

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

.
DEPARTMENT OF THE AIR FORCE .
3800 ABW/AU, MAXWELL AIR .
FORCE BASE, ALABAMA .
Respondent .
and .
AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
AFL-CIO, LOCAL 997 .
Charging Party .
.

Case No. 4-CA-80762

Richard S. Jones, Esquire
For the General Counsel

Major Phillip G. Tidmore, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

The Respondent refused to negotiate over a proposal concerning employee smoking policy submitted by the Charging Party (the Union) during negotiations conducted by the parties pursuant to a provision in their collective bargaining agreement for midterm reopening. The unfair labor practice complaint on which this case is based alleges that this refusal violated sections 7116(a)(5) and (1) of the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et

seq. (the Statute).^{1/} The Respondent, although initially it denied refusing to negotiate over the Union's smoking policy proposal, defends the case solely on the basis that the Union previously waived its right to bargain over this subject.

A hearing was held on March 21, 1989, in Montgomery, Alabama. Based on the entire record and the briefs, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive representative of certain employees of the Respondent in an appropriate bargaining unit. The Respondent and the Union are parties to a collective bargaining agreement which has been in effect since 1980, remaining so during the events giving rise to this case. The agreement is silent on smoking policy.

In July 1986, the Respondent's labor relations officer, Bettye J. Johnson, sent to Union President C. E. Lanthrip, Sr., a copy of an "Anti-Smoking Action Plan" that had recently been approved by the Secretary of the Air Force. In substance, the "Plan" outlined an educational strategy to discourage smoking and to aid smokers in quitting. The only references in the "Plan" to the prospect of mandatory restrictions on smoking were a general statement that commanders were to designate smoking and nonsmoking areas when possible, a statement that existing guidelines on smoking in Air Force facilities would be rigidly enforced and modified as necessary to comply with a Department of Defense directive, and a specific prohibition of smoking during military training.^{2/} Johnson's covering letter

^{1/} Section 7116(a)(5) makes it an unfair labor practice to "refuse to consult or negotiate in good faith with a labor organization as required by this chapter." Section 7116(a)(1), involved here only derivatively, makes it an unfair labor practice to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." The employee right implicated here is the right to engage in collective bargaining, guaranteed in section 7102.

^{2/} Presumably, the smoking prohibitions during military training did not have any foreseeable impact on bargaining unit employees.

stated that the target date for "total compliance" with the plan was September 15, 1986.

The Union did not react to the implementation of the plan until November 1986, when, having received complaints from employees concerning the ban of smoking in certain areas, it requested negotiations on smoking policy. The Respondent rejected this request as untimely and the Union then let the matter rest.

In November 1987, pursuant to a midterm reopener provision of the collective bargaining agreement, the Respondent gave timely notice of intent to reopen the agreement for modification. The parties agreed on ground rules and began substantive negotiations in April 1988. The Union submitted a written proposal on smoking policy. Management, through Labor Relations Officer Johnson, declined to bargain over the proposal, taking the position that the Union's failure to make a timely request to negotiate over this subject in 1986 constituted a waiver of its right to negotiate over it until the expiration of the collective bargaining agreement.

Discussion and Conclusions

The Respondent concedes that but for the asserted waiver by the Union, it would be obligated to bargain over the Union's proposal. Waiver being the sole issue, I find that it has not been established and that the Respondent was obligated to negotiate.

It appears to be the Respondent's theory that the events of 1986 were the legal equivalent of contract negotiations over the subject of smoking policy (Resp. Br. at 3). However, no smoking policy negotiations, whether they be characterized as contract negotiations, midterm negotiations, or ad hoc negotiations, occurred. Assuming that the Union waived its right to bargain over the "Anti-Smoking Action Plan" that the Respondent announced and implemented in 1986 (a question which is not before me), it does not follow that the Union forfeited its right subsequently to make new proposals on the same subject.

The Respondent seems to concede that the effect of the Union's asserted waiver will have dissipated when the contract expires. It passes understanding, however, in what respect the obligation to bargain over this subject is linked to the contract. Neither the contract nor its bargaining history contains, as far as the record here shows, any reference to smoking policy. The Union's

proposal, although submitted during midterm bargaining specifically sanctioned by the contract's reopener provision, would have been mandatorily negotiable at any time unless there was a waiver. Internal Revenue Service, 29 FLRA 162, 165-66 (1987). The Union may have chosen not to seek negotiations in 1986 in immediate response to the "Plan". But nothing in its conduct evinced an intention to waive its bargaining rights during the contract term, any more than an intention to waive its right to bargain over smoking policy for all time.^{3/} There was no waiver, and the Respondent, having been obligated to bargain, violated sections 7116(a)(5) and (1) by refusing to do so. Accordingly, I recommend the following Order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Department of the Air Force, 3800 ABW/AU, Maxwell Air Force Base, Alabama, shall:

1. Cease and desist from:

(a) Refusing to bargain with the American Federation of Government Employees, AFL-CIO, Local 997, the exclusive representative of its employees, concerning smoking policy.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of 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) Upon request, bargain with the American Federation of Government Employees, AFL-CIO, Local 997, concerning smoking policy.

^{3/} Since an effective waiver of such a right must be clear and unmistakable (U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 31 FLRA 1231, 1236 (1988)), it is manifestly the kind of waiver that must be intentional. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 408 (1983).

(b) Post at Maxwell Air Force Base, 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 insure 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 IV, Federal Labor Relations Authority, 1371 Peachtree St., N.E., Suite 736, Atlanta, GA 30367 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., November 22, 1989



JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with the American Federation of Government Employees, AFL-CIO, Local 997, the exclusive representative of its employees, concerning smoking policy.

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

WE WILL, upon request, bargain with the American Federation of Government Employees, AFL-CIO, Local 997, concerning smoking policy.

(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 IV, whose address is: 1371 Peachtree St., N.E., Suite 736, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.