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

MARINE CORPS LOGISTICS BASE, BARSTOW, CALIFORNIA Respondent	
and	Case No. 8-CA-80082
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1482, AFL-CIO Charging Party	

Jonathan S. Levine, Esquire
For the General Counsel

William M. Petty, Esquire
For the Respondent

Mr. Dale E. Boyce
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).

Pursuant to a charge filed by American Federation of Government Employees, Local 1482, AFL-CIO, (the Union) a Complaint and Notice of Hearing was issued on February 29, 1988 by the Regional Director for Region VIII, Federal Labor Relations Authority. The Complaint alleges that the Marine Corps Logistics Base, Barstow, California (the Respondent) violated section 7116(a)(1) and (5) of the Statute (5 U.S.C. 7116(a)(1) and (5)) by unilaterally changing certain working

conditions of unit employees without notifying the Union and affording it the opportunity to bargain on the impact and implementation of the alleged changes.1/ The Respondent admits the jurisdictional allegations of the complaint and does not contest either the Union's status as bargaining representative or that the Respondent made changes without bargaining with the Union, but it denies that it committed any unfair labor practices.

A hearing was held on May 25, 1988, in Barstow, California. 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 recommendation.

Findings of Fact

The facts are not in dispute. The Union is a constituent body of the American Federation of Government Employees (AFGE), the certified representative of a national consolidated bargaining unit of employees of the United States Marine Corps. The Union, by established practice, acts as the agent for AFGE for purposes of local bargaining involving the unit employees employed at the Respondent Logistics Base. Local bargaining, however, is subject to the provisions of the Master Labor Agreement (MLA) between the United States Marine Corps and AFGE.

The MLA that was in effect at the time of the events alleged as unfair labor practices contains several provisions on which the Respondent relies in part in disputing its bargaining obligation concerning the changes it implemented. First, the Preamble to the MLA contains a form of "zipper" clause stating that the agreement as executed, together with any later amendments, constitutes "a total agreement," and clauses to the effect that the agreement prescribes certain rights and obligations of the parties and establishes procedures "that meet the special requirements and needs"

1/ Additional allegations of unfair labor practices in violation of section 7116(a)(8) of the Statute were withdrawn at the hearing.

of the Marine Corps. The MLA concludes with an article entitled "Duration," in which the term of the agreement is set at three years, subject to reopening for modifications only by mutual consent. Article 31 of the MLA deals with the performance appraisal system. It provides, insofar as it is relevant here, that (1) management will establish "performance elements" and "performance standards"; (2) employees will be given the opportunity to participate in the establishment of performance standards; (3) employees will given adequate notice of the applicable performance elements and standards according to which they will be appraised; (4) the elements and standards will be consistent with the employee's duties and responsibilities; (5) the performance standards will be "fair and reasonable"; and (6) "employees may advise management at any time they believe performance standards should be changed."2/

On July 31, 1987, supervisors of unit employees in the Respondent's machine shop called the machine shop employees to a meeting.3/ The meeting consisted of a discussion of management's proposed modifications to the performance appraisal system and to the Respondent's procedures for reporting and recording individual employee production output. After the date of this meeting, machine shop foreman Warnock held individual meetings with each of the employees during which he solicited their input regarding the proposed new performance standards.

On August 7, the president of the Union submitted to the Respondent a written demand to bargain over the new performance standards and individual production output records. The Respondent answered with a letter stating that it had no obligation to bargain with the Union over these matters, and that it was complying with the MLA provisions for employee participation in establishing the new performance standards. In November, the Respondent implemented changes that reflected, entirely or for the most part, the proposed revisions discussed at the July 31 meeting.

2/ I have also considered other MLA provisions to which the Respondent refers in its brief. As is the case with the "past practices" provision addressed in n.9, below, I am able to find no arguable relevance of those provisions to the issues presented in this case.

3/ All further dates are in 1987.

The changes in the performance appraisal system consisted of the addition of one "performance element," the raising of timeliness and quality standards for achieving a given rating (such as "outstanding" or "marginal"), for each performance element, and the addition of new descriptive narratives for each rating.4/ The changes in the individual production reporting system are interrelated with the performance appraisal system, especially with regard to timeliness. Thus, as machine shop foreman Provart testified, the new system became a tool to evaluate employees.5/ Specifically, the new production "tracking system" centered on information not previously included on the routing tags that accompanied each item on which machine shop employees worked. First the foreman would, under the new system, write a time estimate for the particular job on the back of the routing tag and would note the date and time he assigned the job to the employee. The employee would enter his time of completion on the tag and enter the color of the tag on a separate form. An employee's "percentage of effectiveness" for each job, to be used as a factor in his performance appraisal, would be calculated by comparing the actual time spent with the foreman's estimate. Finally, the Respondent incorporated into the system for tracking individual production an emergency/service work authorization," previously used for maintenance employees, to account for time spent and work accomplished by machine shop employees in other parts of the facility.

4/ I deem this generalized description of the above changes sufficient because there is no contention that they are de minimis and no issue as to the Respondent's obligation to bargain over their impact and implementation except for the defenses, discussed below, which are based on the MLA.

5/ Mr. Provart testified that although the new "tracking system" was not used as an evaluation tool before November 1987, it had been implemented "to a certain degree" earlier in 1987. The Respondent, however, admits that the changes involved here were implemented in November. Provart also gave a strong indication that this was the first time the Respondent tracked the individual production of these employees in this manner (Tr. 176). I was appreciative of Mr. Provart in another respect. He livened the proceedings by his answer to the first question asked him by Counsel for the General Counsel on cross-examination:

> Q. It's Mr. Provart?
> A. Close enough. I've been called worse.

As a result of a grievance pursued by several employees, the Respondent rescinded the November changes in the performance appraisal system and went back through the process of meeting with employees for their participation in the development of the changes. The new production tracking system was also put "in a hold pattern" and was included in the agenda for these meetings. The president of the Union was invited to, and did, attend. Apparently, this was for the purpose, principally, of satisfying the Respondent's obligations in settlement of the "formal discussion" allegations of the complaint that were later withdrawn. After these meetings were completed, and after the complaint in this case issued, the changes were implemented again, substantially as before. The second implementation is not under attack here, but the circumstances surrounding it are cited by the Respondent in mitigation of any affirmative remedy that might otherwise be appropriate, should a violation be found.

Discussion and Conclusions

A. The Job Performance Appraisal System

The Respondent concedes in effect that the impact and implementation of the new appraisal system would be mandatory subjects of bargaining but for the effect of certain provisions in the Master Labor Agreement, which, it contends, relieved it of this bargaining obligation.

First, the Respondent argues that it satisfied any bargaining obligation with regard to modifications of the performance appraisal system by negotiating and following those MLA provisions which call for advance notice to employees and their participation in the establishment of the performance standards.6/ As the General Counsel points out, however, the Authority definitively rejected a similar contention in Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, and Newark Air Force Station, Newark, Ohio, 21 FLRA 609 (1986) (Wright-Patterson), where the contractual provisions relied on were to the same effect as the provisions on which the Respondent relies. Thus, Wright-Patterson holds that

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6/ Employees apparently have no role, by contractual right, in the establishment of performance elements. It is not clear whether they have a contractual right to participate in the modification of either performance elements or performance standards.

provisions recognizing management's right to revise performance appraisal systems and giving employees the right to participate in that decision-making process do not relieve the employer agency of its obligation to bargain over the impact and implementation of the revisions.

In Wright-Patterson, the Authority was responding specifically to a finding by the administrative law judge that the contractual provisions constituted a clear and unmistakable waiver of the Union's right to bargain. Here, the Respondent contends that the provisions concerning the performance appraisal system do not constitute a waiver, but, rather, an "accord and satisfaction" by which the parties agreed on the extent and the limit of management's obligation to consult with anyone before modifying the appraisal system. This rephrasing of the defense does not, however, permit this case to be distinguished from Wright-Patterson. As the Authority said there, an agency is bound by the statutory obligation to bargain over the impact and implementation of changes made pursuant to a reserved management right, absent a waiver by the union of its right to bargain. The so-called "accord and satisfaction" would operate, in legal effect, no differently from a waiver. Both presume that the Union has given up its right to bargain over impact and implementation in return for, as argued here and in Wright-Patterson, a contractual right of employee participation in the revision process. However rationalized or articulated, this contention cannot survive the holding in Wright-Patterson that the union did not, by equivalent contractual language, give up its statutory right.7/

7/ What the Authority concluded in Wright-Patterson, in this connection, was essentially that the provisions setting forth management rights and obligations in making decisions to revise the appraisal system did not affect the agency's obligation to bargain over the impact and implementation of the revisions decided upon. Other cases cited by the Respondent for the proposition that agencies do not violate the statute when they unilaterally implement personnel actions by following contract procedures are inapplicable. For example, in Naval Amphibious Base, Little Creek, Norfolk, Virginia, 9 FLRA 774 (1982), the contractual procedures followed were the very procedures on which the parties had agreed as a result of their prior bargaining on impact and implementation. Here, no such bargaining occurred.

The Respondent also contends that other provisions in the MLA constitute express waivers of the Union's bargaining rights.8/ These provisions, including the "zipper clause," limit the Union's right to reopen subjects covered by the agreement. See Missouri National Guard, Office of the Adjutant General, Jefferson City, Missouri, 31 FLRA 1244 (1988). However, this type of waiver is far different from a waiver of the applicable right to bargain concerning unilateral changes in existing conditions of employment. See generally Suffolk Child Development Center, Inc., 277 NLRB 1345, 1350-1 (1985). None of the many provisions cited by the Respondent either express or imply the type of waiver which would excuse bargaining over the impact and implementation of such changes.9/

B. The Production Tracking System

The Respondent's position regarding its admitted refusal to bargain over the impact and implementation of the new tracking system is simply that its impact on conditions of employment was insufficient to trigger a duty to bargain -- that its impact was de minimis. This contention must be rejected.

The appropriate inquiry involves, principally, the reasonably foreseeable effect of the change rather than the actual effect. U.S. Customs Service (Washington, D.C.) and U.S. Customs Service, Northeast Region (Boston, Massachusetts), 29 FLRA 891, 899 (1987). At the time the new system was announced and at the time it was implemented, its potential impact on the manner in which employees would be evaluated under the simultaneously-implemented performance appraisal system could hardly be overestimated. That the two systems being revised were to operate in tandem is beyond question. Therefore, it is not appropriate to view the new

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8/ Although the Respondent recites in its brief the fact that on prior occasions the Union had refrained from demanding to bargain over performance standard revisions, it does not contend that such inaction constituted a waiver. In any event, I find the meager evidence of prior acquiescence insufficient to warrant such a conclusion.

9/ One of the provisions cited maintains in effect all past practices not altered by the agreement. In light of Respondent's failure to argue that the Union's prior acquiescence in similar unilateral changes created a past practice, I am unable to follow the argument that this provision lends support to a finding of a waiver.

tracking system as simply the addition of two minor clerical duties to each employee's responsibilities in connection with each job assignment. The employees' legitimate concern was the impact and implementation of the entire package of revisions to the newly-integrated tracking and appraisal system. This package was the subject of the Union's bargaining request, and I find that the Respondent was obligated to honor that request.10/ By implementing the new package unilaterally, as far as the Union was concerned, the Respondent refused to negotiate in violation of section 7116(a)(1) and (5) of the Statute. Cf. Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475, 476 (1984) (sick leave call-in procedures); Internal Revenue Service, Washington, D.C., 4 FLRA 488, 497-9 (1980) (live case reviews and cross-checks between travel vouchers, signout sheets and time sheets).

The Remedy

The General Counsel seeks an affirmative order to the Respondent to bargain over the impact and implementation of the Respondent's unilateral changes. He does not seek a return to the status quo ante. The Respondent contends that any remedy should be limited to bargaining future changes, relying in part on the rescission of the changes as implemented in November 1987 and the participation of Union President Boyce in the process which led to reinstitution of the changes in 1988.11/

The ordinary prospective bargaining remedy for a refusal to bargain over impact and implementation is that which the General Counsel seeks -- an order to bargain over the impact and implementation, or, tracking more closely the language of sections 7106(b)(2) and (b)(3) of the Statute, to bargain over procedures and appropriate arrangements for employees adversely affected by the unilateral changes that were made. See, e.g., Customs Service, supra, 29 FLRA at 903; Environmental Protection Agency and Environmental Protection Agency Region II, 25 FLRA 787 (1987).

10/ Aside from the Union's request, the complaint alleges and the answer admits that the Respondent made its changes without first notifying the Union and affording it the opportunity to bargain on the impact and implementation of the changes.

11/ The other points raised by the Respondent with respect to the appropriate remedy appear to go only to its opposition to a status quo ante remedy, which is not now an issue.

Should this remedy be withheld because of the Union president's participation in the reinstitution of the changes that were made unilaterally and then rescinded? The record is not clear as to exactly what role Mr. Boyce played in the second round of implementing the changes, beyond his presence to settle the parties' dispute over the Respondent's "formal discussion" obligation and, perhaps, as the representative of the employees who grieved over the Respondent's alleged failure to follow contractual procedures in its original implementation of the changes. (See Tr. 132-134.) What is clear to me is that the parties did not litigate the question of whether his being invited and his participation satisfied the Respondent's obligation to bargain over the impact and implementation of the reinstituted changes. Nor was the evidence presented sufficient for me to conclude that the invitation to Boyce gave the Union the requisite opportunity to bargain over the impact and implementation of those changes. I shall therefore recommend that the normal prospective bargaining order be issued. If a dispute develops over the Respondent's compliance with that order, the Respondent should be permitted, in compliance proceedings, to offer evidence that it has already complied. With that understanding, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Marine Corps logistics Base, Barstow, California, shall:

1. Cease and desist from:

(a) Refusing to negotiate in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, concerning the procedures to be observed in implementing the decision to institute a new individual production reporting system and revise its performance appraisal system, and concerning appropriate arrangements for employees adversely affected by such changes.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, concerning the procedures to be observed in implementing, and appropriate arrangements for employees adversely affected by, the decision to institute a new individual production reporting system and revise its performance appraisal system.

(b) Post at its Marine Corps Logistics Base, Barstow, California, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, 350 South Figueroa Street, Third Floor, Los Angeles, California 90071, 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 8, 1988

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to negotiate in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, concerning the procedures to be observed in implementing, and appropriate arrangements for employees adversely affected by, the decision to institute a new individual production reporting system and revise its performance appraisal system.

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

WE WILL, upon request, negotiate in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, concerning the procedures to be observed in implementing, and appropriate arrangements for employees adversely affected by, the decision to institute a new individual production reporting system and revise its performance appraisal system.

_____
(Agency)

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, Third Floor, Los Angeles, California 90071, and whose telephone number is: (213) 894-3805.