

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS, FORT LOGAN NATIONAL
CEMETERY, DENVER, COLORADO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2241

Case No.
DE-CA-20070

Charging Party

Stephen T. Patterson, Esquire

and Michael Billings

For the Respondent

Steven B. Thoren, Esquire and

Nicholas J. LoBurgio, Esquire

For the General Counsel

Before: JOHN H. FENTON

Chief Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a charge filed by American Federation of Government Employees, Local 2241, against the

Department of Veterans Affairs, Fort Logan National Cemetery, Denver, Colorado, a Complaint and Notice of Hearing was issued by the Regional Director for the Denver Regional Office. The Complaint alleges that the Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor Management Relations Statute, by unilaterally utilizing the services of prison labor to assist unit employees working at the Fort Logan National Cemetery without first giving the Union prior notice of such action and affording it the opportunity to bargain over the manner of implementation of the change and its impact on the conditions of employment of unit employees.⁽¹⁾

Findings of Fact⁽²⁾

The American Federation of Government Employees is the exclusive representative of a nation-wide bargaining unit of certain employees of Respondent, including those working at the Fort Logan Cemetery. The Union is an agent of AFGE for purposes of representing the unit employees working at the Fort Logan Cemetery.

In late September or early October, 1991, Mr. Eugene Vigil, a Union Steward and cemetery caretaker discovered, for the first time, that Respondent was utilizing the services of prison labor in addition to the employees represented by the Union at the Cemetery. Upon discovering the assignment of prison labor, Mr. Vigil notified Union President Emma Sneed, the person designated to receive notice of any changes in conditions of employment.

Upon being informed that Respondent was utilizing prison labor, Ms. Sneed, on October 1, 1991, mailed a letter to the then Director of the Cemetery, Mr. Jim Adamson, wherein she requested bargaining over the use of prison labor and that the practice be stopped until bargaining was completed.

By letter dated October 15, 1991, Mr. Adamson responded as follows:

Subject: Request to Bargain

1. Reference your letter dated October 1, 1991, subject as above.
2. A letter was mailed to you, with a copy to Personnel Service (05), on April 25, 1990 (copy attached) that clearly stated our intentions to enter into an agreement to utilize federal inmates at Fort Logan National Cemetery. No response has been made until October 1, 1991, in the above mentioned letter from the union.
3. Since we did not receive any response from the AFGE, Local #2241, we proceeded in

establishing the agreement with the Englewood Federal Correction Institute on October 1, 1991. . . .

4. I feel the notice provided to the union in 1990 has given sufficient time for the union to respond regarding this issue and you have not acted upon that notice until October 1, 1991. Therefore, I believe your request to bargain at this point is untimely and should be denied.

Attached to the above letter from Mr. Adamson was a copy of the April 25th letter referred to from Acting Director Jorgensen which reads as follows:

Dear Ms. Sneed:

The Fort [L]ogan National Cemetery is considering entering into an agreement with the Englewood Federal Correctional Institute to provide honor camp inmate labor. This is intended to supplement the present work force and will not affect personnel ceilings. Projects such as section renovation and other non-recurring tasks would be assigned to the inmates. These types of programs are being utilized throughout federal agencies and have been positive for those involved.

We hope to institute this program in early July 1990, should you have concerns regarding this program, feel free to contact me . . .

According to an affidavit from Mr. Jorgensen submitted by Respondent at the hearing, the above cited letter was delivered to the Personnel Office of the Denver Veterans Affairs Medical Center (VAMC) which provides personnel services for the Respondent. It appears from the record that the Union and the Respondent have an established practice of exchanging hand delivered documents through the VAMC Personnel Office. Further, according to the affidavit of Mr. Jorgensen, the April 25, 1990 letter to Ms. Sneed was hand delivered by him to "Ms. Trudi Driver, Acting Employee Relations Specialist, Denver Veterans Administration Medical Center. Ms. Driver was to provide the letter to Union officials on our behalf." Further, according to the affidavit, Mr. Jorgensen recalls having a "casual conversation" sometime in May or June 1990 with Mr. Vigil wherein the issue of the Inmate Program was discussed.

Mr. Vigil does not recall ever participating in the above mentioned "casual conversation" and Ms. Sneed denies ever receiving the April 25th letter from Mr. Jorgensen.⁽³⁾ When asked if he had ever been informed prior to September or October 1991 that prisoners would be working at the cemetery, Mr. Vigil stated that at one time some management people ". . . just mentioned that they were thinking about bringing prisoners aboard, and that was it, and that is where we left it until they showed up."

The record reveals that the Cemetery is approximately 360 acres. Although it is fenced in, the gates are open to the public during the day. Because of the terrain, it is impossible to observe the unit employees and prisoners at all times. Moreover, it appears that the employees and prisoners work at different times with little or no supervision. The employees utilize various types of mechanical and power equipment while performing their respective duties. Both prisoners and unit employees share the same transportation to and from the various working sites. At times, a female unit employee has been alone with the prisoners. The unit employees are without knowledge as to how they are supposed to interact with the prisoners. They are also without knowledge as to what training if, any, the prisoners operating the mechanical and power equipment have been given.

Discussion and Conclusions

The General Counsel, relying on the testimony of Ms. Sneed and Mr. Vigil, takes the position that Respondent violated Sections 7116(a)(1) and (5) of the Statute when it failed to give the Union prior notice and an opportunity to bargain over its decision to utilize prison labor at the Fort Logan National Cemetery.⁽⁴⁾

Respondent, while not disputing the status of the law, contends that the Union was given adequate notice of Respondent's decision to utilize prison labor at the Cemetery but failed to exercise its right to request bargaining over such decision. Alternatively, Respondent takes the position that utilization of prison labor at the Cemetery had at most a de minimis impact on the working conditions of the unit employees. According to the Respondent, the addition of the prison labor made the unit employees' job easier.

A reading of the positions of the parties makes it clear that resolution of the instant dispute turns on (1) whether the Union had been given adequate notice and the opportunity to bargain over the change, and (2) whether the change had more than a de minimis impact on the working conditions of the unit employees.

Contrary to the contention of Respondent, I find that the utilization of prison labor at the Cemetery had more than a de minimis impact on the working conditions of the unit employees. The unit employees are entitled to enjoy peace of mind with respect to safety and security while performing their everyday duties. However, unless the prison labor had been sufficiently trained in the operation of the mechanical and power equipment utilized on the job, the operation of such equipment by the prisoners could jeopardize the physical well being of the unit employees. Similarly, absent adequate supervision, the unit employees, particularly the females, might well be subject to intimidation and other forms of harassment from the prisoners. Finally, without any instruction with regard to the limits on any possible fraternization with the prisoners the unit employees might well, albeit unknowingly, be violating the law. In view of the foregoing considerations, I find that utilization of prison labor alongside the unit employees had more than a de minimis impact on the conditions of employment of the unit employees.

Having concluded that the utilization of prison labor had more than a de minimis impact on the working conditions of the unit employees, it must now be determined whether or not the Union received appropriate notice of the contemplated change in the unit employees' conditions of employment. Again, contrary to the contention of the Respondent, I find based upon the credited testimony of Mr. Vigil and Ms. Sneed that the Union was not given notice of the impending change in conditions of employment.⁽⁵⁾ Moreover, to the extent that the record indicates that the matter of utilizing prison labor might have been raised at a barbecue or some

other social affair, I find that such mention is no more than scuttlebutt and not the type of notice contemplated by the Statute.

In view of the foregoing considerations, I find that the Respondent violated Sections 7116(a)(1) and (5) of the Statute by utilizing prison labor at the Cemetery without first giving the Union notice and the opportunity to bargain over the impact of such change upon the conditions of employment of the unit employees.

There remains the question of an appropriate remedy, as General Counsel requested, in his opening statement, restoration of the status quo ante. In the Federal Correctional Institute case (8 FLRA 604) the Authority set forth the balancing criteria to be used in determining whether such a remedy is warranted in a case involving a refusal to bargain over procedures and appropriate arrangements that management will observe in exercising its rights under Section 7106 of the Statute. In a later case⁽⁶⁾ the Authority said that it will consider, among other things:

(1) whether, and when, notice was given to the union by the agency; (2) whether, and when, the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

Here the claimed notice (both written and oral) was provided a year and a half before the contemplated action was taken. Having found the letter was never delivered, and that any off-hand discussions at the picnic were too vague to constitute notice of any specific intent, it is clear no meaningful notice at all was in fact given. The request to bargain was made as promptly as possible upon discovering that the action long ago contemplated was underway. While the Agency may have acted originally in the belief that it had properly notified the Union, its action upon receipt of Ms. Sneed's letter in refusing to bargain based upon very distant intimations of change, suggests very strongly that its conduct was willful. It seized upon very tenuous claims of notice to the Union in order to avoid its obligation to bargain.

The nature and extent of the impact experienced by unit employees was substantial. They had real concerns about the loss of unit work and about the safety of their work environment. While there was considerable testimony that the inmates were carefully selected and so forth, this was matter for discussions with the union that never occurred.

Cessation of use of the inmates, pending bargaining about their use, will obviously have a disruptive affect on the operation of the Cemetery. However, Respondent, in apparent confident reliance upon its defense, did not attempt to marshal such facts, nor did it brief the matter. It had been amply forewarned, no later than in Counsel for the General Counsel's opening statement. In the absence of evidence and argument supporting a claim that the efficiency and effective-ness of the operation of the Cemetery will be seriously disrupted or impaired it is not for me to determine that such consequence will flow from an order to restore the status quo

ante. In the circumstances I conclude such an order is entirely appropriate.

Accordingly, it is recommended that the Authority adopt the following Order designed to effectuate the purposes and policies of the Statute.

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, Fort Logan National Cemetery, Denver, Colorado, shall:

1. Cease and desist from:

(a) Unilaterally establishing a policy of using prison inmates in unit work, without prior notice to, and bargaining with, the American Federation of Government Employees, Local 2241, AFL-CIO, the exclusive representative of certain of its employees, to the extent consistent with law and regulations, concerning the procedures to be observed in implementing that policy, and appropriate arrangements for employees adversely affected by that policy.

(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) Upon request of the American Federation of Government Employees, Local 2241, AFL-CIO, the exclusive representative of certain of its employees, rescind the practice of using such prison labor, and afford it the opportunity to bargain over the impact and implementation of any such changes that occur in the future.

(b) Post at its Denver, Colorado, facilities 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, Fort Logan National Cemetery, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, October 24, 1994

JOHN H. FENTON

Chief 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 unilaterally establish a policy of using prison inmates in unit work, without prior notice to, and bargaining with, the American Federation of Government Employees, Local 2241, AFL-CIO, the exclusive representative of certain of our employees, to the extent consistent with law and regulations, concerning the procedures to be observed in implementing that policy, and appropriate arrangements for employees adversely affected by that policy.

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 upon request of the American Federation of Government Employees, Local 2241, AFL-CIO, the exclusive representative of certain of our employees, rescind the practice of using such prison labor, and afford it the opportunity to bargain over the impact and implementation of any such changes that occur in the future.

(Activity)

Date: _____ By: _____

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Region, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: (303) 844-5224.

1. Counsel for the General Counsel also filed a Motion to Correct the Transcript of the Proceedings. In the absence of any objection, General Counsel's Motion to Correct Transcript, should be, and hereby is, granted.
2. The facts for the most part are not in dispute. The only dispute appears to be over whether or not the Respondent did give the Union prior notice of its intention to utilize the services of prison labor at the Fort Logan Cemetery.
3. With respect to the April 25, 1990 letter to Ms. Sneed, Respondent's Counsel acknowledged that what appeared to be the original letter, not a copy, was found in Respondent's personnel office.

The Employee Relations Specialist who received the letter from Mr. Jorgensen and was entrusted with delivering same to the Union did not testify.

4. In support of its position the General Counsel relies on the Authority's decisions in Ogden Air Logistics Center, Hill Air Force Base, Utah, and Air Force Logistics Command, Wright- Patterson AFB, Ohio, 41 FLRA 690, 698 (Wright-Patterson); and

U.S. Dept. of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky, 38 FLRA 647, 660 (Blue Grass Army Depot). In Wright Patterson the Authority made it clear that prior to instituting a change in a condition of employment, management

was under an obligation to give the certified union adequate notice and an opportunity to bargain, at the least, over the impact and manner of implementation of the change. In Blue Grass Army Depot, the Authority agreed with the Administrative Law Judge's holding that the notice provided to the Union must be more than a general statement that it is contemplating some future action. The notice must contain enough details to allow the union the opportunity to formulate meaningful bargaining proposals.

5. Ms. Sneed and Mr. Vigil, while on the witness stand, impressed me with their candor. Moreover, the discovery of the original letter which allegedly informed Ms. Sneed that the prison labor was to be utilized at the Cemetery lends support to Ms. Sneed's denial of ever receiving any notice of the impending change from the Respondent. Finally, I give little or no weight to the affidavit of Mr. Jorgensen since he was not subject to cross-examination.

6. INS, San Diego, 43 FLRA 642, 664.