

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

PORTSMOUTH NAVAL SHIPYARD  
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and

Case No. BN-CA-20664

PORTSMOUTH FEDERAL EMPLOYEES

METAL TRADES COUNCIL

Charging Party

Ms. Marcia-Ann Pogar For the Respondent

Peter F. Dow, Esquire For the General Counsel

Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.<sup>(1)</sup>, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns whether Respondent violated §§ 16(a)(5) and (1) of the Statute by unilaterally implementing a new procedure for the assignment of overtime.

This case was initiated by a charge filed on March 10, 1992, (G.C. Exh. 1-A). The Complaint and Notice of Hearing issued on July 24, 1992, and set the hearing for October 23, 1992, at a place to be determined in Portsmouth, New Hampshire (G.C. Exh. 1-C); and by Order dated September 17, 1992, the place of hearing was fixed (G.C. Exh. 1-D), pursuant to which a hearing was duly held on October 23, 1992, in Portsmouth, New Hampshire, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 23, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, initially on motion of Respondent, to which the other parties did not object, for good cause shown, to January 22, 1993, and thereafter, on motion of General Counsel, to which the other parties did not object, for good cause shown, to February 10, 1993. Respondent and General Counsel each timely mailed a brief, received on, or before, February 12, 1993, which have been carefully considered. Upon the basis of the entire record<sup>(2)</sup>, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. The Portsmouth Federal Employees Metal Trades Council (hereinafter, "Union") is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire (hereinafter, "Respondent").

2. Shop 99 is a service support shop both for submarines undergoing overhaul and for shipyard facilities, including buildings and barges. Shop 99 provides electrical, pipefitting and gas monitoring services. A submarine undergoing overhaul is referred to as a "project" and in December 1991, there were four submarines in the process of overhaul: SSN 686; SSN 708; SSN 714; and NR-1 (a research boat). Each project, i.e., submarine, had a Project Manager and Respondent's production shops, not Shop 99, provided project teams comprised of mechanics from various trades to accomplish the overhaul. The function of Shop 99 was to support the project crews. Thus, Shop 99 would install temporary services on each project, e.g., electricity, water, maintain such services, repair or replace equipment used by project trades, etc.

3. There are about 70 to 75 electricians in Shop 99 and about the same number of pipefitters. Some electricians and pipefitters are assigned to support the production crews on each project, but the bulk of Shop 99's employees work in the shop repairing equipment (Tr. 12-14). Employees working in the shop have limited opportunity for overtime work. On the other hand, there are frequent overtime work opportunities for Shop 99's project support pipefitters and electricians; indeed, for the year beginning December 1, 1990, through November 30, 1991, Shop 99 project support employees were offered weekend overtime to support particular projects 70% of the weekends (Tr. 16-17) or on about 36 of the 52 weekends.

4. For at least eight years prior to December 1991 (Tr. 16), the procedure for selecting Shop 99 employees for weekend project support overtime work had been to offer the overtime to the employees assigned to that project, i.e. if the overtime were on project 708, then the overtime would be offered to the employees assigned to support project 708 (Tr. 15, 16, 18, 36, 50-51, 64). If the employees assigned to a particular project all turned down the overtime, then Respondent went to the list of all Shop 99 employees (Tr. 15, 51).

5. Prior to December 1991, each project [boat] with weekend project work would request one pipefitter and one electrician just in case something went wrong. I shall call these contingent employees "what if" employees. In addition to the "what if" employees, a project might require Shop 99 employees for direct support (Tr. 49, 51) such as installation of temporary service for a boat newly arrived for overhaul, or for the planned movement of equipment, pipes or lines for sandblasters to do their work. Thus, apart from direct support employees, before December 1991, each project [boat] would have had one "what if" pipefitter and one "what if" electrician for eight hours each day that a production crew worked on the weekend, or, as more fully set forth in Respondent's Brief, at page 3, with four projects [boats] there would have been eight mechanics (four pipefitters and four electricians) on Saturday, working 64 hours, and eight mechanics on Sunday, working 64 hours, or a total of 128 hours for "what if" weekend overtime.

6. On, or about, December 4, 1991, Shop 99 Superintendent, John F. Stinson (Tr. 47) (at the time of the hearing, Acting Group Superintendent (Tr. 47), told Mr. Paul Richard O'Connor, Chief Steward of the Union and President and Business Manager of Local 2071, IBEW (Tr. 11), that he had implemented a new "Waterfront Support" policy for weekend work and that thenceforth "what if" weekend overtime would no longer be offered first to the employees assigned to support a particular project but would be offered only on the basis of Shop 99's overtime list.

The new "Waterfront Support" policy meant two things: First, Project Managers could no longer request a "what if" pipefitter and a "what if" electrician for each day; rather, each project would be limited to two hours "what if" time for each mechanic (Tr. 49).<sup>(3)</sup>Of course, the Project Manager could also request as much direct support as needed (Tr. 51). Thus, absent direct support requirements, under the "Waterfront Support" policy, each project would have one "what if" pipe-fitter for two hours and one "what if" electrician for two hours each day, or, as more fully set forth in Respondent's Brief, at page 4, with four projects, there would be a total of one pipefitter and one electrician working a total of 16 hours Saturday and 16 hours Sunday for a total both days of 32 hours "what if" time, whereas, under the practice before December 1991, there would have been a total of 128 hours "what if" time for Saturday and Sunday.

Second, as noted above, Respondent would thereafter use the entire Shop 99 overtime list when offering weekend "when if"<sup>(4)</sup> overtime to, ". . . make it more fair and equitable for all the employees." (Tr. 20). Because the general Shop 99 employees rarely worked any overtime, they had fewer total hours of overtime and the new "Waterfront Support" policy resulted in their receiving preference over the project support employees who had worked directly on the projects during the preceding week (Tr. 27-28, 36-37, 52, 61, 62-63).

7. The acknowledged procedure for notifying the Union of proposed changes in the working conditions of bargaining unit employees, which the parties had followed for at least 12 years prior to December 1991, requires that Respondent provide the Union President, 1st Vice-President, or Recording Secretary with advance written notice of the proposed change and the date it proposed to implement the change. Respondent recognizes that notice of changes of conditions of employment must be provided in advance to the Union qua Union; that only the Union's officers can make binding agreements; and that Chief Stewards and Stewards have no authority to make agreements on behalf of the Union. Nevertheless, Respondent did not notify the Union in advance that it had:

(a) ended its long established and well recognized practice of first offering weekend project support overtime to Shop 99 employees assigned to support projects and who had worked the particular project during the preceding week; and

(b) unilaterally implemented a new procedure whereby weekend project support, i.e., "what if", overtime would be offered only on the basis of the entire Shop 99 overtime list, and assign it "from the least amount of overtime to most." (Tr. 50-51).

### Conclusions

There is no dispute as to the facts. The record shows, and Respondent admits, that for many years before December 1991, all weekend project support overtime was offered first to Shop 99 employees assigned to support projects and who had worked on the particular projects during the proceeding week; and that on, or about, December 4, 1991, it changed this procedure and implemented a new procedure whereby weekend

"what if" overtime would be offered only on the basis of the entire Shop 99 overtime list, assigning it in the inverse order of the amount of overtime worked. No notice of the proposed change was given to the Union prior to its implementation and Respondent states, "It is no secret that the Respondent did not negotiate with the Charging Party on the creation of the Waterfront Support procedure. . . ." (Respondent's Brief, p. 5). Respondent's justification for its refusal to negotiate is wholly without merit; indeed, totally ignores the only issue raised by the Complaint and "floats a red hearing" to which it addresses its comments. To be sure, Respondent's prior practice of having one "what if" electrician and one "what if" pipefitter for each project on the weekend when any project work was being performed plainly appeared to have been, ". . . very ineffective and costly" (Tr. 48); but Respondent's right to reduce such "what if" time is not in issue. As stated, the issue is Respondent's unilateral change of the procedure for assigning whatever weekend "what if" project support overtime Respondent elects to have. The assignment of overtime has nothing to do with Respondent's determination of its staffing needs. It is said that the road to Hades is paved with good intentions. Respondent may have viewed the long established right of the project support employees to the first refusal of weekend overtime as inequitable; nevertheless, it was a right accorded them over a period of many years, was a condition of their employment, and, good intentions aside, Respondent was not free to change this condition of employment of Shop 99 project support employees without notice to the Union and an opportunity for the Union to bargain about the proposed change. U.S. Department of the Air Force, 56th Combat Support Group (TAC), MacDill Air Force Base, Florida, 41 FLRA 850, 853 (1991); U.S. Department of Labor, Washington, D.C., 38 FLRA 899, 910 (1990).

Respondent having changed a condition of employment in violation of its bargaining obligation, ordinarily, General Counsel's request for a status quo ante order would be granted; but here the record shows that sometime after the charge was filed, March 10, 1992, Respondent abandoned the new procedure for the assignment of weekend project support overtime and reverted to its prior procedure (Tr. 25, 52, 62-63). Accordingly, because the change of conditions of employment has been eliminated and Respondent has already returned to the prior procedure, a status quo ante order is not necessary and will not be ordered.

Shop 99 project support employees, i.e., those Shop 99 employees assigned to project support and who worked on the projects the preceding week, who lost weekend overtime as the result of Respondent's unlawful unilateral implementation, on, or about, December 4, 1991, of a new procedure for assigning overtime, are entitled to be made whole for all overtime lost as the result of Respondent's unlawful action. United States Customs Service, Southwest Region, El Paso, Texas, 44 FLRA 1128, 1130 (1992). Respondent asserted, and I have found, that it continued to give project support employees first refusal for any direct support weekend work (see, n.4, supra); and that it was only the contingent, "what if", work that was assigned on the basis of the entire Shop 99 overtime list. In ordering back pay, all weekend support overtime is intentionally ordered. If there were direct support overtime and if it were offered first to the project support employees, then they will not have suffered any loss to that extent. On the other hand, if weekend support overtime, whether contingent or direct (specifically prescheduled), occurred and the project support employees suffered any loss because of Respondent's unlawful action they are entitled to be made whole.

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute, it is recommended that the Authority adopt the following:

#### ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment by implementing a new procedure for assigning weekend project support overtime and no longer assigning overtime to employees based on the projects worked by the employees the preceding week.

(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) Compensate those Shop 99 employees assigned to project support who lost weekend overtime work opportunity because of Respondent's unlawful implementation, on, or about, December 4, 1991, of a new procedure for assigning weekend project support overtime whereby Respondent did not assign overtime to them based on the projects worked by them the preceding week.

(b) Furnish the Portsmouth Federal Employees Metal Trades Council, the exclusive representative of its employees, with notice and an opportunity to bargain concerning any future proposed change of the procedure for assigning weekend project support overtime.

(c) Post at its facilities at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Shipyard, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423,30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

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WILLIAM B. DEVANEY

Administrative Law Judge

Dated: December 7, 1993

Washington, DC

**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 conditions of employment by implementing a new procedure for assigning weekend project support overtime and no longer assigning overtime to employees based on the projects worked by the employees the preceding week.

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

WE WILL furnish the Portsmouth Federal Employees Metal Trades Council, the exclusive representative of our employees, with notice and an opportunity to bargain concerning any future proposed change of the procedure for assigning weekend project support overtime.

WE WILL compensate those Shop 99 employees assigned to project support who lost weekend overtime work opportunity because of our unlawful implementation, on, or about, December 4, 1991, of a new procedure for assigning weekend project support overtime whereby we did not assign overtime to them based on the projects worked by them the preceding week.

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(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, Boston Region, whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5730.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".

2. On my own motion, the transcript is hereby corrected as follows:

Page 1, line 13, and thereafter throughout the transcript where ever it appears, the name, "DEVANAY" is changed to "DEVANEY".

3. Respondent's decision to reduce "what if" time was a management right (§ 6 of the Statute); the Complaint does not allege a violation with respect to this change; and I express no opinion whatever as to whether a violation of § 6(b)(2) and/or (3) might have lain. Thus, Paragraph 10 of the Complaint alleges specifically,

"10. In or around December 1991, the Respondent, . . . changed the procedure for assigning weekend overtime . . . by no longer assigning overtime to employees based on the projects worked by the employees the preceding week." (G.C. Exh. 1-C, Par. 10).

See, also, General Counsel's Brief, pp. 2, 6, 7, 14-15.

4. Mr. Stinson made it clear that direct support was not changed. He stated, inter alia, that,

". . . if the 708 boat requested a pipe fitter and an electrician on Saturday and Sunday . . . then we will fill those openings, vacancies from the project. . . . People already assigned to the 708. If they didn't have enough volunteers or didn't want to work, then we go to the shop overtime summary report, and fill it from the least amount of overtime to most." (Tr. 50-51).

". . . I didn't specifically take requested overtime away from the project people that were working on the projects." (Tr. 53).