

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**WASHINGTON, D.C. 20424-0001**

LOUIS A. JOHNSON VETERANS AFFAIRS MEDICAL CENTER, CLARKSBURG,  
WEST VIRGINIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2384,  
AFL-CIO

Case No.  
WA-CA-20686

Charging Party

Gregory A. Burke

Counsel for the Respondent

William Nazdin

Representative of the Charging Party

Laurence M. Evans

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

**DECISION**

Statement of the Case

The unfair labor practice complaint alleges that Respondent (VAMC Clarksburg) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§

7116(a)(1) and (5), by establishing and implementing a new wage rate schedule for Canteen workers in the bargaining unit without negotiating with the Charging Party (Local 2384 or Union) over the substance or the impact and implementation of the change in working conditions.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute. Respondent averred that no management official of VAMC Clarksburg has any authority to control or bargain over the pay or benefits of any person employed by the Department of Veterans Affairs at VAMC Clarksburg.

A hearing was held in Washington, D.C. The Respondent, Union, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

#### Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the Department of Veterans Affairs (VA). A collective bargaining agreement (Master Agreement) is in effect between VA and AFGE. Local 2384 is an agent of AFGE for representing unit employees at Respondent VAMC Clarksburg. The unit includes all non-supervisory professional and non-professional employees in the regular work force, including Canteen workers and guards. Local 2384 and VAMC Clarksburg also have a Labor-Management Agreement (Local Agreement).

#### Governing Statute, Regulation, and Agreements

38 U.S.C. § 7802(5) provides that the Secretary shall:

(5) employ such persons as are necessary for the establishment, maintenance, and operation of the Service, and pay the salaries, wages, and expenses of all such employees from the funds of the Service. Personnel necessary for the transaction of the business of the Service at canteens, warehouses, and storage depots shall be appointed, compensated from funds of the Service, and removed by the Secretary without regard to the provisions of title 5 governing appointments in the competitive service and chapter 51 and subchapter III of chapter 53 of title 5 [relating to classification of positions and General Schedule pay rates]. Those employees are subject to the provisions of title 5 relating to a preference eligible described in section 2108(3) of title 5, subchapter I of chapter 81 of title 5, and subchapter III of chapter 83 of title 5 [relating to civil service retirement.]

Under delegated authority, the Director, Veterans Canteen Service, establishes the position titles and grade ranges for canteen positions. Veterans Canteen Service I Operating Procedures, Part III, Chapter 1, Position Management, of July 27, 1984 (VCS-1) accurately describes the VCS Retail-Clerical-Administrative pay system, in part, as follows:

## 1.08 VCS RETAIL-CLERICAL-ADMINISTRATIVE SYSTEM

a. The VCS retail-clerical-administrative (RCA) system includes all classes of positions the duties of which are: to receive, stock and sell food and retail merchandise; to take food and retail inventories at canteens; and to complete the purely clerical or administrative tasks of canteen accounting, procurement and record-keeping. Because these positions do not meet the criteria for craft, trade, or manual labor work, they are excluded from the provisions of Public Law 92-392; FPM Supplement 532-2; MP-5, part I, chapter 512; and VA Supplement 532-1.

b. The RCA pay system is established and administered by the VCS. Compensation for these positions is based on hourly rates for the Patron Services Schedule resulting from Department of Defense wage surveys. RCA schedules are effective on the same date NAF regular wage schedules for the same wage area become effective.

c. The following titles and grades are authorized for hourly rate positions in the VCS RCA system. No others may be used without approval of the Director, VCS. All positions are assigned to the VC pay plan. . . .

The positions set out in the VCS-1 Operating Procedures include those of Administrative Assistants, Supply Clerks, and Sales Clerks.

Article 20, Wage Surveys, of the Master Agreement, provides:

SECTION 1 - Survey teams will consist of one member nominated by the local agency and one member nominated by the labor member of the local wage survey committee. Each will be selected on the basis of qualifications set forth under Federal Wage System procedures. The number of teams needed to complete the surveys will be determined by the local committee.

SECTION 2 - The host installation designated by the lead agency will provide office space and telephone capability to local committee members and survey teams for the purpose of conducting the survey. The VA also will provide such facilities where necessary.

SECTION 3 - The VA will make every effort to provide official vehicles for the use of survey teams and, if necessary, for committee members involved in the survey. In the event such vehicles are unavailable, management will explore all other alternatives to provide transportation for the survey team. [Jt. Exh. No. 1].

Article XXIV, Area Wage Surveys (WG and Canteen Employees), of the parties' Local Agreement provides:

1. The Medical Center will notify the Union of a pending wage survey promptly upon receipt of notice that such survey is to be made.
2. If any meetings are held at this Medical Center concerning planning of an upcoming survey, a Union representative will be invited to attend.
3. When Union representative participate in a wage survey, Personnel will provide them with necessary information and assistance in carrying out their duties. [Jt. Exh. No. 2].

Article 4, Mid-Term Bargaining, Section 1, VA Transmittal of National Level Changes, of the Master Agreement provides:

The VA will forward all proposed changes initiated above the individual facility level for which there is a bargaining obligation under the Statute to the designated Council representative with copies to the 4 Council Officers and a copy to the national office of AFGE.

Article 4, Sections 2 and 3 provide for the national level negotiations. Article 4, Section 4, Local Bargaining on National Changes, of the Master Agreement provides:

On all policies and directives or other changes for which the VA meets its bargaining obligations at the national level, local bargaining at individual facilities will be restricted to local implementation unless there was agreement at the national level to provide for local bargaining on the national subject.

Article 4, Section 5, Local Level Changes, of the Master Agreement provides:

Proposed changes affecting personnel policies, practices or conditions of employment which are initiated by local management at a single facility will be forwarded to the designated local union official. Upon request, the parties will negotiate as appropriate. . . .

Article XII, Rights of the Union, Paragraph 2 of the Local Agreement provides:

It is agreed and understood that matters appropriate for consultation and negotiation between the Union and the Employer must be within the administrative discretion and authority of the Medical Center Director and permissible by applicable laws and regulations, executive orders, Office of Personnel Management regulations, and VA policy.

Article XXXIII, Duration, Amendment, and Termination, Paragraph 5 of the Local Agreement provides:

Any request for amendment or renegotiation from either party shall be in writing and must include a summary of the changes proposed and the reasons therefore. Within 30 calendar days after receipt of such request, representatives of the parties shall meet to discuss the changes proposed and to negotiate those proposals where change is found warranted.

On January 12, 1992, James B. Donahoe, Director, VCS, by Duane A. Walsh, Director of Personnel and Administration, VCS, issued a new wage rate schedule for Retail, Clerical and Administrative employees pursuant to 38 U.S.C. § 7802(5) and VCS-1. The schedule noted that it was for "employees engaged in other than craft, trade or manual labor occupations." These employees include the employees at issue here, Administrative Assistants, Sales Clerks, and Supply Clerk.

The schedule was derived from a wage survey of area 066 Allegheny, Pennsylvania, one of the 147 or more wage survey areas, performed by the Department of Defense of Administrative Services (AS) and Patron Services (PS) employees. AS and PS employees are not covered by P.L. 92-392, 86 Stat. 564, 574 (1972) (codified at 5 U.S.C. § 5343 note (1988), section 9(b) of the Prevailing Rate Systems Act of 1972. Rather, the wages of AS and PS employees are set by being "piggy-backed" on the surveys conducted for crafts and trades employees, those covered by P.L. 92-392. The VCS then uses the Department of Defense AS and PS schedules to set the wage rates for Retail, Clerical and Administrative employees.

The January 12, 1992 wage rate schedule noted that it was applicable to five VAMC installations in the Ohio, Pennsylvania, and West Virginia area, including VAMC Clarksburg.

On February 26, 1992, Local 2384 President Helen Newlon, made, in writing, a demand to bargain over the wages and benefits for certain of Respondent's Canteen Service employees. The Union did not submit any proposals, but did request certain information "[i]n order that we might develop proposals" pursuant to section 7114(b)(4) of the Statute. On March 27, 1992, VAMC Clarksburg provided the information, but denied the Union's request to bargain, stating, in part, as follows:

Amongst other reasons, and based upon the U.S. Court of Appeals Fourth Circuit case, which stated that union initiated midterm bargaining is not required by the statute, we do not at this time desire to undertake such bargaining; therefore, we are denying your request to bargain.

Local 2384 sought to bargain over the wages for unit positions designated as Administrative Assistants, Supply Clerks, and Sales Clerks. Local 2384 did not seek to bargain over the wages of non-appropriated fund positions designated as cook and food service workers which are covered by P.L.

92-392.

The Union had never before bargained over the wages of any of the VCS unit employees as these employees' wages had been set historically by operation of area wage surveys. Local 2384 President Newlon acknowledged that the Union had never made a request to bargain over wage increases for VCS employees because "[u]ntil the Ft. Stewart decision, we didn't have any idea that we could."

Discussion and Conclusions

The General Counsel contends that since wages are a condition of employment under Fort Stewart Schools v. FLRA, 495 U.S. 641 (1990)(Fort Stewart), and since there is no statute setting wages for the employees at issue in this case, Respondent violated the Statute by refusing to bargain over wages for these employees. The General Counsel claims that Respondent's affirmative defenses are without merit.

Respondent maintains that it had no obligation to bargain because (1) the procedures concerning wage surveys and related wage determinations are covered by the parties' collective bargaining agreements, (2) the Union did not submit proposals as required by Article XXXIII of the Local Agreement, (3) Respondent had no obligation to bargain over Union-initiated midterm bargaining proposals absent Agency-initiated changes in the terms or conditions of employment, (4) the January 12, 1992 change in wage rates did not constitute a change in conditions of employment as the policies and procedures used to establish those wages have remained unchanged since at least 1984, and (5) VAMC Clarksburg cannot be found to have committed an unfair labor practice for a failure to negotiate because only the Director, VCS has authority to establish wages for VCS employees at VAMC Clarksburg or any other VA facility.

Matters pertaining to the wages, or compensation, of Federal employees covered by the Statute are conditions of employment subject to the duty to bargain under the Statute unless they are excluded from the definition of conditions of employment because they are specifically provided for by Federal statute, within the meaning of section 7103(a)(14)(C) of the Statute. See Fort Stewart, 495 U.S. at 644-50. Where a Federal statute provides discretion to an agency with respect to the determination of matters pertaining to Federal employee wages, the wages of those employees are not a matter specifically provided for by Federal statute within the meaning of section 7103(a)(14)(C) of the Statute. Department of Defense, Fort Bragg Dependents Schools, Fort Bragg, North Carolina and Fort Bragg Association of Educators, OEA/NEA,

49 FLRA 333, 339-40 (1994).

The Wages of the Employees Involved Here Are Not Specifically Provided by Federal Statute

38 U.S.C. § 7802(5), set out above, provides that the Secretary shall pay the wages and compensate such employees from the funds of the Service without regard to the provisions of title 5 governing appointments, classification, and General Schedule pay rates, but subject to its provisions relating to preference eligibles and civil service retirement. Thus, the statute provides discretion to the Agency with respect to the determination of wages of administrative assistants, supply clerks, and sales clerks and such matters are not specifically provided for by Federal statute and are not excluded from the definition of conditions of employment. Unless the request to negotiate over compensation for these employees was otherwise inconsistent with applicable law, rule, or regulation, Respondent was required to bargain with respect to the wages of the employees involved here. Cf. Fort Bragg, 49 FLRA at 340.

Union's Right to Initiate Mid-term Bargaining

The Authority has previously rejected the contention advanced by Respondent here that the Authority should adopt the 4th Circuit's decision in Social Security Administration v. FLRA, 956 F.2d 1280 (4th Cir.

1992), which held "that union-initiated midterm bargaining is not required by the [S]tatute and would undermine the [C]ongressional policies underlying the [S]tatute." 956 F.2d at 1281. The Authority has held that it respectfully disagrees with the 4th Circuit's decision, and will continue to adhere to its holding in Internal Revenue Service, 29 FLRA 162 (1987), that the duty to bargain in good faith that is imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union-initiated proposals concerning matters that are not contained in the collective bargaining agreement, unless the union has waived its right to bargain about the subject matter involved. See Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan, 46 FLRA 582 (1992).

#### Bargaining Not Appropriate By VAMC Clarksburg and Local 2384 Under Parties' Agreements

VAMC Clarksburg claims that it cannot be found to have committed an unfair labor practice for a failure to negotiate because only the Director, VCS has authority to establish wages for VCS employees at VAMC Clarksburg or any other VA facility. VAMC Clarksburg points out that no evidence was presented that the Director, VCS was even made aware of any request to bargain, and whether or not the VCS Central Office would have bargained is not raised by the complaint in this case.

Under section 7114(b)(2) of the Statute, the duty of an agency and an exclusive representative to negotiate in good faith includes the obligation "to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment." Thus, the Statute clearly requires the parties to provide representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit. National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 13 FLRA 554, 556 (1983). However, the issue of where, that is, at what level such bargaining will take place requires an examination of the Statute and the parties' agreements and delegations of bargaining authority. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 39 FLRA 1409, 1417-18 (1991)(Ogden).

The AFGE is the certified exclusive representative of a nationwide consolidated unit. Since the exclusive recognition is at the national level, the Statute, in the absence of an agreement between the parties, or other appropriate delegation of authority, does not require negotiations at any other level. See, e.g., Department of Health and Human Services, Social Security Administration, 6 FLRA 202 (1981); Department of Defense Dependents Schools and Overseas Education Association, 12 FLRA 52, 53 (1983); Ogden, 39 FLRA at 1417.

Article 4, Section 1 of the National Agreement, set out above, provides that "[t]he VA will forward all proposed changes initiated above the individual facility level for which there is a bargaining obligation under the Statute to the designated Council representative with copies to the 4 Council Officers and a copy to the national office of AFGE." Sections 2 and 3 of that Article provide for such national level negotiations. Section 4 of the National Agreement provides for bargaining at the local level on changes "which are initiated by local management at a single facility[.]" Article XII, Section 2 of the Local Agreement, set out above, states that "matters appropriate for consultation and negotiation between the [Local] Union and the Employer must be within the administrative discretion and authority of the Medical Center Director. . . ."

The record reflects that the wage rate change in issue was established by the Director, VCS at the national

level and was made applicable to five VAMC installations in Ohio, Pennsylvania, and West Virginia, including VAMC Clarksburg. Thus, it was not a change initiated by local management at VAMC Clarksburg. There has been no showing that the Local 2384 President was delegated authority to request national level bargaining or that the Medical Center Director, VAMC Clarksburg had any administrative discretion and authority with respect to the matter. Therefore, pursuant to the Statute, the parties' agreements, and the delegations of bargaining authority, VAMC Clarksburg cannot be found to have committed an unfair labor practice for its failure to negotiate with Local 2384 on this matter in this instance, as alleged, even assuming, without deciding, that the matter is not covered by or contained in the parties' agreements and the Union has not waived its right to bargain.

In view of this disposition it is not necessary to consider the additional defenses raised by Respondent.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, August 5, 1994

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GARVIN LEE OLIVER

Administrative Law Judge

Dated: August 5, 1994

Washington, DC