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

DEPARTMENT OF THE ARMY, U.S. ARMY FINANCE AND ACCOUNTING CENTER, INDIANAPOLIS, INDIANA Respondent	
and	Case No. 5-CA-80403
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1411, AFL-CIO Charging Party	

John F. Gallagher, Esquire
For the General Counsel

Michael C. Barry, Esquire
and
Mr. William B. Shultz
For the Respondent

Mr. Cornell Burris
For the Charging Party

Before: JESSE ETELSON
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. § 7101, et seq., (the Statute).

The issue presented for decision is whether the Charging Party (the Union) partially waived its right under the Statute to designate its representatives for collective bargaining, by subjecting the number of its representatives to a contractual limitation.

The complaint alleges that the Respondent unlawfully refused to bargain with the Union by balking at the number of the Union's designated representatives for the scheduled negotiations. The Respondent admits that it insisted, as a condition to entering into negotiations, that the Union reduce the size of its negotiating team, but contends that it was within its rights to impose such a condition because the parties had agreed to the size limitation on which it was insisting.

A hearing was held on October 5, 1988, in Indianapolis, Indiana. 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, and from my evaluation of the evidence, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

The Respondent and the Union have a collective-bargaining relationship, subject to the rights and duties provided under the Statute, and are parties to a master labor agreement that contains the following relevant provision:

> ARTICLE XXXVII - CONSULTATION AND BARGAINING
>
> * * * *
>
> Section 4. If the Union requests bargaining under Section 3, the ground rules for negotiations will be as follows:
>
> * * * *
>
> c. . . . The number of union representatives will not exceed the number of management representatives.

It is undisputed that the negotiations giving rise to this case fall "under Section 3" as referred to in the quoted language above, and that they involved a subject over which the Respondent was obligated to bargain with the Union.

Problems arose in 1987, prior to the negotiations at issue here, over the application of the "will not exceed" provision (Article XXXVII, Section 4c), when Respondent's labor relations representative William Shultz showed up as management's sole representative for certain negotiations. Union President Cornell Burris wanted the Union to have a negotiating "team" of at least two, because one negotiator did not constitute a team. Shultz, on the other hand, was expressly concerned with the number of Union representatives who would be bargaining on official time.1/ At a certain point later in 1987, the parties resolved a whole package of disputes, including some unfair labor practice charges, by entering into a settlement which included the following provision addressing the question of negotiating "teams":

> [T]he Parties agree that Article XXXVII, Section 4c, shall be interpreted that the Union shall be permitted to have at least two representatives on official time during mid-term and interim bargaining sessions, and shall be allowed additional representatives on official time equal to the number of Employer representatives at such sessions.

After the parties thought they had finally disposed of the problem, the instant dispute arose. On three different occasions, the Union showed up for negotiations with representatives who were employees on official time, equal to the number of management representatives, plus a non-employee representative.2/ Shultz, as management's spokesman, told the Union team on each occasion that it had one too many members, and that he would negotiate as soon as the number was reduced.

1/ These characterizations of the respectively stated positions are based on a composite of the testimony of Shultz and General Counsel's witness, James Lowe. In this and in most other respects, their testimony was not mutually inconsistent. Union President Burris, however, credibly testified that on at least one occasion Shultz refused to negotiate with a Union "team" of three, even when only one was on official time, and that this incident led to an unfair practice charge and, ultimately, to the settlement described below.

Transcript references to "Schultz" should be "Shultz."

2/ In none of the incidents at issue did that part of the settlement provision giving the Union a minimum negotiating team of two come into play.

Discussion and Conclusions

The parties agree that the issue is one of waiver, and that any waiver by the Union of a statutory right must, to be effective, be clear and unmistakable. The crucial predicate for a proper analysis of the case, however, is an accurate identification of the statutory right that may have been waived, and of the manner by which a waiver may have been effected.

This is not a case where a party which has refused to bargain contends that the party which demands bargaining has waived its right to bargain. For here, the putative waiver goes only to the Union's right to designate its own representatives for dealing with management, which right, it may be assumed for the purpose of this discussion, normally includes the right to determine the number of its representatives. See American Federation of Government Employees, Local 1738, AFL-CIO, 29 FLRA 178, 188 (1987); Department of Transportation, Federal Aviation Administration, San Diego, California, 15 FLRA 407 (1984).3/

As far as the effectuation of the asserted waiver is concerned, there is no doubt that the basis for the assertion is Article XXXVII, Section 4c, the contractual provision that limits the number of union representatives to the number of management representatives. The question that remains in defining the issue is whether it is sufficient for the Respondent to show that the Union has clearly and unmistakably substituted a contractual provision for its statutory right, or whether, in order to prevail, the Respondent must show that the clear and unmistakable intention of the contractual arrangements was to limit the Union to the number of representatives management brought to the negotiating sessions.

I believe that under either theory, the Union has waived its statutory right, but that the first, the "contractual substitute" theory as described above, is the appropriate

---

3/ As the Respondent concedes that the Union had a statutory right (subject to waiver) to determine how many representatives it wished to designate, it is unnecessary here to explore the limitations on that statutory right, that is, whether the Respondent could have challenged the size of the Union's negotiating team as being unwieldy.

one. A similar situation was encountered in Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 22 FLRA 91 (1986) (hereinafter "SSA"). There, management refused to honor the Union's designation of its alternate local representative to deal with it, relying on a contractual provision which arguably committed the Union to use only its regular local representative whenever he was in the office. Administrative Law Judge Oliver found that, although the union had a statutory right to designate its own representatives, the parties had provided by contract for a formalized bargaining relationship, and that the appropriate avenue for the resolution of a question of interpretation of the formalized, contractual bargaining relationship was through the parties' mutually agreed upon grievance and arbitration procedures rather than through the unfair labor practice procedures. Id. at 113-114.

I find Judge Oliver's approach, properly understood, to be persuasive and applicable to this case.4/ I do not read his SSA opinion as sanctioning an open-ended opportunity for parties to avoid statutory duties by relying on a contractual provision that arguably absolves those duties. Such a reading would subvert the well established principle that the waiver of a statutory right (the obverse of the statutory duty involved) must be clear and unmistakable. Rather, as illustrated by the instant, case SSA recognizes that a party (here, the Union) may choose to substitute a formalized structure for bargaining in place of its prerogative to designate bargaining representatives freely. See American Federation of Government Employees, AFL-CIO, 4 FLRA 272, 274 (1980), reaffirmed in Commander, Carswell Air Force Base, Texas, 31 FLRA 620, 627 (1988). A determination that such a choice has been made must be consistent with the "clear and unmistakable" principle. Thus, it is not sufficient to

---

4/ I follow this precedent out of choice, not out of a sense that it is binding. For it is not clear whether the Authority passed on the judge's relevant finding. In adopting his findings, the Authority noted "particularly the limited nature of the General Counsel's exceptions," (Id at. 91-92) which were "limited to the Judge's dismissal of one allegation in the consolidated complaint" (Id. at 91). Since the judge dismissed several allegations, the Authority's published affirmance does not reveal whether the Authority considered the allegation of refusal to honor the Union's designation on the merits or adopted the dismissal in the absence of an exception.

point to a contractual provision which might or might not represent an intention to subsume the statutory right into a formalized structure. The intention to do so must be clear and unmistakable. And here, that test is met, for the parties have unequivocally made the number of union representatives subject to a contractual limitation.5/

Using this test, it does not matter whether the provision or provisions (which the parties have agreed to substitute for the statutory right) clearly support the Respondent's interpretation as applied to the incidents in which it refused to bargain. What the Respondent must show, and has shown, is that the statutory right was, clearly and unmistakably, intended to be limited, and that the Respondent has interpreted that limitation in a manner which is "supportable"6/ or "plausible."7/ Pursuant to section 7121(a)(1) of the Statute, and the contract itself (Article XXXIX, Sections 1 and 2), the parties' differences in interpreting the contractual limitation are to be resolved through the grievance procedure.

Assuming, however, that in order to prove a waiver the Respondent must show that it clearly and unmistakably had the right to insist on the Union's reducing the number of representatives on its negotiating team, I find that it has carried that heavy burden. Article XXXVII, Section 4c, is clear on its face in limiting the total number of union representatives to the total number of management representatives. No extrinsic evidence was offered to the contrary. In fact, the Respondent presented the uncontradicted testimony of the drafter of the language in

---

5/ There is no contention that the agreed-upon provisions are merely a re-statement of the statutory provision, section 7131, authorizing official time for employee union representatives not exceeding the number of management representatives. In fact, the provision in the "settlement" agreement that authorizes a minimum of two employee representatives on official time is a distinct departure from section 7131. Article XXXVII, Section 4c, on the other hand, does not address official time at all.

6/ Marine Corps Logistics Base, Barstow, California, 33 FLRA 626, 642 (1988).

7/ Department of the Navy, United States Naval Supply Center, San Diego, California, 31 FLRA 1088, 1093-94 (1988). See also, Action, 31 FLRA 634, 639 (1988).

question. She testified that it originated in management's concern with the Union's past tendency to bring too many people to meetings and was intended to keep the meetings to a reasonable number of people.8/

Having thus waived its statutory right to that extent, the Union regained part of what it had given up when it obtained the 1987 settlement provision. By virtue of that provision, management, in effect, relinquished part of the waiver it had obtained in the contract. But, since the Union had already waived the right to bring more representatives than management did, it was not incumbent on the Respondent to show further that the 1987 settlement provision clearly and unmistakably reaffirmed the contractual waiver. I believe, rather that the General Counsel must show that the Respondent relinquished that aspect of the waiver that is crucial to this case. This the General Counsel has not done.9/

Standing alone, the relevant provision in the 1987 settlement agreement limits only the number of Union negotiators who are on official time. However, that provision is, on its face, a guide to the interpretation of Section 4c. The question, therefore, is the extent to which the "settlement" provision modifies the "will not exceed" limitation of Section 4c.

Plainly, given the extrinsic evidence on its bargaining history, the settlement provision was intended to create an exception to the "will not exceed" limitation, at least in

---

8/ This witness' name is Colleen Sontag. The transcript is hereby corrected to reflect the correct spelling of her surname.

9/ It is appropriate to analyze this problem in terms of shifting burdens only because the Union, having unequivocally waived the right at issue, no longer stood on the same legal footing it otherwise would have at the time it signed the 1987 settlement. Had Article XXXVII, Section 4c, and the relevant language in the 1987 settlement agreement been parts of the same instrument, agreed to simultaneously, one could not properly construe Section 4c in isolation, but would be required to look at the "four corners" of the instrument in order to determine whether there had been a clear and unmistakable waiver upon its execution. As it is, I have found that there was such a waiver when the contract containing Section 4c was signed. That waiver remains in effect until something terminates it.

the situation where management brought only one negotiator to the table. The problem that remains lies in the fact that the original limitation is addressed to the total number of Union negotiators, while the interpreting provision speaks only of negotiators on official time. I am not persuaded that this narrower focus translates into an intention to eliminate the general restriction on numbers. The extrinsic evidence shows only that the parties had different concerns that did not necessarily mesh but nevertheless negotiated the problematic language. The bargaining history does not warrant the conclusion that the silence of the settlement provision on the subject of the total number of Union negotiators carries with it the affirmative implication that a limitation on the number of official time negotiators was meant as a substitute for the Section 4c limitation on the total number.10/ Thus, that limitation, which I have previously construed as a clear and unmistakable waiver remained in effect.

I therefore conclude that under either theory of the Respondent's burden in proving a clear and unmistakable waiver, it has established such a waiver. That waiver provides it a valid and complete defense for its refusal to negotiate with a team of Union negotiators that outnumbered the management team. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

The complaint in this case is dismissed.

JESSE ETELSON
Administrative Law Judge

Issued, Washington, D.C., April 6, 1989

10/ In the one significant area in which the bargaining history testimony of General Counsel's witness Lowe clashed with that of Respondent's witness Shultz, Lowe claimed that Shultz told him he didn't care how many Union negotiators there were if they were not on official time. Shultz denied this. Lowe's testimony is undercut by the testimony of Union President Burris that Shultz previously had refused to bargain with Burris' negotiating team even after the team members in excess of the management team members went on "annual leave."