UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

UNITED STATES IMMIGRATION AND

NATURALIZATION SERVICE,

WESTMINSTER INVESTIGATION OFFICE

WESTMINSTER, CALIFORNIA

Respondent

and Case No. SA-CA-20469

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 505, AFL-CIO

Charging Party

Ms. Beth F. Eberle

For the Respondent

Lisa Miller, Esq.

For the General Counsel

James Max Humble-Sanchez

For the Charging Party

Before: ELI NASH, JR.

Administrative Law Judge

DECISION

Statement of the Case

On September 30, 1992, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (herein called the Authority), pursuant to a charge filed May 14, 1992, by American Federation of Government Employees, Local 505, AFL-CIO (herein called the Union), issued a Complaint and Notice of Hearing alleging that the United States Immigration and Naturalization Service, Westminster Investigation Office, Westminster, California (herein called the Respondent), engaged in unfair labor practices within the meaning of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute). The Complaint alleged that on or about November 21, 1991 Respondent changed conditions of employment for unit employees by changing an existing past practice for Respondent's employees by limiting their lunch period to 30 minutes without first notifying the Union and providing it with an opportunity to negotiate over the substance or the impact and implementation of the change.

A hearing on the Complaint was conducted in Los Angeles, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. The General Counsel filed a timely brief which has been carefully considered. Respondent did not file a post hearing brief.

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

Findings of Fact

Respondent's facilities are located in an office building where neither its offices nor the building itself offers hot food services other than self help. Although Respondent's offices contain a sink and a refrigerator, the microwave oven located in the conference room was not provided by Respondent. The nearest hot food service facilities are outside of the office building in the community. In the outside range, it could take an employee ten to fifteen minutes to travel by car for lunch. There are, however, food services which are a lot closer to the office. Clearly, if an employee would like a hot lunch which he or she did not bring into the office from home, the employee must leave the office and travel from a half block to three miles, requiring in some cases that they contend with congested, noon-time traffic along the way. Respondent's evidence that there are fast food restaurants and other stores from which food can be purchased is not inconsistent with the above. Thus, it is clear that employees do have a choice of a full range of meals, but their selection, in some cases, requires that the employee exceed the 30 minute limitation in issue here.

According to special agents Michael Gati and Ida Brazier, employees normally work from approximately 6:00 a.m. to approximately 2:30 p.m., with additional overtime, on a regular basis, following their regular shifts. The record shows that these special agents are criminal investigators who spend a portion of their work days in field investigations. The issue involved here centers around lunch breaks for the investigation staff when they are in the office at lunch time. Prior to November 21, 1991,[(1)] lunch breaks for the investi-gation staff were taken in a flexible band starting at 11:00 a.m. The employees scheduled their own lunch breaks independently. There were no time limitations placed on employees' lunch periods. The length of the lunch

period varied from agent to agent, lasting up to one hour. This practice went on routinely from 1988 through November 21, 1991, according to Gati. The record also shows that Respondent through its supervisory personnel had knowledge of this practice by Westminster employees. In fact, the evidence disclosed that supervisors routinely accompanied unit employees from Respondent's facilities on some of these lunch breaks. Thus, Gati named supervisors Carol White, Bill Wildanger, Nick Weyland, and three section chiefs as management officials who accompanied unit employees on lunch breaks.

To counterbalance taking a lunch hour extending beyond 30 minutes, investigation staff employees either work through their two negotiated breaks, come in early, or stay late. Gati testified that employees sometimes did not take their 15 minute break periods and combine that with the lunch hour or on occasion he would come in early or leave later than his regular time, to compensate for the extra time spent at lunch. Brazier also stated that she made up time, either before or after the shift. For the sake of time-keeping expediency, employees did not reflect this flexibility in scheduling on their sign-in and sign-out sheets. Also, employees did not claim this extra time worked to make up for the long lunch as overtime. Finally, based on the record testimony there is little question that Respondent's supervisors were aware of the employees' time-keeping practices and acquiesced the practice for several years prior to the instant change.

On November 21, Respondent's employees each found a memorandum from Robert Reed, the Supervisory Special Agent in charge of the Westminster facility in their individual mail boxes at work. The memorandum directed employees to there-after limit their lunch breaks to no more than 30 minutes. The memorandum also stated, and Reed testified at the hearing, that he had called the District Office Labor Relations Department for guidance on this issue. Reed further testified, that he was told by the District Office that no bargaining was required on this change. Reed, who was recently assigned as supervisory agent, from his testimony at the hearing, appeared determined to create a strict environment in the Westminster office, one where, employees worked an 8½ hour day with a half hour for lunch.

Since November 21, Respondent has conscientiously enforced this new 30 minute lunch break policy, including requiring two employees, Gati and Janet Shanks, to take annual leave for the time spent at lunch beyond 30 minutes. Although both Gati and Shanks worked an extra 30 minutes that day, to make up for the extended lunch break on the day that Reed directed them both to take, the 30 minutes of mandatory annual leave was never refunded to these two employees.

Some 5 or 6 weeks before the November 21 memorandum issued, the then Union President Brazier and Reed first broached the subject of the 30 minute, strictly enforced lunch break. Reed told Brazier of his plan, and she replied, at the time, that this was a subject on which it would be appropriate to notify the Union and negotiate. Brazier also told Reed that his proposal entailed a change in a past practice. Reed, admittedly never notified the Union of this change to the employees' lunch hours prior to implementation. As previously noted, Reed called the District Office for advice and was given instructions that no bargaining was required on the initiation of the 30 minute lunch period in the Westminster office. Reed stated as much in the November 21 memorandum.

Gati testified that the change in lunch break was the cause of considerable inconvenience to employees. According to Gati, since November 21, he must get his workday lunches at what he considers to be lunch counters that are less than desirable to him. At times, he must forego lunch entirely. He also testified that there are no sit-down type cafeterias accessible and also useable within 30 minutes.

Conclusions

The issue is whether Respondent violated section 7116(a)(1) and (5) of the Statute when it unilaterally implemented a 30 minute lunch break for unit employees, after a lengthy practice of allowing employees to take up to one hour for lunch, at the employee's discretion.

The evidence shows a longstanding practice at Re-spondent's Westminster facility of investigation staff employees extending their work days to accommodate extended lunch breaks. In determining when a condition of employment exists under section 7103(a)(14) the test applied is whether there is a close relationship between the entity and the work situation or employment relationship. This record reveals that the lunch hour is a scheduled break in the middle of the work day, and that actions of employees associated with this midday break can result in loss of leave. It also appears from the record that there is a close relationship between work and the lunch break at the facility in this case. Thus, the lunch break herein is a condition of employment and, therefore, any changes regarding the lunch break at the facility can be negotiated.(2) Furthermore, the loss of leave, as suggested by the Union provides a reasonably forseeable impact of this change.

Even though the timekeeper's records do not reflect the flexible practice lunch break practice at issue here, testimony from agents Gati and Brazier discloses a consistent and widespread practice to notate the time-keeping records to reflect a standardized attendance practice, not actual attendance. Also both the practice of extending lunch breaks and the practice of extending the workday were well known to Respondent, as Respondent's managers and supervisors were involved on a routine basis in this practice. Thus, there was an established past practice regarding the condition of employment of investigation staff employees extending their lunch periods, of which Respondent had full knowledge and to which Respondent acquiesced. In the circumstances, the condition of employment involved in this matter could be altered only after providing to the Union notice and an opportunity to bargain the substance and impact and implementation of the change.(3) In this case, Respondent, admittedly implemented the change as alleged in the Complaint, and never notified or negotiated with the Union. This approach to a negotiable subject, in my opinion, violates section 7116(a)(1) and (5) of the Statute.

Respondent relies on a Decision of the Comptroller General, File B-190011, dated December 30, 1977 and an interpretation of 5 U.S.C. § 6001 contained therein. Respondent argues that extended lunch breaks for employees are illegal.(4) Its position, apparently based in part, on its reading of the Decision and on 5 U.S.C. § 6101 is a myopic view apparently resulting from its own interpretation of the Decision and from its disregard of Authority precedent. This much is clear, since the Authority had already addressed the applicability of decisions of the Comptroller General in matters which come before it. Its view being, decisions of the Comptroller General do not have binding force on the Authority. Besides, the Authority has made it clear that in situations such as here, it is required to evaluate independ-ently the application of 5 U.S.C. § 6101.(5) Prior to this matter, the Authority had the opportunity to do just that, and held, contrary to Respondent's argument that 5 U.S.C. § 6101 provides that "unless the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased", the head of the agency is free to establish unpaid breaks of up to one hour duration.(6) Lunch is only one such break. Neither testimony at the hearing nor Respondent's exhibits presented at trial disclose any finding by the head of the Immigration and Naturalization Service to the effect that employees in the Westminster office taking up to one hour for their lunches and then extending their workdays accordingly, seriously damages the agency either monetarily or in achieving its functions. Thus, under the test enunciated in VA, Newington, supra, the one hour lunch break would be negotiable and not as Respondent declares, illegal. As long as the workday is

extended equivalent to the extension of the lunch break, and the employees complete the eight hours of work for which they are paid, 5 U.S.C. § 6101 would not appear to be violated. VA, Newington, supra; SSA, supra at 605.

Although the time-keeper's record in this case, do not actually reflect employees extending their work days or skipping other breaks to adjust their lunch break, the record as a whole, in my view, supports such a finding. Thus, employees worked their paid eight hours of work per day. As long as an agency establishes a work schedule which includes five eight hour workdays in a workweek and contains no breaks longer than one hour, its work schedule is consistent with law and regulation, and therefore, not illegal. VA, Newington, supra at 453. Here the workweek in place, because of a longstanding past practice, prior to Respondent's implementation of the unilateral change was in compliance with 5 U.S.C. § 6101, and never, as Respondent alleges, illegal. Thus, Respondent's arguments as to the illegality of the practice of extending lunch breaks are not only lacking in merit, but also not binding on the forum with jurisdiction over this unfair labor practice situation.

Assuming arguendo, that the Decision is correct and of some value in resolving this matter, a close reading shows a sensible approach, for it states that such breaks should be scheduled "with the requirements of the reality of the situation in mind." Furthermore, it states that 45 minutes to one hour is a reasonable period in which to require employees to eat their lunches. Decision, at 6. It does not require strict adherence the 30 minute lunch break unilaterally implemented in the Westminster facility. The pliancy of the Decision is far removed from the Spartanic view on breaks practiced, in this case, by the Westminster office's leadership. Consequently, it is the view of the undersigned that any arguments relying on the Comptroller General's Decision as meaning that lunch breaks in excess of 30 minutes are illegal, must be rejected.

In light of the foregoing, it is found that Respondent violated section 7116(a)(1) and (5) of the Statute by changing an existing past practice for employees in its Westminster Investigation Office by limiting employees' lunch break to no more than 30 minutes without first notifying the Union and providing it the opportunity to negotiate over the substance and the implementation of the change.

Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the United States Immigration and Naturalization Service, Westminster Investigation Office, Westminster, California, shall:

1. Cease and desist from:

(a) Unilaterally changing the working conditions of our employees by establishing a policy limiting the lunch break to 30 minutes, without first notifying the American Federation of Government Employees,

Local 505, AFL-CIO, the exclusive representative of its employees and affording it an opportunity to bargain regarding such change and the impact and implementation of such change.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the policy implemented by memorandum on November 21, 1991 and restore the prior practice of allowing our employees up to one hour for their lunch break.

(b) Notify and, upon request, bargain forth the American Federation of Government Employees, Local 505, AFL-CIO, concerning any intended change in the length of the lunch break.

(c) Restore the 30 minutes annual leave to employees Michael Gati and Janet Shanks which they were required to take as a result of the November 21, 1991 policy regarding lunch breaks.

(d) Post at its facilities at United States Immigration and Naturalization Service, Westminster Investigation Office, Westminster, California 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 Director, District 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.

(e) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, 901 Market Street, Suite 220, San Francisco, CA 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 20, 1993

ELI NASH, JR.

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 unilaterally change working conditions of unit employees in the Westminster Investigations Office by estab-lishing a policy limiting the lunch breaks to 30 minutes, without first notifying the American Federation of Government Employees, Local 505, AFL-CIO, the exclusive representative of our employees, and affording it an opportunity to bargain re-garding such change and the impact and implementation of such change.

WE WILL NOT in any like or related manner interfere with, re-strain, or coerce our employees in the exercise of the rights guaranteed under the Federal Service Labor-Management Rela-tions Statute.

WE WILL rescind the policy implemented by memorandum dated November 21, 1991, and restore the prior practice of allowing Westminster Office employees up to one hour for their lunch breaks.

WE WILL restore to employees Michael Gati and Janet Shanks the 30 minutes annual leave which they were required to take as a result of the November 21, 1991 policy regarding lunch breaks.

WE WILL notify and, upon request, bargain with the American Federation of Government Employees, Local 505, AFL-CIO con-cerning any intended change in the length of the lunch breaks.

_____

(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, 901 Market Street, Suite 220, San Francisco, California 94103, and whose telephone number is: (415) 744-4000.

1. All dates are 1991 unless otherwise noted.

2. U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 19 FLRA 290 (1985) (U.S. Army Reserve), relying on Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida, 5 FLRA 441 (1981) (Proposals 1, 2, and 3); see also, generally, Antilles Consolidated Education Association and Antilles Consolidated School System,

22 FLRA 235 (1986).

3. U.S. Army Reserve, supra at p. 292; U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, 37 FLRA 1058 (1990).

4. Respondent also argued that it had attempted to provide lunch areas for employees and that some employees and supervisors ate lunch within the established 30 minute lunch break. Since it is clear that a longstanding practice existed of extending the lunch break at the Westminster office, which in my view, ripened into a condition of employment, I find it unnecessary to address these arguments as they in no way diminish the past practice.

5. Department of Health and Human Service, Social Security Administration, 25 FLRA 600 (1987).

6. Veterans Administration, Veterans Administration Medical Center, Newington, Connecticut, 37 FLRA 448, 451-452 (1990); Department of Health and Human Services, supra; Plum Island, supra at 1064.