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

56TH Combat SUPPORT GROUP MACDILL AIR FORCE BASE, FLORIDA Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 547 Charging Party	Case No. 4-CA-10039

Major Phillip Tidmore, Esq.
For the Respondent

Richard S. Jones, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. § 7101 et seq., (herein called the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (herein called the Authority), 5 C.F.R., Chapter XIV, § 2410 et seq.

On October 9, 1990 the National Federation of Federal Employees, Local 547 (herein called the Union), filed an unfair labor practice charge against the 56th Combat Support Group (TAC), MacDill Air Force Base, Florida (herein called Respondent). Pursuant to the aforementioned charge, the Regional Director of the Atlanta, Georgia Region of the Authority, issued a Complaint and Notice of Hearing alleging that Respondent violated section 7116(a)(1), and (5) of the Statute by unilaterally implementing a restriction on leave usage by its Medical Group employees and by changing

procedures by which these employees requested, and their supervisors approved leave without providing the Union with notice and an opportunity to negotiate the impact and implementation of the changes.

A hearing was held before the undersigned in Tampa, Florida. All parties were represented and afforded the full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs which were timely filed by the parties have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor and my evaluation of the evidence, I make the following:

Findings of Fact

1. The Union is the exclusive representative for a unit of Respondent's medical facility civilian employees at its Florida facility.

2. The uncontroverted evidence, discloses that for at least the past 23 years, the leave policy at Respondent's facility was that employees, at the beginning of the leave year in January, would forecast their annual leave for the entire year. They each submitted the forecasts through their supervisors, and also put their requests in a leave request book. This past practice also appears to be consistent with language in the parties' negotiated agreement. The collected bargaining agreement calls for the employee's supervisor to maintain the discretion to "approve [leave] contingent upon work load and manpower requirements" and, in Section 13.1b. outlines the system described above of submitting preferences at the beginning of the year. During the 20 some years described above, union representatives never had any complaints from employees about not getting their leave requests approved.

3. Sometime, in August 1990, employees began complaining to union representative, Clara J. Newgent that their leave requests were being denied. Newgent immediately contacted union president, Kathryn Jack, who advised her to speak to the Commander and find out what was going on. The Commander, Col. Gary K. Brandon, informed Newgent that "due to Desert Shield and the upcoming inspection that the leaves would have to be denied because of the deployment of the troops to Saudi Arabia."

4. It is uncontroverted that Respondent, implemented the leave restrictions in August 1990 without notice to the Union. In fact, Lt. Col. Russell W. Lemke, who handles Labor-Management matters for Respondent, admitted at the hearing not only that, "All leaves for all personnel, military and civilian, were cancelled, all leaves in excess of one day" but, also that it was Respondent's position that it had no duty to bargain on either the substance or the impact and implementation of leave matters. Lemke admitted further that Respondent continued to make other changes in leave policy throughout the ensuing months and never gave the Union notice of those changes, either.

5. The Union formally complained to Respondent about the unilateral change in leave policy at a labor-management meeting held September 12, 1990, bringing up the matter as "new business". Respondent's representatives at that meeting stated that they were not aware of the change, but would look into the matter. Respondent, apparently after looking into the matter, delivered Newgent a letter from its Employee Relations Chief, Joyce Jett, with two attached letters dated September 17, 1990. Significantly, the letter dated 17 September 1990 signed by Col. Brandon set forth a policy of "closely scrutinizing" leave, and allowing only senior staff members (high-ranking managers) to approve leave except for short durations up to eight hours. On September 18, 1990, when Respondent finally notified the Union of the already-implemented change, it had already decided that it had no duty to bargain, whatsoever.

6. On October 4, 1990 the Union presented a written, formal demand to bargain. Respondent formally refused to negotiate any aspect of leave policy on October 17, 1990, when Col. Brandon declared, in writing: "After consultation with the Civilian Personnel Office on base, I am convinced it is my prerogative as commander to regulate working schedules as I see fit in the best interest of my organization. Furthermore, I am convinced that this is not an area open for bargaining. The policy will stand as implemented."

7. Although Respondent claimed to the Union that the situation in the Middle East (Operation Desert Shield) compelled its actions, the record evidence disclosed that Respondent had never before failed to notify and negotiate with the Union over changes in leave procedures due to emergencies such as the Cuban Missile Crisis, a matter involving much less notice and advance build-up than Desert Shield.

8. Because of Respondent's change in leave policy, employees had their leave plans severely curtailed. Peter Heintz, an employee who came to union representative Newgent for help, had to cancel an October trip to Rochester, New York to visit elderly relatives--leave that had been planned since the beginning of the year on his projected leave schedule. The record also shows evidence of at least ten other employees--Maria Algarin, Lou Clement, Savilla Hackett, Roberta L. Christensen, Anna Abbot, Bernice Harvey, Margaret Kolnick, Mark G. Fletcher, Margaret T. Pierce, and Robert Mills--who were denied leave because of these new restrictions. There is, of course, no way of knowing how many other employees, after learning of the new restrictions, did not bother to even request leave. It is clear from the record that the change in leave policy dictated the above denials and took discretion out of the hands of the first-line supervisors. Examples include George F. Hepp's handwritten memorandum bemoaning the fact that Col. Spiegel had overruled his approval of Margaret Kolnick's leave, and Richard E. Cutts' pronouncement, dated 20 August 1990, that all leave is cancelled "per Col. Brandon's orders". Col. Spiegel's memorandum to Mrs. Pierce, of November 28, 1990, denying leave "due to manpower shortages created by Operation Desert Shield" which limits leave to 5 days at a time, illustrates the liberalization from the initial August policy. As noted above and admitted by Lemke, Respondent notified the Union of none of these later changes in leave policy.

Conclusions

Respondent's argument is that an emergency situation was created and that under AF Regulation 40-630, Attachment 1, Paragraph A1-2, annual leave could be cancelled in an emergency situation and that Operation Desert Shield constituted that situation. Respondent argues further that the Union had been given a copy of AF Regulation 40-630, in 1988 and had never requested to bargain. Finally, Respondent states that under Article 13.1b of the parties' memorandum of understanding, annual leave could be cancelled in an emergency situation. That section clearly states that leave already approved in advance "will not be cancelled unless a valid emergency is identified and/or anticipated."

This is a case where the Respondent admittedly begun making changes involving annual leave for employees and when told that some notice and need to bargain existed, denied that the Union had any right to bargain about the leave changes. The General Counsel points out that when the changes were initially made, the Union was told that leaves

were suddenly being cancelled for several reasons: Desert Shield, the upcoming hospital inspection; and the deployment of troops to Saudi Arabia. And that none of those reasons provide any justification for failing to notify and bargain impact and implementation with the Union. I agree.

The Authority in U.S. Department of the Army, Lexington Blue Grass Army Depot, Lexington, Kentucky, 39 FLRA 1472 (1991) rejected the agency's contention that Desert Shield constituted an emergency situation which would prevent it from complying with an order which would effectuate the purposes and policies of the Statute. In that situation the Authority found that such arguments should be left to the compliance stage of proceedings. Its position in that case clearly indicates that an agency, to avoid a bargaining obligation, must do more than make a bare claim that certain actions can not be taken because of a military operation. Here, the record reveals an unsupported claim that an emergency existed requiring changes in annual leave policy.

The General Counsel notes and I agree that if a "true" National emergency existed, the President under section 7103 (b)(1)(B) of the Statute presumably could have issued an Executive Order suspending Respondent's Statutory obligations. The absence of any such order certainly militates against any finding that Respondent could unilaterally suspend Statutory rights. In any event, the facts does not establish the type emergency claimed by Respondent. Furthermore, the record shows that almost immediately, reservists replaced departing military personnel. Thus, there is no showing of shortage of personnel, at least to the extent that emergency situation actions should be taken. Most damaging however, is the admission that, at least part of the reason for imposing leave restrictions without bargaining, was the regularly scheduled inspection which was about to take place, hardly an emergency situation.

Surprisingly, Respondent did not argue as should be expected that section 7106(a)(2)(D) allows it to "take whatever action may be necessary to carry out its ongoing mission during emergencies." To do so would have been an admission of its refusal to negotiate post-implementation constituted a violation, See U.S. Customs Service, Washington, D.C., 29 FLRA 307, 324-325(1987). Although the changes began to occur in August 1990, Respondent argues that Colonel Brandon's informing the Union, after it had requested to know what was going on concerning leave restrictions, on September 17, 1990 constituted notice of

the change. Such a claim that notice given almost a full month after the change was instituted constitutes adequate notice under the Statute is ludicrous. Failure to address the issue in a serious manner and by simply stating that the Brandon announcement of September 17 was following procedures shows either a misunderstanding of, or disdain for the Statute. Previous commanders had no such misgivings, for it seems that in other military emergencies such as the Cuban Missile Crisis, the Union was called in to discuss such matters. In all the circumstances, it is found that the Union received no notice or an opportunity to negotiate prior to Respondent's implementation of the annual leave changes involved herein.

No emergency situation existed which would allow Respondent to make unilateral changes without notice or an opportunity to bargain over the impact and implementation of the unilaterally imposed leave restrictions. However, Respondent also raised a claim that the Union waived its bargaining rights in the annual leave area. As already stated, Respondent argues that its supervisors can deny leave when exigencies arise under Article 13.1b and AF Regulation 40-630 which were both signed off on by the Union thereby, waiving its right to negotiate over the leave changes implemented in this case.

Recent Authority cases take a tougher approach on the waiver issue than Respondent would like. Article 13 of the collective bargaining agreement does not contain a waiver. A waiver of a statutory right must be clear and unmistakable. U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts, 38 FLRA 770, 784 (1990). In Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060 (1991), the Authority reiterated its holding in Internal Revenue Service, 29 FLRA at 167:

> . . . the fact that a mid-term proposal may relate to a general subject area covered in a collective bargaining agreement will not relieve an agency of its obligation to bargain. Rather, the determinative factor is whether the particular subject matter of the proposals offered during contract and mid-term negotiations is the same.

Similarly, in this case, the general subject area of leave is included in the collective bargaining agreement, but the "particular subject matter" of the change--an exhaustive,

across-the-board policy denying all employees leave because of perceived shortages and an upcoming inspection--is not the same as that in the contract, which, at most recognizes Respondent's Statutory right to deny leave and to set up requirements for employees being informed of the reasons for the denial.

The Authority recently rejected an almost identical argument as that raised by Respondent in Marine Corps Logistics Base, Barstow, California, 39 FLRA 1126 (1991). In Barstow the agency argued that it was under no obligation to bargain over the impact and implementation of revisions to performance standards because the applicable collective bargaining agreement covered the matter, both substantively and procedurally. The Authority noted that "negotiation of a contract containing reference to a particular subject does not mean that anything relating to that subject necessarily is a 'matter' that is 'covered by' or 'contained in' the agreement." Id. 1132-33. The Authority reiterated its holding 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) that a contract provision which recognizes an agency's statutory right to make a change does not constitute a clear and unmistakable waiver of a union's right to receive notice and an opportunity to request bargaining concerning procedures and appropriate arrangements for adversely affected employees when an agency chooses to exercise that right. Nothing in this record establishes a clear and unmistakable waiver relieving Respondent of its obligation to notify and bargain over new procedures and guidelines it implemented in connection with the approval or denial of leave in this case. Therefore, it is found that the Union did not waive any right through the collective bargaining agreement herein and was entitled to notification and an opportunity to bargain prior to the implementation of the leave changes herein.

It is also found that AF Regulation 40-630 did not constitute a waiver. If anything, that regulation illustrates that Respondent changed the practice of allowing first-level supervisors to approve leave based on employee projections, the individual supervisors knowledge of work needs and the individual employees circumstances. In implementing its across-the-board ban on leave, Respondent seemingly undercut its own policy of allowing its low level supervisors to exercise independent judgment. Finally, the regulation post-dates the collective bargaining agreement and

to the extent it conflicts with the agreement the agreement controls. See National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 983, 985 (1982). Consequently, the regulation is found not to nullify the collective bargaining agreement and therefore, does not act as a waiver in this case.

Accordingly, it is found that Respondent violated section 7116(a)(1) and (5) of the Statute when it implemented a restriction on leave usage by its Medical Group employees and by, changing procedures by which these employees requested and their supervisors approved leave, without giving notice to the exclusive representative and giving it an opportunity to negotiate over the changes.

Therefore it is recommended that the Authority adopt the following:

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 the 56th Combat Support Group (TAC), MacDill Air Force Base, Florida, shall:

1. Cease and desist from:

(a) Implementing changes in the working conditions of bargaining unit employees, by unilaterally implementing a restriction on leave usage by its Medical Group Employees and by changing procedures by which these employees requested, and their supervisors approved leave without, giving notice to the American Federation of Government Employees, Local 547, the exclusive representative of certain of its employees, and affording it an opportunity to bargain concerning the impact and implementation of said changes.

(2) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their 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) Make whole, any employee, who lost annual leave because of the FPM "use or lose" provisions.

(d) Notify and upon request negotiate with the American Federation of Government Employees, Local 547, the exclusive representative of its employees of any intended changes in conditions of employment including intended changes in procedures for having annual leave approved and afford it the opportunity to bargain over said changes.

(e) Post at its facility 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.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 16, 1991.

ELI NASH, JR.
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 institute changes in the working conditions of bargaining unit employees, by unilaterally implementing a restriction on leave usage by Medical Group Employees and by changing procedures by which these employees request, and their supervisors approve leave without giving notice to the American Federation of Government Employees, Local 547, the exclusive representative of certain of our employees, and affording it an opportunity to bargain concerning the impact and implementation of said changes.

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 make whole, any employee, who lost annual leave because of the FPM "use or lose" provisions.

WE WILL notify and upon request negotiate with the American Federation of Government Employees, Local 547, the exclusive representative of our employees of any intended changes in conditions of employment including intended changes in procedures for having annual leave approved and afford it the opportunity to bargain over said changes.

_____

(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 of the Atlanta Regional Office, whose address is: 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.