the problem and determine if the tap water was safe to drink. In September of 1987, Mr. Graf opined that the color, turbidity and iron content of the water made it unacceptable as potable water. Dissatisfied with the steps taken by the Kansas City Water Department and the building manager, Mr. Dillon wrote to John Platt, Regional Administrator, GSA for assistance in solving the problem. In the fall of 1987, the water problems spread to the nine higher floors occupied by DOL in the Federal Building. By October of 1987, all the floors occupied by DOL were being furnished bottled water.

At a September 1987, quarterly labor relations committee meeting, Union and Management officials discussed the water problem. Management agreed to share all water test results and correspondence with the Union. Pursuant to the agreement Management sent the Union a memorandum in October 1987, which informed the Union that in an attempt to correct the original problem, a sealant had been sprayed on the hot water tanks which created a new odor problem with the water.

The water problem was again discussed at a quarterly labor relations meeting held in February 1988. The Union expressed satisfaction with management's attempts to correct the water problem. The Union also indicated that it wanted Management to furnish the Union with 30 days prior notice of any intention to discontinue the use of bottled water.

2/ According to Mr. Roger Jackson, vice-president of the Union and Mr. Michael Harcourt, President of the Union, it was because of their complaints to management that Respondent followed their suggestion that bottled water be installed in the building. Respondent acknowledges that complaints were made about the water by the Union, but claims that such complaints occurred about the time that management had already made the decision to install bottled water.

At the conclusion of the meeting, according to management witnesses, management understood that an agreement had been reached in which the Union would be provided 30 days prior notice of any intention to remove the bottled water, and that this agreement relieved Respondent of any further obligation to bargain over any future decision to remove the bottled water from the buildings. Management was never specifically told why the Union wanted the notice, but speculated that it was to conduct a poll of the Union membership to ascertain if they wanted to pay for the water themselves at the termination of the 30 days. According to the testimony of the Union witnesses, the 30 day notice was requested so that the Union would have adequate time to initiate bargaining. They denied that an agreement had been reached wherein the Union had waived its right to bargain over any future discontinuance of the water coolers.

At the May 2-3, 1988 quarterly meeting, management reminded the Union that as soon as the plumbing problems were corrected, with little likelihood of recurrence, the bottled water would be discontinued following the 30 day notification previously agreed to at the February 1988 meeting.

In September 1988, two separate tests were run on the tap water at the Federal Building by General Testing Laboratories, Inc., and Mr. Henry Kravitz, a senior industrial hygienist. Both test results found the water potable and well within EPA drinking standards. Following the receipt of the test results, Mr. Dillon determined that the water in the building was safe and that it would be improper to continue providing bottled water under a number of existing Comptroller General Decisions which prohibited an agency from supplying bottled water to employees, when the building wherein they are employed already supplies potable water.

At a meeting on October 11, 1988, management notified the Union that since the tap water had stabilized and recent tests indicated that the water was safe, it intended to discontinue the bottled water. Management provided the Union with the 30 day notice agreed upon in February of 1988. Messrs. Harcourt and Jackson were present at the meeting on behalf of the Union. Messrs. Wischropp, Dillon and Garcia represented management at the meeting. According to the testimony of all three management witnesses and Mr. Garcia's notes from the meeting, the Union did not indicate that it wanted to bargain over the removal of the water at this meeting. The Union witnesses testified that they did indicate that they wanted to bargain at the meeting.

On October 14, 1988, Mr. Dillon sent a memorandum to the Union confirming that 30 days notice of management's intention to discontinue the bottled water had been given at the October 11, 1988, meeting. The memorandum referenced the 30 days notice agreement which had been arrived at in February of 1988.

On October 18, 1988, the Union sent a letter requesting bargaining over the substance, impact, and the manner of implementation of the discontinuance of the bottled water. Management was surprised to receive the request to bargain because it thought that there was an agreement that as long as the 30 day notice was given, there would be no further bargaining on the subject. Mr. Dillon sent a memorandum to the Union on November 2, 1988, in which he agreed to a meeting with the Union to discuss and resolve its concerns regarding discontinuance of the bottled water. A meeting was held on November 29, 1988, at which the Union presented four written proposals.3/ The proposals provided for the

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3/ NCFLL PROPOSALS FOR CHANGE IN BOTTLED WATER SUPPLY 911 WALNUT

1. The Department will continue to provide and bear the full cost of the bottled drinking water and dispensers currently being provided at the 911 Walnut Street Federal Building until March 1, 1989.

2. Prior to March 1, 1989, employees on each floor of the 911 Building will be consulted in all employee meetings on their willingness to pay part of the cost of supplying the bottled water.

3. After March 1, 1989, for any floor in the 911 Building on which the employees are not willing to bear part of the cost, the Department will discontinue providing bottled drinking water for that floor.

4. After March 1, 1989, for any floor where employees are willing to bear some of the cost, the Department will continue to provide the bottled water and dispensers. The Department will pay the full monthly cost of the dispensers and 50 percent of the cost of the bottled water while the employees on these floors will reimburse the Department for 50 percent of the cost of the bottled water.

(footnote continued)

Department to pay for 100 percent of the cost of the bottled water and dispensers until March 1, 1989, and thereafter, for the Department to pay for the full cost of the dispenser and 50 percent of the expense of the bottled water on the floors in which employees were willing to bear some cost. Mr. Dillon explained that the proposals were unacceptable because under a line of Comptroller General decisions, it would be illegal for management to continue bearing any expense for the bottled water. Management advised the Union that it was not obligated to negotiate over the substance of the decision to remove the water since provision for duplicate services would be illegal, and there is no duty to bargain over illegal practices. Management did, however, come back with a counter-proposal addressing impact and implementation.

A further meeting was held on December 6, 1988. Management provided the Union with a formal response to its four proposals and a counter-proposal. The counter-proposal reiterated management's position that the decision to discontinue the bottled water was non-negotiable, and explained that for this reason, the Union's proposal was inappropriate. The counter-proposal addressed the issue of impact and implementation, and offered to extend the water for an additional month until December 31, 1988, and to take prompt corrective action should problems reoccur. The Union rejected the counter-proposal. All of the Union's proposals required management to share the cost of the bottled water indefinitely. The Union indicated an interest in contacting a mediator and management agreed to meet with a mediator.

The Union initiated contact with a mediator and a meeting was scheduled for a Friday. Mr. Dillon could not

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3/ (footnote continued)

5. For any floor where bottled water is discontinued, the Department will monitor the quality of the water supply on a continuous basis. In case of any observable deterioration in water quality appropriate professional evaluation of the status of the water supply will be made. This will include water sampling and analysis for the affected floor. If there are any detected health hazards or the apparent quality of the water is below standards, then appropriate corrective action will be taken by the Department. This will include again providing bottled drinking water if other corrective actions fail to resolve the deficiency.

make the Friday meeting but offered to meet with the Union and mediator the following Monday. The Union indicated that it was unavailable to meet for the remainder of December and indicated it would have to wait until after the first of the year. At the final meeting with the Union to discuss proposals and counter proposals, management notified the Union that although it would be glad to meet with a mediator after the first of the year, the water would be terminated on December 31, 1988, because management could no longer justify paying for duplicative services. The Union disputes the testimony of Management witnesses to the effect that it was notified in December by Messrs. Garcia and Wischropp that the water would be discontinued on December 31, 1988.

The bottled water was discontinued on December 31, 1988. Since such time, there has not been any significant problem with the safety or the availability of the water supply.

Discussion and Conclusions

The General Counsel takes the position that the availability of bottled water is a "condition of employment." In reaching this conclusion the General Counsel relies on the Authority's decision in Antilles Consolidated Education Association and Consolidated School System, 22 FLRA No. 23, wherein the Authority set forth the criteria to be applied in determining whether a matter constitutes a condition of employment.

Further, according to the General Counsel, once a condition of employment has been established for the employees of a bargaining unit through either past practice or agreement of the parties, such condition of employment may not be changed without bargaining thereon. In this latter connection the General Counsel would find that the condition of employment, i.e. availability of bottled water, became established by past practice. In support of this conclusion the General Counsel points to the length of time the bottled water had been available and the fact that all management representatives were aware of its availability.

Having established that the bottled water was a condition of employment of Respondent's employees it is the General Counsel's position that when Respondent discontinued the bottled water prior to completion of bargaining thereon it violated Sections 7116(a)(1) and (5) of the Statute.

Finally, the General Counsel would find that the Comptroller General's decisions dealing with the availability

of bottled water, which Respondent relies on in support of its position that it is illegal to supply bottled water when potable water is supplied to the building by other means, do not necessarily make it illegal to supply bottled water when city water is available. In support of this position the General Counsel points to a number of decisions wherein "the Authority has consistently viewed such appropriation provisions as affording an agency the discretion to determine whether an item is a 'necessary expense'."

Respondent, on the other hand, takes the position that it was within its rights in refusing to bargain with the Union over the substance of its decision to remove the bottled water since it would have been illegal to continue supplying bottled water when potable city water became available. In support of its position in this regard Respondent relies on a number of Comptroller General decisions wherein it was held that "in the absence of a clear showing of necessity therefor from the government's standpoint, as distinguished from the needs or preferences of its officers or employees, the purchase of drinking water at government expense for use in offices is not authorized."[4/]

Since the aforementioned decisions prohibit spending government funds for bottled water when potable water is available, it would have been illegal for Respondent to continue to make available bottled water at its expense following the results on the two water tests made in the latter part of 1988 which found the water in the building to be potable. Accordingly, Respondent takes the position it was under no obligation to bargain with the Union over the substance of its decision to terminate an unlawful practice, i.e. supplying bottled water.

Respondent further contends that to the extent it was obligated to bargain with the Union over the impact and manner of implementation of its decision, it fulfilled such obligation. Thus, it is Respondent's position that during the meetings with the Union preceding the removal of the water coolers the parties had numerous discussions with respect to the bottled water and reached an agreement that once Respondent was satisfied that the water to the building

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4/ Comptroller General Decisions B-43297, 24 Comp. Gen. 56 (1944); A-91465, 17 Comp. Gen. 698 (1938); B-58031, 25 Comp. Gen. 920 (1946), all of which rely on Comptroller Decision A-10207, 5 Comp. Gen. 53 (1925).

was potable it would give the Union 30 days notice of its intention to remove the bottled water from the premises. Further, according to Respondent it was under the impression that the notice was for purposes of polling the employees to determine whether they wanted to pay for the water themselves. Based upon this agreement calling for thirty days notice to the Union of Respondent's intention to remove the bottled water, Respondent was under the impression that I & I bargaining had been completed and was surprised when the Union subsequently submitted a number of bargaining proposals.

Following the Union's submission of bargaining proposals concerning the removal of the bottled water dispensers, Respondent bargained to impasse with the Union. Thereafter, when parties could not agree on a date to meet with the mediator Respondent subsequently removed the water coolers. According to Respondent, it has made it clear that it is prepared to continue bargaining on any I & I proposals submitted by the Union. Based upon the foregoing, Respondent takes the position that it has complied with the Statute in every respect and that the Complaint should be dismissed in its entirety.

In agreement with the General Counsel, I find that the "availability of bottled water" qualifies as "a condition of employment" and that bargaining thereon, even when water is available at the premises from other sources, is not precluded by the Comptroller General Decisions cited supra in footnote #4. In reaching these conclusions I rely upon and adopt the excellent analyses by Judge Chaitovitz and Judge Devaney wherein identical conclusions were reached.5/

However, despite the foregoing conclusions, I can not find on the basis of the facts of the instant case that Respondent violated Sections 7116(a)(1) and (5) of the

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5/ U.S. Department of Labor Washington, D.C.) and U.S. Department of Labor, Employment Standards Administration (Boston, Massachusetts), et al and American Federation of Government Employees, AFL-CIO, National Council of Field Labor Locals, Local 948, Case Nos. 1-CA-80008, 80015, 80065, OALJ-89-70 (Chaitovitz, ALJ, April 27, 1989; The Adjutant General Massachusetts National Guard (Boston, Massachusetts), and National Association of Government Employees, SEIU, AFL-CIO, Case No. 1-CA-80340. OALJ-89-116 (Devaney, ALJ, September 6, 1989.

Statute when it refused to bargain over the substance of its decision to remove the bottled water from the premises. While it is true, as pointed out by the General Counsel, that prior to changing a "condition of employment" which became established for the unit employees by virtue of agreement or past practice an Agency is under statutory obligation to bargain with a certified Union with respect to the substance and/or impact and manner of implementation, as the case may be, of the change, I cannot agree with the General Counsel's position that the availability of bottled water did in fact become a condition of employment for the unit employees by virtue of "past practice."

In support of his position that the "availability of bottled water" became a condition of employment for the unit employees working in Respondent's building by virtue of a past practice, the General Counsel points to the fact that the bottled water was available for a little over a year with the knowledge of responsible management representatives. Although the foregoing is true, it overlooks the fact that at the time Respondent installed bottled water, Respondent made it clear that the availability of such bottled water was only until the drinking water currently available to the employees was certified as potable. There was no evidence that management had any intention of retaining the bottled water as a supplement to the city water.

Thus, we have a condition of employment which was clearly of a limited nature, i.e. only until the city water was certified as potable, as opposed to a condition of employment which existed and/or was applied to unit employees for an extended period of time without any announced time limit. Clearly, the Federal Labor Relations Authority has found the latter type condition of employment to be a bargainable subject. With regard to the former, research has failed to disclose any case where an agency was required to bargain over the removal of a condition of employment which came into existance solely because of an emergency, despite the fact that the emergency might have existed for a considerable period of time and thereby required a continuance of the condition for an extended period of time.

In the instant case there was no showing that Respondent provided bottled water for any significant period of time after the city water was certified as potable. Accordingly, I find that the "availability of bottled water" did not become a condition of employment of the unit employees by virtue of past practice and therefore Respondent was under no obligation to bargain with the Union prior to discontinuing same.

In view of the above findings, it is hereby recommended that the Federal Labor Relations Authority issue the following Order dismissing the Complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the Complaint should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., November 27, 1989

BURTON S. STERNBURG
Administrative Law Judge