

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

WILLIAMS AIR FORCE BASE
CHANDLER, ARIZONA

Respondent

and

AMERICAN FEDERATION OF

Case No. SA-CA-20302

GOVERNMENT EMPLOYEES,

LOCAL 1776, AFL-CIO

Charging Party

Major David L. Frishberg For the Respondent

Lisa Miller, Esquire For the General Counsel

Before: BURTON S. STERNBURG Administrative Law Judge

DECISION

Statement of the Case

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

Pursuant to a charge filed on February 25, 1992, by American Federation of Government Employees, Local 1776, AFL-CIO, (hereinafter called the Union), against Williams Air Force Base, Chandler, Arizona, (hereinafter called the Respondent), a Complaint and Notice of Hearing was issued on August 21, 1992, by the Regional Director for the San Francisco Regional Office, San Francisco, California. The Complaint alleges that the Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by eliminating the designated smoking area in Building 410 without first notifying the Union and affording it an opportunity to negotiate over the substance, impact and manner of implementation of the change.

A hearing was held in the captioned matter on October 21, 1992, in Phoenix, Arizona. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Counsel for the General Counsel and Counsel for the Respondent filed post-hearing briefs on December 22, 1982, which have been fully considered.

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

Findings of Fact

The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent's facilities.

Prior to the events leading up to the filing of the charges in the instant case, Respondent allowed the employees in Building 410 to smoke in a designated area located in a hallway which led to the exterior of the building. The designated area in the hallway was equipped with a smoke eating device, an exhaust fan, tables, chairs and ashtrays. There were also signs identifying the area as a designated smoking area.

According to the credited testimony of Union President Walter Taylor and Mr. Edward Castagno, a delivery driver who works in Building 410, during the early part of December 1991, Mr. Castagno was on his way to the above described smoking area when he met his supervisor, Mr. Donis Layton, coming from the opposite direction. Upon informing Mr. Layton where he was heading, Mr. Layton informed him that he could no longer smoke in the designated area since "they've stopped it because the ventilation wasn't proper". After hearing from Mr. Layton, Mr. Castagno continued on to what had been the smoking area and discovered that the ash trays and smoking signs had been removed. He then left the building and entered a gazebo which was located directly outside the hallway door leading to the exterior of the building. The gazebo is neither screened nor air conditioned. Further, according to Mr. Castagno, upwards of twenty smokers per day were accustomed to using the designated smoking area in Building 410.

According to the testimony of Mr. Taylor and Mr. Castagno, since the closure of the smoking area in Building 410, the employees working in Building 410 who want to smoke have no choice but to use the gazebo area, where the temperature at times reached 116 degrees and the smokers, at times, were subjected to hordes of white flies.

Upon hearing, for the first time, of the closure of the smoking area in Building 410 from Mr. Castagno and employee Jim Grainger, Mr. Taylor called Ms. Linda Connelly, Respondent's Labor Relations Officer, and asked her to have the smoking area restored or to bargain over the closure.⁽¹⁾ Ms. Connelly refused to reinstate the smoking area and stated that there would be no smoking in any building at Williams Air Force Base.

According to a smoking evaluation study, dated March 21, 1991, which was conducted by "Bioenvironmental Engineering Service", the ventilation in what was the smoking area in Building 410 was inadequate. In this connection, Ms. Connelly testified that Respondent had insufficient funds available to perform the modifications necessary to bring the smoking area into conformance with existing standards. She further noted that the Air Force Base was scheduled to close in 1993. Finally, Ms. Connelly did not supply any cost estimates for the modifications that would be necessary in order to continue using the hallway space for a smoking area.

The Union and the Respondent are parties to a "Memorandum of Understanding" dated December 14, 1988 which provides, among other things, that smoking shall be permitted only in designated areas. Further, according to the memorandum, "when a question is raised concerning the adequacy of a designated smoking area, the Bioenvironmental Office shall be consulted before a final decision is made with respect to the area." Finally, according to the memorandum, "If current designated smoking areas cannot be brought into

compliance . . . , the unit commander will make reasonable efforts to identify alternate acceptable areas."

Discussion and Conclusions

The General Counsel takes the position that Respondent violated Sections 7116(a)(1) and (5) of the Statute by virtue of its actions in closing the designated smoking area in Building 410 without first giving the Union notice and an opportunity to bargain over the substance, impact and manner of implementation of its decision.

Respondent, on the other hand, offers various alternate defenses to its failure to give the Union prior notice and the opportunity to bargain over the closure of the designated smoking area. Namely, that by entering into the Memorandum of Understanding dated December 14, 1988, the Union waived its right to bargain over any changes in smoking areas, the area in question was not ever designated a smoking area, and that the Union not only failed to request bargaining over the closure of the smoking area located in Building 410, but also failed to submit any bargaining proposals. With respect to remedy, it is Respondent's position, that in the event a violation of the Statute is found, only a "prospective bargaining order" should be issued, rather than a "status quo ante" remedy as requested by the General Counsel. In this connection, according to Respondent, "any expenditure of Respondent's funds in this case for minor construction would be only a gross waste of limited resources" because the base is scheduled for closing in 1993.

Contrary to the contention of the Respondent, I can not find on the basis of the instant record that the Union by entering into the "Memorandum of Understanding" waived its right to notice and the opportunity to bargain over changes in designated smoking areas. Rather, I find that by entering into the Memorandum of Understanding the Union merely agreed that all smoking would be confined to designated smoking areas. The agreement is silent with respect to the Union's bargaining rights in the event that a designated smoking area is changed, closed, etc. In order for a waiver to be found, such waiver must be clear and unmistakable. U.S. Department of the Treasury, Customs Service, Washington, D.C., and Customs Service, Northeast Region, Boston, Massachusetts, 38 FLRA 770, 784. Such is not the case herein.

With respect to Respondent's contention that the area in dispute in Building 410 was never designated a smoking area, I find, based primarily on the credited testimony of Mr. Taylor and Mr. Castagno that the area was indeed a recognized smoking area. Thus, according to their testimony, the area was used for over a year as a smoking area and was equipped with exhaust fans, ash trays, signs and smoke eaters, etc.

Finally, with respect to Respondent's contentions, i.e. that it did not violate the Statute since the Union never made a demand to bargain and/or failed to submit bargaining proposals, I find such contentions to be without merit. Having credited the testimony of Mr. Taylor, I find that he did in fact request bargaining over the closure of the smoking area. While it is true that the Union did not submit any bargaining proposals, I know of no Authority decision requiring the presentation of bargaining proposals simultaneously with a bargaining demand. Moreover, and in any event, since the Union became aware of the closure of the designated smoking area only after it was a fait accompli, a bargaining demand is not a requisite to establishing a 7116(a)(1) and (5) violation. U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 38 FLRA 887.

Having found that the Respondent unilaterally and without prior notice to the Union closed the designated smoking area in Building 410,⁽²⁾ I further find that by such act the Respondent violated Sections 7116(a)(1) and (5) of the Statute.

As noted above, Respondent contends, contrary to the General Counsel, that a status quo ante remedy would be inappropriate, primarily because the base is scheduled for closure sometime in 1993 and any minor construction "would be a gross waste of limited resources". Respondent, however, has not seen fit to supply any cost estimates with respect to the construction necessary to bring the designated smoking area up to the required standards. Nor has Respondent seen fit to give an exact date that the base is scheduled to close. Accordingly, I am without the tools necessary to evaluate and/or weigh the merits of Respondent's contention. In such circumstances, I agree with the General Counsel that a statusquo ante remedy would best effectuate the purposes and policy of the Statute.

In view of the foregoing findings and conclusions, it is hereby recommended that the Authority issue the following Order.

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 Williams Air Force Base, Chandler, Arizona, shall:

1. Cease and desist from:

(a) Unilaterally changing the working conditions of bargaining unit employees by eliminating the designated smoking area located in the first floor hallway of Building 410 without first giving notice to American Federation of Government Employees, Local 1776, AFL-CIO, the exclusive representative of its employees, and allowing it the opportunity to bargain over the substance and/or the impact and manner of implementation of any contemplated 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) Restore the designated smoking area to its former location in the first floor hallway of Building 410.

(b) Prior to effecting any changes in the designated smoking area located in the first floor hallway of Building 410 notify American Federation of Government Employees, Local 1776, AFL-CIO, the exclusive representative of its employees, and afford it the opportunity to bargain over the substance and/or impact and

the manner of implementation of any contemplated change.

(c) Post at its facilities in Chandler, Arizona facilities, where employees in the bargaining unit 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 Commanding Officer, 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Regional Office, Federal Labor Relations Authority, 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, April 26, 1993

BURTON S. STERNBURG

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 STATUE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the working conditions of bargaining unit employees by eliminating the designated smoking area located in the first floor hallway of Building 410 without first giving notice to American Federation of Government Employees, Local 1776, AFL-CIO, the exclusive representative of our employees, and allowing it the opportunity to bargain over the substance and/or the impact and manner of implementation of any contemplated change.

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 Federal Service Labor-Management Relations Statute.

WE WILL restore the designated smoking area which formerly existed in the first floor hallway of Building 410.

WE WILL notify American Federation of Government Employees, Local 1776, AFL-CIO, in advance of any contemplated changes to established smoking areas and, upon request, bargain with American Federation of Government Employees, Local 1776, AFL-CIO over the substance and/or the impact and manner of implementation of such changes.

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.

(Activity)

Date: _____ By: _____

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

1. Mr. Taylor worked in Building 410 from February 1990 through January 1991. During this period, according to his credited testimony, smoking was always allowed in the designated hallway described above.

2. There is no contention that an agency's smoking policy is not negotiable.