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

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Respondent	
and	Case No. 3-CA-90013
NATIONAL COUNCIL OF EEOC LOCALS #216, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

LaVerne G. Rens
Counsel for the Respondent

Edward A. Watkins
Representative for the Charging Party

Saul Y. Schwartz
Bruce D. Rosenstein
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent (EEOC or Agency) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing revised personnel ceilings for its headquarters and field office locations on or about August 1, 1988 without affording the Charging Party (Union) reasonable notice and an opportunity to negotiate over the impact and procedures for implementation of the change.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

The issue posed is whether Respondent's implementation of the revised personnel ceilings constituted a greater than de minimis change in the working conditions of unit employees so as to trigger an obligation to bargain. I conclude that it did not.

A hearing was held in Washington, D.C. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material, the Union has been recognized as the exclusive representative of an appropriate unit of Respondent's employees. Between 2500 and 2700 employees are in the bargaining unit. These employees work at Respondent's headquarters office and at approximately 49 field office locations.

In June and July of 1988, it became apparent to Agency management officials that there would be a budgetary crisis at the Agency in Fiscal Year 1989 (FY 1989) if cost-saving measures were not undertaken. Various cost-saving measures, including a leave without pay plan, were discussed with the Union.

During the latter part of July 1988 Respondent decided to reduce the personnel ceilings for its headquarters and field office locations as a longterm cost-saving measure due to the budget constraints imposed upon the Agency. The decision was made to reduce the number of full-time employees over a period of time through normal attrition. The Agency determined that this action would have no impact on the conditions of employment of unit employees and, therefore, that formal notice to the Union was not necessary. Accordingly, the Union was not afforded reasonable notice and an opportunity to bargain.

On July 28, 1988, Patricia Matthews, Director of the Agency's Labor Management Relations Division, informally advised Union officials Edward A. Watkins and Levi Morrow[1/], by means of as telephone conference call, that the Agency was lowering its personnel ceiling. She also sent them copies of a draft memorandum from the Chairman on August 1, 1988 which announced the revised personnel ceilings. The memorandum stated, in part, as follows:

> Our FY 89 budget will allow us to support an FTE [Full Time Equivalency] level of approximately 2900 employees, as compared to 3198 requested for FY 88. This reduction can be accomplished without resort to a RIF [Reduction in Force] or furlough if we plan ahead and start now to reduce our staffing levels through attrition.

During the telephone conference, Union President Watkins requested impact and implementation negotiations. He also requested that implementation be held in abeyance until negotiations were completed.

Watkins and Morrow foresaw a RIF or reorganization as possibilities if the personnel ceilings could not be reduced by attrition or other means. The Agency had not informed them of any other way it intended to reduce personnel ceilings, and they had not received absolute assurance that there would be no RIF. They were also concerned about the effect on performance appraisals if employees were lost and the remaining employees had to assume their case loads. Watkins and Morrow decided to request negotiations and seek information about the reduced ceiling, including current and anticipated staffing levels. Watkins did so by an August 2, 1988 letter to Matthews.

By reply dated August 5, 1988, Ms. Matthews referred to the August 1 memorandum and stated, in part, "That memorandum clearly stated the Agency would reduce its staffing levels through attrition. Management has made it abundantly clear, on a number of occasions, that it does not intend to conduct a reduction-in-force." Matthews also

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1/ Mr. Edward A. Watkins is President of the National Council of EEOC Locals, AFL-CIO, and Mr. Levi Morrow is Treasurer and Chief Negotiator for the National Council.

stated that the personnel ceilings did not affect individual General Performance Appraisal and Recognition (GPAR) standards. Matthews did not supply the information requested.

On August 8, 1988, Respondent's Directors of its Field Management Programs issued a memorandum to District Directors which disclosed that 250 staff positions were to be reduced. The memorandum stated, in pertinent part, as follows:

> The purpose of identifying these ceiling reductions now is to avoid more serious corrective measures in the future. At this point, we do not anticipate the need for a reduction-in-force.

On August 5, 1988 Ms. Matthews notified Union President Watkins that the Office of Personnel Management (OPM) had approved the Agency's request for a voluntary early retirement (early-out) authorization. At about the same time, eligible employees began receiving notices of the early-out authorization. Some complained to Mr. Watkins that they felt they were being pressured into retiring by being singled out for the notice. The Union speculated that OPM's approval of the early-out option was linked to a possible reduction in force or reorganization and that the Agency must have sought such approval as part of its decision to reduce personnel ceilings.

The early-out retirement program was not part of the implementation of the decision to reduce personnel ceilings. It was a separate cost-saving measure initiated by the Agency to manage its budgetary constraints, as was an earlier proposal made to the Union in June-July 1988 to offer a special leave without pay program to employees (Tr. 80-81). The decision to reduce personnel ceilings was another cost-saving measure. (Tr. 113, 108-109).2/

By letter dated August 11, 1988, Union President Watkins, in further support of his request for information and negotiations, outlined the Union concerns allegedly linked to the reduction in personnel ceilings. First, he reiterated the Union's concern over a potential reduction

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2/ I have credited the testimony of Patricia C. Matthews in this respect.

in force. Second, Watkins noted that on August 4, 1988, the Chairman had sent to all office directors OPM's approval of the early-out program, and had identified eligible bargaining unit employees and addressed individual letters to them. Third, he stated that staffing patterns directly influence the performance appraisals of individual bargaining unit employees under the GPAR system, such as in the category of meeting office goals for case processing time. Respondent did not reply to this letter.

By memorandum dated August 22, 1988, the Director, Office of Program Operations, informed Respondent's District Directors that he had "been directed to reduce field office personnel ceilings by a total of 318 positions to avoid more serious corrective measures in the future. . . . We do not anticipate the need for a reduction in force." Thereafter, it appears that Respondent reduced the personnel ceilings by a total of over 400 positions. The Union was never informed concerning how many of the positions to be reduced were bargaining unit positions or the circumstances and rationale behind the increase in the ceiling reduction levels.3/

By letter dated October 24, 1988, Watkins reiterated his request to negotiate over the impact and implementation of the revised personnel ceilings. No response was received from Respondent. No impact and implementation bargaining ever took place.

Had there been negotiations on the impact and implementation of the reduction in personnel ceilings, the Union desired to negotiate (1) procedures for providing employees pertinent information about the early-out retirement program, (2) options in case management did not meet the established personnel ceilings, such as minimizing reductions in force, (3) procedures for details or shifting employees around, and (4) the effect on performance evaluations of a shifting workload.

The reduction in personnel ceilings for FY 89 did not cause offices to automatically have fewer employees. It simply meant that some offices had averages above their

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3/ The complaint does not allege a failure to furnish data under section 7114(b)(4) of the Statute.

allocated ceilings. As noted, the decision was reached that the new ceilings would be accomplished over an extended period of time through normal attrition.

There has been no reduction in force or furlough of employees to date as a result of the FY 89 reduction in personnel ceilings. Article 26 of the parties' collective bargaining agreement establishes procedures for the implementation of a reduction in force and specifies actions to be taken to assist employees who are impacted as a consequence. There is no evidence that downgradings, details, shifting of personnel, or other adverse actions have occurred as a result of the ceiling reduction (Tr. 90-91, 101-102).4/ Article 16.00 of the parties' collective bargaining agreement contains procedures to be followed concerning details and individual and mass reassignments. Article 26 also sets out procedures to be followed when there is an adjustment of the work force by reorganization, which is defined as the planned elimination, addition or redistribution of functions or duties within an organizational component.

There is no evidence that the reduction in personnel ceilings had an impact or foreseeable impact on individual bargaining unit employees' performance appraisals. As noted, the Union was concerned that if less positions were available to handle cases, employees could be required to handle an increased workload and may have difficulty meeting certain critical elements in their performance appraisals, e.g., timely case processing, achieving office goals. The Union was also concerned that if employees were unable to meet performance goals they might possibly be put on performance improvement plans.

4/ Union President Watkins testified that, subsequent to the reduction in personnel ceilings, clerical employees were shifted between different units in both the Dallas and New York offices and, with regard to investigators, "you may have someone transferred [where] they lost a body, say in the Federal Sector, . . . from the Investigative unit. . . ." With regard to clerical transfers, I credit the testimony of Jacqueline Shelton, Respondent's Director of Field Management Programs, Western Sector, that the transfers were caused by leave problems and routine turnover in the units. With regard to the investigative transfers, Watkins' testimony did not identify any actual or reasonably foreseeable transfers and is vague and speculative.

As noted, the lowering of the Agency's personnel ceilings did not mean that offices automatically lost employees. Also, the office goals and productivity expectations for FY 89 were based upon the actual staff on-board in an office. The numerical production goals set for each District Director were not transposed down to bargaining unit employees. Investigators and attorney-examiners were only responsible for those cases reasonably within their control and actually assigned for work.

There was no specific evidence that after the lowering of the personnel ceiling bargaining unit employees experienced a change in case assignments, or had larger inventories of cases, or are being held to different case processing standards than before.

The record contains some background regarding previous personnel ceiling revisions. During 1978-1979 Respondent revised its personnel ceiling downward in some offices, but increased it in others due to a reorganization and transfer of functions from the Department of Labor. At that time, the Union and Respondent negotiated over the impact and implementation of the change in personnel ceilings. An agreement was reached which addressed such issues as permitting employees in offices where the ceiling had been reduced to apply for positions in other offices where the ceiling had been increased, an exemption from the reduction for the upward mobility program and the right of employees from offices where the ceiling had been reduced to make a second request where they could apply for up to five positions in other offices. The record also reflects that approximately three or four years ago, when the Memphis and Atlanta offices were determined to be overstaffed, Respondent did implement a reduction in force.

Discussion, Conclusion, and Recommendations

Where an agency in exercising a management right under section 7106(a)(1) of the Statute changes conditions of employment of unit employees, the statutory duty to negotiate under section 7106(b)(2) and (3) comes into play if the change results in an impact upon unit employees or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 203 (1983). In order to determine whether the change in conditions of employment required bargaining, it is necessary to carefully examine the facts and circumstances, placing principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on

conditions of employment of bargaining unit employees. Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986). The appropriate inquiry involves an analysis of the reasonably foreseeable effect of the change in conditions of employment at the time the change was proposed and implemented, including temporary and transitory effects. U.S. Customs Services, (Washington D.C.) and U.S. Customs Service, Northeast Region (Boston, Massachusetts), 29 FLRA 891, 899 (1987).

As the time the change in personnel ceilings was made, Union officials foresaw a reduction in force or a reorganization if management could not accomplish the reduction in personnel ceilings by normal attrition. The Union officials also foresaw details, reassignments, and lower performance appraisals if employees were lost and remaining employees had to assume their workloads. The Union also suspected that the early-out retirement program, which was announced shortly thereafter, was related to the decision to reduce personnel ceilings.

Against this speculation concerning the possible impact of the change,5/ the record reflects that management assured the Union that the change in staffing levels would be accomplished through normal attrition, and that it did not intend to conduct a reduction in force. There is no evidence that the Agency's judgment was flawed or made in bad faith. No reductions in force or furlough have occurred, and there is no persuasive evidence that reductions in force, furloughs, details, reassignments, or changes in individual work inventories or performance appraisals were reasonably foreseeable as a result of the reduction in personnel ceilings. It is also noted that the Agency and the Union had already negotiated in their collective bargaining agreement procedures to be followed in the event of reductions

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5/ See Administrative Law Judge Francis E. Dowd's discussion in U.S. Government Printing Office, 13 FLRA 203, 224-226 (1981) concerning the General Counsel's burden of proof. Judge Dowd urged that more be required than mere argument that adverse impact "could" happen, "might" happen or is "possible" of happening. He urged that the General Counsel be required to prove "there was a reasonable likelihood of substantial impact." His preferred definition of "likelihood" suggested the "probability or an eventuality that can reasonably be expected." The Authority developed the "reasonably foreseeable" test in that case.

in force, reorganization, details, and individual or mass reassignments. Cf. Island Creek Coal Co., 289 NLRB No. 121, aff'd sub nom. United Mine Workers v. NLRB, No. 88-1669 (D.C. Cir., July 21, 1989) (Provisions on subcontracting in collective bargaining agreement relieved employer of the duty to bargain further over the terms and the manner in which subcontracting could be done including whether other options were available).

With regard to the early-out retirement program, as found above, the early-out retirement program was a separate cost-saving measure unrelated to the change in personnel ceilings. The Union received separate notification concerning the early-out program.

Section 2423.18 of the Rules and Regulations, 5 C.F.R. § 2423.18 (1989), based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." It is concluded that a preponderance of the evidence does not establish that Respondent's revised personnel ceilings had an effect or reasonably foreseeable effect on the conditions of employment of bargaining unit employees so as to give rise to an obligation to bargain. Accordingly, Respondent did not violate section 7116(a)(1) and (5) of the Statute, as alleged.

Based upon the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is DISMISSED.

Issued, Washington, D.C. November 21, 1989.

GARVIN LEE OLIVER
Administrative Law Judge