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

U.S. PATENT AND TRADEMARK OFFICE Respondent	
and	Case No. 3-CA-10667
NATIONAL TREASURY EMPLOYEES UNION Charging Party	

Christopher M. Feldenzer, Esquire
For the General Counsel

Phillip Boyer, Esquire
For the Respondent

Aileen A. Johnson
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The Trademark Office (TO), part of the Respondent agency, U.S. Patent and Trademark Office (PTO), moved its operations to the South Tower Building, where, for the first time, it provided a lunchroom for its employees. When an employee brought a small personal television set into the lunchroom, a management official told her it was not permitted. The employee asked to see "the paper" on which such a rule was written. The manager then called a meeting of managers to discuss the problem. After that meeting the Assistant Commissioner for Trademarks (the head of the TO) issued this memorandum to all TO employees:

> The purpose of this memorandum is to set forth policy regarding the use of personally owned

television sets, including combination radio/TV sets. Trademark employees may not use TV's or TV/radios at any time inside the Tower buildings, including the lunchroom in the South Tower.

This case arose because PTO did not give advance notice to the Charging Party (NTEU), the certified exclusive representative of PTO's nonprofessional employees (PTO's Br. at 2) or give it the opportunity to negotiate over the "substance or impact and implementation" (Complaint, para. 10(c)) of the memorandum. The sole issue presented is whether the announcement of the policy set forth in the memorandum was an event that required negotiation. If it was, then, as alleged in the complaint, PTO's conduct constituted an unfair labor practice in violation of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by virtue of PTO's refusal to "negotiate in good faith" with NTEU.

A hearing was held on December 19, 1991. Counsel for the General Counsel, for PTO, and for NTEU filed post-hearing briefs.

Findings of Fact

Except for some noncritical details, the testimony of the witnesses on both sides is compatible. Witnesses for the General Counsel testified about a longstanding practice of some clerical employees, at the TO's former location, of watching small portable TV sets while taking their lunch breaks at their desks or in vacant offices. Credible testimony persuaded me that in at least some instances supervisors had observed this conduct and had not objected. On the other hand, it was not shown that this practice was so widespread or notorious that one would be compelled to infer that higher management officials must have been aware of it. Cf. Defense Distribution Region West, Tracy, California, 43 FLRA 1539, 1560-61 (1992).

PTO supervisors and management officials testified that the practice described by the General Counsel's witnesses was not permitted and that they so instructed any employees they saw watching TV at any time. However, the unwritten policy they purported to be enforcing was that there should be no TV-watching in the workplace (Tr. 86-87, 160).

The TO moved to the South Tower Building in April 1991. The parties negotiated about the impact and implementation of the move, but the subject of TV-watching was not raised.

The Assistant Commissioner issued his memorandum banning TV's on July 3, 1991.

Discussion and Conclusions

The General Counsel's theory of the case, as presented at the hearing, was that a permissive policy regarding TV-watching during lunch breaks had become an established past practice. My condensed recitation of the relevant evidence reflects my view that the disposition of the case does not require a finding that there was a past practice of permitting TV-watching. It will be sufficient to determine whether, prior to the prohibition of TV-watching in the lunchroom, a practice comparable to that prohibition existed.1/

The "established past practice" theory is perfectly legitimate. However, it is a cumbersome vehicle for getting at the infirmity of PTO's conduct here.2/

It is not disputed that the permissibility or prohibition of TV-watching in the lunchroom constitutes a condition of employment. In analyzing the duty to bargain, the Authority has spoken of "the right of the union to negotiate over the conditions of employment of bargaining unit

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1/ I note that the complaint does not allege a violation in the memorandum's prohibition of TV-watching elsewhere in the South Tower. Presumably this would have constituted an unfair labor practice, to the same extent as the prohibition in the lunchroom did, if the established past practice the General Counsel sought to prove here had existed.

2/ "In order to constitute the establishment by practice of a term or 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." Norfolk Naval Shipyard, 25 FLRA 277, 288 (1987). The General Counsel's burden to show that responsible management officials were aware that a restrictive policy was being ignored over an extended period appears to be a heavy one. Thus, when a judge invoked a rebuttable presumption that a practice discontinued by a new manager when he learned of its existence had been exercised and condoned for as long into the past as the contrary was not shown, the Authority rejected that presumption sub silentio. U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky, 42 FLRA 137, 142-43, 150-52 (1991).

employees and the right of the agency to set the conditions of employment of nonbargaining unit employees." American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA 478, 482 (1986) (subsequent history not relevant to quoted statement) (emphasis added). The clear implication is that an agency's right to set conditions of employment of bargaining unit employees is subject to the union's right to negotiate. There is no indication that the union's right is limited to situations where the conditions of employment the agency seeks to set are to supersede existing conditions of employment and thus constitute a "change."3/

The proposition that an employer must negotiate before setting a condition of employment, irrespective of whether that condition is more accurately described as "new" or as "changed," is a corollary to the basic concept of the duty to bargain. Section 7103 of the Statute defines "collective bargaining" as "the performance of the mutual obligation. . . to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting [unit] employees . . . ." A unilateral change becomes an unfair labor practice because it circumvents the underlying duty; this conclusion is a special application of

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3/ In the private sector, a successor employer is said ordinary to have the right, not enjoyed by its predecessor in the collective bargaining relationship, "to set initial terms on which it will hire the employees of a predecessor." NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 294, 92 S.Ct. 1571, 1585-86 (1972). Even then, however, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294-95, 92 S.Ct. at 1586. Although the Supreme Court uses the word "consult" here instead of "bargain" or "negotiate," the context strongly suggests that "consult" is used here as a synonym for "bargain" or "negotiate" (with an exclusive representative) and is not restricted to the sense in which Congress used the term, "consultation," in section 7113 of the Statute. Thus, the Court said a few sentences later that the successor employer could initiate its own proposals as the "opening terms and conditions of employment," if the union made a request to bargain after hiring had been completed, but only after the employer "had negotiated in good faith." Id.

the general concept. Thus, unilateral changes make up only one part, albeit a very significant part, of the universe of refusals to bargain. See NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107 (1962). To mistake that part for the whole is to fall into the same fallacy as did, through no fault of their own, the five blind men who tried to identify the elephant.

Turning to the facts presented here, it is difficult to dispute that the prohibition of TV-watching in the lunchroom was as new as the lunchroom itself. I accept the fact that management maintained and, to some extent, enforced an unwritten policy against TV-watching in the workplace. With reference to the TO's old location, such a policy may very well have had the practical effect of banning TV's from anywhere in the building where employees sought to use them. That may have also meant that a manager catching an employee watching TV would order it "off the premises" (Tr. 168). But that was the result of the circumstance that there were no nonwork areas where it would have been feasible to watch TV.

David Bucher, Director of the Trademark Examining Operation for five of the years preceding the TO's move, testified at length about the reasons supporting the wall-to-wall prohibition that management sought to "continue" by applying it to the lunchroom. But those reasons are really negotiating points. Bucher himself described the actual "practice and policy," as it existed in the former location, as a ban on TV in the workplace (Tr. 86-7, 105). So did Robert Anderson, Deputy Assistant Commissioner for Trademarks (Tr. 160). Management is now compelled to characterize the whole building as a workplace (Tr. 168). But the characterization does not fit the lunchroom, an area specifically set aside for employees to use only when they are on nonduty time.

Employee Relations Branch Chief James Cooper testified that the longstanding policy was that no TV sets were allowed in "the office." This terminology injects a bit of ambiguity, since the agency designation of both PTO and TO is "Office." However, Cooper described his awareness of the policy as arising from an incident where an employee had refused to remove a TV set from "her office." When, in elaborating on his answer to the same question (Tr. 128), Cooper described the ban as applying to "the office," I take it that he used the term in the same sense as he used it first, and thus, consistent with Director Bucher, to refer to the workplace. To the extent that Cooper intended his second and subsequent references to "the office" to be taken as though the letter "o" were capitalized, I find Bucher's

characterization of the actual "practice and policy" to be more persuasive.

Nor does the fact that the previous policy applied to TV-watching during lunch breaks as well as during duty time change its essential nature. Taken at face value, the policy was a ban on TV in the workplace. Its enforcement meant that employees who took their lunch breaks in work areas (because there was nowhere else to go if they wished to have lunch in the building) were prohibited from watching TV. But that does not change the policy to one of wall-to-wall prohibition.

PTO also argues that NTEU exhausted its opportunity to bargain about policies covering the lunchroom when the parties negotiated over the impact and implementation of the move to the South Tower building. However, NTEU was not required to raise at that time issues that it could not reasonably anticipate would become relevant to the move. Consistent with my findings above, there was no policy in effect that would reasonably have put NTEU on notice that TV-watching would be banned in the lunchroom. It is not even arguable, therefore, if those findings are correct, that a waiver or waiver-type defense can be established here. Moreover, there can have been no exhaustion of PTO's duty to bargain over a subject that was not even raised during the negotiations.4/

I conclude, in sum, that PTO created a new condition of employment when it banned TV-watching in the lunchroom. Its establishment of this condition of employment without first giving NTEU notice and an opportunity to negotiate was an unfair labor practice within the meaning of section 7116(a)(1) and (5) of the Statute. I recommend that the Authority issue the following order.5/

4/ Were this cluster of defenses effective to relieve PTO of liability notwithstanding my findings regarding the nature of the prior practice, they would be equally effective to neutralize a finding that there was an established past practice of permitting TV-watching.

5/ The General Counsel and NTEU request that the posted notice be signed by the Commissioner of Patents and Trademarks. The General Counsel also requests that the notice be posted throughout the "Agency." Since the bargaining unit apparently includes employees throughout PTO, it seems appropriate that the notice be posted wherever (Footnote continued on next page.)

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Patent and Trademark Office shall:

1. Stop:

(a) Setting conditions of employment regarding the use of television sets in an employee lunchroom without first notifying the National Treasury Employees Union, the exclusive representative of affected employees, and providing it with an opportunity to negotiate about such conditions.

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

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

(a) Rescind the prohibition against watching television in the lunchroom in the South Tower Building.

(b) Notify and, upon request, negotiate with the National Treasury Employees Union concerning any restriction on watching television in the lunchroom.

(c) Post at all of its facilities where bargaining unit employees are located copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of

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(Footnote continued from previous page.)

unit employees are employed. See Department of Housing and Urban Development, San Francisco, California, 41 FLRA 480 (1991). Given that the Assistant Commissioner for Trademarks has no jurisdiction outside the TO, I deem it appropriate that the notice, since it is to be posted in non-TO locations, be signed by the Commissioner. A status quo ante remedy is also appropriate. Although I have not treated this as a classic "unilateral change" case, the policies supporting such a remedy in those cases are applicable here. See U.S. Department of Labor, Washington, D.C., 38 FLRA 899, 913 (1990).

such forms, they shall be signed by the Assistant Secretary and Commissioner of Patents and Trademarks and shall be posted and maintained for 60 consecutive days, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Take reasonable steps to ensure that these 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, Washington, D.C. Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply with it.

Issued, Washington, DC, April 21, 1992

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 set conditions of employment regarding the use of television sets in an employee lunchroom without first notifying the National Treasury Employees Union, the exclusive representative of affected employees, and providing it with an opportunity to negotiate such conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured by the Statute.

WE WILL rescind the prohibition against watching television in the lunchroom in the South Tower Building.

WE WILL notify and, upon request, negotiate with the National Treasury Employees Union concerning any restriction on watching television in the lunchroom.

_____
(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, Washington Regional Office, whose address is: 1111 18th Street, NW, 7th Floor, P.O. Box 33758, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.