UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

LUKE AIR FORCE BASE, ARIZONA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547, AFL-CIO Charging Party	Case No. SA-CA-20784

Lt. Col. Victor R. Donovan
For the Respondent

John R. Pannozzo, Jr., Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the San Francisco Region, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by implementing a change in conditions of employment of bargaining unit employees by prohibiting smoking in a building on Respondent's Base.

A hearing on the Complaint was conducted in Phoenix, Arizona at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees.

On July 12, 1990 the Authority issued its decision in United States Department of the Air Force, 832D Combat Support Group, Luke Air Force Base, Arizona, 36 FLRA 289 (1990) (Luke Air Force Base). In that case the Authority found Respondent had failed to bargain in good faith with the Union by unilaterally implementing a base-wide no-smoking policy without completing bargaining over the substance, impact, and implementation of the change. The Authority, inter alia, ordered Respondent to rescind the no-smoking policy it implemented on May 15, 1988, having adopted Administrative Law Judge Garvin Lee Oliver's findings, conclusions and recommended order.[1/] In his May 30, 1989 decision Judge Oliver found that prior to the change on May 15, 1988, ". . . the policy on employee smoking at Luke Air Force Base was to permit employees to smoke anywhere on the base including inside buildings except near hazardous materials."

When the implementation of the base-wide no-smoking policy occurred in May 1988, building 610 was being used for aircraft maintenance training, such training being given to civilian employees and military personnel but conducted by military instructors. Credited testimony reveals that while building 610 was used for training, three of four bargaining unit employees were employed in clerical work at that facility. Further, during the pre-May 1988 period, credited testimony of employee witnesses called by counsel for the General Counsel discloses that civilian employees assigned to the building for training as well as military personnel were permitted to smoke while attending classes.[2/]

Robert Cvengros, Union President from early 1988 until he retired from employment sometime in July 1990, credibly testified that he and other painters smoked in building 610 while performing painting duties on a quarterly basis prior to

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1/ Respondent complied with the Authority's Decision and Order.

2/ Testimony also discloses that at least since 1989 or 1990 ashtrays were affixed outside of building 610.

May 1988 and after the Authority's July 1990 decision, above, at least until his retirement.[3/] While Cvengros' testimony raises questions as to his credibility regarding the past July 1990 smoking practice in building 610, Respondent called no witness to give testimony regarding personal observations or offer reliable evidence of any smoking or non-smoking practice in building 610 during this period. Accordingly, I find building 610 prior to May 1988 and after the Authority's decision in July 1990 was subject to the general Agency policy operative at Luke Air Force Base regarding permitting employee smoking inside buildings located on the Base.

On December 2, 1991 the Union was formally notified by Respondent that its Base Information Management operation was going to be relocated to building 610. The operation had previously been located in buildings 152 and 154 and five bargaining unit employees from those buildings would be affected by the relocation, which was anticipated to occur around January 10, 1992. Smoking was permitted in buildings 152 and 154 and at least two of the five employees being relocated smoked. Flammable chemicals in building 152 were stored in a warehouse room separated from the work area. The Union made no request to bargain on the matter. Due to "budget problems", the move did not occur until May 1992.

Respondent's Labor Relations Officer Gerry Berger, testified that sometime during the spring of 1992 she heard from Chief McClendon, the superintendent of Base Information Management at the time. According to Berger, McClendon said he had been told by "military people", who were in building 610, that the building was a non-smoking building and he would "honor" that after the relocation.[4/] Sergeant James Sergeant, current superintendent of Base Information Management, testified that during the renovation period prior to moving into building 610, McClendon did the "legwork" and they determined "based on the chief of (training) at the time "that there was no smoking in the building prior to the training operation moving out of the building.

In any event, when employees were moving into building 610 in May 1992 they were advised that Respondent's policy was there would be no smoking within the confines of building 610.

3/ Cvengros remained as Union President until November 1991 handling grievances on the Base on behalf of the Union during this period.

4/ McClendon was not called to testify. Berger testified that at the time of the hearing McClendon was "no longer with Luke Air Force Base."

In May or June 1992 it came to the Union's attention that Respondent was not permitting smoking in building 610. On June 30 the Union sent Respondent the following correspondence:

> It has come to the attention of the Union, AFGE Local 1547, that a new smoking policy has recently taken effect in bldg. 610.
>
> It appears that at Cmsgt. McLendon has issued a smoking policy contradicting the Luke AFB ULP settlement agreement between Local 1547 and Luke AFB. This action was taken with full knowledge and consent of the labor relations officer.
>
> We request that this policy be rescinded immediately, or the union may be forced to file ULP. Please reply ASAP within five days preferably.

The no-smoking policy was not rescinded and the Union filed the unfair labor practice charge which gave rise to these proceedings.

Additional Findings, Discussion and Conclusions

The General Counsel contends that prior to May 1992 smoking was permitted in building 610 and thereafter Respondent changed the smoking policy by prohibiting smoking by unit employees without affording the Union an opportunity to bargain on the substance, impact and implementation of the change in violation of section 7116(a)(1) and (5) of the Statute.

Respondent takes the position that the General Counsel has not met its burden of establishing Respondent changed the smoking policy in building 610 in May 1992 or otherwise changed the smoking policy of employees assigned to that building. Respondent further avers that even if the smoking policy was changed, it was not changed without providing the Union with notice and an opportunity to bargain and, even if a violation of the duty to bargain is found, public policy and special circumstances make a status quo ante remedy inappropriate.

I find and conclude the record herein clearly establishes Respondent changed the smoking policy for employees working in building 610. Prior to the Authority's July 1990 decision in Luke Air Force Base, according to the findings of fact in that case, Respondent's policy was to permit employees to smoke anywhere on the base including inside buildings. No distinction is made in that decision as to smoking buildings

or non-smoking buildings. Rather, the policy found to be in existence was that unit employees were permitted to smoke anywhere.

In any event, the record herein reveals that prior to the July 1990 decision building 610 was one of those buildings wherein smoking by unit employees was permitted.[5/] There is no probative evidence that such smoking policy was ever changed after the Authority's Luke Air Force Base decision in a manner permissible under the Statute. In the circumstances of this case where I have direct testimonial evidence of smoking in building 610 by unit employees, I give no weight to the hearsay testimony by Labor Relations Officer Berger and superintendent Sergeant that they were told by the prior superintendent of Base Information Management, McClendon, that he had been told by others that there was no smoking in the building while training operations were in the building. Such hearsay upon hearsay is simply unreliable. Indeed, even if accepted as probative evidence, it is possible that McClendon was only referring to the period during which Respondent declared the entire base to be non-smoking, which action was found constituted an unfair labor practice. Nor do I find significant in the circumstances herein that ash trays were located outside of building 610. Such ash trays could have been placed there for various reasons, such as simply to keep the outside of the building "policed," since trainees might have gathered in substantial numbers and be inclined to go outdoors during good weather during break periods and smoke at that time. They could also have been placed there when Respondent illegally imposed its no-smoking ban in 1988.

I also find and conclude that Respondent never provided the Union with notice and an opportunity to bargain on the change in smoking policy. To be sure Respondent notified the Union in advance that it was relocating Base Information Management operations and employees from buildings 152 and 154 to building 610. However, Respondent did not at any time notify the Union that it was changing the base-wide smoking policy as applicable to building 610 until the change had been effectuated. Such action does not constitute notice and an opportunity to bargain within the meaning of the Statute. Cf. 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, 505-508 (1988) (Indian Health Service), enforced sub nom. Department of Health and Human Services,

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5/ There is no dispute that employees in buildings 152 and 154 were permitted to smoke while working in those buildings.

Indian Health Service, Oklahoma City v. FLRA, 885 F.2d 911 (D.C. Cir. 1989) and cases cited therein.

Lastly, Respondent urges that if a Statutory violation is found, the "special circumstances" in this case and "public policy" make a status quo ante remedy inappropriate. With regard to special circumstances, Respondent argues: that Respondent did not willfully violate the Statute but Respondent (and the Union) made an erroneous initial assumption that there was nothing to negotiate concerning the relocation to building 610; that it tried in good faith to accommodate smokers and allow indoor smoking prior to the Union making demands[6/] and did not rescind its ban on smoking because it concluded it had not changed its policy; and given the "reasonableness" of Respondent's conduct, and the "intransigence" of the Union, a return to the status quo ante will excessively reward the party who was right rather than the party who tried to do what was right.

Respondent cites no cases to support its contention that the matters raised constitute valid defenses to the imposition of a status quo remedy and I am unaware of any case where the Authority has held that such arguments would be a valid defense. Further, I am unpersuaded that such arguments are of such significance that the Authority's customary remedy for conduct found herein should be circumvented. Accordingly, Respondent's arguments are rejected.[7/]

As to its contention that "public policy" considerations make a status quo ante remedy inappropriate in this case, Respondent essentially urges that because of the widely accepted physical hazards of tobacco smoke, it should not be required to return conditions to the status quo ante. Similar arguments have been raised previously before the Authority. Thus, in U.S. Department of Health and Human Services, Public Health Service, Indian Health Service, Indian Hospital, Rapid City, South Dakota, 37 FLRA 972 (1990) (Indian Hospital Rapid City), the respondent therein instituted a smoking policy to create a smoke-free environment, the purpose being to safeguard the health of employees and patients and provide good example to patients and visitors. Notwithstanding such a

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6/ Referring to testimony of Sergeant that, while he was not "in the process" of the original layout for building 610, it was his "understanding" that they were going to try to have some facility for smoking but the building layout did not "provide . . . that capability."

7/ I have also considered and rejected related arguments raised by Respondent in its brief.

laudable objective, the Authority held the respondent was obligated to fulfill its Statutory bargaining obligations with the collective bargaining representative and, as part of the remedy for respondent's failure to fulfill such obligations, the employer was required to rescind the changes made in its smoking policy and reinstitute the policy in effect before the change. I find Indian Hospital Rapid City, and cases cited therein, to be controlling in this case and I therefore reject Respondent's contention and will recommend a status quo ante remedy.

I further find no merit in Respondent's argument that its position against the imposition of a status quo remedy is supported by the decision of the Federal Service Impasses Panel (the Panel) in Department of Housing and Urban Development, Region V, Cleveland, Ohio and Local 3701, American Federation of Government Employees, AFL-CIO, Case No. 92 FSIP 205, February 11, 1993 (Panel Release No. 340, March 1, 1993). In that case the Panel indicated it recognized ". . . the overwhelming body of scientific evidence that has conclusively established the health hazards associated with the passive inhalation of second-hand or environmental tobacco smoke." The Panel then "reach(ed) beyond the boundaries of the dispute" and prohibited all indoor smoking in the facility. While I recognize that if impasse in bargaining occurs it may be likely that the Panel would resolve the dispute in a similar manner to the case above, it is nevertheless necessary to reinstitute the prior policy and allow the parties to negotiate on any change which might be deemed desirable in order not to render meaningless the Statutory obligation to bargain. See Indian Health Service, at 509 and see Indiana Hospital Rapid City, at 976 and 981. As part of the remedy therefore, I shall recommend that the smoking policy be restored to that which was the prior policy found to exist by the Authority in Luke Air Force Base, which would exclude smoking only in the room wherein flammable chemicals are stored.

Accordingly, in view of the entire foregoing and the record herein I conclude Respondent changed the smoking policy of unit employees located in building 610 by prohibiting them from smoking in building 610 without notifying the Union and affording it an opportunity to negotiate concerning the substance, impact or implementation of the change in violation of section 7116(a)(1) and (5) of the Statute and I recommend the Authority issue the following:

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 Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions for unit employees by changing the smoking policy for employees in building 610 without first bargaining with the American Federation of Government Employees, Local 1547, AFL-CIO, herein called the Union, the exclusive representative of certain of its employees, to the extent consonant with law and regulations, on the decision to effectuate such a policy and its impact and implementation.

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

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

(a) Rescind the no-smoking policy implemented when unit employees relocated to building 610 in May 1992 and reinstate the policy of permitting employees to smoke in building 610.

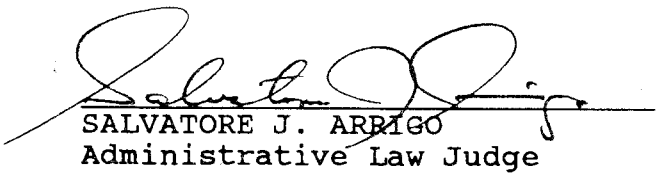
(b) Notify the Union in advance of any intended changes in smoking policy and, upon request, negotiate to the extent consonant with law and regulations, on the decision to effectuate such a policy and its impact and implementation.

(c) Post at its facilities at Luke Air Force Base, Arizona, where bargaining unit members represented by the American Federation of Government Employees, Local 1547, AFL-CIO, 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 Commanding Officer and shall be posted and maintained for 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 of the San Francisco 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.

Issued, Washington, D.C., September 30, 1993



SALVATORE J. ARRIGO
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 NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change working conditions of bargaining unit employees by changing the smoking policy for employees in building 610 without first bargaining with the American Federation of Government Employees, Local 1547, AFL-CIO, herein called the Union, the exclusive representative of certain of our employees, to the extent consonant with law and regulations, on the decision to effectuate such a policy and its impact and implementation.

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

WE WILL rescind the no-smoking policy implemented when unit employees relocated to building 610 in May 1992 and reinstate the policy of permitting employees to smoke in building 610.

WE WILL notify the Union in advance of any intended changes in a smoking policy and, upon request, negotiate to the extent consonant with law and regulations, on the decision to effectuate such a policy and its impact and implementation.

_____

(Activity)

Date: _____ 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, San Francisco Region, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 744-4000.