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

NAVY RESALE ACTIVITY, NAVAL STATION, CHARLESTON, SOUTH CAROLINA Respondent and FEDERAL EMPLOYEES METAL TRADES COUNCIL OF CHARLESTON Charging Party	Case No. AT-CA-20721

Richard R. Giacolone
For the Respondent

Ronald Goodman
For the Charging Party

Richard S. Jones, 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 Atlanta Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by reducing the hours of work of various of its employees without providing the Union with notice and an opportunity to bargain on the impact and implementation of the reduction.

A hearing on the Complaint was conducted in Charleston, South Carolina 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 certain of Respondent's employees affiliated with the Navy Exchange operation in Charleston, which has approximately 270 employees.[1/] By correspondence dated April 10, 1992, Respondent was advised by the Navy Exchange Service Center, Jacksonville Regional Office, that it was required to reduce expenditures by 10 percent for the remainder of 1992. Managers of Respondent's various operations, such as retail sales area, warehouse and vending machines, were permitted wide discretion on how to carry out the directive in their particular operations. The warehouse manager decided to reduce the hours of all warehouse employees to meet the mandated 10 percent cost reduction goal. Accordingly, on or about April 17, 1992 the approximately 16 warehouse employees were notified by management that the work hours for full and part-time employees were to be reduced effective in seven days. Full-time employees, those scheduled to work between 36 and 40 hours a week, were reduced to 35 hours and part-time employees, those scheduled to work between 20 and 34 hours a week, were reduced to a maximum of 30 hours. Thus, employees normally working 40 hours a week were reduced to 35 while employees normally working 34 hours a week were reduced to 30 hours. In the past, except for a reduction-in-force situation, some warehouse employees' hours were never reduced while others experienced only minor fluctuations in work hours. Sales employees experienced a larger degree of fluctuation in work hours, but a general across-the-board cut in hours had never been effectuated.

On or about April 23, 1992 a number of warehouse employees complained of the cut-back in hours to Union General

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1/ Respondent is a non-appropriated fund instrumentality and part of its objective is to be self-supporting through selling goods and services to its patrons.

Representative Ron Goodman. After ascertaining that the reduction in hours would be permanent, on April 24 Goodman delivered a letter to Respondent protesting that the reduction in hours of full and part-time employees was a violation of the Statute and Article 8 of the parties' collective bargaining agreement. The letter also stated:

> Prior to implementation of any permanent changes to the hours of work of bargaining unit members, the Council desires to meet and discuss the reasoning and legality of the changes and the impact on each employee affected. We wish to reserve the right to a follow up meetings (sic) to present and exchange proposals prior to implementation.

The reduction in hours for warehouse employees was effectuated on April 27. On this date Respondent sent a letter to the Union relating that a 10 percent reduction in expenses had been mandated by Navy Exchange Command and, although the directive might result in elimination of positions or reduction-in-force, ". . . all efforts (would) be made to minimize the impact of this action."

Representatives of Respondent and the Union met on April 29, 1992. The Union essentially asked to have work hours returned to what employees were working before the change and that Respondent bargain on the impact and implementation of any change, suggesting that a reduction-in-force be utilized as opposed to a reduction in hours. Respondent refused to return to the status quo ante, taking the position that management had the right to reduce hours and would stand by its individual managers' decisions to effectuate the required reduction in expenses as they saw fit. The Union replied it was going to have individual grievances filed by every employee.[2/] The meeting concluded without any agreement and the unfair labor practice charge giving rise to these proceedings was filed by the Union.

Additional Findings, Discussion and Conclusions

The General Counsel contends that by reducing the working hours of its warehouse employees without bargaining with the Union on the impact and implementation of the changes, Respondent violated section 7116(a)(1) and (5) of the Statute. Respondent denies it violated the Statute, taking the position

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2/ Subsequently, 53 grievances were filed by employees concerning the reductions in work hours but were thereafter withdrawn.

that where changes in work hours occurred, such action followed specific negotiated procedures set forth in the parties collective bargaining agreement and thus it was not under a duty to bargain further over work hour changes.

Clearly Respondent failed and refused to bargain with the Union when it reduced the regularly scheduled work hours of certain of its warehouse employees without providing the Union with notice and an opportunity to negotiate the matter. However, Respondent essentially defends such conduct on its interpretation of Article 8 of the parties' current collective bargaining agreement which it contends "covers" the matter at issue herein. Article 8, entitled "Basic Workweek and Hours of Work," provides, in relevant part:

BASIC WORKWEEK AND HOURS OF WORK

Section 1. It is agreed that the Navy Exchange is a service organization for the convenience of authorized patrons. Accordingly, working hours will be determined by the Employer to provide optimum use of the facilities and provide the maximum service to patrons. The Employer reserves the right to determine hours of operation of the Exchange.

Section 2. The basic workweek for employees will not exceed 40 hours, exclusive of mealtimes. Where possible, two consecutive days off will be provided in each employees administrative workweek. However, the basic workweek may be scheduled over a period of six days provided the total scheduled hours do not exceed 40 per week.

Section 3. The Employer agrees to maintain stability in assignment consistent with requirements for coverage. The Employer agrees to provide a minimum of twenty-four (24) hours notice for routine continuing shift changes. As much notice as possible will be given for emergency changes of a temporary nature.

Section 4. A Unit employee's assigned tour of duty shall not be changed without voluntary consent, unless the employee has been given seven (7) calendar days advance notification of such change. However, in this connection, it is understood that the Employer retains the right to change employee's tours of duty in order to meet emergency situations.

The relevant portions of the prior collective bargaining eement, under the caption "Workweek and Hours of Work," vided:

Section 1. The administrative workweek for Unit employees shall consist of seven (7) consecutive calendar days, commencing at 0001 and expiring at 2400 7 days thereafter. The calendar days of such administrative workweek will be that as established by the Navy Resale System Office Centralized Payroll System.

Section 2. The Employer agrees that the basic workweek of all Unit employees will be Monday through Friday, where practicable, within which all Unit employees shall work eight hours per day, where practicable. It is further recognized and agreed by the parties that Exchange services are required on days other than Monday through Friday, and in this connection, the establishment of other basic workweeks will be required. In those work areas where workweeks are established which include Saturday and/or Sunday work shifts, and the workload of that work area permits the rotation of work schedules to permit Saturdays/Sundays off as a non-workday, it is agreed that such work schedules shall be rotated on a fair and equitable basis by job titles. However, in the event there are sufficient volunteers to work such work schedules, it is understood that such volunteers will be utilized and rotating work schedules will not apply. It is further understood that the rotation of work schedules shall not apply in the case of part-time employees who are hired for the express purpose of filling Saturday/Sunday work shifts, peak work load hours, or where such rotation would affect the employment status of full-time Unit employees.

Section 3. Tour of duty means the hours of a day (daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that are scheduled in advance and during which an employee is required to perform work on a regularly recurring basis.

Section 4. Priority for consecutive days off will be determined by seniority within job title, according to work location.

> Section 5. A Unit employee's assigned tour of duty shall not be changed without voluntary consent, unless the employee has been given seven (7) calendar days advance notification of such change. However, in this connection, it is understood that the Employer retains the right to change employees' tours of duty in order to meet emergency situations. In the event such emergency situations arise, the Employer agrees to notify the Council as far in advance as possible.

When the case herein was litigated before me and briefs were filed on March 24, 1993, the General Counsel relied on the State of Authority law at that time regarding an employer's obligation to bargain with a union and a defense raising the terms of a collective bargaining agreement. Thus, the General Counsel took the position that the contract article relied on herein did not "cover" the matter at issue since the matter was not "specifically addressed in the negotiated agreement," as the Authority required at that time, nor did the facts of this case establish that the Union "clearly and unmistakably waived" its right to bargain about such matters. 375th Combat Support Group, Scott Air Force Base, Illinois, 45 FLRA 557, 570 (1992) and cases cited therein. Respondent, on the other hand, took the position in its brief the case herein should be controlled by Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA and Marine Corps Logistics Base, Barstow, California v. FLRA, 962 F.2d 48 (D.C. Cir. 1992). Respondent relies upon the Court's conclusion that the Authority incorrectly applied its "clear and unmistakable waiver" standard and its "covered by" standard in assessing the duty to bargain where an employee's action is grounded on a term of the parties' collective bargaining agreement. Thus, Respondent points out that the Court stated, at 50:

> We hold that the Authority committed legal error . . . by improperly equating the question of whether the disputed agency actions were "covered by" the CBA with the question of whether the union had waived its right to bargain. A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain over a matter; but where the matter is covered by a CBA, the union has exercised its bargaining right and the question of waiver is irrelevant . . . By adopting this flawed approach, the Authority departed from its own prior cases and the private sector principles upon which it purported to rely; it also reached results at odds with both the governing statute and common sense . . .

Respondent further alluded to the following language of the Court, at 59:

> The Authority's approach is not only illogical but also impermissible, because it contravenes the policies of the FSLMRS. A primary purpose of the Statute is to promote collective bargaining and the negotiation of collective bargaining agreements. . . .
>
> The Authority's "waiver" approach to the "covered by" inquiry subverts the statutory policies of contractual stability and repose by requiring endless bargaining.

On July 12, 1993 the Authority issued its decision in Internal Revenue Service, Washington, D.C., 47 FLRA No. 103 (1993) pursuant to a remand by the Court of Appeals for the D.C. Circuit. The Authority in the remand re-examined its approach to resolving situations wherein a collective bargaining agreement is raised as a defense to refusal to bargain allegations. The Authority articulated its new approach that in unfair labor practice cases where the underlying dispute is governed by the interpretation and application of specific terms of the parties' collective bargaining agreement, it would no longer apply the "clear and unmistakable waiver" analysis. Id at 13. The Authority announced its new approach generally as follows:

> We now hold that when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly. Id. at 20.

The Authority also stated, at 21:

> . . . in determining the meaning of the collective bargaining agreement, the administrative law judge should consider, as necessary, any alleged past practices relevant to the interpretation of the agreement. In cases where the judge's interpretation of the meaning of the parties' collective bargaining agreement is challenged on exceptions, the Authority will determine whether the judge's

interpretation is supported by the record and by the standards and principles of interpreting collective bargaining agreements applied by arbitrators and the Federal courts.[3/]

Since briefs were filed herein, the Authority has also modified its approach when considering whether matters in dispute are "covered by" or "contained in" an agreement so as to preclude further bargaining. In U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (SSA), the Authority, inter alia, reviewed various prior decisions dealing with this subject. It rejected its prior holding in Internal Revenue Service, 29 FLRA 162 (1987), where it held, at 167, that in determining whether a matter is covered by an agreement, "the determination factor is whether the particular subject matter of the proposal . . . is the same." The Authority went on in SSA, at 1018-1019, to set forth the "framework" it would use to determine whether a contract provision covers a matter in dispute, as follows:

> Initially, we will determine whether the matter is expressly contained in the collective bargaining agreement. In this examination, we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. (Citation omitted).
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> If the provision does not expressly encompass the matter, we will next determine whether the subject is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." (Citations omitted). In this regard, we will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated

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3/ After Internal Revenue Service issued I notified the parties by Order to Show Cause and Notice of Hearing that I was prepared to reopen the hearing to receive evidence concerning the interpretation and application of that portion of the parties agreement relied on by Respondent as a defense to its refusal to negotiate. Both Respondent and the General Counsel opposed reopening the hearing and I accordingly withdrew my Notice reopening the hearing in this case.

in the provision. If so, we will conclude that the subject matter is covered by the contract provision. . . .

We recognize that in some cases it will be difficult to determine whether the matter sought to be bargained is, in fact, an aspect of matters already negotiated. For example, if the parties have negotiated procedures and appropriate arrangements to be operative when management decides to detail employees . . . it may not be self-evident that the contract provisions were intended to apply if management institutes a wholly new detail program, or decides during the term of the contract to detail employees who previously had never been subject to being detailed. To determine whether such matters are covered by an agreement, we will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. In this examination, we will, where possible or pertinent, examine all record evidence. (Citation omitted). If the subject matter in dispute tangentially related to the provisions of the agreement and, on examination, we conclude that it was not a subject that should have been contemplated as within the intended scope of the provision, we will not find that it is covered by that provision. In such circumstances, there will be an obligation to bargain.

The Authority subsequently applied the SSA test in U.S. Department of the Navy, Marine Corps Logistics Base, Barstow, California, 48 FLRA No. 10 (1993) (Marine Corps, Barstow) and Social Security Administration, Douglas Branch Office, Douglas, Arizona, 48 FLRA No. 33 (1993).

In the case herein Respondent relies upon its interpretation of Article 8 to support its refusal to bargain on its reduction in scheduled work hours of warehouse employees. The words of the collective bargaining agreement itself is where the inquiry must begin. Marvin F. Hill, Jr. and Anthony V. Sinicropi, Evidence In Arbitration at 346-366 (The Bureau of National Affairs, 2d ed. 1987). Although Article 8 does not specifically address the question of notification to the Union when a change in the basic workweek or hours occurs, Section 4 of Article 8 does specifically address notice to employees of changes in hours and states that tours of duty may not be changed without employee consent "unless the employee has been

given seven (7) calendar days advance notification of such change." This section further acknowledges the Employer's right to change employees' hours to meet emergency situations, apparently without employee consent or advance notification.

Respondent contends the agreement reflects its entire legal obligation to provide notice of change in hours of work. Respondent takes the position that since the agreement only requires notification be given to the employee, once such notice has been provided all legal notice obligations have been fulfilled. The General Counsel takes the position that the seven day notice requirement of Article 8, Section 4 merely reflects Respondent's statutory obligation under 5 U.S.C. § 6101(a)(3)(A), which provides:

> (3) Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide with respect to each employee in his organization, that -
>
> (A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week . . .

In Article 8, the seven day notice to the employee remains the same in Section 4 of the current agreement as that contained in Section 5 of the prior agreement. However, the prior agreement required Respondent to provide the Union with notice of a tour of duty change in an emergency situation "as far in advance as possible." Such requirement is not found in the current agreement, from which I conclude the parties deliberately deleted the requirement. Further, in Article 8 of the current agreement, Section 3 requires a 24 hour notice, obviously to employees, for routine continuing shift changes, giving "as much notice as possible" in emergency situations. Again, obviously notice is to be given to the affected employee with no express notice obligation being provided the Union. The prior agreement was silent as to shift changes and notice requirements either for the employees or the Union.

While Article 8 might be construed to set forth the only notice obligation Respondent has when a change of tour of duty is envisioned, Article 8 clearly does not provide that the only notice of a general change in tours of duty which need be given is the one set forth in Section 4, nor does it otherwise clearly indicate that no notice be provided the Union. To resolve this ambiguity it is necessary to examine any past

practice or bargaining history as to the meaning or prior application of Article 8 regarding changes in hours. Id. The record contains no evidence of past practice but Respondent has provided testimony concerning the bargaining history of Article 8. John Lyons, Branch Manager of Labor and Employee Relations at the Navy Exchange System Services Headquarters in New York, testified that he was a member of Respondent's negotiating team when the current collective bargaining agreement effective August 1987, was negotiated. When questioned regarding the intent of Article 8, as negotiated, Lyons testified:

> A This Agreement is no different than any other Navy Exchange Agreement in that given the nature of our business, we need flexibility. We have to be able to respond to the requirements of our customers, the authorized patrons who keep us in business, the requirements of having flexible schedules and being able to change schedules as sales periods peak and then ebb and then continue throughout the year in a pattern of up and down and so we wanted the language in there that reflected both the philosophy and allowed us the operational range that we need to effectually (sic) run our business.
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> Q Did that Contract accomplish that goal in your opinion?
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> A In my opinion, yes. It did certainly as far as this Article and in several others I think we improved from our standpoint and also as far as having it reflect the business that we're in and the goals and the requirements that we have.
>
> Q Specifically, Mr. Lyons, where do you see improvement from a Management control standpoint in hours of work between the two (2) Collective Bargaining Agreements?
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> A Well, starting at Section 1, the philosophy comes in. There was nothing - if you read the other Section or the other Article, it could have come out of any Agreement and had no reference really to the special character of the Navy Exchange. It is agreed that the Navy Exchange is a service organization for the convenience of authorized patrons. Again, that's a philosophical aspect that we and we being both Management and the Union as reflecting the employees should adapt. We were

customer oriented. We've got to be able to respond to customer things and it all starts with philosophical attitude or approach and the language here I think very clearly determines that. I don't recollect that there were any changes concerning either the basic work week or the time of notification with regard to changes but there was a change with regard to the philosophy and I thought that was significant.

Q What is the seven (7) day notice period? What does that infer in that Contract?

A That the tour of duties - any employee's tour of duty wouldn't be changed unless they received seven (7) days advance notice.

Q And if given seven (7) days notice, what would happen?

A Once the notice requirement had been satisfied, that the tours could be changed.

Q Without any additional negotiation?

A Without any additional negotiation.

Thus Lyons essentially testified that the Article 8 language was changed in the 1987 collective bargaining agreement to reflect that, because of the service nature of the exchange, the Employer needed flexibility in scheduling work hours and at least management "inferred," under the circumstances, that the only notice requirement it had when changing work hours was to provide the affected employees with seven days notice. Thereafter the Employer could act without any further negotiations on the matter.

Counsel for the General Counsel urges that the collective bargaining agreement itself reaffirms Respondent's Statutory obligation to negotiate matters concerning hours of work. Counsel refers to Article 6, Section 1 of the agreement which provides:

> Subjects appropriate for discussion and/or negotiation between the Employer and Council include personnel policies and practices and matters affecting working conditions which fall within the scope of authority of the Employer. Such subjects may include but are not limited to various aspects of health and safety, training, labor-management

cooperation, employee services, methods of adjusting grievances, hours of work, promotion plans, procedures for leave and reduction-in-force procedures.

However, notwithstanding the language of Section 1, Section 3 of that same article provides:

> Discuss: The term discuss, where used in this Agreement, means the parties will meet and exchange views. This is used where no agreement is necessary or required or on matters which are non-negotiable.

Although Section 1 of Article 6 states hours of work is a subject appropriate for "discussion and/or negotiations," the terms of the agreement do not specifically require negotiation on hours of work in every situation since "discussion" may be Respondent's only obligation where, for instance, the agreement otherwise covered the subject. Accordingly, I find no support for Counsel for the General Counsel's argument that Article 6 reaffirms Respondent's Statutory right to negotiate on work hours under consideration herein.

I conclude from the entire foregoing, and the record taken as a whole, that Article 8 of the parties' collective bargaining agreement covered Respondent's change in the working hours of warehouse employees and accordingly Respondent had no obligation under the Statute to notify the Union and provide it with an opportunity to bargain on the impact and implementation of the change. The record discloses that when the current agreement was negotiated, the one requirement in the prior agreement expressly dealing with notice to the Union (notice to the Union in emergency situations) was deleted. When a new provision was negotiated requiring 24 hours notice to employees for routine continuous shift changes, no mention of notice to the Union was contained in the provision. In addition, testimony supports a conclusion that the use of revised and simplified language in the current agreement was motivated to reflect providing more flexibility to Respondent in operating the exchange and assigning work hours to employees. Thus it is reasonable to infer that after complying with the terms of the agreement regarding "notice" before changing work hours, Respondent was not obligated to provide any additional notice to the Union, and I conclude that the parties reasonably should have contemplated that in these circumstances the agreement would foreclose the requirement for further bargaining on changes in employees' work hours. See SSA at 1018-1019 and Marine Corps, Barstow.

Accordingly, I conclude Respondent did not violate the Statute as alleged and I recommend the Authority issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. AT-CA-20721 be, and hereby is, dismissed.

Issued, Washington, DC, October 25, 1993

SALVATORE J. ARRIGO
Administrative Law Judge