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

UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD SAFETY AND INSPECTION SERVICE, WASHINGTON, D.C. Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS, AFL-CIO Charging Party	Case No. 3-CA-10721

William F. Dailey
Counsel for the Respondent

David Rodriguez
John W. Mulholland (On the Brief)
Representatives of the Charging Party

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Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5), by refusing to comply with a Relationships By Objectives program agreed to by Respondent and the Charging Party on April 1, 1991.

Respondent's answer denied that it agreed in writing on the Relationship by Objectives program and denied any violation of the Statute. The Respondent admitted that it and the Charging Party jointly designed in writing a Relationships by Objectives action plan during a workshop in Phoenix, Arizona on March 11-14, 1991.

A hearing was held in Washington, D.C.[1/] The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The parties filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material herein the Charging Party (Union) has been the exclusive representative of permanent full-time food inspectors employed in the field service of the Respondent. The Respondent and the Union are parties to a collective bargaining agreement (basic agreement) which went into effect October 10, 1984 for a period of three years. This agreement was renewed by mutual consent in 1987 and by operation of the agreement's automatic renewal clause in 1990 for an additional three years.

In an attempt to improve their working relationship, Respondent and the Union agreed to participate in a conflict resolution process called Relationships by Objectives conducted under the auspices of the Federal Mediation and Conciliation Service (FMCS) during the week of March 11-14, 1991 in Phoenix, Arizona.

Relationships by Objectives (RBO) was created by FMCS in 1975. In this program, representatives of both parties are brought together and led by FMCS mediators to surface and analyze all of their complaints about each other as well as all of the problems which have contributed to a poor relationship. They than decide on common objectives to improve their relationship and reach agreement on action steps to be taken to achieve or implement the objectives.

1/ Respondent's unopposed motion to correct the transcript is granted; the transcript is corrected as set forth therein.

Respondent and the Union met in Phoenix, Arizona the week of March 11-14, 1991. There was no prior ground rules agreement and, unlike the previous bargaining sessions in which the Respondent and the Union participated, the Respondent paid all travel and per diem expenses incurred by the Union's participants.

Each party was represented by 16 representatives of its own choosing. The chief spokesperson for the Union was Delmar Jones, then Chairman of the Union. The chief spokesperson for Respondent was Dr. Lester Crawford, then Administrator of FSIS. In Phoenix Crawford represented to Jones, as he had done previously in December 1990, that any RBO plan developed at the meeting would be a binding agreement and that he was authorized by the Secretary's Office of the Department of Agriculture to enter into such an agreement. Jones likewise advised Crawford that he, Jones, was authorized to enter into such an agreement on behalf of the Union.

The RBO process was facilitated by five mediators from the FMCS. Don Doherty of FMCS explained at the outset that the parties were setting off on a great adventure which many would have misgivings about, but would come to see as valuable. He described it in terms of conflict resolution, open communication, and better attitudes, and did not specifically use the words "bargaining," "contract," or "negotiation." He explained that at the end of the session the parties would develop a document which they would be expected to adhere to and they would also establish a joint labor-management committee to oversee its implementation.

The parties initially watched motion pictures dealing with conflict resolution which demonstrated the advantages of good attitudes and full communications and the disadvantages of poor attitudes and incomplete or inadequate communications. The parties were then divided up into teams of four management and four Union persons to discuss and report on the lessons learned from the movies. Thereafter, the parties went off separately to make lists of their problems as well as proposed solutions. The solutions consisted of things each party wanted the other to do and actions each side was willing to take itself in order to change the relationship. The lists were placed on flip charts.

The lists prepared separately by the parties were then consolidated by an FMCS mediator as a result of open discussion with the entire group. The walls were papered with such lists.

The resulting lists were later placed in categories of objectives by the mediators from FMCS. These categories were given to the teams of four management and four labor persons with the assignment to develop action steps to achieve the objectives.

When the teams eventually came back to the general session with the proposed action steps, the management group and the labor group were permitted to caucus and then return to the general session to comment or object as they saw fit. During this discussion there were proposals, counter-proposals, give and take, and compromise.

Ultimately, the parties agreed upon the action steps and designated the persons responsible for accomplishing the objectives and the actions steps. They also set the time period within which the action steps were to occur.

At the conclusions of the RBO procedure in Phoenix, a written agreement was reached which proved acceptable to the chief spokespersons Jones and Crawford. Both Jones and Crawford understood that the parties had reached a final and binding agreement. Thus also agreed that the parties would prepare a signature page and sign the agreement at a later date.

Before leaving the RBO session each member of the management and labor teams was asked by the FMCS mediators to comment on the process and the resulting document and pledge his or her support to the labor-management committee jointly established by the parties to implement the RBO agreement. No one expressed dissatisfaction with the process or the document.

In late March 1991 the FMCS conducted a training session in Pensacola, Florida for the joint labor-management committee.

With one modification that was mutually agreed to after the parties left Phoenix, the RBO document was signed by Lester M. Crawford, Administrator, FSIS, and Delmar Jones, Chairman of the Union, on April 1, 1991 and by other members of the National Joint Council a few days later in early April, 1991.

The RBO agreement sets forth objectives, action steps, responsibilities, and time frames in outline form under columnal headings. For example, under the objective of "labor management cooperation" the agreement begins with the

action step: "Both management and labor at all levels will commit to a cooperative working relationship through the following: (a) Consult/negotiate on matters that impact on conditions of employment, (b) Adopt win/win attitude...,(c) Make an honest attempt to stop suspicion." Later on the agreement pinpoints more graphically the perceived prior behavior and attributes of the parties that contributed to a poor relationship by adopting objectives such as, "Union should deal with facts-don't exaggerate or fib! Management should quit lying." The action step to accomplish these objectives is set forth as: "Both sides should make a concentrated effort to deal with issues and not personalities."

The RBO agreement also calls for constructive consultations. It provides for a joint agenda to be set five days in advance and area consultations to be held quarterly for one week or more often, if necessary.

In addition, the RBO plan contains provisions which affects such matters as grievance clarity and resolution at the lowest possible step; communication between the parties; joint interpretation sessions on the national basic agreement, employee rest breaks ("kill floor breaks"); work unit meetings; reevaluation of the system for allocations and accounting for official time; employee health and safety complaints; prohibition of "bootleg" forms for documentation of employee performance and work assignments; review of employee performance awards; and other matters. With regard to internal delegations, the Union agreed to put in place regional and circuit safety committees if needed; management agreed to have the Labor Management Relations Director report to the Administrator.

Almost immediately after the Phoenix meeting opposition to the RBO developed within the FSIS, at the departmental level of the Department of Agriculture, and outside the Department in the industry regulated by the FSIS. Objections to the agreement were expressed by (1) some FSIS field managers, (2) the representatives of four major trade associations within the industry which FSIS regulates, (3) Dr. Ronald Prucha, the Associate Administrator, FSIS, and (4) William H. Hudnall, the Deputy Administrator for Administrative Management, FSIS, among others. These objections were eventually expressed directly and/or indirectly to JoAnn R. Smith, Assistant Secretary for Marketing and Inspection Services, Department of Agriculture, who oversees the FSIS. On April 11, 1991 Smith sent Administrator Crawford a memorandum directing, in part, that "the 8 page RBO action plan not be issued to anyone."

At the request of Smith and Hudnall, the Deputy Administrator for Administrative Management, FSIS, Larry B. Slagle, Director of Personnel, Department of Agriculture, who had been delegated responsibility for agency head approval or disapproval of collective bargaining agreements pursuant to section 7114(c) of the Statute, conducted an informal review of the RBO document to identify provisions which were inconsistent with law, rules, or published regulations. In a discussion with Administrator Crawford on April 26, 1991, and by memorandum to Crawford dated May 13, 1991, Slagle identified five provisions which he claimed violated management's reserved rights under section 7106 of the Statute. Slagle also stated, in part, as follows:

> The provisions discussed above are the only provisions within the original RBO found to be nonnegotiable. Other provisions may suffer for lack of clarity, or may be couched in rather strong terms, but they cannot be ruled nonnegotiable and unenforceable. Thus, even though some of the provisions effectively amended the National Basic Agreement, the Department can find no basis for ruling those provisions nonnegotiable.

Despite Slagel's opinion that certain provisions of the agreement violated management rights under the Statute, he did not reject or disapprove the document under section 7114(c) of the Statute. Slagle was of the opinion that the RBO document was not a collective bargaining agreement subject to the Statute, but rather was merely an action plan to improve the relationships and the behavior between management and labor. Consequently, no document was issued or addressed to the Union rejecting or disapproving the action plan.

By letter to the Union dated May 2, 1991 from Administrator Crawford, and at a meeting with the Union in Denver, Colorado on May 15 and 16, 1991, FSIS, by Deputy Administrator William Hudnall, insisted that it was necessary for the parties "to rewrite the action plan." The Union refused, contending, "We've got a done deal, and we're not going to enter into another agreement with you."

Later, Union President Jones, in an effort to clarify the matter, arranged a meeting with the Department's Director of Personnel Slagle and all eight Council presidents of the Union on June 6, 1991. At the meeting, Slagle explained that, from a legal standpoint, the Department objected only to the five provisions violating

certain management rights; however, he felt that certain other language was negative and would not serve to improve the relationship. He expressed the hope that both parties would look at the whole action plan again and use more constructive language. He told the Union that he had given FSIS executives the same advice. Delbert Jones, on behalf of the Union, responded that the Union was certainly willing to accommodate the Department with respect to the five matters which Slagle claimed dealt with reserved management rights.

Thereafter, the parties met in Savannah, Georgia in June 1991. Mr. Hudnall was chief spokesperson for FSIS, and Delbert Jones was chief spokesperson for the Union. The parties initially discussed the five items of concern to the Department and reached oral agreement on them. The FSIS team then brought up "one more concern" dealing with a possible misunderstanding concerning quarterly consultation at the area level, and the parties reached oral agreement on that item. Mr. Hudnall then asked if anyone else in the management team had anything else to rewrite and insisted that the parties had to go through the entire document. The Union refused, contending that, "We've got a done deal." No resolution of the parties' differences on the extent of mutually acceptable modification to the executed RBO was reached.

No portion of the executed RBO agreement has been implemented. The FSIS has at all times after April 1, 1991 failed and refused to implement the executed RBO agreement.

Dr. Jerome T. Barrett, a third party consultant in labor management relations and a former Director of the preventive mediation program of the FMCS until 1982, testified as an expert witness for Respondent on the general aspects of an RBO process. His description of the steps of an RBO process was in accord with the procedures described by the participants in the RBO meeting in Phoenix. He testified that the negotiation process is different from the RBO process in that the negotiation process is a process in which the parties make proposals and counter proposals to one another and eventually, over an extended period of time, compromise their positions and reach a written agreement setting forth rights and obligations concerning wages, hours, and working conditions. He testified that the RBO process is a softer kind of process in which the parties focus on behavior, attitudes, and points of view to which the collective bargaining relationship does not lend itself. He stated that the matters in an RBO action plan

appear in outline form, in columns, and could not be converted into contract language without significant rewriting. Dr. Barrett acknowledged that some of the same matters dealt with in the Phoenix RBO document could be treated in a traditional collective bargaining agreement; namely, labor-management cooperation, area consultations, grievance machinery, work breaks, contract interpretation meetings, training, the use of bootleg forms, and Union jurisdictional boundaries. He also acknowledged that an RBO agreement reached by the parties would be binding and enforceable if they so agreed -- "whatever they agreed to, they agreed to."

Discussion and Conclusions

The General Counsel and the Union contend that the RBO agreement, although reached pursuant to RBO techniques, concerns conditions of employment, was executed by the parties' highest officials, and was not disapproved pursuant to section 7114(c)(1) of the Statute. Consequently, it is, according to the General Counsel and the Union, an enforceable agreement pursuant to the Statute, and Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to implement it. The General Counsel argues that the fact that the RBO agreement was not arrived at in a traditional way, or is not structured like a traditional collective bargaining agreement, or does not read like a traditional agreement is beside the point. The General Counsel and the Union urge that the agreement be ordered implemented as it stood when it was executed on April 1, 1991, effective May 1, 1991, pursuant to section 7114(c)(3) of the Statute, and that the legality of any disputed portion, or its affect on the parties' national basic agreement, be left for resolution in the appropriate forum.

Respondent contends that the RBO process in which the Respondent and the Charging Party participated from March 11-14, 1991, in Phoenix, Arizona, was not "collective bargaining" under the Statute. Consequently, the action plan arrived at through the RBO process in Phoenix does not, in Respondent's view, constitute a "collective bargaining agreement" within the meaning of the Statute. Because this action plan results from the RBO process, rather than from collective bargaining under the Statute, Respondent claims that it represents a collection of hortatory goals, related primarily to behavior, attitudes, and points of view which depend upon voluntary compliance, and falls outside the framework of rights and obligations established by the

Statute. Respondent maintains that since the RBO process, facilitated by FMCS in Phoenix, was not collective bargaining, there is no duty under section 7114(b)(5) to implement the results of this process and, absent such a duty, there can be no violation of section 7116 (a)(1) and (5) of the Statute.

Several provisions of the Statute must be examined in order to decide the issues in this case. In enacting the Statute, Congress determined, among other things, that collective bargaining

(A) safeguards the public interest.
(B) contributes to the effective conduct of public business, and
(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment [.] 5 U.S.C. § 7101(a)(1).

Section 7114 provides in part:

> (a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. . . .
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> . . . . .
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> (4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.
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> . . . . .
>
> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

. . . . .

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

Section 7103 (a) of the Statute also provides the following definitions:

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

. . . . .

> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached....

The record reflects that authorized representatives, indeed the top officials of both the Respondent and the Union, agreed to meet, and met, in Phoenix pursuant to the FMCS facilitated RBO process. The RBO process is designed to have the parties surface and analyze all problems in their relationship and reach agreement on an action plan. Section 7114(a)(4) clearly provides that the parties may determine appropriate techniques to assist in any negotiation. The problems surfaced, discussed, and addressed by the parties during their meeting encompassed not only behavior and attitudes concerning their relationship, but substantial conditions of employment such as union-management consultations, grievances, rest periods, training, forms, health and safety, pilot programs, and awards. Although discussed in an RBO forum, which one witness described as "chaotic," proposals, counter-proposals, and compromises were developed in substance in the process which led to the final RBO agreement. This agreement was executed in writing by authorized representatives of the parties and was then regarded by them as final and binding consistent with the intentions they had expressed to each other before and during the session.

I conclude that, the parties, by this conduct, did "consult and bargain in a good faith effort to reach agreement with respect to conditions of employment" within the meaning of section 7103(a) and did "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement" within the meaning of section 7114(b). Any other conclusion would impose a stylized form of conduct on the parties and a form-over-substance element to "collective bargaining" that is not present in the Statute. Cf. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, North Atlantic Region, New York, New York, 8 FLRA 296, 303-04 (1981).

The RBO agreement was entered into as a result of "collective bargaining" as defined in section 7103(a)(12) of the Statute and is, therefore, a "collective bargaining agreement" within the meaning of section 7103(a)(8) of the Statute.

As noted the agreement contains substantial terms and conditions of employment affecting unit employees. It is not necessary that the language of an agreement be in any usual or particular form. The fact that the agreement was referred to as an RBO action plan rather than a memorandum or agreement, contains short sentences or phrases in outline form, and is divided into goals, objectives, action steps, responsible individuals, and time frames does not remove the agreement from the definition of section 7103(a)(8).

As the agreement was not disapproved within 30 days after the agreement was executed, it went into effect automatically on the 31st day after execution and became effective and binding under the provisions of section 7114(c)(3).

Respondent points to the "ragged and unsanitized nature" of the language used, the "quarrelsome phases," the "bullet-like phases" and questions how such language can change past practices or amend, modify, or be incorporated in the existing provisions of the parties' basic agreement. It is well settled that provisions in an agreement that are contrary to the Statute or other applicable law, rule, or regulation may not be enforceable. 5 U.S.C. § 7114(c)(3). Questions as to the validity of such provisions may be raised in other appropriate proceedings. American Federation of Government Employees, National Mint Council and U.S. Department of Interior, Bureau of Mines, San Francisco, California, 41 FLRA 220, 222 n* (1991).

It is concluded that Respondent, by failing and refusing to take such steps as are necessary to implement the parties' Relationship by Objectives collective bargaining agreement thereby failed to bargain in good faith with the Union in violation of section 7116(a)(1) and (5) of the Statute.

Based on the above findings and conclusions, it is recommended that the Authority issue the following:

ORDER

Pursuant to § 2423.29 of the Authority's Rules and Regulations, and section 7118 of the Federal Service Labor-Management Statute, the United States Department of Agriculture, Food Safety and Inspection Service (FSIS), Washington, D.C. shall:

1. Cease and desist from:

(a) Failing or refusing to take such steps as are necessary to implement the Relationships by Objectives collective bargaining agreement with the American Federation of Government Employees, National Joint Council of Food Inspection Locals, AFL-CIO (the Union), the exclusive representative of a unit of its employees, which took effect on or about May 1, 1991 subject to applicable law, rule, or regulation.

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

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

(a) Take such steps as are necessary to implement the Relationships by Objectives collective bargaining agreement with the Union, which took effect on or about May 1, 1991 subject to applicable law, rule, or regulation.

(b) Post at all of its facilities where 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 Jo Ann Smith, Assistant Secretary for Marketing and Inspection Services, U.S. Department of Agriculture, or her successor in office, 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 of the Washington 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 herewith.

Issued, Washington, DC, October 9, 1992

GARVIN LEE OLIVER
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 fail and refuse to take such steps as are necessary to implement the Relationships by Objectives collective bargaining agreement with the American Federation of Government Employees, National Joint Council of Food Inspection Locals, AFL-CIO (the Union), the exclusive representative of a unit of our employees, which took effect on or about May 1, 1991 subject to applicable law, rule, or regulation.

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 take such steps as are necessary to implement the Relationships by Objectives collective bargaining agreement with the Union which took effect on or about May 1, 1991 subject to applicable law, rule, or regulation.

_____
(Agency)

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.