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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION Respondent	
and	Case No. 3-CA-00013
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

Ana de la Torre, Esquire
For the General Counsel

Richard Matthews, Esquire
For the Respondent

Barry Nelson
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on October 2, 1989, by the American Federation of Government Employees, AFL-CIO, (hereinafter called the Union), a Complaint and Notice of Hearing was issued on January 31, 1990, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the Department of Health and Human Services, Social Security

Administration, (hereinafter called the Respondent), violated sections 7116(a)(1), (5) and (6) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by implementing changes to the "areas of consideration" in vacancy announcements which reduced the "areas of consideration" set forth in Article 26, Section 5(B)(11) of the parties expired national agreement at a time when negotiations for a new collective bargaining agreement had reached impasse and certain impassed items had been submitted to the Federal Service Impasses Panel for resolution.

A hearing was held in the captioned matter on May 8, 1990, Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on June 20, 1990, which have been duly considered.

Upon the basis of the entire record,[1/] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.[2/]

Findings of Fact

By letter dated March 10, 1988, Respondent gave the Union formal notice that it desired to reopen a number of Articles/Sections of their 1982 collective bargaining agreement. Paragraph 3 of the letter stated as follows:

> A list of the provisions in the current agreement which constitute permissive areas of bargaining and which are being withdrawn [are in] (tab C). We are also withdrawing the terms of other forms of agreements, such as MOU's, which were derived from permissive areas of bargaining.

1/ In the absence of any objection, the Respondent's "Motion To Correct Portions Of Transcript", should be, and hereby is, granted.

2/ The facts are for the most part undisputed.

Among the list of items which were considered by Respondent to be permissive subjects of bargaining and were being withdrawn was Article 26, Section 5, entitled "Vacancy Announcements and Areas of Consideration." Subsection 5(B)(11)(b) of Article 26 which dealt with optional reductions in the Area of Consideration provided that optional reductions could only be "instituted by mutual consent of the parties." According to Respondent, this was a permissive subject of bargaining since it affected "the numbers of employees assigned to an organizational segment."

Subsequently, the parties reached agreement on a new collective bargaining agreement[3/] and signed a "Memorandum of Understanding" in the latter part of April 1988, wherein the parties agreed to withdraw their proposed revisions of a number of Articles, including Article 26.

On December 23, 1988, the Union sent a letter to the Respondent wherein it informed the Respondent that the collective bargaining agreement negotiated around April of 1988 had not been ratified by the membership. On January 9, 1989 the Union requested the services of the Federal Mediation and Conciliation Service (FMCS).

On April 10, 1989, the Respondent notified the Union that since the collective bargaining contract had not been ratified it was withdrawing any commitments previously made and that, among other things, it intended to withdraw an attached list of permissive and prohibited subjects from the bargaining table. Article 26, Section 5(B)(11) was listed as falling within both permissive and prohibited areas of bargaining. Respondent's April 10 letter went on to state that it intended to effect the changes in the permissive and prohibited areas on April 17, 1989, and that after such date any such provisions which were in the expired contract would no longer be enforced. Finally, Respondent informed the Union that it would consider any Union proposals on the withdrawn permissive and prohibited subjects on a post implementation basis.

On April 11, 1989 the Union filed a Request for Assistance with the Federal Service Impasses Panel.

3/ The Collective Bargaining Agreement was subject to ratification by the Union membership.

On April 26, 1989 the Union responded[4/] to Respondent's April 10th letter and informed the Respondent that it had contacted the FSIP and expected that FSIP would resolve the matter, that it would deal with the issue regarding the permissive and prohibited areas of the contract as soon as the impassed issues were resolved, and that if Respondent wished to make any changes, it should follow the procedures for same set forth in the collective bargaining agreement.

Subsequently, the FSIP appointed Dr. Daniel H. Krueger to hear the matter.

On July 14, 1989 the Respondent informed the Union that it was ready to return to the bargaining table and advised the Union that it was obligated to return to the bargaining table since the membership had failed to ratify the earlier agreement. Respondent also informed the Union that it was of the opinion that they could resolve their problems with out the intervention of a third party. Attached to the Respondent's letter was a list of "management's proposed modifications."

On November 15, 1989, Respondent wrote to Dr. Krueger of the FSIP and informed him that if he decided to implement the entire 1988 agreement without any requirement for ratification by the membership, Respondent would abandon its announced intention to modify certain permissive subjects of bargaining, as proposed in its earlier April 10, 1989 letter to the Union.

On December 22, 1989, the FSIP issued its Decision and Order wherein the parties were instructed to implement the terms and conditions of the agreement reached in April 1988 with the exception of giving the Union the right to submit the agreement to ratification. In its decision the FSIP noted that the Union had sought its assistance in resolving only the smoking and alternate work schedule issues, while the Activity proposed that the Panel either put the entire 1988 tentative agreement into effect or reopen the numerous sections of the contract which were listed in its earlier letters to the Union described above.

4/ The Union in its submission to the FSIP narrowed the issues at impasse down to two issues, namely, the no-smoking policy and alternate work schedules.

According to Respondent's brief, the parties subsequently signed into effect a new collective bargaining agreement on July 25, 1990.

The record indicates that while the matters were before the Panel the Respondent during the period between May 30, 1989 and September 29, 1989 issued a number of vacancy announcements wherein it unilaterally changed the areas of consideration by reducing same. Respondent's action was taken without obtaining the consent of the Union as required by Article 26, Section 5(B)(11). It is this latter action of Respondent which is the subject matter of the instant Complaint.

Discussion and Conclusions

The General Counsel takes the position that the Respondent violated Sections 7116(a)(1), (5) and (6) of the Statute when it issued various job vacancy announcements which unilaterally reduced the areas of consideration without the consent of the Union. According to the General Counsel, "areas of consideration" are mandatory subjects of bargaining which must remain in effect after the expiration of a collective bargaining agreement until such time as appropriate notice is given the Union and the parties complete the bargaining obligations imposed by the Statute. The General Counsel does acknowledge, however, that permissive subjects of bargaining may be unilaterally changed following the expiration of the collective bargaining agreement.

It is the further position of the General Counsel that Respondent violated the Statute by not maintaining the status quo while impasse proceedings were pending before the FSIP. To the extent that Respondent argues that it was at liberty to make changes in Article 26 since Article 26 was not specifically before the FSIP, the General Counsel points out that Respondent, in its November 8, 1989 letter to the FSIP, raised the subject when it requested the Panel to either enforce all provisions of the tentative agreement without change, or, in the alternative, open various articles of the contract, including sections of Article 26, for further negotiations.

Respondent, who appears to acknowledge that mandatory subjects of bargaining may not be unilaterally changed upon the expiration of a collective bargaining agreement, takes the position that "areas of consideration" are permissive subjects of bargaining which may be unilaterally changed after the expiration of the collective bargaining agree-

ment.5/ In such circumstances, since Respondent did give the Union appropriate notice and the opportunity to request impact and implementation (I&I) bargaining prior to effecting the change in Article 26, it is Respondent's position that it did not violate the Statute, as alleged. Respondent further argues that since the no-smoking policy and alternate work schedules were the only issues before the Impasses Panel, it was within its rights when it unilaterally changed Article 26. In support of its position that "areas of consideration" for vacancy announcements are permissive subjects of bargaining, Respondent takes issue with the General Counsel's contention that a larger area of consideration does not impinge on management rights set forth in Section 7106(b)(1) of the Statute since management still retains the right to select only individuals employed by the component for which the vacancy is announced. According to Respondent, failure to select the most qualified employees who respond to the announcement and may be located outside the component would make a shambles of the "internal merit promotion process and result in gross inefficiency of the Respondent's operation." Finally, Respondent makes it clear that, irrespective of the final decision herein, "it does not intend to undo any agreements reached in the final resolution of the new contractual agreement reached by the parties on January 25, 1990 with the assistance of the FSIP."

The Authority has held "that terms and conditions of employment which concern mandatory subjects of bargaining and which are embodied in a collective bargaining agreement continue following the expiration of the Agreement." The Authority has also held "that once an agreement has expired, either party may elect to no longer be bound by provisions therein concerning 'permissive' subjects of bargaining, but

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5/ In support of its position Respondent relies on the decision of the United States Court of Appeals for the District of Columbia in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. FLRA and NTEU, No. 87-1234, 9/23/88, 129 LRRM 2559, wherein the Court reversed the Authority and found that a union proposal that would require an agency to rank and consider current employees for promotion before soliciting or considering outside applications was not negotiable since it was not purely procedural, but would constitute a direct and substantive impediment to management's exercise of its statutory right to select employees from an appropriate source. There is no showing that the Authority has adopted the Court's decision.

instead may reassert the right not to negotiate with regard to such permissive subjects of bargaining." Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio and AFGE, 21 FLRA 1062, 1070.

The Authority has further held "that once parties have reached an impasse in their negotiations and one party timely invokes the services of the [Impasses] Panel, the status quo must be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. A failure or refusal to maintain the status quo during such time would, except as noted above, constitute a violation of section 7116(a)(1), (5) and (6) of the Statute." Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms and NTEU, 18 FLRA 466, 469.

The Parties to this proceeding do not quarrel with the Authority's conclusions of law set forth above. They do, however, have a dispute with respect to application of the law to the facts of the instant case. Thus, as noted above, it is the contention of the Respondent that the "areas of consideration" for job vacancies are permissive subjects of bargaining and that various sections of Article 26 dealing with the "areas of consideration" were not before the Impasses Panel at the time the changes in such "areas of consideration" were made. In such circumstances, Respondent takes the position that it did not violate Sections 7116(a)(1), (5) and (6) of the Statute, as alleged, and that the complaint should be dismissed in its entirety.

Contrary to the contention of the Respondent, I find in agreement with the General Counsel that the Authority has determined that the "area of consideration" for a job vacancy is a mandatory subject of bargaining and may not be unilaterally changed upon the expiration of the parties collective bargaining agreement. Thus, in Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky and Lodge 830, IAM, 4 FLRA 760, the Authority found that the agency, there involved, violated Sections 7116(a)(1) and (5) of the Statute when, upon the expiration of the parties' collective bargaining agreement, it cancelled Section 2 of the contractual agreement dealing with "Area of Consideration" which established the "Ordnance Station and the Voluntary Application File" as the initial area of consideration for all vacancies and substituted therefore a "nationwide area of consideration" in six vacancy announcements. In reaching this latter conclusion

the Authority adopted the Administrative Law Judge's finding that the area of consideration provision of the expired collective bargaining agreement was a negotiable matter since it was merely a procedure for assembling qualified applicants and did not infringe on the agency's 7106(a)(2)(C) right to make the ultimate selection for the vacant position.

I find the instant case to be indistinguishable from Department of Defense, Department of the Navy, Naval Ordnance, supra, except to the extent that the instant case involves a reduction in the area of consideration as opposed to an expansion of the area of consideration. However, in neither case is management restricted in the exercise of its 7106(a)(2)(C) right to make the ultimate selection for the announced vacancy. If, as alleged by the Respondent herein, it has a cap on the amount of employees which can be employed at a certain component of the Agency and therefore must only hire applicants currently employed at the component, there is nothing in the "area of consideration" language of Article 26 which restricts Respondent from making such a selection.

Accordingly, based upon the foregoing, I find that the "area of consideration" is a mandatory subject of bargaining and that Respondent's action in unilaterally changing various sections of Article 26 of the expired collective bargaining agreement, without first giving the Union the opportunity to request bargaining over the substance of the change, violated Sections 7116(a)(1) and (5) of the Statute.

I further find that since the change, described above, occurred at a time when the FSIP was considering certain impassed issues at the request of the Union, Respondent also violated Section 7116(a)(6) of the Statute. As noted, supra, the Authority has held that once one party invokes the services of the Impasses Panel the status quo must be maintained to the maximum extent possible in order to allow the Panel to take whatever action is deemed appropriate. Failure to maintain the status quo constitutes a "failure to cooperate in impasse procedures" in violation of Section 7116(a)(6) of the Statute. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, supra.6/

6/ To limit the status quo to only the items submitted to the Impasses Panel as urged by Counsel for the Respondent would only serve to frustrate the workings of the Panel since it could never predict with any certainty the current status of the remaining working conditions.

Having found that the Respondent violated Sections 7116(a)(1), (5) and (6) of the Statute by virtue of its actions in unilaterally changing a condition of employment at a time when certain other impassed items were before the Impasses Panel, it is hereby recommended that the Authority issue the following Order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Health and Human Services, Social Security Administration, shall:

1. Cease and desist from:

(a) Reducing the areas of consideration for vacancy announcements without first achieving the mutual consent of all parties as required by Article 26, Section 5(B)(11) of the expired June 11, 1982 collective bargaining agreement, without giving appropriate notice to the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, and affording it the opportunity to negotiate, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(b) Failing and refusing to cooperate in impasse proceedings by unilaterally reducing the areas of consideration for vacancy announcements while an impasse concerning a number of other contractual items is pending before the Federal Service Impasses Panel.

(c) In any like or related manner interfering with, restraining or coercing their 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 Statute:

(a) Repost all vacancy announcements in which the areas of consideration were unilaterally reduced in violation of Article 26, Section 5(B)(11).

(b) Post at its facilities wherever bargaining unit employees are located, 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 Commissioner, Social Security Administration, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, 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, D.C., November 27, 1990

BURTON S. STERNBURG
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 reduce the areas of consideration for vacancy announcements without first achieving the mutual consent of all parties as required by Article 26, Section 5(B)(11) of the expired June 11, 1982 collective bargaining agreement, without giving appropriate notice to the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, and affording it the opportunity to negotiate, to the extent consonant with law and regulations, on the decision to effectuate such a change.

WE WILL NOT fail and refuse to cooperate in impasse proceedings by unilaterally reducing the areas of consideration for vacancy announcements while an impasse concerning a number of other contractual items is pending before the Federal Service Impasses Panel.

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

WE WILL repost all vacancy announcements in which the areas of consideration were unilaterally reduced in violation of Article 26, Section 5(B)(11) of the July 11, 1982 collective bargaining agreement.

_____
(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 III, whose address is: 1111 - 18th Street, N.W., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.