OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS DATA PROCESSING CENTER
AUSTIN, TEXAS
Respondent

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, AFL-CIO, LOCAL 1745

Case Nos.
6-CA-10699
6-CA-10702

Charging Party

Janet E. Harford, Esq. For the Respondent

Julie Garnett Griffin, Esq. For the General Counsel
Jacqueline Muehlbach For the Charging Party
Before: ELI NASH, JR. Administrative Law Judge

DECISION

Statement of the Case

A Consolidated Complaint and Notice of Hearing issued by the Dallas Regional Director of the Federal Labor Relations Authority on January 19, 1993. It alleges that the Department of Veterans Affairs Data Processing Center, Austin, Texas (herein called Respondent or VADPC) violated section 7116(a) (1) and (5) of the Statute by issuing a questionnaire to bargaining unit employees stating that its current fitness program would be terminated and by terminating the fitness program without providing the National Federation of Federal Employees, Local 1745 (herein called the Union or Charging Party) an opportunity to negotiate the substance or the impact and implementation of that termination.(1)

A hearing on the Consolidated Complaint was conducted in Austin, Texas at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.(2) All parties filed timely briefs which have been carefully considered.

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

Findings of Fact

1. The Union is the certified exclusive representative of employees in a unit appropriate for collective bargaining at Respondent's facility in Austin. The Charging Party also represents Department of Veterans

Affairs employees of Veterans Benefits, located in the same building as VADPC, and employees of the Department of Veterans Affairs Finance Center (VAFC), also in Austin, Texas, at a different location.

2. During the period covered by this complaint Jacqueline Muehlbach was an accounting technician at the VAFC, where she was also the Union President. Patricia Shaw Napier was a computer specialist at the Respondent and Chief Steward for the Charging Party.

3. At all times material herein, Thomas Melville was the Personnel Officer of the VA station in Austin, Texas.

4. In 1986, the Charging Party and Respondent negotiated a local supplemental agreement which included the provision that "Management shall endeavor to establish a 'wellness program' designed to assist employee's [sic] in maintaining good health."

5. In 1987, Respondent conducted a survey and established a wellness program for employees at the VADPC and for other local VA employees. As part of the wellness program, Respondent contracted with St. David's Hospital for physical fitness or aerobics classes to be held on site at the Austin VADPC. Employees who signed up for classes first took physical fitness screening exams, which included cholesterol and flexibility or stress testing.

6. Respondent actively promoted this wellness program from the highest levels, including the Director of VADPC in 1987, Thomas Acklen, and Assistant Director, Rosina Maiers. From at least August 1987 through February 28, 1991, Respondent granted administrative leave to employees who participated in aerobics classes.(3) While not everyone who participated in the program used administrative leave, it was certainly available to all. From 1987, Respondent made the fitness program available, including the provision of administrative leave, to other local VA employees in Austin, including those from Veterans Benefits and from the Finance Division. The fitness program continued for over three years, with the contract being renewed each year.

7. Respondent's annual allocation for the aerobics or fitness program was somewhere around $10,000.00. The number of participants was based on room-size, and the room-capacity was about 20 persons. There were two sessions of classes, one meeting Mondays and Wednesdays, and the other meeting Tuesdays and Thursdays with different participants in each session.

8. At the beginning of the program, classes were "packed", then when some employees dropped out new participants were enrolled from a waiting list after periodic screenings were conducted by St. David's Hospital. More employees signed up for the screenings than attended the fitness classes themselves. A committed group of participants did not drop out, once they had joined. On average, in any one class session there would be around 10 participants. For the month of October 1991, for example, the total number of attenders about 31.

9. Sometime around mid-January 1991 Respondent made its decision to terminate or not to renew the contract for the fitness classes at the contract's end. Thomas Melville, the Personnel Officer, recommended to the Director that the contract be terminated. About that same time, Respondent communicated its intention to the contractor.

10. On February 5, 1991, Respondent issued a memorandum/survey to the participants in the classes, announcing the termination of administrative leave use for attendance at the classes and a change in class times, and requesting the employees to return the survey portion of the memorandum with their preferred times and day or days of attendance. While the Charging Party did not receive notice of this communication, Napier, an employee-participant in the fitness classes, received the memorandum as a participant. The Charging Party sent a request to bargain substance or impact to the Respondent concerning any changes planned in the program, dated February 7, 1991. The Charging Party received no answer as of February 20, 1991, and therefore, sent a follow-up electronic memorandum requesting a response from Respondent on February 20, 1991.

11. On February 21, 1991, management issued a memorandum to the Charging Party declining to bargain concerning changes related to administrative leave for the classes, based on the contention that the classes and administrative leave were not conditions of employment. In the same memorandum, Respondent announced that the program was going to be cancelled effective March 1, 1991. On February 22, 1991, the Charging Party requested bargaining concerning the discontinuance of the program, and requested that Respondent not implement until the parties could meet. Respondent did not answer, and on February 25, 1991 the Charging Party requested, again, that Respondent not implement, but meet with the Charging Party to negotiate.

12. Respondent issued a memorandum to employee-participants in the class around February 25, 1991, informing them that "due to budget constraints, the fitness classes being held at the DPC will not be renewed when the current contract expires on February 28." Respondent did not respond to the Charging Party's requests to bargain until after the decision to terminate the fitness program contract had taken effect. On March 8, 1991, after implementation of its non-renewal and the effective cancellation of the program on March 1, 1991, Respondent met with the Charging Party concerning the issue.

13. On March 8, 1991, the Charging Party presented the Respondent with three written proposals concerning the decision to discontinue funding the fitness program. The proposals included distribution of a survey, negotiating with the Charging Party regarding management's decision to terminate funding for the fitness class/wellness program following the survey results, and negotiating with the Charging Party regarding the issue of payment for the fitness classes. At the March 8 meeting, the Charging Party requested to negotiate and Respondent declined, citing its view that the issue did not concern a condition of employment. In a March 8, 1991 letter by Melville, Respondent stated that it would develop and distribute a questionnaire concerning wellness activities to employees and would "consider [the Charging Party's] input" regarding the survey. Respondent never developed the survey, but relied instead on the 1987 survey in preparing for an Employee Assistance Program (herein called EAP). It is worth noting, that the 1987 survey reflected a high interest in physical fitness activities.

14. Following Respondent's exit from sponsorship of the physical fitness program, employee-participants, on their own, initiated arrangements with St. David's Hospital to continue fitness classes. Although Respondent continued to make space available for the program, employees now had to pay for the classes on

their own, move heavy furniture before and after the classes, and attend classes without working fans. Since employees no longer had automatic continuous access to a regular room, on occasion they needed to secure other space, when the room was otherwise occupied. After the changes in the previous conditions, within nine months to a year, employees were unable to maintain the number of participants needed to continue the arrangement with St. David's Hospital, and therefore, that arrangement ended. Employees who had participated in the physical fitness program allegedly suffered adverse impact from the lack of the program, including increased stress, back pain, and use of leave. Additionally, since administrative leave was no longer available, classes had to take place at a later time during the day, and employees had to arrange duty hours differently in order to attend.

15. As already stated, both Respondent and the Department of Veterans Affairs actively encouraged employees to engage in physical fitness activities. Also both Respondent and the Department of Veterans Affairs expressly noted and acted upon a connection between employees' physical fitness as well as their work relationship with the VA as an employer. Specifically, with respect to this relationship, Respondent and the Department of Veterans Affairs have, through reports and other documents addressing employee fitness, pointed to reduced absenteeism, lowered insurance and disability benefit expenses, increased productivity, stress reduction, the positive effect on morale, and other indicia of the positive effects which employee physical fitness and wellness have on the work relationship. Al Fayard testified for Respondent to the same effects on the work relationship as having been elements in the original establishment of the wellness and physical fitness program in 1987. Melville also testified for Respondent that physical fitness is a component of the wellness concept. In fact, Respondent conceived its original physical fitness program as a part of its wellness program when it was installed in 1987. Melville acknowledged that employee assistance programs, which include wellness components, are negotiable. Also, the Department of Veterans Affairs has interpreted section § 7901(a), as authorizing the expenditure of agency funds on physical fitness equipment for use by VA employees. Moreover, employees who engaged in the Respondent's physical fitness program attest to its signif-icant effects on the work relationship in lowering stress, increasing morale and work effectiveness and reducing leave use. Lastly, Respondent supported the adjustment of work schedules for the purpose of enabling employees to attend physical fitness classes.

16. There is no question that Respondent had complete discretion and authority in making the decision to terminate the physical fitness program contract with St. David's Hospital in 1991. There is also no question that Respondent had complete discretion and authority to take a different course at that time, including continuing that contract for another year.

17. Although discontinuing the physical fitness program contract, Respondent continues to maintain a line item for a wellness program. This eliminates any question of whether or not Respondent possessed the funds to continue the fitness classes which it terminated in February 1991. The evidence disclosed that after making the decision not to renew the contract for aerobics classes, Respondent diverted that money to other items that were on its "unbudgeted initiatives" list. Thus, between March 1991 and January 1993, Respondent made no wellness program available to its employees.

18. In January 1993, Respondent implemented an EAP through a contract with the Employee Assistance Center of Texas, staffed by Dr. Chuck Sublett. The EAP offers a variety of counseling services and, when requested by the agency, can and does provide seminars on wellness-related issues. The contracted-for EAP does not, however, include any physical fitness component. The "same" appropriated money which funded the aerobics classes and fitness screenings provided by St. David's Hospital from 1987 through February 1991, now funds the EAP contract with Dr. Sublett. Presently, Respondent has the authority to contract for on-site

fitness classes. Furthermore, Respondent has the funds to fulfill the obligations of a contract such as the one entered into with St. David's Hospital from 1987 through 1991, either from its miscellaneous funding source, or from other available sources, such as those used to meet obligations arising from settlements of litigation involving backpay. The percentage of the total budget used by the wellness/physical fitness program is less than one percent. Respondent definitely has the authority and ability to obtain funds for "most anything" if ordered to do so by an appropriate third party authority.

19. Melville testified that administrative leave is granted within the discretion of supervisors for some purposes.

20. Physical fitness programs are considered to be a major component of corporate wellness programs by Gina Akin, an authority in the field.

Conclusions

A. Positions of the Parties

The General Counsel maintains that Respondent violated the Statute by unilaterally implementing a change in its employee fitness program without providing the Charging Party the opportunity to bargain, in bypassing the Charging Party concerning changes in the fitness program, and by refusing to bargain with the Charging Party concerning the fitness program. For these alleged violations the General Counsel seeks a ***status quo ante*** remedy. The General Counsel argues that such a remedy, including the reinstatement of the fitness program along with the provision for administrative leave for employees to attend fitness classes, is necessary to effectuate the purposes and policies of the Statute.

The General Counsel urges that the fitness program and its administrative leave provision were conditions of employment. Accordingly, the General Counsel asserts that Respondent was obligated to bargain with the Charging Party over any changes in the fitness program, including the discontinuation of the program. Here, the evidence reveals a fundamental connection between the fitness program and the employment relationship and it shows that the fitness program definitely had a direct effect on the work relationship. Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235 (1986); U.S. Department of the Army Aviation Systems Command, St. Louis, Missouri, 36 FLRA 418 (1990). Thus, Respondent's refusal to bargain with the Charging Party regarding changes in the fitness program, including its discontinuation although the fitness program clearly had a direct effect on the work relationship, violated the Statute.

Contrarily, Respondent, denies a violation of the Statute because the aerobics or fitness class was, in its opinion, not a condition of employment for bargaining unit employees, and because the Charging Party's proposal to continue the fitness or aerobics class contract at government expense interferes with Respondent's exclusive authority to determine its own budget under section 7106(a)(1). Respondent also argues that the authority for establishment of an aerobics class rests with the Secretary of Veterans Affairs pursuant to 5 U.S.C. 7901 who is bound by the limits of the appropriations available. Additionally, Respondent contends that requiring collective bargaining on the exercise of the statutory authority contained in section 7901 is inconsistent with the grant of that authority which rests exclusively with Respondent. Finally, Respondent

argues that the memorandum sent to the aerobics class participants did not constitute a bypass of the Charging Party since the memorandum did not concern a condition of employment.

B. The fitness program which was in existence from 1987 through February 28, 1991 became a condition of employment which was negotiable.

A condition of employment exists when a matter pertains to bargaining unit employees and when the record establishes a direct connection between the matter at issue and the work situation or employment relationship of bargaining unit employees. Antilles Consolidated School System, supra. In this case there is little question that the fitness program pertained to bargaining unit employees. Regarding the latter, element, the Authority looks to whether there is a nexus between the matter at issue and an employee's employment. In Aviation Systems Command, supra, the Authority found that when an agency linked employee participation in physical fitness activities to more efficient work performance and when the agency encouraged the adjustment of work schedules to enable employees to participate in physical fitness activities, the existence and availability of physical fitness facilities directly affected the work situation and employment relationship of bargaining unit employees, and thus constituted a condition of employment.

The elements essential for establishing a condition of employment are demonstrated in this case. Through a variety of internal analyses, reports, interpretations of statutory authority, guidelines, newsletters and other documents produced by the Department of Veterans Affairs and the Respondent, in addition to the testimony of the Respondent's personnel officer and budget analyst, Respondent and its parent agency have encouraged employees to engage in physical fitness programs for such purposes as increased productivity, reduced absenteeism and use of leave, lowered insurance rates, and other objects which directly affect the work relationship. Moreover, in the physical fitness program itself, Respondent created an explicit nexus between the program and the employment relationship, by sponsoring it on agency premises, paying for it, providing administrative leave for attendance at classes, and more or less actively encouraging the involvement of employees through its newsletter and presentation of tee-shirts. See U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York, 37 FLRA 570, 574-76 (1990), aff'd sub nom. U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York v. FLRA, 949 F.2d 1169 (D.C. Cir. 1991).

The policy of allowing administrative leave for employees to attend physical fitness classes from 1987 through February 28, 1991, alone establishes that the fitness program as it existed at Respondent constitutes a condition of employment. The matter of administrative leave constitutes a condition of employment even when it is held in conjunction with non-work activities. See for example, U.S. Department of Defense, Michigan Air National Guard, 127th Tactical Fighter Wing, 43 FLRA 344, 355 (1991); U.S. Department of the Army, Head-quarters, 101st Airborne Division, Fort Campbell, Kentucky, 40 FLRA 371, 380 (1991). The Authority has also clearly recognized that off-duty activities are conditions of employment when there is a nexus between that activity and the work relationship. U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York, 37 FLRA 570, 575-76 (1990). Consequently, it is found that the matter of Respondent's physical fitness program for employees, including its provision of administrative leave for employees to attend fitness classes, constituted a condition of employment.

The record also reveals that Respondent's physical fitness program was an established past practice. According to Melville, Respondent never considered the past practice aspect of the aerobics class, but was more concerned in terms of "legality" and "money." Authority law is clear that an agency may not change an

established past practice without fulfilling its bargaining obligations. The physical fitness program at issue in this case, was conceived and promoted in 1987, pursuant to guidelines provided by the Department of Veterans Affairs. It continued through February 1991 only by Respondent's renewing its contract with the provider. This practice of providing the exercise classes to employees and actively promoting the program which it tied in with the work relationship was consistently exercised for a sufficient amount of time to demonstrate that a past practice was established. U.S. Department of Labor, Washington, D.C.,

38 FLRA 899, 909 (1990). Accordingly, Respondent violated the Statute when it terminated this past practice along with the administrative leave provision of the fitness program and when it implemented its decision to discontinue the fitness program without bargaining with the Charging Party.

Finally, Respondent's argument that an aerobics or fitness program, which it promoted as a component of a wellness program, is not a condition of employment and, not negotiable is frustrated by its own bargaining history with the Charging Party. In 1986 or shortly before creation of the fitness program, as part of its wellness program in 1987, the parties negotiated into the local agreement a provision concerning the creation of a wellness program. Moreover, Respondent admitted that wellness programs are negotiable. In any event, Respondent's concerns over the negotiability of the fitness program are discussed further below.

1. The decision to end the use of administrative leave for participation in physical fitness classes was negotiable as to impact and implementation.

It has been found that proposals requiring an agency to permit employees to use duty time for physical fitness activities interfere with the agency's right to assign work. U.S. Department of Defense, Michigan Air National Guard, 127th Tactical Fighter Wing, 43 FLRA 344, 359 (1991). Thus, only the impact and implementation of changes related to the granting or denial of administrative leave in connection with physical fitness activities is negotiable here.

Accordingly, Respondent's decision to terminate the use of administrative leave while attending physical fitness activities was negotiable as to impact and implementation. Respondent's failure to provide the Charging Party with prior notice and an opportunity to bargain concerning the impact and implementation of the termination of administrative leave for the fitness program violated the Statute.

2. The decision to terminate the physical fitness contract was negotiable as to substance and/or impact.

The decision to end the physical fitness program which Respondent established and continued for three and a half years, was negotiable as to substance. The record is barren of evidence showing that the decision to end the fitness program affects the authority of Respondent to determine the mission or budget. Nor does the decision to end the physical fitness program encroach on Respondent's right to assign work. Unlike negotiability cases finding non-negotiable certain proposals addressing fitness programs for national guard technicians, see Michigan Air National Guard, supra, the program at the Respondent did not per se require a

grant of duty time. Rather, Respondent affirmatively allowed administrative leave for over a three-year period. Since a requirement of administrative leave was the only aspect on which the physical fitness-related proposals in the national guard technician cases were found to interfere with an agency's right to assign work, that principle does not apply here. Nor does the decision to terminate a fitness program usurp any other management right specified in section 7106(a), or permissive subjects enumerated in section 7106(b).

Accordingly, the Respondent's refusal to bargain with the Charging Party concerning the substance and impact and implementation of its decision to terminate sponsorship of the fitness program, violated the Statute.

C. No regulatory or statutory authority existed which would relieve Respondent of the obligation to bargain concerning changes in the fitness program, including its provision for administrative leave.

Respondent's claim that its continued policy concerning administrative leave was inconsistent with regulatory authority is not supported by the record. Respondent had and still has discretion in the matter of granting administrative leave for a variety of purposes, and from 1987 through 1991 Respondent exercised its discretion with respect to the fitness program. It is well established that insofar as an agency has discretion regarding a matter affecting conditions of employment it is obligated to exercise that discretion through negotiations unless precluded by regulatory or statutory provisions. Defense Mapping Agency, Aerospace Center, St. Louis, Missouri, 40 FLRA 244, 245 (1991). Respondent offered no statutory or regulatory provisions supporting its claim that a regulation prohibits the use of administrative leave for fitness classes or precludes Respondent from bargaining with the Charging Party concerning changes to the classes concerning administrative leave. The lone document of record relied on by Respondent to support this argument is FPM Letter 792-23. That letter, by its own terms, is designed solely to provide guidance to agency officials concerning the matter of assisting employees in finding time to participate in health and fitness activities. It is written entirely in the language of recommendation, suggestion, and encouragement, and "urges agencies to adopt" a specified list of recommended policies for granted excused absences to employees for participating in health and fitness activities. Nothing in the letter mandates that the suggested policy be implemented; nothing in the letter precludes such matters from bargaining. SeeDefense Contract Audit Agency, 47 FLRA 512 (1992). Notwithstanding that Respondent has unfettered discretion in making its decision to change the administrative leave practice with respect to the fitness classes, in order to accommodate its interpretation of the FPM letter's guidance, it was not free to implement that change without meeting its bargaining obligations with the Charging Party.

D. *The questionnaire issued directly to employee-participants of the fitness program concerning changes in the program constituted a bypass of the exclusive representative.*

Respondent sees its action on the communication as privileged since it considered the aerobic or fitness class not to be a condition of employment for bargaining unit employees. Since the condition of employment

issue has already been resolved against Respondent, the remaining question seems to be whether the agency communication herein undermined the status of the exclusive representative.

The law is settled that an agency's direct dealing with employees, including seeking their opinions and proposals concerning matters clearly bargainable with the exclusive representative, constitutes an unlawful bypass. Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado, 42 FLRA 1226, 1234-1235, 1239 (1991). While all solicitation of views of employees do not constitute an unlawful bypass, an agency may not undermine the status of the exclusive representative when it does solicit such views from employees. See Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Indianapolis, Indiana District Office, 31 FLRA 832, 836 (1988).

Sometime around February 5, 1991, Respondent issued a letter directly to bargaining unit employees, telling them of administrative leave approval for attendance at fitness classes, and directly soliciting employee views and preferences for new times and days for fitness classes. At the time, Respondent had not notified the Charging Party of any of the matters contained in the letter, nor had it informed the Charging Party of its decision to end administrative leave approval for fitness classes. Furthermore, Respondent never told the Charging Party of its intention to poll employees concerning the subject of changing class times or dates. In this regard, Respondent also ignored a previously negotiated agreement which required that it notify the Charging Party before conducting a poll of unit employees. In addition, it ignored the Charging Party's request to negotiate concerning the changes in the fitness program indicated in the February 5, 1991 letter for two full weeks. Meanwhile, employees and the Charging Party were left with only conjecture and rumor to imagine what Respondent had in mind for the already existing fitness program. Respondent thus sought to deal directly with bargaining unit employees, soliciting feedback from bargaining unit employees concerning proposed changes in conditions of employment, thereby bypassing the Charging Party. By its action, Respondent sent a message to employees that the Charging Party had no role to play in the matter of the fitness program or any changes concerning that program. It is the opinion of the under-signed, that such a message, whether it was intended to do so or not, could not help but undermine the status of the Charging Party.

Under these circumstances, it is found that Respondent committed a bypass in its February 5, 1991 communication to employees regarding a condition of employment, in violation of the Statute. Department of Transportation, Federal Aviation Administration, Los Angeles, California, 15 FLRA 100, 104 (1984).

E. Respondent's failure to give notice or the opportunity to bargain to the exclusive representative concerning changes to the fitness program, and its refusal to bargain concerning such changes including the termination of the program itself, violated the Statute.

Respondent refused to bargain concerning its changes to the physical fitness program, including the termination of the program. Further, Respondent failed to give notice or the opportunity to bargain concerning the termination of the administrative leave provision for attending fitness classes. Since the matters are found to be conditions of employment, Respondent was obligated to give notice and an opportunity to bargain to the Charging Party concerning changes prior to an implementation. Failure to do so, as seen here, constitutes an

express refusal to bargain and thereby, violated the Statute. U.S. Department of Labor, Washington, D.C., 38 FLRA 899, 909 (1990).

In summary, it is found that Respondent violated section 7116(a)(1) and (5) of the Statute by issuing a questionnaire to bargaining unit employees stating that its current fitness program would be terminated and by terminating the fitness program without providing the Charging Party an opportunity to negotiate the substance or the impact and implementation of that termination.

The Remedy

The General Counsel recommends a ***status quo ante*** remedy in this case. I agree. The instant record reveals that the factors in Federal Correctional Institution, 8 FLRA 604, 606 (1982) were met. Further, Respondent did not establish any special circumstances to show that a ***status quo ante*** remedy is unwarranted in the circumstance of this particular case. In my view, Respondent's argument that a ***status quo ante*** remedy would "wipe out" the current EAP program, presumably because that program uses the same funds appropriated for the wellness program, which previously went to the fitness program, lacks merit. In this regard, the record discloses that Respondent would have no difficulty obtaining additional funds, if required to do so. Likewise, the undersigned rejects Respondent's argument that restoring the aerobics or fitness class would "involve a significant increase in the amount of money allocated for employee wellness programs." Finally, Respondent pointed to nothing which precludes immediate contracting for a fitness program. Since there is no evidence of special circumstances to preclude a ***status quo ante*** remedy, the requested remedy appears appropriate.

Having found that Respondent violated the Statute by its action herein, 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, it is hereby ordered that the Department of Veterans Affairs Data Processing Center, Austin, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to provide to the National Federation of Federal Employees, Local 1745, the exclusive representative of bargaining unit employees, the opportunity to negotiate the substance or the impact and implementation of changes in conditions of employment regarding a fitness program, including the termination of the program.

(b) Failing and refusing to bargain with the National Federation of Federal Employees, Local 1745, the exclusive representative of bargaining unit employees, regarding the substance or the impact and

implementation of changes in conditions of employment regarding a fitness program, including the termination of the program.

(c) Failing and refusing to bargain in good faith with the National Federation of Federal Employees, Local 1745, the exclusive representative of bargaining unit employees, by bypassing the designated union representatives and soliciting input directly from employees regarding changes in conditions of employment of the fitness program.

(d) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights under 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) Upon request, bargain in good faith, with the National Federation of Federal Employees, Local 1745, regarding any changes in conditions of employment affecting bargaining unit employees regarding the fitness program.

(b) Rescind the termination of the fitness program which took effect March 1, 1991, and reinstate the fitness program, including the use of administrative leave, which was in effect prior to March 1, 1991.

(c) Post at its facilities in the Department of Veterans Affairs Data Processing Center, Austin, Texas, where bargaining unit members represented by the National Federation of Federal Employees, Local 1745, 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 the Director, 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 other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notifying the Regional Director of the Dallas Region, Dallas, Texas in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 18, 1994

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 fail or refuse to provide to the National Federation of Federal Employees, Local 1745, the exclusive representative of bargaining unit employees, the opportunity to negotiate the substance or the impact and implementation of changes in conditions of employment regarding a fitness program, including the termination of the program.

WE WILL NOT fail or refuse to bargain with the National Federation of Federal Employees, Local 1745, the exclusive representative of bargaining unit employees, regarding the substance or the impact and implementation of changes in conditions of employment regarding a fitness program, including the termination of the program.

WE WILL NOT fail or refuse to bargain in good faith with the National Federation of Federal Employees, Local 1745, the exclusive representative of bargaining unit employees, by bypassing the designated union representatives and soliciting input directly from employees regarding changes in conditions of employment of the fitness program.

WE WILL NOT in any like or related manner interfere with, restrain or coerce bargaining unit employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute.

WE WILL bargain in good faith, upon request, with the National Federation of Federal Employees, Local 1745, regarding any changes in conditions of employment affecting bargaining unit employees' fitness program.

WE WILL rescind the termination of the fitness program which took effect March 1, 1991, and we will reinstate the fitness program, including the use of administrative leave, which was in effect prior to March 1, 1991.

(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 its provisions, they may communicate directly with the Regional Director, Dallas Region, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-4996.

1. The Complaint was amended at the hearing.

2. Evidence concerning settlement communications is inadmissible and therefore, not material to any determination in this case. Rolla Research Center, U.S. Bureau of Mines, Rolla, Missouri, 29 FLRA 107 (1987); Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio; and Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 21 FLRA 529 (1986). Accordingly, the testimony elicited concerning communications between the parties while attempting to settle this matter has not been considered in making the findings herein.

3. The parties stipulated that "From at least August 1987 through February 28, 1991, the Department of Veterans Affairs Automation Center in Austin, Texas (formerly Veterans Admin-istration, Austin, Texas, the Data Processing Center and Veterans Benefits Administration) granted administrative leave to employees who participated in aerobics classes." Respondent currently is called the Department of Veterans Affairs Austin Automation Center.