

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

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56TH COMBAT SUPPORT GROUP (TAC) .  
MACDILL AIR FORCE BASE, .  
FLORIDA .

Respondent .

and .

Case No. 4-CA-10090 .

NATIONAL FEDERATION OF .  
FEDERAL EMPLOYEES, LOCAL 153 .

Charging Party .

.....  
Major Phillip Tidmore, Esq.  
Captain Louis A. Deleon  
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, Part 2423.

On October 22, 1990 and November 23, 1990 respectively, the National Federation of Federal Employees, Local 153 (herein called the Union), filed an unfair labor practice charge and amended charge against the 56th Combat Support Group (TAC), MacDill Air Force Base, Florida (herein called Respondent). Pursuant to the aforementioned charges, the Regional Director of the Atlanta, Georgia Region of the Authority, issued a Complaint and Notice of Hearing on

December 19, 1990 alleging that Respondent violated section 7116(a)(1) and (5) of the Statute by implementing a change in the performance plans/requirements of sales store checkers assigned to its commissary without providing the Union with notice and an opportunity to negotiate over the impact and implementation of the change.

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

The Union is the exclusive representative for a unit of Respondent's employees in its Florida facility. The bargaining unit includes approximately 40 sales store checkers (herein called checkers) employed at the Commissary. There are three different checker categories: part time, full time and intermittent. The Commissary is akin to a private sector grocery store.

Until the beginning of fiscal year 1991, the checkers, regardless of category, worked under a performance plan with the following critical and non-critical elements:

1. INTERACTS WITH A VARIETY OF PATRONS, VENDORS, SUPERVISORS, AND CO-WORKERS
  - a. Interacts with patrons, co-workers, and supervisors in a courteous manner, demonstrating an ability to work cooperatively with other persons.
2. COMPLIES WITH EXISTING SAFETY REGULATIONS
  - a. Reports health hazards and accidents immediately to supervisors.
  - b. Reports safety hazards in the work areas.
  - c. Follows proper safety and scanning procedures.

3. CHECKS ID CARDS TO VERIFY COMMISSARY PATRON PRIVILEGES.
  - a. Responds promptly and courteously to routine inquiries and or telephone calls.
  - b. Checks ID cards and letters for correct name, expiration date, validity and condition of card. Keeps unauthorized persons out of the commissary or notifies supervisors when unable to stop entry of unauthorized persons.
  - c. Issues cigarette [sic] cards and refunds as instructed.
4. ASSIST IN VERIFYING PRICES
  - a. Determines item prices by promptly calling for price check and using correct computer price look up codes to charge proper prices.
5. CLEANS ASSIGNED AND SURROUNDING WORK AREA
  - a. Daily removes all debris, including damaged food items from work area to avoid insect and/or rodent infestation.
  - b. Cleans scanning glass in accordance with AFCOMS procedures when operating terminal.
  - c. Daily cleans checkout counter, belt, register and stand.
  - d. Insures all perishable items are promptly returned to stock.
6. RECEIVES CASH TILLS FROM CASH CAGE WITH SPECIFIED AMOUNT TO MAKE CHANGE AS REQUIRED.
  - a. Check number of till.
  - b. Maintain adequate supply of change.
  - c. Maintain security of till by locking register if leaving the work area at any time.
  - d. Opens rolls of coins as needed, turning in till with a minimum amount of loose change.
7. CHECKS (RINGS UP) ITEMS USING CASH REGISTER
  - a. Accurately credits authorized coupons. Spot-checks merchandise to coupons and checks all expiration dates.

- b. Seeks supervisor signature on all voids over \$5.00, and all refunds at time of transaction and signs void and refund forms.
- c. Meets store standard for average sales per hour and items per minute.
- d. Accepts checks that include all proper identification information are approved by the NCR system. Makes proper change.
- e. Processes all transaction accurately giving correct change - variances that exceed \$6.00 are considered excessive.

Under this performance plan, elements 1, 2, 5 and 7 were critical; Elements 3, 4 and 6 were non-critical.

Sometime in July, 1990, Respondent decided to revise the performance standards. At that time, the supervisor, Florence Garrett, told individual employees, when giving them their annual appraisals, that a new performance plan was "in the works". She provided no further details at that time nor did she inform the Union or attempt to seek out Union representatives to notify. Garrett is not the person responsible for giving the Union notice of changes, in any event.

There is no evidence that anyone gave notice to the Union about any change in the performance plans for the checkers. Respondent's Employee Relations Specialist, Kathryn Arnold, admitted that she had no knowledge of the Union being given any notice, whether written or oral, at any time between July 1990 (when Respondent began formulating the new plans) and October 1990 (when Respondent implemented the new plans), even though she advises Respondent's managers to do so. During cross-examination, Arnold said that the mere fact that a steward in the work place learns of a possible change is not sufficient to consider the Union to have received notice.<sup>1/</sup>

According to Garrett, Respondent implemented the new performance plans in October 1990. Individual employees

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<sup>1/</sup> This admission seemingly repudiates Respondent's novel theory that certain contract language allows stewards to discuss things informally with managers and that if any steward happens to hear about a change, Respondent has satisfied its obligation to notify the Union.

were called in to read and sign acknowledgment that they had received the new plans. Ray Thurber received his new plan on October 11, 1990; Cecelia Delgado received hers on September 30, 1990; and Deborah Wilson received the new Plan on October 2, 1990. Although all three of these checkers were stewards, however, they received their new plans in their capacity as employees, just as the other checkers did. It is undisputed that the checkers were not shown the plans during the formulative stage, but only after they were finished and implemented. The Union learned about the already-implemented plans when Thurber brought copies of the old and new standards to Chief Steward Sam Sadler. At that point, since the change had already been implemented, Sadler filed the unfair labor practice charge on behalf of the Union.

The new performance plans apply across-the-board to all checkers, whether full time, part time or intermittent. The new plans contain the following critical and non-critical elements:

1. INTERACTS WITH PATRON, SUPERVISORS AND CO-WORKERS.
  - A. Works in a professional and courteous manner at all times; demonstrating an ability to work co-operatively with other persons. Absolutely no arguments allowed; all complaints will be handled by a supervisor or manager.
2. COMPLIES WITH EXISTING HEALTH AND SAFETY REGULATIONS.
  - A. Report all Health and/or safety hazards immediately to a supervisor.
  - B. Report all accidents and/or injuries to supervisor at time of occurrence [sic].
  - C. Practice proper safety, health and scanning procedures at all times.
3. IDENTIFICATION CHECKS.
  - A. Check identification of all patrons as required, to determine if authorized commissary privileges.
  - B. Insures eligibility and requirements are met for use of all food stamps and WIC checks.

4. RECEIVES, MAINTAINS AND SECURES CASH TILL.

- A. Receives only assigned till daily. One to two failures allowed per rating period.
- B. Always maintain an adequate supply of change, turn till in with a minimum amount of loose change. Two to five errors for satisfactory performance.
- C. Insure cash, coupons, checks and food stamps are never mixed. Keep secure in cash till at all times. Two to five failures allowed per rating period for satisfactory performance.
- D. Insures till is secure at all times, locking register if leaving work station, never leave till unattended in cage window.
- E. Sign in and out when going to or leaving a register, as applicable. One to two non-compliances allowed for satisfactory performance.

5. SCANS AND OPERATES CASH REGISTER

- A. Scan all items one at a time, except closed cases or those items specified by a supervisor. Two to six non compliances per rating period is satisfactory.
- B. Use proper look-up codes to insure correct price is charged. Two to five errors allowed per rating period for satisfactory performance.
- C. Ring proper price and department for all unscannable items. Two to five errors allowed per rating period for satisfactory performance.
- D. Enter bagger number on all transactions. Use 999 for self-baggers. Two to four failures to enter bagger number per rating period is satisfactory.
- E. Sales per hour will average between \$850.00 and \$1150.00 per rating period for satisfactory performance.
- F. Ring an average of 20 to 30 items per minute for satisfactory performance.

6. ACCEPTS PAYMENTS AND MAKES CHANGE.
  - A. Cash discrepancies are considered when they exceed \$6.00 in one day. (Includes all negotiable instruments). Two to three excessive discrepancies per rating period is satisfactory.
  - B. Must obtain required information on all checks accepted, including signature and correct amounts. Two to ten errors allowed per rating period for satisfactory performance.
  - C. Always call a supervisor when a check is entered incorrectly, before voiding. One to three non compliances allowed for satisfactory performance.
  
7. ACCEPTS MANUFACTURES COUPONS.
  - A. Ask all patrons if they are using coupons before starting order. Insure coupons are valid. Remove coupons from cartons of cigarettes. Ring coupons one at a time, at end of order before tendering of amount due. Four to ten coupon discrepancies allowed for satisfactory performance.
  
8. PERFORMS VOID AND REFUND TRANSACTIONS
  - A. All voids over \$5.00 and all refunds for any amount must have supervisor approval at time of transaction. One to three errors allowed per rating period for satisfactory performance.
  - B. AF Form 461 must be properly completed by patron before ringing. Sign your full name on 461; ring accurately on 2440. Two to five errors allowed per rating period for satisfactory performance.
  - C. Rings voids and refunds on proper department. Two to five errors allowed per rating period for satisfactory performance.
  
9. CLEANS REGISTER AND SURROUNDING AREA, TURNS IN VOID SHEET, MAINTAINS REGISTER TAPES
  - A. Keeps register and checkout area clean through-out the shift and at the end of

the shift. Insures register and checkout area is clean with all items being picked up and put away. Two - four non compliances allowed per rating period for satisfactory performance.

- B. Turns in void sheet daily with cash till. Two to three non-compliances allowed per rating period for satisfactory performance.
- C. Changes detail and receipt tapes as needed and turns in detail tape with cash till and end of shift. Two to three non compliances allowed per rating period for satisfactory performance.

Elements 1, 2, 3, 5, 6 and 7 are critical; Elements 4, 8 and 9 are non-critical.

A comparison of the old and new performance plans reveals notable a differences. Element 1 now contains an absolute standard, where even one argument with a customer causes the employee to fail. Previously, the element gave an employee much greater latitude, requiring only that an employee generally demonstrate the ability to work cooperatively with other people. Similarly, element 2-- dealing with safety-- now emphasizes the employee's duty to perform at all times, again posing an absolute standard. The ID check element has been changed from non-critical to critical. In the remaining elements, Respondent implemented specific numerical requirements for most employees to meet, simply to reach the Satisfactory Level. The reasonably foreseeable impact on the individual checker's appraisal is conspicuous. According to the uncontradicted testimony of the two checkers, they already know, based on recent quarterly appraisals, that they are not likely to maintain the high performance ratings received in the past. Employees Delgado and Wilson, testified, without contradiction, that their number of errors (their actual performance) has remained unchanged; however, it "is how many [mistakes] you are allowed" that has changed. In short, it is reasonably foreseeable that employees will get lower appraisals under the newest standards for exactly the same level of performance of past years.

Delgado and Wilson are both part-time employees. It is obvious that the impact of the new plans on full time employees will be even more dramatic. This significant impact arises because the absolute numerical standards in the new plans (except for a few based on hourly statistics)

do not take into account the number of hours worked in the year. To illustrate, "two errors per rating period" means "two errors" no matter how many hours the employee worked. Therefore, the full time employee is exposed to more chances to make errors in a rating period. The change has genuine foreseeable impact on the intermittent employees as well. In this regard, a former intermittent employee, Wilson, testified without contradiction that intermittent employees can be removed from Federal service much easier than the other employees. According to Wilson, failure to perform up to standards in a critical element could impact upon a decision not to renew the contract of an intermittent employee.

Respondent did not refute the testimony of the checkers who testified that the new standards are tougher to attain, and that where they had received "superior" ratings in their appraisals in the past, for work performances which now they will receive only "satisfactory", or worse. Thus, it is found the new numeric standards greatly increases the chance for a checker to fail to meet any given standard and to be rated lower on his or her performance evaluation. Quite, obviously the lower rating creates genuine foreseeable impact on the checkers in this case.

#### Conclusions

In this performance standards case Respondent expresses its belief that the charges are de minimis and, if not, that the Union waived its right to bargain over the performance standards.

Recognizing that the performance standards are a management right under section 7106(a) of the Statute the General Counsel maintains there is nonetheless a duty to bargain consistent with section 7106(b)(2) and (3) of the Statute with respect to the procedures management will employ in exercising such right and respecting the appropriate arrangements for employees who may be adversely affected by the changes. Department of Transportation, Federal Aviation Administration, Washington, D.C., 20 FLRA 486, 489 (1985).

The General Counsel's position with regard to the impact issue is simply that performance standards and critical elements "which strike at the heart of an employee's job situation, have substantial impact" and arguments that there is no substantial foreseeable impact concerning such working

conditions should be rejected in short order. Department of the Air Force, Air Force Systems Command, Electronic Systems Division, 14 FLRA 390 (1984); Social Security Administration, 16 FLRA 1135 (1984); 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). This argument needs little edification. Performance standards and the critical elements were intended and they do impact on employee job retention, wage increases and the like. Respondent states that there was an actual decrease in the duties of the checkers herein. This position does not, in my opinion, address the de minimis issue in the case.<sup>2/</sup> What is at issue here is not new duties, but new numeric standards which greatly increase the chances for these checkers to fail to meet any given standard. Given the fact that these standards impact on whether or not an employee will even retain his checker job if she or he do not meet those standards, any argument that the changes are de minimis must necessarily fail. Therefore, it is found that the change in performance plans/requirement of checkers herein is more than de minimis.

Moving on to the waiver argument, it is clear that the Union did not waive its statutory right to negotiate concerning the impact and implementation of the new performance plans in this case. Respondent asserts that sufficient contacts exist between management and union representatives in this case to impute knowledge of the new plans to the Union and that the Union's failure to act after that knowledge constitutes a waiver by inaction.

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<sup>2/</sup> Respondent relies on several cases to support its de minimis position. Internal Revenue Service and Brookhaven Service Center, 14 FLRA 766 (1984); Army Reserve Components Personnel and Administration Center, 20 FLRA 117 (1985); Department of the Treasury, Internal Revenue Service, 20 FLRA 46 (1985); Department of the Treasury, Internal Revenue Service, 20 FLRA 403 (1985) cited by Respondent all used a different standard for measuring impact than announced by the Authority in Social Security Administration, 24 FLRA 403 (1986) and therefore, have no application to this matter. Further, Department of the Air Force, Scott Air Force Base, 33 FLRA 532 (1988) and U.S. Environmental Protection Agency, 35 FLRA 674 (1990) are distinguishable on their facts and offer little or no support for Respondent's position herein.

On the other hand, the General Counsel suggests that the waiver issue as applied to Air Force performance standards was settled long ago in Wright-Patterson, supra, 610-611, where it was noted that the agency was not relieved of its duty to notify the union when it revises standards, although supervisors had been given a contractual right to establish standards and to discuss them with employees. Further, the General Counsel submits that even if knowledge of the instant change is imputed to the Union, because some affected employees happened to be stewards, the alleged notice is not sufficient to meet present requirements to provide adequate notice.

The waiver and notice issues are clearly intertwined under Respondent's analysis of the case. Unfortunately, if the question of adequate notice is resolved against Respondent, its waiver argument will also fail. Factually, Respondent sees the Union as having received notice of the new performance plans when employees, who were also union stewards received quarterly appraisals under the new plan between September 30, 1990 and October 11, 1990; employees, who were also union representatives were told in July 1990 they would be receiving performance plans later that year; and finally, adding that Article 2.4 of the collective bargaining agreement allows notice to be given to union stewards. What Respondent fails to note is that in July 1990 Garrett, according to her testimony, told the three stewards, in their capacity as employees, "there was a new one in the works and when we got it all worked out and all it would be presented to them." Nothing was provided these employees to even give a hint as to what Garrett was talking about and the first thing they saw was a completed plan when receiving quarterly appraisals in September and October of that year. In those circumstances, such a nebulous statement as that made by Garrett in July 1990, can hardly serve as adequate notice. Further, Garrett's giving the plan to employees, who were also stewards served to implement the new plans and can hardly be argued to serve as the adequate notice which would give the Union an opportunity to request negotiations before the plans were put in place. See United States Department of Defense, Department of the Air Force, Headquarters, Air Force Training Center (ATC), Lackland Air Force Base, Texas, 24 FLRA 334 (1986). Moreover, Garrett had never given any notice of changes to the Union and it is doubtful from her testimony that she had the authority to do so. Consequently, it is found that the Union did not receive

adequate notice of the changes in the performance plans in this matter.<sup>3/</sup>

The fact that a waiver must be "clear and unmistakable" has been repeatedly emphasized. See U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, North East Region, Boston, Massachusetts, 38 FLRA 770, 784 (1990); Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060 (1991). Respondent maintains that the waiver here is through "inaction" by the Union once it received notice of the change. Respondent argues that Article 2.4 of the agreement allows notice to be made to Union stewards and that the stewards were given notice. Other than Garrett, who lacked the authority to give notice, telling employees under her supervision that "there was a new one in the works," there is not a single strand of evidence that the Union was notified of this change prior to implementation. Even Respondent's own witness Arnold was unaware of any notice being given the Union about formulating new performance plans. Her testimony casts doubt that the language of Article 2.4 relied on by Respondent establishes that informal discussions by supervisors with an employee, who happens to be a steward satisfies its obligation to notify the Union of changes in working conditions. In all the circumstances, it is found that Respondent failed to prove that the Union had adequate notice of the change or that upon becoming aware that new performance plans were being formulated it waived through inaction the right to negotiate over the new performance plans.

Accordingly, it is found that Respondent violated section 7116(a)(1) and (5) of the Statute by implementing a change in the performance plans/requirements of sales store

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<sup>3/</sup> Respondent's reliance on Veterans Administration Medical Center, Lyons, New York, 24 FLRA 255 (1986) is misplaced. In that case, the issue was whether the agency's failure to give the union notice of a change in performance standards prevented the discovery of an unfair labor practice within six-months of its occurrence. Unlike the instant matter, the shop steward involved in that case was found to have more than casual knowledge of the new performance standards since she had been given a copy of the new standards so that she could type them. Here the stewards were given nothing.

checkers assigned to its commissary without providing the Union with notice and opportunity to negotiate.

#### The Remedy

The General Counsel recommends a status quo ante remedy in this matter seeking to have Respondent rescind the new performance plans, restore the plans which we in effect prior to October 1990 and redo performance appraisals given under the new plans and to apply the old plans to those appraisals which are redone. Respondent made no argument and presented no evidence with respect to remedy. I agree with the General Counsel that the Federal Correctional Institution, 8 FLRA 604 (1982) elements were met. Furthermore, I agree that the initial Wright-Patterson case remedy is not applicable to this case since there unlike the instant case, employees had not been appraised under the revised performance standards nor were any losses alleged to have occurred due to their implementation. 21 FLRA 612-613. Based on the General Counsel's brief, it appears likely that employees have suffered losses due to implementation of the new plans here.

#### 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) Unilaterally implementing new or revised performance plans/requirements for its sales store checkers in the Commissary, without giving prior notice to the National Federation of Federal Employees Local 153, the exclusive representative of certain of its employees, and affording it an opportunity to bargain concerning procedures to be observed in implementing them and concerning appropriate arrangements for employees affected thereby.

(b) 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:

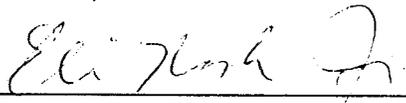
(a) Rescind the performance plans/requirements for sales store checkers implemented in October 1990, reappraise any employee who was evaluated under the new plans by applying the old performance plans and make whole any employee adversely affected by the new standards.

(b) Notify and upon request negotiate with the National Federation of Federal Employees, Local 153, the exclusive representative of the employees in its Commissary, concerning procedures to be observed in the implementing new or revised performance plans/requirements applicable to those employees and concerning appropriate arrangements for employees adversely affected thereby.

(c) 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 of the base 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.

(d) 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, September 27, 1991.

  
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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 unilaterally implement new or revised performance plans/requirements for our sales store checkers in the Commissary, without giving prior notice to the National Federation of Federal Employees, Local 153, the exclusive representative of certain of our employees, and affording it an opportunity to bargain concerning procedures to be observed in implementing them and concerning appropriate arrangements for employees affected thereby.

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 rescind the performance plans/requirements for sales store checkers implemented in October 1990, reappraise any employee who was evaluated under the new plans by applying the old performance plans and make whole any employee adversely affected by the new standards.

WE WILL notify and upon request negotiate with the National Federation of Federal Employees, Local 153, the exclusive representative of the employees in our Commissary, concerning procedures to be observed in the implementing new or revised performance plans/requirements applicable to those employees and concerning appropriate arrangements for employees adversely affected thereby.

\_\_\_\_\_  
(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.