

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PHOENIX DISTRICT
OFFICE, PHOENIX, ARIZONA

Respondent
and

Case No.
SA-CA-20188

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3230,
AFL-CIO

Charging Party

Gerald M. Goldstein, Esquire

and Millicent Gleason

For the Respondent

Lisa Miller, Esquire

For the General Counsel

Before: BURTON S. STERNBURG

Administrative Law Judge

DECISION

Statement of the Case

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

Pursuant to a charge filed on December 26, 1991, by American Federation of Government Employees, Local 3230, AFL-CIO, (hereinafter called the Union), against the Equal Employment Opportunity Commission, Phoenix District Office, Phoenix, Arizona, (hereinafter called the Respondent), a Complaint and Notice of Hearing was issued on May 26, 1992, by the Regional Director for the Federal Labor Relations Authority, San Francisco Region. The Complaint alleges that the Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by unilaterally changing existing conditions of employment without "first completing bargaining with the Charging Party over the impact and implementation of the change".

A hearing was held in the captioned matter on October 21, 1992 in Phoenix, Arizona. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Counsel for the General Counsel and Counsel for the Respondent filed post hearing briefs on March 9 and 10, 1993, respectively, which have been fully considered.⁽¹⁾

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

Findings of Fact

The American Federation of Government Employees, (AFGE), is the exclusive representative of a nationwide unit of Respondent's employees appropriate for collective bargaining. Included in the nationwide unit are a number of investigators working at Respondent's facilities located in Phoenix, Arizona and Albuquerque, New Mexico. The Union, i.e. Local 3230, services these two locations.

Prior to February 1991 Respondent had always assigned charge files or cases as they came in to its investigators. Despite the number of cases assigned to a particular investigator, the older cases were to be given priority. However, the number of new cases assigned to an investigator interfered with the processing of the older cases since the investigators were still responsible for answering any inquiries from the public concerning the newer cases.

In November or December of 1991 Mr. Charles Burtner, the District Director of the Phoenix District Office, which has jurisdiction over the investigators in Phoenix and Albuquerque, met with Mr. Fred Brown, then President of the Union. Mr. Brown pointed out that inquires from the public concerning the newer filed charges or cases were consuming too much of the investigators' time and preventing them from handling the older cases in a timely manner. In order to solve the problem, Mr. Brown suggested the establishment of a "holding tank" for the new cases.

Following discussions with various supervisors and Union officials, including Mr. Ernie Padilla who at the time was a Union steward, Mr. Burtner, effective February 1, 1991, established a "holding tank" on a trial basis for ninety days. According to the published instructions, the investigators were to surrender all cases in their possession but the oldest 55 to their respective supervisors who in turn would be responsible for answering the inquiries thereon. Following the expiration of the 90 day trial period and further discussions between Mr. Brown and Mr. Burtner, the trial period was extended to the end of the fiscal year, i.e. September 30, 1991.

On September 27, 1991, Field Management Programs-West issued a "Report of Quality Review" based upon a May 1991 audit of the Phoenix Office. The report stated, among other things, that the use of "holding tanks" as a means of managing an office's workload "is contrary to the Agency's case management system". The District Office was ordered to assign the charges currently in the "holding tanks" to the investigators.

On October 8, 1991, Mr. Burtner wrote a letter to Mr. Padilla, who had become President of the Union, and informed him of the substance of the "Report of Quality Review" dated September 27, 1991. He further informed Mr. Padilla that, in accordance with the report, all pending charges or cases presently assigned to supervisors "will be assigned to investigators' active inventories on November 1, 1991." Mr. Burtner closed the letter by urging Mr. Padilla to give the contents of the letter careful consideration and informing him, that he, Mr. Burtner was available for any questions.

According to Mr. Burtner, although he didn't consider the abolishment of the "holding tanks" to be "really a substantive change" he decided, since Mr. Padilla was a new Union officer, that he would follow the collective bargaining contract and notify him of the change and how he planned to implement it and allow Mr. Padilla to submit impact proposals.

On October 22, 1991 Mr. Padilla sent a "Letter of Protest" to Mr. Burtner wherein he contended that the changes were circumventing the General Performance Appraisal Recognition (GPAR) negotiations which were being conducted by AFGE at the National Level. He requested that implementation of the changes be held in abeyance pending completion of the GPAR negotiations. He also requested that if the changes resulted in an increased work load for the investigators, management rate each investigator at the highly effective level. Finally, he proposed that the changes be delayed for one month. He also requested that impact and implementation negotiations be based upon ground rules that were different from those appearing in the current collective bargaining agreement.

On October 29, 1991 Mr. Burtner issued a memorandum wherein he confirmed that on October 28, 1991 the parties had agreed to postpone the implementation date to November 15, 1991, and that the Union would submit written proposals by November 7, 1991. Mr. Burtner also made it clear that Respondent intended to follow the negotiation procedures set forth in the collective bargaining agreement.

On November 8, 1991, after receiving a one day extension to submit his proposals, Mr. Padilla submitted a memorandum entitled "Elimination of 'holding tanks'" to Mr. Burtner. The memorandum urged the Respondent to reconsider its decision on "holding tanks" because of the impact on the employees and to supply the investigators with file cabinets to store the additional case files so as to protect their required confidentiality.

On November 11, 1991, not having heard anything further from Mr. Padilla, Mr. Burtner telephoned Mr. Levi Morrow, Vice President of the National Council of EEOC Locals, concerning Mr. Padilla's November 8, 1991 memorandum. Mr. Morrow informed Mr. Burtner that he would be receiving a communication from Mr. Padilla which would make it clear that there would be no local negotiations on the impact of the discontinuance of the "holding tanks".

On November 14, 1991, Mr. Padilla sent Mr. Burtner a memorandum concerning the discontinuance of the "holding tanks". The memorandum which had two attachments read as follows:

As per Ed Watkins (nat'l council president) and Levy Murrow (Chief Negotiator), local negotiations on the "holding tanks" is being prohibited because said subject matter is on the table at the national level of negotiations in accordance with the schedule GPAR negotiations slated for December 2, 1991. (see attached memoranda on negotiations)

It is recommended that we negotiate the impact items referenced on my memorandum to you of 11/8/91. They also suggested that items such as 270 day old inventory, average processing time, volume, confidentiality, case prioritization be addressed; and, that, we maintain the status quo with respect to case inventory.

Upon receipt of the November 14, 1991 memorandum, Mr. Burtner, who had a problem understanding the memorandum since it referred to impact items that were outside the time limits set forth in the collective bargaining contract for submitting impact proposals and seemed to be saying that he, Mr. Padilla, was without power to bargain impact at the Local level, again telephoned Mr. Levi Morrow for clarification. According to the uncontradicted testimony of Mr. Burtner, Mr. Morrow told him that he had never told Mr. Padilla to raise the items contained in the second paragraph of his November 14, 1991 memorandum.

On November 15, 1991, Mr. Burtner responded to Mr. Padilla's latest memo and informed him that a number of matters that he had raised were untimely, citing Section 8.05(b) of the Collective Bargaining Agreement which required proposals to be submitted within 10 days of notification of changes. With respect to the remaining concerns which appeared in his November 8, 1991 memorandum, Mr. Burtner proposed the use of plastic storage crates to file and store the new cases in the investigators' offices.⁽²⁾ With respect to confidentiality, Mr. Burtner took the position that it would not be a problem, citing the fact that employees always left their files around their respective offices and never had a problem with the files being compromised. Finally, Mr. Burtner informed Mr. Padilla that he would implement his, Mr. Burtner's, proposal of October 8, 1991 with the above mentioned modifications. Mr. Padilla made no response to this memorandum and on November 20, 1991, Mr. Burtner issued another memorandum to Mr. Padilla wherein he announced that as of November 15, 1991 the "holding tank" system was eliminated and that as of November 18, 1991 management had implemented the new system of assigning cases.

Discussion and Conclusions

The General Counsel takes the position that Respondent violated Sections 7116(a)(1) and (5) of the Statute

by virtue of its action in abolishing the "holding tanks" prior to completing bargaining with the Union over the impact and manner of implementation of the aforementioned change in an established condition of employment.

Respondent on the other hand takes the position that it was not under any obligation to bargain with the Union since the abolishment of the "holding tanks" had a de minimis effect on the bargaining unit employees. Moreover, and in any event, Respondent takes the position that it did fulfill its bargaining obligations prior to abolishing the "holding tanks".

It is well settled, and neither party to this proceeding contends to the contrary, that an agency is obligated to bargain with the certified bargaining representative prior to effecting a change in a condition of employment. In the instant case, the bargaining obligation, if any, extends only to the impact and matter of implementation of the change. Cf. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration Hartford District Office, Hartford, Connecticut, 41 FLRA 1309, 1317.

It is also well settled that a condition of employment may be established by contract or by a past practice which has been in existence for a period of time with the knowledge and consent of the agency. United States Department of Justice, Immigration and Naturalization Service, Washington, D.C., 31 FLRA 145, 151.

Here we have a condition of employment which was established, at the request of the Union, on a trial basis for a set period of time. As noted in the factual portion of this decision, following the expiration of the set period of time the procedure for handling and/or assigning cases reverted to what was in existence prior to the start of the trial period. Inasmuch as the abolishment and or termination of the "holding tanks" at a set time was part and parcel of the agreement to establish the "holding tanks" in the first instance any impact bargaining concerning the abolishment of the "holding tanks" should have been conducted prior to the start of the trial period. In other words, I find that the change in the unit employees' condition of employment occurred at the inception of the trial period and not the end, since by its terms abolishment of the "holding tanks" was a fait accompli barring further agreement on an extension of the trial period.

Based upon the foregoing analysis, I find that the abolishment of the "holding tanks" did not amount to a change in a condition of employment over which Respondent was obligated to bargain impact and implementation with the Union. See, Space Systems Division, Los Angeles Air Force Base, Los Angeles, California, 45 FLRA 899, 905.

Moreover, to the extent that it is found that, irrespective of the fact that the establishment of the "holding tanks" was on a trial basis, Respondent was obligated to bargain over the impact and manner of implementation, I find that Respondent did fulfill its bargaining obligations thereon.

Thus, the record evidence indicates that Mr. Burtner, being conscious of the fact that Mr. Padilla had just become President of the Local Union, in accordance with the terms of the collective bargaining agreement, gave Mr. Padilla timely notice of the impending termination of the "holding tanks" and solicited proposals thereon.⁽³⁾ Thereafter, Mr. Padilla, while expressing concerns about the need for storage facilities for the files

in order to protect their confidentiality, never submitted any proposals other than urging the continuation of the use of "holding tanks". Additionally, Mr. Padilla attempted to negotiate various other items, which, admittedly, were being considered on the National Level. In this latter connection both the record evidence and the testimony of Mr. Burtner establish that Mr. Padilla was without authority to negotiate such matters, including the decision to abolish the "holding tanks".

After many weeks of exchanging memoranda on the matter and talking with the Chief Negotiator handling the negotiations on the National Level, Mr. Burtner finally informed Mr. Padilla that the trial period for the use of "holding tanks" was to be terminated as of a certain date and that Respondent, due to a shortage of funds, would only supply plastic cases and/or baskets for the storage of the cases which were to be reassigned from the supervisors to the investigators. He also assured Mr. Padilla that his concerns with respect to protecting the confidentiality of the files was unfounded. Mr. Padilla never responded and the changes went into effect several days later.

Based upon the foregoing, I find that Mr. Padilla's sole interest was a continuation of the status quo, i.e. retention of the "holding tanks", as opposed to legitimate impact and implementation bargaining.⁽⁴⁾ I further find that he, as the Union's chief negotiator, had ample opportunity to submit written proposals, as required by the collective bargaining agreement, concerning impact and implementation. Having failed to do so, Respondent can not be faulted for finally terminating the "holding tanks" after addressing, without any further comment from the Union, the sole legitimate concerns raised by the Union, i.e. storage and confidentiality of the additional files.

Having concluded that the Respondent did not violate Sections 7116(a)(1) and (5) of the Statute, as alleged, it is recommended that the Authority issue the following Order dismissing the Complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint in Case No. SA-CA-20188, should be, and hereby is, dismissed in its entirety.

Issued, Washington, DC, October 18, 1993

BURTON S. STERNBURG

Administrative Law Judge

1. Counsel for the General Counsel also filed a Motion to Correct Transcript. In the absence of any objection, it is hereby Ordered that the Motion to Correct Transcript, should

be, and hereby is, granted.

2. According to the uncontradicted testimony of Mr. Burtner, due to the shortage of money, the plastic storage containers

were all that Respondent could afford.

3. Section 8.05(b) of the Collective Bargaining Agreement provides as follows:

If the UNION wishes to negotiate on the proposed changes, it shall notify the EMPLOYER of the UNION's specific concerns within 10 work days following notification by forwarding written proposals on all matters it wishes to discuss further or negotiate.

4. In this latter connection, it should be noted that the abolishment of the "holding tanks" in the District Office was pursuant to orders from higher management. In such circumstances Mr. Burtner could not retain the status quo requested by Mr. Padilla.