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, VETERANS CANTEEN SERVICE. LEXINGTON, KENTUCKY Respondent	
and	Case No. 4-CA-00786
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-184 Charging Party	

Sherrod G. Patterson, Esquire
For the General Counsel

Ginny M. Hamm, Esquire
For the Respondent

Michael Lane Doss, National Representative
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The Respondent, without notifying the union that represents its employees, authorized the removal of most of the food and beverage vending machines in an employee break room, intending that some of them (but not all) would be replaced immediately with similar but older machines. Unexpected problems caused a two-week delay in the planned replacement. An unfair labor practice complaint alleges that the unilateral removal of the original machines constituted a refusal to bargain in violation of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute). The Respondent concedes that the action was taken unilaterally but argues that it was under no duty to bargain because the action, when it was

authorized, did not foreseeably change any working conditions.

A hearing was held in Lexington, Kentucky, on February 28, 1991. Counsel for the General Counsel and for the Respondent filed post-hearing briefs.

Findings of Fact

The Charging Party (the Union) is the agent for the exclusive representative of employees at the Respondent's Leestown Road facility in Lexington, Kentucky. With the Union's approval, the Respondent in 1989 created an employee "vending room" for their exclusive use during work breaks. Under contract with an outside vendor, the Respondent had installed in the vending room a sandwich machine, a light snack machine, two soft-drink machines, a coffee machine, and a microwave oven which was available for use without charge. All of these machines were new.

In mid-1990, John Winski, then Chief of the Veterans Canteen Service at Lexington, observed that revenues from the vending room machines were unexpectedly low and anticipated that the outside vendor, which owned the machines, might exercise its option to cancel the contract and remove all of the machines. Winksi decided to try to head such an action off by suggesting that the vendor swap the Leestown Road vending room machines with a group of older machines then in use at the Respondent's Cooper Drive facility, also in Lexington. (The Cooper Drive machines were then generating considerably more revenue.)

The vendor agreed to this swap, which included all of the Leestown Road vending machines except a can-dispensing soft-drink machine, which was to stay. Removed were another soft-drink machine (a fountain type which sold soft drinks in cups), the sandwich, snack, and coffee machines, and the microwave. Winski's discussions with the vendor led him to understand that the Cooper Drive machines would be installed in place of these within three or four hours of their removal. The Cooper Drive machines to be moved to Leestown Road were a sandwich machine and a snack machine similar to those removed, except that the sandwich machine was of "the older type," and a microwave oven, still available for use without charge.

As often marks the start of the road to litigation, something went wrong. Inadequate plumbing and electrical capacity at Cooper Drive made it impossible to install the

Leestown Road machines there as scheduled. In Winski's absence (he was on leave that week), the vendor decided to leave the Cooper Drive machines in place until the deficiencies could be corrected. Instead of returning the Leestown Road machines temporarily, however, the vendor left them, unused, at Cooper Drive, awaiting installation there.

According to the testimony of General Counsel's witnesses Green and Stewart, the Leestown Road vending room remained without machines (except for the canned soda machine) for not less than two weeks. Although Green's testimony was based at least partly on hearsay, and Stewart's was pretty vague ("Two or three weeks. I don't really know"), their composite account is marginally more reliable than Winski's hearsay declaration that the machines were "down no more than one week." I reluctantly credit Green and Stewart. The difference, however, is not crucial.

When the Cooper Drive machines were eventually installed at Leestown Road, the vending room there lacked a coffee machine and a cup-dispensing soft-drink machine to replace those removed, but still had the original canned soft-drink machine. That machine has a dollar bill changer. The canned drinks cost five or ten cents less than the cup drinks had, but the machine does not provide ice. The removed fountain-type machine did. Coffee was and is available from a machine in a connected building located, it would appear from a map of the Leestown Road facility, approximately one/tenth of a mile from the vending room. Employees are also permitted to make coffee at their work stations, using their own pots. Doing so is a common practice.

As far as sandwiches and snacks were concerned, the vending room provided the only convenient source for prepared foods, other than those brought from home, for many employees working on evening and night shifts. (During at least some of the hours of these shifts the Leestown Road facility's cafeteria is closed.)

Discussion and Conclusions

The Respondent does not dispute the proposition that the availability of food, beverages, and microwave in the vending room had become a condition of employment for employees represented by the Union. At issue are two aspects of the removal of the machines--the temporary situation that deprived the employees of all the amenities provided by the removed machines for two weeks and the

permanent change from one set of machines to another less complete and older set.

The temporary deprivation may be analyzed independently of the permanent change, because the obligation to bargain about it would have been the same whether or not the ultimate replacement of one set with the other represented any change in conditions of employment. I find that the temporary hiatus between the removal of the original machines and the installation of the others was not a bargainable event--that is--there was no duty to bargain over the hiatus.

Whether one addresses the negotiability of the substance of a change or only matters as to its impact and implementation, the duty to bargain arises only at the point where a change affecting conditions of employment (as determined later) is contemplated. Until then there is no event about which bargaining is required. Winski authorized the replacement of one set of machines with another, but with only a 3-4 hour interruption. Instead, a two-week interruption occurred. It appears to have been caused in large part by the vendor's poor planning and insensitivity to the labor relations implications of its actions. But the resulting, unforeseen, extended hiatus cannot retroactively have created a duty to bargain at the time the originally contemplated hiatus was conceived. The question is, rather, whether the 3-4 hour hiatus contemplated as incidental to the swap represented a change in conditions of employment.1/

Whenever a decision to change a condition of employment is itself negotiable, the extent of the impact of the change on unit employees is not relevant. Department of Health and Human Services and Social Security Administration, 30 FLRA 922, 926 (1988). However, before it may be said that a condition of employment is involved at all, there must be an

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1/ When the Union learned of the removal, it contacted management, whose representative, in Winski's absence, knew nothing about it. Thus, no one on either side seems to have been thinking about the problem in terms of a hiatus, and, apparently, neither party approached the other about bargaining concerning that. The Union filed the unfair labor practice charge a few weeks later, but that may have been after the replacement machines had been installed. In any event, the unfair labor practice alleged was simply the unilateral removal.

inquiry as to "the extent and nature of the effect of the practice on working conditions." Veterans Administration Medical Center, Leavenworth, Kansas, 40 FLRA 592, 596 (1991) (VA Leavenworth), quoting American Federation of Government Employees, Local 2761, AFL-CIO v. FLRA, 866 F. 2d 1443, 1445 (D.C. Cir. 1989). This has been called the second part, or second prong, of the Antilles test, referring to Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235, 236-37 (1985).2/

Here, the availability of the products and services offered by the machines that were to be replaced had become a condition of employment. But implicit in that condition of employment was the prospect and even the probability that from time to time the availability would be interrupted for brief periods as a result of a number of possible causes, such as power outages, depletion of a particular machine's "inventory," and equipment breakdowns. Few images are more firmly fixed in the popular mind, in fact, than the application of Yankee ingenuity to a malfunctioning vending machine by kicking the Pepsi out of it.

Does it make any difference that this interruption was caused by a conscious decision on the part of management? Not if the contemplated interruption was no greater than what could normally be expected and would usually be regarded as a more or less minor annoyance.3/ In other words, availability of the products and services was a condition of employment; absolutely continuous availability was not. I find that the contemplated hiatus of a few hours did not change a condition of employment and was not, therefore, a bargainable event.

2/ Although Antilles involved a negotiability appeal, the Authority held in VA Leavenworth that the same analysis applies in unfair labor practice cases involving the duty to bargain over an alleged unilateral change. Id. at 597.

3/ While it might smack of the proscribed de minimis analysis (Social Security, supra), it is difficult not to consider the fact that the scheduled hiatus was to occur during daytime hours, when the cafeteria and the Leestown Road facility's retail store (which sells snacks) were open (Tr. 65).

It remains to consider whether the permanent exchange of the set of vending machines originally installed in the Leestown Road vending room for the machines previously in use at Cooper Drive was a change in any condition of employment. The change encompassed the substitution of some relatively older (Cooper Drive) machines for the newer machines (about a year old at the time of the switch) and the loss of two machines--coffee and fountain soda with ice.

I cannot regard the substitution of the older machines, which, according to General Counsel's witness Green, provided substantially the same services and products as the originals and were in working order, as a change in working conditions. The newer machines may have been more aesthetically pleasing (perhaps less so to some) than their replacements, but this aspect of their presence is too marginal to qualify, in my subjective view, as a real factor in the "bargaining unit employees' work situation." VA Leavenworth, supra, at 597. Although the extent of the impact on working conditions is not relevant, the subject of the change will not be considered a condition of employment at all unless it meets the second part of the Antilles test, which implies that the change must affect working conditions at least to some extent. The record in this case does not show any such effect. See VA Leavenworth at 596-97.

Arguably having some "nexus" (VA Leavenworth at 596) to the employment situation is the availability of soft drinks in cups and with ice. However, as in VA Leavenworth, the record here is silent as to how the availability of the product in question--soft drinks in cups as an additional option to canned drinks--"affected the employees' work situation or employment relationship." Id. at 597.

Of all the changes made here, the loss of the coffee machine looks most like a change in a condition of employment. The Authority considers "break room conveniences" in general, independent of cafeteria facilities, to be conditions of employment. Department of the Treasury, Internal Revenue Service (Washington, D.C.); and Internal Revenue Service, Hartford District (Hartford, Connecticut), 27 FLRA 322, 325, 338 (1987). It has also held a union proposal for various food-related items including a coffee machine to be negotiable. American Federation of Government Employees, Social Security Local 3231, AFL-CIO and Department of Health and Human Services, Social Security Administration, 16 FLRA 47 (1984). Cf. U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Boston,

Massachusetts, 37 FLRA 25, 34 (1990) (availability of potable water is a condition of employment).

The loss of the machine did not actually deprive the employees of access to coffee at or near their work locations. The effect of the removal of the machine from the vending room was to compel coffee drinkers to choose an alternative. Among those conceivable are to bring or share a pot, to bring hot coffee from home in a thermos, or to walk up to two/tenths of a mile (back and forth) further, to the next closest machine, a practical impossibility during a ten-minute break but only an inconvenience during a half-hour lunch break.

There is a nexus to the work situation here, albeit a slight one. The convenience of one's access to coffee at one's work site is implicitly related to working conditions in a way that tobacco products, the subject of dispute in VA Leavenworth, is not. The most striking and otherwise nonjudgmental difference is that tobacco products, in a form ready for consumption, are portable in a way that fresh coffee is not. Nor does the fact that the proximity of a coffee machine is a convenience rather than in the commonly understood sense a necessity preclude a finding that its presence in the vending room is a condition of employment. See U.S. Department of Health and Human Services, Social Security Administration, Region X, Seattle, Washington, 37 FLRA 880 (1990) (providing of copies of Federal Times for employee break rooms was a condition of employment).

Although relatively inconsequential, then, the employees' loss of the convenience of having a coffee machine in the break room is a change that affects their working conditions to some extent. If the issue is framed in a different but legally equivalent way, the negotiability of the change becomes more apparent. Thus, one would be hard put to deny, consistent with Authority precedent, that a union proposal concerning the location of a coffee machine is negotiable.4/ That is, if the providing of a coffee machine is negotiable (AFGE Local 3231, supra), I can see no basis on which to draw a line excluding the subject of the

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4/ The subjects of other changes at issue in this case, such as the difference between older and newer machines and the availability of a cup soft-drink machine, might be found to be negotiable based on evidence, absent here, of effect on working conditions. See VA Leavenworth at 596-97.

machine's location, except that proposals for locating one in certain particular locations might be nonnegotiable for different reasons.

As to the permanent removal of the coffee machine, therefore, I conclude that the Respondent violated sections 7116(a)(1) and (5) by failing to give the Union notice and an opportunity to bargain. I also find that restoration of a comparable machine, by whatever means the Respondent may find suitable, is a remedy appropriate to effectuate the purposes and policies of the Statute. See Library of Congress, 15 FLRA 589, 591, 602-03 (1984). On the appropriateness of status quo ante remedies generally in unilateral change cases, see U.S. Department of Labor, supra, 37 FLRA at 39-40. Therefore, I recommend that the Authority issue the following remedial order.

ORDER

Pursuant to section 2423.39 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of Veterans Affairs, Veterans Administration Medical Center, Veterans Canteen Service, Lexington, Kentucky, shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in working conditions by removing the coffee machine from the Leestown Road employee vending room without providing notice to the National Association of Government Employees, Local R5-184, the exclusive representative of certain of its employees, and affording it the opportunity to bargain concerning the change.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of 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) Notify the National Association of Government Employees, Local R5-184, the exclusive representative of certain of its employees, in advance of any intended changes in the working conditions of bargaining unit employees

concerning the permanent removal of vending machines from employees break areas and, upon request, negotiate with the exclusive representative concerning such proposed changes.

(b) Restore to the employee vending room at Leestown Road a coffee machine comparable to the one it removed.

(c) Post at its Leestown Road cafeteria 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 Director of the Medical Center 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, 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, June 17, 1991

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 instituting changes in working conditions by removing the coffee machine from the Leestown Road employee vending room without providing notice to the National Association of Government Employees, Local R5-184, the exclusive representative of certain of our employees, and affording it the opportunity to bargain concerning the change.

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 notify the National Association of Government Employees, Local R5-184, the exclusive representative of certain of our employees, in advance of any intended changes in the working conditions of bargaining unit employees concerning the permanent removal of vending machines from employees break areas and, upon request, negotiate with the exclusive representative concerning such proposed changes.

WE WILL restore to the employee vending room at Leestown Road a coffee machine comparable to the one we removed.

_____
(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, Atlanta Region, whose address is: 1371 Peachtree Street, NE, Atlanta, Georgia, and whose telephone number is: (404) 347-2324.