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

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C., AND U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, PORTLAND, MAINE, DISTRICT OFFICE, PORTLAND, MAINE, AND IMMIGRATION AND NATURALIZATION SERVICE, ST. ALBANS SUB-OFFICE, ST. ALBANS, VERMONT Respondents	
and	Case No. 1-CA-90192
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL INS COUNCIL, LOCAL 2076 Charging Party	

Marilyn H. Zuckerman, Esquire
For the General Counsel

Alan M. Mendel
For the Respondents

George Gratto, President of the Charging Party (Union), entered a formal appearance at the hearing.

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The Respondents (collectively, Immigration and Naturalization Service, hereafter "INS") permitted employees to smoke in most areas of its St. Albans, Vermont, Sub-Office

until January 1989, when it restricted smoking to the basement lobby of the building that sub-office occupies. INS concedes that it did not bargain with the union representing affected employees in the sub-office. The issue presented in this case is whether the 1989 restriction was a unilateral change or merely the application of an existing policy over which the Charging Party (the Union) previously had the opportunity to bargain.

This case was heard in Burlington, Vermont, on October 17, 1989. Based on the record, the briefs, and my evaluation of the evidence, I find and conclude as follows.

Findings of Fact

The St. Albans Sub-Office occupies space on two floors of the Federal Building in St. Albans, which also houses part of INS's Eastern Regional Service Center. The sub-office employs approximately 10 employees who are represented by the Union. Of these, only two or three smoked during the crucial period of about two years preceding January 1989.

Based on the credited uncontradicted testimony of Union officers George Gratto and Mary Agnelly, I find that for several years prior to 1989 smoking was permitted throughout the space occupied by the sub-office except for its conference room and the office of the officer-in-charge. Areas where smoking was permitted included, among others, an Investigations Section room and a lunch and break room on the first floor and a mail and file room on the second floor.

Barbara Conn, a smoker, joined the Investigations Section staff in August 1987. One coworker in the section when Conn arrived, Cindy Maskell, was also a smoker. When Officer-in-Charge Norman Henry noticed that Conn smoked, he asked two other employees in the section whether they objected. They did not. Henry then told Conn (and, presumably, Maskell) that they could smoke at their desks as long as the others didn't object. Henry did not testify at the hearing, and, in view of the fact that Conn apparently did not break new ground by smoking in the section, it is not clear why Henry took this occasion to impose a condition on smoking.

No change occurred at this time with respect to smoking in the lunch room or the mail and file room. Conn had occasion to smoke in those areas and to observe cigarette butts left by others in lunch room ashtrays.

Noel Induni came on as assistant officer-in-charge in February 1988. Induni, a pipe smoker, was concerned about the smoking rules. He asked Henry, who told him that smoking was permitted in the Investigations Section as long as the Special Agents, or "investigators," working there did not object. Induni testified that he had assumed that smoking was prohibited elsewhere, but, since he was only aware of Conn and Maskell being smokers, and since they did most of their smoking at their desks, his testimony is insufficent to establish a pre-1989 change in other areas of the sub-office. Induni himself had permission to smoke inside his private office.

In April 1988 INS distributed to its district and subsidiary management officials a package of documents designed for the implementation of then existing Department of Justice-General Services Administration smoking regulations. The package calls for notification and negotiations with local unions such as the Charging Party prior to implementation. It has not been contended here, however, that any alleged changes affecting this case were made pursuant to these regulations.

One of the Special Agents (possibly a replacement for one of the two who consented to smoking in 1987) let Henry know in January 1989 that he objected to smoking in the Investigations Section. Henry told Conn and Maskell that from then on they could smoke in the office only when the Special Agents were not there. A few days later Henry told them that they could not smoke at all in the office -- that they would have to go downstairs to smoke. This meant no smoking anywhere in the sub-office's space, but only, if within the building, in the basement lobby.

The Union had not been notified of any of this. When Union President Gratto learned of it he called Henry and asked him if he had banned smoking in the office. Henry said he had, and that he had not informed the Union because the ban was necessary. Gratto quoted Henry as explaining: "The investigators complained and, so, I decided there would be no smoking."

Discussion and Conclusions

The subject of designating smoking and nonsmoking areas for employees is a mandatory subject for negotiations under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq. (the Statute). Department of Health and Human Services, Public Health Service, Health Resources and Services Administration, Oklahoma City Area, Indian Health Service, Oklahoma City, Oklahoma, 31 FLRA 498, 505-07 (1988) (Indian Health Service), aff'd 885 F.2d 911 (D.C. Cir. 1989). Thus, INS was obligated to give the Union notice and an opportunity to bargain over the substance of any change in the designation of smoking areas and over its impact and implementation. Unless the Union waived its right to bargain, failure to give notice is an unfair labor practice. U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 19 FLRA 290, 292 (1985).

However, before a change in a condition of employment may be found, it is necessary to show that, by express agreement or otherwise, an established practice, with respect to that condition of employment, preceded the alleged change. See Department of the Treasury, Internal Revenue Service (Washington, D.C.); and Internal Revenue Service Hartford District (Hartford, Connecticut), 27 FLRA 322, 324-25 (1987). General principles for the establishment of such a past practice are set forth in Norfolk Naval Shipyard, 25 FLRA 277, 286 (1987):

> In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time with the agency's knowledge and express or implied consent. [Internal citations omitted.] Essential factors in this regard are that the practice must be known to management, responsible management must knowingly acquiesce, and such practice must continue for some significant period.

My prior factual findings amply warrant the conclusion that a practice of long standing existed, of employee smoking within all areas of this small sub-office except the conference room and the officer-in-charge's office. The size of the office makes it hard to escape the conclusion

that this practice was known to management and knowingly permitted. Moreover, when Henry spoke to newly hired Conn about smoking, he included in the conversation another employee who was a smoker. I draw the inference that Henry knew she was a smoker because she previously smoked in the office. Thus the necessary elements of an established condition of employment are present.

I also conclude that the practice existed independent of any private understanding by management that its continuation was contingent on the consent of other employees. There is no evidence, in any event, of such a limitation before Henry's 1987 conversation with Conn. By that time the practice had already become established.

INS asserts that no real change occurred in January 1989 because Henry had earlier established the policy making permission contingent on the consent of other section employees. This policy, however, by clear implication applied only to smoking within the Investigations Section, and did not purport to affect smoking in other parts of the sub-office where previously permitted. Even as to the Investigations Section, I conclude that Henry's contingency policy does not have the effect INS claims for it.

INS asserts that it should be presumed that the Union had the opportunity to bargain about the contingency policy at the time it was "properly implemented and in place." I cannot so presume. There is no evidence that the Union was informed of the new twist Henry put on the smoking policy, and no way the Union can reasonably be held responsible for learning of it. There is no evidence that any unit employees other than Conn and Maskell knew about it and no evidence that either of them was even a member of the Union. As no one was actually denied permission to smoke, there was no outward sign that the existing policy had become contingent or that the existing practice had changed in any way.

The argument INS presents is akin to asserting that the Union waived its right to bargain, but I cannot find in these circumstances that anything like a waiver occurred. The argument is also suggestive of the policies underlying section 7118(a)(4) of the Statute, which bars complaints that are based on unfair labor practices occurring more than six months before the filing of the charge. INS does not assert that section as a defense as I believe it must if

reliance is to be had on it. See Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, Case No. 4-CA-80973, slip op. at 5-7 (1990), ALJ Decision Reports, No. 89 (May 17, 1990). I conclude in any event that consideration of the substance and purpose of section 7118(a)(4) makes it clear that INS's position must be rejected.

The 6-month limitation period of section 7118(a)(4) is, by express statutory language, inapplicable where "the person filing any charge was prevented from filing the charge during the 6-month period" by reason of "any failure of the agency. . . against which the charge is made to perform a duty owed to the person" or "any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period." These exceptions warrant the assumption that under the Statute, as under the National Labor Relations Act, the purpose of the limitation period is to prevent prejudice to respondents who might otherwise be forced through no fault of their own to defend against stale claims. See Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 419 (1960). Here, on the other hand, any condition imposed on the previously existing practice of permitting smoking was imposed without notice to the Union. If management intended to implement such a change at some time earlier than January 1989, it owed the Union the duty to notify it. Its failure to do so prevented the Union from doing anything about it, whether that might have been to request bargaining or to file a charge.

INS has violated sections 7116(a)(5) and (1) of the Statute by unilaterally changing an established practice concerning smoking areas. A status quo ante remedy is appropriate for this violation. Indian Health Service, supra, at 509. Accordingly, I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., and U.S. Department of Justice, Immigration and Naturalization Service, Portland, Maine, District Office, Portland, Maine, and Immigration Service, St. Albans Sub-Office, St. Albans, Vermont, shall:

1. Cease and desist from:

(a) Unilaterally establishing a new smoking policy for the St. Albans Sub-Office, St. Albans, Vermont, without providing the American Federation of Government Employees, AFL-CIO, National INS Council Local 2076 (the Union), the exclusive representative of a unit of its employees, adequate opportunity to bargain, to the extent consistent with law and regulations, on the decision to effectuate such a policy and on its impact and implementation.

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

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

(a) Rescind the new smoking policy implemented for the St. Albans Sub-Office.

(b) On request, bargain with the Union, to the extent consistent with law and regulation, concerning any future change in the smoking policy.

(c) Post at the St. Albans Sub-Office 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 Officer-in-Charge for the St. Albans Sub-Office, and shall be posted and maintained of 60 consecutive days in conspicuous places, including all bulletin boards and 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.

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

Issued, Washington, D.C., August 16, 1990.

Jesse Etelson

JESSE ETELSON
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 unilaterally establish a new smoking policy for the St. Albans Sub-Office without providing the American Federation of Government Employees, AFL-CIO, National INS Council Local 2076 (the Union) the opportunity to bargain, to the extent consistent with law and regulation, on the decision to effectuate such a change and on its impact and implementation.

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

WE WILL rescind the new smoking policy implemented for the St. Albans Sub-Office.

WE WILL, upon request, bargain with the Union to the extent consistent with law and regulation, concerning any future change in smoking policy.

_____

(Agency or 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, Region I, whose address is: 10 Causeway Street, Room 1017, Boston, MA 02222-1046, and whose telephone number is: (617) 565-5538.