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

DEPARTMENT OF VETERANS AFFAIRS. VETERANS ADMINISTRATION MEDICAL CENTER, BOISE, IDAHO Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1273, AFL-CIO Charging Party	Case No. 9-CA-90575

R. Timothy Shiels, Esquire
For the General Counsel

William F. Helfrick, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The Respondent (Medical Center) initiated some changes in working conditions for employees represented by the Charging Party (the Union). The Union submitted proposals for the ground rules for negotiating about the changes. The Medical Center refused to bargain over the Union's ground rule proposal that its bargaining team should consist of five members, all of whom would be on official time. The Medical Center asserts that the applicable collective bargaining agreement insulates it from bargaining over this proposal.

A complaint issued by the Regional Director for Region IX of the Federal Labor Relations Authority alleges that the Medical Center, by its refusal to negotiate over the Union's proposal, is engaging in an unfair labor practice within the meaning of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (FSLMRS or the

Statute). A hearing was held in Boise, Idaho, on March 15, 1990. The parties presented evidence and filed briefs.1/

Findings of Fact

The Medical Center's facility is part of a nationwide consolidated bargaining unit of employees of the Department of Veterans Affairs (formerly Veterans Administration) represented by the American Federation of Government Employees (AFGE), the parent organization of which the Union is a local affiliate. The Veterans Administration and AFGE executed their first national collective bargaining agreement (the master agreement) in 1982, and this agreement was still in effect at the time of the hearing, having been automatically renewed under its terms. Under the heading, "Local Level Changes," the agreement provides:2/

> Proposed changes affecting personnel policies, practices or conditions of employment which are initiated by local management at a single facility will be forwarded to the designated local union official. Upon request, the parties will negotiate as appropriate. The union representatives shall receive official time for all time spent in negotiations as provided under 5 USC §7131(a) (emphasis added).3/

1/ At the hearing, I sustained an objection to a question asked by Counsel for the General Counsel on the ground that the answer called for hearsay. I am now inclined to doubt my authority to exclude evidence on hearsay grounds. See the Authority's Rules and Regulations, §2423.17. However, this exclusion does not affect the outcome of the case.

2/ A companion section of the agreement contains a similar provision for official time for "Local Bargaining on National Changes." However, as will become clear, it is the meaning of the quoted "Local Level Changes" section that is crucial here.

3/ "§ 7131. Official Time
(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes . . . during the time the employee otherwise

(footnote continued on next page)

The time came when the Medical Center initiated some local changes in working conditions. The Union sought to negotiate ground rules for the substantive bargaining over these changes. Among its ground rules proposals was one to the effect that the Union's bargaining team would consist of one chief negotiator and four other members, all of whom would be on official time. The Medical Center refused to negotiate over this proposal, and this case resulted.

Over the objection of Counsel for the General Counsel, I permitted testimony by Howard Steinwandel, who had served as chief negotiator for management in negotiating the master agreement, concerning the background of certain provisions of the agreement that are relevant or arguably relevant to the refusal to bargain at issue here. Mr. Steinwandel testified that "the intent" of those provisions which granted official time for local bargaining "as provided under 5 USC §7131(a)" was both to provide official time to as many union representatives as there were management representatives and to limit the union representatives on official time to that number. Steinwandel expressed this several times, in different ways. It does not qualify, however, as an evidentiary fact. It is conclusionary except to the extent that it reflect's Steinwandel's understanding of what management intended when it agreed to those provisions. To that extent, and to that extent only, I credit him.

I also credit Steinwandel's uncontradicted testimony that the Union had sought, unsuccessfully, to provide for additional representatives on official time. More troublesome is his further testimony that management's response was to take the position that it would give the Union "as many as provided by 7131 and no more." In considering this testimony, I place beside it the testimony of Artie Pierce, one of AFGE's negotiators of the master agreement, who swore that, on his side of the bargaining table, "we knew that under 7131(d) we had the option to enter negotiations and change the size of the bargaining unit [sic] so we felt rather comfortable without necessarily putting [the right to more members on official time] into the contract."

(footnote continued from previous page)

3/ would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes."

Evaluation of Pierce's testimony, in turn, requires reference to the pertinent language of "7131(d)" (section 7131(d) of the Statute):

> (d) Except as provided in the preceding subsections of this section--
>
> (1) any employee representing an exclusive representative . . . .
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Passing over the question of whether Pierce interpreted section 7131(d) correctly, I credit his honest belief (reflecting the Union team's understanding at the time) that the Union's failure to obtain language in the contract which granted to the Union a larger bargaining team, on official time, did not preclude later negotiations for more members on official time. Thus, while I also credit Steinwandel's testimony that management stated it would "give . . . as many as provided by 7131 and no more," I take that at no more than its literal meaning--that it was management's position that the contract would not provide for any more than section 7131(d) provided. As for Steinwandel's ability to supply a definitive explanation for the contract language granting official time "as provided under 5 USC §7131(a)", it is noteworthy that he was unable to recall whether the idea for it originated with management or the Union.

Discussion and Conclusions

> The FSLMRS requires a federal agency to negotiate in good faith with the chosen representative of employees covered by the Statute, 5 U.S.C. §7114(a)(4), and makes it an unfair labor practice to refuse to do so, §7116(a)(5). The scope of the negotiating obligation is set forth in §7102, which confers upon covered employees the right, through their chosen representative, "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. §7102(2). Section 7103 defines "conditions of employment" as follows:
>
> > "'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ."

Fort Stewart Schools v. FLRA, ___ U.S. ___, 110 S.Ct. 2043, 2045-6 (1990). In this roundabout way, the Statute defines the scope of an agency's obligation to bargain.

The union proposal about which the Medical Center refused to bargain was a proposal for ground rules for negotiating over changes in working conditions. Absent any evidence or contention that the subject matter of the changes brought them outside the duty to bargain (either over the decision to make the changes or over their impact and implementation), the undisputed fact that they were changes in "working conditions" brings them within the section 7103 definition of "conditions of employment" and establishes that the Medical Center was required to bargain about them. That being so, the Medical Center was equally obligated to bargain over ground rules for the negotiations over the changes. Department of Defense Dependent Schools, 14 FLRA 191, 193 (1984); U.S Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 524, 533 (1990). Moreover, the subject of official time for the Union's negotiators is within the normal scope of ground rules negotiations. See Environmental Protection Agency, 16 FLRA 602, 613 (1984), remanded on other grounds, 784 F.2d 1131 (D.C. Cir. 1986).

The Medical Center takes the position, initially, that the national master agreement limits the Medical Center's obligation to bargain at the local level to such matters and under such conditions as the agreement provides for. This position cannot be sustained, for it ignores the fact that, as found above, there is a statutory duty to bargain over matters such as the Union's ground rules proposal. The Medical Center's burden, then, is to show that the Union has clearly and unmistakably waived its right to enforce that duty. 22 Combat Support Group (SAC), March Air Force Base, California 25 FLRA 289, 290 n. 2 (1987)

The issue of the level of bargaining (national vs. local) is a false issue in this case. The Medical Center points to no provision in the master agreement that even arguably waives the Union's right to bargain locally over local changes. Rather, the section of the agreement most pertinent to the Medical Center's defense (quoted fully ante at 2), specifically authorizes local bargaining over "changes affecting . . . conditions of employment which are initiated by local management at a single facility." The only serious issue here is whether that part of the section that grants official time "as provided under 5 USC §7131(a)" precludes a finding that the Medical Center committed an

unfair labor practice when it refused to bargain over the Union's proposal.

The Medical Center contends that it refused to bargain over the Unions's proposal in reliance on an arguable interpretation of the master agreement, and that this insulates its refusal to bargain from being treated as an unfair labor practice. The General Counsel argues, on the other hand, that the issue is one of waiver--that the applicable contract terms cannot insulate the Medical Center's conduct unless they constitute a clear and unmistakable waiver of the Union's right to negotiate for a larger bargaining team, on official time, than management's bargaining team.

I am constrained to adopt the Medical Center's statement of the issue to be decided. In Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Chicago, Illinois District Office, 33 FLRA 147, 154 (1988) (IRS, Chicago), the Authority held that notwithstanding an agency's failure to establish a waiver of a union's statutory right, it could avoid an unfair labor practice finding by asserting a plausible argument that the proposal over which the union sought to negotiate "conflicts with the contract." The Authority found that the agency's assertion was "plausible and constitutes an arguable interpretation of the contract" while acknowledging that the contract was silent on the subject of the union's proposal. I am forced to conclude that this holding means that a party can avoid its liability under the enforcement provisions of the Statute without bargaining over a negotiable subject, as long as it can point to a provision in its contract that arguably conflicts with the other party's subsequent proposal on that subject.

Counsel for the General Counsel cites Department of the Navy, United States Naval Supply Center, San Diego, California, 31 FLRA 1088 (1988) as supporting the applicability of the waiver test. I do not read that decision as necessarily in conflict with IRS, Chicago, but to the extent that it may be, IRS, the later decision, controls.

Having concluded that I am precedentially bound by IRS, I also find myself duty bound to express serious misgivings about the legitimacy of the approach IRS takes toward the problem of sorting out issues of contract interpretation and issues of waiver of statutory rights. In stepping beyond an administrative law judge's traditional role of reflecting existing agency policy, I take my cue from Judge Merritt

Ruhlen, who, in his Manual for Administrative Law Judges (revised ed. 1982) at 80, admonishes ALJ's that, while they should follow agency policy, they also have a responsibility "to call the attention of the agency . . . to an important problem of law or policy."

In what I respectfully believe to be a refutation of the IRS approach, the Supreme Court has held that it should not be inferred "from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). And although Metropolitan Edison involved rights under the National Labor Relations Act, the Court has made it clear that waivers sought to be established by virtue of provisions in collective bargaining agreements must meet the same standard when the waivable right arises under other statutes. See Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 409-10 n.9 (1988).

Before IRS, Chicago, the Authority had applied the "clear and unmistakable" standard to alleged contractual waivers of the right to bargain, in a manner "consonant with case law in the private sector." Internal Revenue Service, 29 FLRA 162, 166 (1987). Earlier, and consistent with this approach, Judge Arrigo had occasion to explain what I believe to be the proper distinction between contract interpretation cases and waiver cases:

> [C]ases wherein the essence of the unfair labor practice conduct involves differing but arguable interpretations of the agreement are limited to those situations wherein the union's right . . . essentially arose through the collective bargaining agreement and the meaning of the contract must be resolved in order to ascertain whether that right . . . actually exists. Such is not the case . . . where the existence of the Union's statutory right is clear and the question is whether the Union engaged in conduct which limited that right.

Department of Defense Dependent Schools, Mediterranean Region (Madrid, Spain); and Zaragoza Elementary School (Zaragoza, Spain), Case No. 1-CA-50145 (1986), ALJ Decision Reports, No. 62 (Aug. 29, 1986), slip op. at 16. Two years later, Judge Arrigo had what turned out to be the IRS, Chicago, case before him. He decided that it presented a question of waiver, not of contract interpretation. 33 FLRA at 172.

However, the Authority overruled that conclusion, holding, as stated above, that the existence of differing and arguable interpretations of the contract precluded an unfair labor practice finding, notwithstanding the silence of the contract on the subject on which the union sought to negotiate.

I am, respectfully, unable to reconcile this approach with the Supreme Court's waiver doctrine. I do not believe that the Court recognizes a ground, other than waiver, of dispensing with a statutory right. I also believe that the substantive statutory right, if it exists, carries with it the right to enforcement through an unfair labor practice proceeding. The IRS approach seems to stand the waiver doctrine on its head and in effect to place on the party with the statutory rights the burden of showing, beyond plausible argument, that it did not waive these rights.

Meanwhile, the instant case must be resolved in accordance with IRS, Chicago. The Medical Center interprets the contract provisions giving union representatives official time "as provided under 5 USC §7131(a)" as limiting the number of union negotiators on official time to the number of management negotiators. It is a plausible interpretation.

Section 7131(a) "authorize[s]" official time for the purpose of representing a union in negotiations, but "[t]he number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purpose." The contractual phrase, "provided under," can reasonably be interpreted as synonymous with the phrase, "authorized under," as used in section 7131(a). The phrase could also reasonably be interpreted as meaning to whatever extent section 7131(a) permits. (Section 7131(a) does not preclude negotiation of official time beyond that "authorized as an entitlement." American Federation of Government Employees, AFL-CIO and U.S Environmental Protection Agency, 15 FLRA 461, 463 (1984)). In that case, the phrase, "provided under," would leave open the option of future negotiations. As the first (the Medical Center's) interpretation is a plausible one, however, the proposal arguably conflicts with the contract, IRS controls, and the complaint must be dismissed.4/

4/ I would agree with the result compelled by IRS, for different reasons, only if it were clear that the parties

(footnote contined on next page)

I therefore recommend that the Authority issue the following order:

ORDER

The complaint is dismissed.

Issued, Washington, D.C., November 9, 1990.

JESSE ETELSON
Administrative Law Judge

(footnote continued from previous page)

had bargained to some agreement on the number of union negotiators on official time. See Department of the Army, U.S. Army Finance and Accounting Center, Indianapolis, Ind., Case No. 5-CA-80403 (Apr. 6, 1989), exceptions pending; United Mine Wkrs., Dist. 31 v. NLRB, 879 F.2d 939 (D.C. Cir. 1989). The Authority has recently hinted at a compatible approach. See U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Cincinnati, Ohio, District Office, 37 FLRA No. 115, slip op. at 7-8 (1990).