OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND WRIGHT-PATTERSON AIR FORCE BASE, OHIO
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 214, AFL-CIO

Case No. CH-CA-20635

Charging Party

Lt. Col. Timothy D. Wilson

For the Respondent

Philip T. Roberts, Esquire

For the General Counsel

Mr. Paul D. Palacio

For the Charging Party

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.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether the Union's request for information concerning vacant position authorizations is governed by the Memorandum of Understanding negotiated by the parties with respect to formation of Air Force Materiel Command [AFMC Activation].

This case was initiated by a charge filed on July 13, 1992, (G.C. Exh. 1(a)), which alleged violations of §§ 16(a)(1) and (5) of the Statute, and by a First Amended charge filed on November 27, 1992 (G.C. Exh. 1(b)),

which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The Complaint and Notice of Hearing (G.C. Exh. 1(c)) issued on November 27, 1992; alleged violations of § 16(a)(1), (5) and (8) of the Statute; and set the hearing for a date, time and place to be determined. By Notices dated April 22 and May 21, 1993, the hearing was set for June 9, 1993, in Dayton, Ohio, pursuant to which a hearing was duly held on June 9, 1993, in Dayton, Ohio, 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, July 9, 1993, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed a brief, received on July 13, 1993, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees,

AFL-CIO (AFGE), is the certified exclusive representative of a nationwide unit of Respondent's employees. American Federation of Government Employees, Council 214, AFL-CIO (Union), is the agent of AFGE for the representation of Respondent's employees.

2. Respondent, Air Force Materiel Command (AFMC), was formed from what had been the Air Force Systems Command (AFSC), headquartered at Andrews Air Force Base, Maryland, and the Air Force Logistics Command (AFLC), headquartered at Wright-Patterson Air Force Base, Ohio. AFMC is headquartered at Wright-Patterson Air Force Base, Ohio.

3. In anticipation of the integration of AFSC, which developed weapons systems for the Air Force, and AFLC, which provided the logistics support, training, etc. (Tr. 52), a Provisional AFMC Headquarters was set up in June or July 1991, to work on the integration of the Commands into AFMC (Tr. 70). The Union was notified of the integration and offered the opportunity to bargain on the impact and implementation (Tr. 54, 71). On, or about, August 9, 1991, the Union submitted its proposals for the AFMC Integration (G.C. Exh. 7; Tr. 54-55, 71). In the ensuing negotiations, the Union was represented by Mr. Joseph H. Nickerson, Executive Director of the Union (Tr. 51, 55) and Respondent was represented by Mr. H. Dale Biddle (Tr. 55, 71-73). The parties discussed the Union's proposals (Tr. 55) and, subsequently, Mr. Biddle, "came back with a counter-proposal" (Tr. 55) which, after discussion, was signed on August 30, 1991, by the parties, without modification, as the "AFMC Activation Memorandum of Agreement" (G.C. Exh. 2) (hereinafter, "MOA").

4. In Paragraphs 3 and 4 of its proposal, the Union had provided,

"3. Data to justify any vacancies filled, particularly through promotion will be provided to AFGE Council 214 as requested.

"4. Identify by grade and series the number of AFSC slots being transferred to Wright-

Patterson Air Force Base and identify which are vacant and provide this to Council 214. For those vacancies, identify procedures on how those slots will be filled. Identify those slots to be filled by promotion and provide rationale." (G.C. Exh. 7).

Paragraph 3 of the MOA provided that procedures for filling bargaining unit positions at Wright-Patterson would be "consistent and in accordance with regulations, the MLA [Master Labor Agreement] and local agreements negotiated prior to or after the effective date of this agreement [August 30, 1991]" (G.C. Exh. 2), but information to be provided was set forth in Paragraph 4 as follows:

"4. When available, a listing of the HQ AFSC position authorizations being transferred to Wright-Patterson AFB will be provided to AFGE Council 214." (G.C. Exh. 2).

5. Beginning on September 12, 1991, Respondent, pursuant to Paragraph 4 of the MOA, provided the Union with a listing of the HQ AFSC vacant position authorizations transferred to Wright-Patterson AFB and thereafter, through June 16, 1992, updated the listing fourteen times (G.C. Exh. 3; Res. Exh. A; Tr. 73-74). The initial listing (September 12, 1991) consisted of about 1¼ pages; the final updated listing (June 16, 1992) consisted of about $10^{4}/_{5}$ pages (Res. Exh. A).

6. AFMC, i.e. the integration of AFLC and AFSC, became effective July 1, 1992 (Tr. 52).

7. By letter dated June 17, 1992, the Union requested,

"Provide an annotated and updated list of the positions filled that were reflected as vacancies. Indicate name, grade, and series of the new position. Indicate whether the individual filing (sic) the vacancy was surplus.

"If the position filled was not by a surplus individual, indicate how position was filled and provide the pertinent data on how the selections were made. Cite applicable regulations and provide copies of same. Ethnicity, gender and age of those individuals are also required." (G.C. Exh. 4).

8. Respondent, by letter dated June 29, 1992, denied the Union's June 17 request for information for the reason, interalia, that,

"The parties previously bargained in good faith and signed an agreement on 30 August 1991 relative to the AFMC Activation. Council 214's proposals on information needs were fully discussed and explored during bargaining. Paragraph four (4) of the 30 August 1991 agreement specifies the information the employer is obligated to provide Council 214. Since information proposals were previously discussed and agreement reached regarding them, you cannot modify or expand on that agreement -- as you now are attempting to do. Therefore, your request for additional information on this matter is denied." (G.C. Exh. 5) (By letter dated July 7, 1992, Respondent corrected the last paragraph, i.e., the paragraph following the paragraph set forth above. G.C. Exh. 6).

9. Mr. Nickerson stated that the Union's information request of June 17, 1992, signed by Mr. Squires (G.C. Exh. 4) was basically the same as the Union's proposals of August 9, 1991 (G.C. Exh. 7). Thus, Mr. Nickerson testified,

"A. The proposals that I originally submitted are basically the same as the our data request that we made, that Mr. Squires signed, that's Exhibit, General Counsel's Exhibit Four.

"In discussions with Mr. Biddle and with what little I knew about Personnel matters, I felt that Paragraph Three was the -- was the avenue that provided my visibility if I needed it, okay?

"And Paragraph Four, while it -- yes, it -- and I agree that it is just a listing of those positions, actually gave us no information at all. . . ." (Tr. 61).

10. The Union in its request of June 17, 1992, stated that,

"This data is required by AFGE for surveillance purposes in determining that management has been and is complying with applicable regulatory guidance, Memorandums of Agreement and the Master Labor Agreement. Managements (sic) compliance with Article 9, Section 9.01 and 9.01 is requested." (G.C. Exh. 4).

Respondent is denying the Union's request had stated,

"Moreover, you claim the information is needed for surveillance purposes. You failed to specify what provisions of the Master Labor Agreement or Memorandums of Agreements would be monitored for compliance by use of the requested data or why[2] the information is necessary to enable Council 214 to fulfill its representational responsibilities with regard to bargaining unit employees." (G.C. Exh. 6). (Emphasis in original.)

Conclusions

In Internal Revenue Service v. FLRA, 963 F.2d 429 (D.C. Cir. 1992) (hereinafter, "IRS"), the Court held, in part, as it had held in Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA, 962 F.2d 48 (1992) (herein-after, "Marine Corps"[3], that ". . . the 'clear and unmistakable waiver' approach adopted by the Authority in this case is internally inconsistent and produces results at odds with the policies of the FSLMRS." (963 F.2d at 438). In its decision on remand, Internal Revenue Service, Washington, D.C., 47 FLRA 1091 (1993) (hereinafter, "Internal Revenue Service"), the Authority stated, in part, as follows:

". . . On reexamination, we conclude that in unfair labor practice cases . . . where the underlying dispute is governed by the interpretation and application of specific provisions of the parties' collective bargaining agreement, we will no longer apply the 'clear and unmistakable waiver' analysis. We have carefully examined the court's decision in IRS v. FLRA [IRS] . . . We have formulated a new approach to these cases that will carry out the purposes and policies of the Statute. We now hold that when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly." (47 FLRA at 1103) (Emphasis supplied).

The Authority's ". . . definitive test for determining when a matter is contained in or covered by a collective bargaining agreement" may be found in U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004, 1016-1019 (1993) (hereinafter, "SSA, Baltimore"). See, also, Sacramento Air Logistics Center, McClellan Air Force Base, California, 47 FLRA 1161, 1165 (1993); U.S. Department of The Navy, Marine Corps Logistics Base, Barstow, California, 48 FLRA 102, 106-107 (1993); Social Security Administration, Douglas Branch Office, Douglas, Arizona, 48 FLRA 383,

386-387 (1983); USDA Forest Service, Pacific Northwest Region, Portland, Oregon, 48 FLRA 857, 859-860 (1993); Marine Corps Base, Camp Lejeune, North Carolina, 48 FLRA 1062, 1065-1066 (1993).

Here, it is conceded by the Union that its information request of June 17, 1992, with respect to AFSC slots transferred to Wright-Patterson AFB, was basically the same as its proposal in the 1991 negotiations which it dropped and accepted, in lieu thereof, Paragraph 4 of the MOA, which provides that Respondent will provide the Union, ". . . a listing of the HQ AFSC position authorizations being transferred to Wright-Patterson AFB". Thus, there is no dispute whatever that: (a) the MOA of August 30, 1991, specifically covered the information to be furnished with respect to HQ AFSC position authorizations transferred to Wright-Patterson AFB; and (b) that the Union's more expansive proposal, which is basically the same as its 1992 request, was discussed and that the Union agreed to Paragraph 4 of the MOA with full knowledge and awareness that it would be provided a listing, only, of HQ AFSC position authorizations being transferred to Wright-Patterson AFB and not the much more detailed information it had sought in its proposal.

If this were a bargaining case, there could be no doubt that the Union's 1992 "request to bargain" would be barred in the sense that Respondent's refusal to bargain would not have violated §§ 16(a)(5) or (1) of the Statute. SSA, Baltimore, supra; but is the Union's request for information under § 14(b)(4) of the Statute also barred, in the sense that Respondent's refusal to supply the data requested did not violate §§ 16(a)(1), (5) and (8) of the Statute? I concluded, for reasons set forth hereinafter, that denial of an information request does not violate §§ 16(a)(1), (5) or (8) of the Statute when the agreement of the parties covers the furnishing of the information involved and the record shows an intentional abandonment by the Union of more detail concerning the same information. First the duty to bargain in good faith includes a duty to provide relevant information, National Labor Relations Board v. Truitt Manufacturing Co., 351 U.S. 149 (1956); National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432 (1967); Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979); and, notwithstanding that § 14(b)(4) of the Statute, unlike the National Labor Relations Act, 29 U.S.C. § 151, et seq., specifically provides for the furnishing of data, § 14(b)(4)(B) requires, inter alia, that the data relate to "subjects within the scope of collective bargaining". Accordingly, for the purpose of Internal Revenue Service, supra; SSA, Baltimore, supra, a request for information is governed by specific provisions of the parties' collective bargaining agreement.

Second, the Authority, in Internal Revenue Service, supra, directed its holding to all, "unfair labor practice cases . . . where the underlying dispute is governed by the interpretation and application of . . . the parties' collective bargaining agreement . . . when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority . . . will determine the meaning of the . . . agreement and will resolve the unfair labor practice complaint accordingly."

Third, the Union, by its intentional abandonment of its quest for the same information in 1991 and its knowing acceptance in lieu thereof of the proffered listing of HQ AFSC position authorizations being transferred to Wright-Patterson AFB, showed that the additional information it had sought was not necessary, a conclusion firmly reiterated by Mr. Nickerson's testimony (Tr. 57). Because the data requested concerning HQ AFSC position authorizations transferred to Wright-Patterson AFB was not necessary, and the Union is estopped by its 1991 agreement to assert to the contrary, Respondent's refusal to furnish data, which was not necessary within the meaning of § 14(b)(4)(B), did not violate §§ 16(a)(1), (5) or (8).

General Counsel's statement that, ". . . the issue here is whether, by incorporating a specific information provision into the MOA, the (sic) [Union] is now precluded from obtaining any further information concerning the integration under Section 14(b)(4) of the Statute." (General Counsel's Brief, p. 9) is not correct. This case does not involve and, most assuredly, I do not find, or decide, that all further information requests under § 14(b)(4) concerning integration is precluded. To the contrary, I hold only that the denial of the Union's information request concerning the HQ AFSC position authorizations transferred to Wright-Patterson AFB did not violate § 16(a)(1), (5) or (8) of the Statute because the Agreement of the parties specifically covered the information to be furnished with respect to the HQ AFSC position authorizations transferred to Wright-Patterson AFB. I am fully aware, as Mr. Nickerson was fully aware, that Paragraph 3 of the August 30, 1991, MOA provided that,

"3. Procedures for filling bargaining unit positions . . . will be consistent and in accordance with regulations, the MLA and local agreements . . ." (G.C. Exh. 2).

Beyond question, as Mr. Nickerson stated ". . . Paragraph Three of Exhibit Two, provided the wherewithal for the Union being able to get the data that they needed." (Tr. 57).

Let me emphasize, the only issue before me, and the only issue decided, is that the Union's information request of June 17, 1992, concerning HQ AFSC position authorizations transferred to Wright-Patterson AFB, was lawfully denied because the parties' MOA of August 30, 1991, specifically covered the information to be furnished with respect to HQ AFSC position authorizations transferred to Wright-Patterson AFB. The same information requested in 1992 had been requested by the Union in 1991 in the negotiations leading to the MOA and the Union abandoned that request for a listing of the position authorizations transferred.

Having found that Respondent did not violate § 16(a)(1), (5) or (8) of the Statute by its denial of the Union's § 14(b)(4) request for information because the Parties' Agreement specifically covered the information to be furnished, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. CH-CA-20635 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: May 6, 1994

Washington, DC

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 7114(b)(4) will be referred to, simply, as "§ 14(b)(4)".

2. The line following, "the information is necessary to enable Council 214 to fulfill its representational" was left out of Respondent's June 29, 1992, letter (G.C. Exh. 5) and was inserted in Respondent's July 7, 1992, revision of its June 29 letter to correct an obvious omission (G.C. Exh. 6; Tr. 21).

3. Marine Corps and IRS were argued the same day, before the same panel; but Marine Corps was decided April 24, 1992, and IRS was decided May 5, 1992. In its decision on remand in Marine Corps, 45 FLRA 502 (1992), the Authority, concluded, "In accordance with the instructions of the court, we will dismiss the complaint." (45 FLRA at 505).