OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

NAVAL WEAPONS STATION CONCORD

CONCORD, CALIFORNIA

Respondent
and

Case No. SF-CA-30565

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 1931, AFL-CIO

Charging Party

Gilbert J. Merrill Representative of the Respondent James L. Wright Representative of the Charging Party
Gary J. Lieberman 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 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 requiring the Charging Party (Union) to provide keys to its offices at Respondent's facility and keep its office unlocked during business hours as long as Union personnel were present, without providing the Union notice and the opportunity to bargain over the decision and/or the impact and implementation of the changes.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the Union's charge, but denied any violation of the Statute.

A hearing was held in San Francisco, California. 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

On February 2, 1993, after an incident in the Union office involving a process server,[1] Union officials closed the entrance to the Union office. Later that day, when Respondent's security personnel and others went to the Union office to conduct further business concerning the incident, they were unable to gain access to the Union space or to personnel in the office.

After Captain Alan Nibbs, Respondent's Commanding Officer, learned that Respondent's security personnel did not have access to the Union office, he prepared and delivered two memoranda to Union President James Wright on February 4, 1993.

The first memorandum dealt with key control to Government office spaces provided to the Union and stated as follows:

1. It recently came to my attention that the station did not have keys to the government office spaces which have been provided to A.F.G.E. Local 1931. As the station's commanding officer, I am accountable for the security and safety of all facilities and personnel here. This includes the office space which has been provided to the union in Building 181.

2. This serves to notify you that I will, from this day forward, maintain keys to any office spaces provided for the use of A.F.G.E. Local 1931. In order to ensure that security and safety are not impaired in the future, I am directing you not to change the locks without first obtaining my written permission to do so.

3. You retain the right to maintain all keys to file cabinets or other furniture used to store and safeguard your union documents. (G.C. Exh. 2).

The second memorandum dealt with access to the Government office spaces provided to the Union and read as follows:

1. The government provided office space occupied by A.F.G.E. Local 1931 shall remain unlocked during normal working hours, as long as union personnel are present, in order to allow access by persons with a need to do business with the union, to conduct such business.

2. If there are extenuating circumstances which would prevent allowing free access to the union offices during normal business hours, you should notify me or my designee as soon as possible. (G.C. Exh. 3).

Captain Nibbs advised Mr. Wright that he was responsible for all spaces on the base and needed the key for security measures, personnel safety measures, and fire measures. With regard to the Union office being unlocked during normal working hours, Captain Nibbs advised Mr. Wright that he wanted to make sure the offices were open and serving the purpose they were supposed to serve.[2]

The Union provided the keys, as requested, at that time or shortly thereafter. Captain Nibbs' memorandum provided that he would maintain a copy of the key to the Union office. However, at the hearing, it was revealed that the key is kept by the Security Director.

Mr. Wright, upon receipt of the memoranda, and in a telephone call later that afternoon with Captain Nibbs, and in a telephone conversation with Labor Relations Officer Deborah Eres, and in an E-mail message to Captain Nibbs on February 5, 1993, made or reiterated his "[request] that your memorandums be withdrawn in their entirety, and that the parties immediately bargain on the issues prior to implementation."[3] Mr. Wright expressed his concerns in the E-mail message regarding how the memoranda jeopardized the internal affairs and operations of the Union.

Since 1975, the Union has maintained an interior

office in Building 181 on Respondent's premises. Article 6, Section 15 of the collective bargaining agreement provides that Respondent "will provide to the Union the use of appropriate office space within the confines of the Naval Weapons Station for use as the Union office, at the cost of $25.00 per month . . . ." In addition to the Union, there are departments of Respondent in Building 181, including the Ordinance Department. The Union shares an exterior door with the other departments. The Union has four rooms with four interior doors, including the main entrance to the Union office, that lead from the hallway. Inside the Union office, the Union maintains computers, typewriters, various office equipment, and furniture, some of which were provided to the Union through negotiations with the Respondent. The office also has filing cabinets, without locks, where the Union maintains financial records and sensitive employee records. The Union performs a variety of activities in the Union office, including negotiations, meeting with employees to discuss potential complaints and grievances, membership meetings, and arbitration proceedings.

Prior to February 4, 1993, only Union officials maintained keys to the Union office, and Respondent's representatives never requested that the Union furnish a copy of the key to the Union office, nor did the Union ever provide a copy of the key to the Respondent. The Union changed the locks to the interior doors of the Union office on numerous occasions, specifically when the Union took control of the office in 1975, when an employee stopped working in the office, or the Union changed officers. When the Union wanted to change the locks, it would either hire a private locksmith or contact the locksmith on the base. In 1992, the Union used the services of the station locksmith, Chuck Dwyer, to change the locks to the Union office. It is uncontroverted that Mike Lewis, who was the Security Director at the time, had knowledge that the Union had the locks changed and never asked the Union for a copy of the key.

Pursuant to Respondent's regulations, the head of each department is required to designate a lock and key custodian who maintains liaison with the Security Department on matters of lock and key control. The custodian takes an inventory of internal locks every 90 days and submits it to the Security Department. The lock and key custodian is supposed to maintain a copy of the keys to all internal spaces.

Mr. Harry Marshall was the key custodian for Building 181 in February 1993 and had been for 10 years. During that time, Mr. Marshall maintained keys to all interior doors for Building 181 except for the doors to the Union office. The inventories that he took during that period and submitted to the Security Department showed that he did not maintain a key to the Union office.

With regard to the requirement that the Union keep its doors open during normal duty hours, the record establishes that the main entrance to the Union office is normally open during normal business hours. However, over the years the Union has experienced security problems in its office space. Since 1975, if the Union was holding a staff meeting in the back room (three rooms away from the main entrance), counting funds, or if a secretary was alone in the office, or the office was short-handed, the Union would lock the main entrance to the Union office briefly on these occasions for security reasons.[(4)] If an employee seeking Union assistance discovered the Union door locked during normal business hours, the employee would knock on the door for assistance and either schedule a meeting for a later time period or would be assisted depending on the situation. Respondent's security personnel have conducted business in the office on numerous occasions since 1975.

According to Captain Nibbs, it is a practice on the base for offices to be open during normal duty hours, and he was merely reiterating this practice. Captain Nibbs acknowledged that if the Union locked its entrance because of a meeting in the back room or because a secretary is out for the day, it would be a violation of his February 4, 1993 policy, presumably unless he or his designee granted permission for the entrance to be locked. (Tr. 177-78).

Prior to February 4, 1993, there were no restrictions on when the Union could lock the doors to its office, and there were no written regulations on whether the Union was required to keep its doors open during normal business hours.

Respondent implemented the changes without providing the Union with notice and the opportunity to bargain over the decision and/or the impact and implementation of the changes. Since the changes were implemented, Respondent has failed and refused to bargain with the Union concerning the decision and/or the impact and implementation of the changes.

Discussion and Conclusions

Section 7116(a)(5) of the Statute makes it an unfair labor practice for an agency to fail or refuse to bargain in good faith with an exclusive representative of its employees. As a result, an agency must provide the exclusive representa-tive with notice of proposed changes in conditions of employment affecting unit employees and an opportunity to bargain over those aspects of the changes that are negotiable. U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Memphis, Tennessee, 42 FLRA 712, 713 (1991) (VAMC). Even if the subject matter of the change is outside the duty to bargain, an agency must bargain about the impact and implementation of a change in conditions of employment that has more than a de minimis impact on unit employees. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut, 41 FLRA 1309, 1317 (1991).

The issues presented for determination are: (1) whether Respondent's actions constituted changes in past practices; (2) if so, whether they were conditions of employment under section 7103(a)(14) of the Statute; (3) if so, whether the changes represented determinations of internal security practices under section 7106(a)(1) of the Statute; (4) if negotiations were required, did the Union make a proper request and/or submit proper proposals; and (5) if negotiations were required, the proper remedy for violation of the Statute.

Respondent's actions constituted changes in past practices

The record establishes that Respondent's actions constituted changes in past practices. See U.S. Department of Labor, Washington, D.C., 38 FLRA 899, 908 (1990); Norfolk Naval Shipyard, 25 FLRA 277, 286-87 (1987). Although Captain Nibbs had no prior knowledge of the practices, he had been at the base only five months prior to making the changes. The record shows that for an extended period of time other responsible management officials had knowledge and never challenged the practices that the Union changed its locks, closed the office on occasion during normal duty hours, and Respondent had no keys to the Union offices.

The changes involved conditions of employment of bargaining unit employees within the meaning of section 7103(a)(14) of the Statute

The Authority has stated that "it is well established that the use of office space by a union functioning as the exclusive representative of bargaining unit employees is a matter affecting conditions of employment." Veterans Administration Medical Center, Chillichothe, Ohio, 25 FLRA 366, 369 (1987); Department of Health and Human Services, Social Security Administration, 41 FLRA 1268, 1278 (1991). Since the Union's

use of office space is a matter affecting conditions of employment, it logically follows that conditions or restrictions placed on the Union's exclusive access to such space, as in this case, also affected the working conditions of employees in the bargaining unit and were "conditions of employment" within the meaning of section 7103(a)(14) of the Statute as well.

Testimony at the hearing revealed that the Union maintains sensitive documents relating to employees in unlocked file cabinets. The changes imposed, that the Union provide Respondent keys to the Union office, never change locks without notification, and never prevent free access to the Union office during normal working hours while officials are present without notification to Respondent, infringed on the Union's own ability to safeguard its office space, including sensitive employee records. Any suspicion among the Union and bargaining unit employees that their confidential documents relating to representation could be accessed by individuals outside the Union could impair employee rights to assist the Union and the Union's responsibility to act for employees as an exclusive representative. See sections 7102, 7114, and 7121(b)(1)(C)(i) of the Statute. Therefore, the change pertained to unit employees and affected their working conditions. See Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235, 236-37 (1986).

Internal Security Considerations and Duty to Bargain

Under section 7106(a)(1) of the Statute, the right to determine internal security practices includes an agency's right to determine the policies and practices that are necessary to safeguard its operations, personnel and physical property against internal or external risks. Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office, 41 FLRA 795, 836 (1991). The Agency must demonstrate a link or a reasonable connection between its goal of safeguarding its personnel, property, or operations and its practice or decision designed to implement that goal. American Federation of Government Employees, Local 1920 and U.S. Department of Defense, Army and Air Force Exchange Service, Fort Hood Exchange, Fort Hood, Texas, 47 FLRA 340, 348 (1993).

The Respondent contends that it has a need to obtain prompt access at all times to its facilities provided for Union use based on its responsibility for the security of all personnel and physical property on the station. Respondent contends that such concerns require keys to the Union office space, that the Union not change locks without written permission, and that Respondent be notified as soon as possible if there are extenuating circumstances which would prevent allowing free access to the Union offices during normal business hours, such as closing the office entrance briefly for a meeting in the back room.

The Respondent has demonstrated a reasonable connection between its goal of safeguarding its personnel and property and its decision to require keys to the Union office space and prohibiting the Union from changing the locks without its permission. Respondent obviously needs emergency access to the space after normal working hours for police and fire protection and such access should be available without causing damage to windows and doors. However, management's right "to determine the . . . internal security practices of the agency" is expressly "[s]ubject to subsection (b)" which, as relevant here, does not preclude an agency and labor organization from negotiating "(2) procedures which management officials of the agency will observe in exercising any authority under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." The change had more than

a de minimis impact on unit employees as discussed above.

I do not find that Respondent has demonstrated a reasonable connection between its goal of safeguarding its personnel and property and its decision that Union space must always remain unlocked during normal business hours unless it is notified of extenuating circumstances, such as the closing of the office entrance briefly for a meeting in the back room. The record establishes that the main entrance to the Union office is normally open during normal business hours. However, over the years, the Union has experienced security problems in its office space. Since 1975, if the Union was holding a staff meeting in the back room (three rooms away from the main entrance), counting funds, or if a secretary was alone in the office, or the office was short-handed, the Union would lock the main entrance to the Union office briefly on these occasions for security reasons. If an employee seeking Union assistance discovered the Union door locked during normal business hours, the employee would normally knock on the door and either schedule a meeting for a later time period or would be assisted depending on the situation.

Aside from the one incident on February 2, 1993, when Respondent's security personnel were denied entrance to the Union office (the details from which the situation arose being in dispute), there is no other evidence that Respondent's security personnel have been denied entrance when Union personnel were in the office. Respondent's security personnel have conducted business in the office on numerous occasions since 1975. Under Respondent's policy of now maintaining a key to the office, Respondent's security personnel could gain entrance even in the rare event that they would again be denied permission by personnel in the office. Accordingly, under all the circumstances, I conclude that Respondent has not established a reasonable connection between its goal of safeguarding its personnel, property, or operations and its practice or decision designed to implement that goal of requiring that Union offices always remain unlocked and notice be provided of any extenuating circumstances before the Union can close its entrance during normal working hours. Accordingly, Respondents decision in this respect is substantively negotiable by the Union.

The Union made a proper request to negotiate.

Respondent contends that the Union did not submit a proper request to negotiate with written counterproposals pursuant to Article 5, Section 4.b. of the collective bargaining agreement. I conclude that this provision did not apply in the circumstances since it relates to a response by the Union to notice of "proposed changes" by Respondent. Article 5, Section 1 also provided for 10 days prior notice of proposed changes. Respondent provided no prior notice here contrary to the Statute and the parties' agreement. Respondent preempted bargaining prior to implementation. As found above, the Union made a proper request to negotiate after the fait accompli. As the Authority stated in U.S. Department of Health and Human Services, Public Health Service, Indian Health Service, Indian Hospital, Rapid City, South Dakota, 37 FLRA 972, 980 (1990):

We are unwilling to interpret the Statute in a manner which would require a union, in this circumstance, to label its proposals in a particular way to preserve its right to bargain. To do so, in our view, would encourage the parties to engage in semantic disputes instead of collective bargaining and, as such, would not be consistent with the policies and purposes of the Statute. [footnote omitted.]

It is concluded that Respondent violated section 7116(a)(1) and (5), as alleged, by failing and refusing to provide the Union appropriate notice and the opportunity to bargain on its decision to require that Union offices be unlocked during normal working hours and that Respondent be notified as soon as possible if there are extenuating circumstances, and on the impact and implementation of its decision requiring keys to the Union office space and prohibiting the Union from changing the locks without its permission.

Remedy

The General Counsel's requested remedy includes status quo ante relief. The Authority has held that where a management action is based on its right to determine internal security practices of the agency, greater weight must be given to the disruptive effect in applying the factors contained in Federal Correctional Institution, 8 FLRA 604 (1982)(FCI), and that to require the respondent to rescind such changes would be by its very nature disruptive to Respondent's operation. U.S. Army Adjutant General Publications Center, St. Louis, Missouri, 22 FLRA 457, 459-60 (1986)(Adjutant General). With regard to the other factors in FCI, Respondent failed to give any prior notice to the Union, the Union promptly requested bargaining, the Respondent's conduct in failing to discharge its bargaining obligations under the Statute was willful, and the extent of the impact experienced by the Union and employees, as discussed above, is considerable. While these factors weigh heavily in the Union's favor, I conclude, as did the Authority in Adjutant General, that in view of the internal security implications, the problems presented here by Respondent having keys to the Union offices and prohibiting the Union from changing locks would best be resolved by bargaining on the impact and implementation of the changes rather than ordering a return to the status quo ante.

On the other hand, Respondent's decision to require that Union offices remain unlocked during normal working hours while Union personnel are present and that Respondent be notified as soon as possible if there are extenuating circumstances, was a negotiable condition of employment and the imposition of a status quo ante remedy is appropriate, there being an absence of special circumstances. Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California, 36 FLRA 509, 511 (1990).

Based on the above findings and conclusions, it is 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 the Naval Weapons Station Concord, Concord, California, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain with the American Federation of Government Employees, Local 1931, AFL-CIO (Union), the exclusive representative of three units of its employees, to the extent consistent with law and regulation, concerning (1) maintaining keys to any office spaces provided for the use of the Union, (2) prohibiting

the Union from changing its locks without permission, and (3) requiring that Union offices remain unlocked during normal working hours while Union personnel are present and that Respondent be notified if there are extenuating circumstances.

(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) Rescind its memorandum to the Union dated February 4, 1993 requiring that Union offices remain unlocked during normal working hours while Union personnel are present and that Respondent be notified of any extenuating circumstances.

(b) Bargain with the Union to the extent consistent with law and regulation on the impact and implementation of its decision to maintain keys to any office spaces provided for the use of the Union and prohibiting the Union from changing its locks without permission.

(c) Provide the Union appropriate notice and the opportunity to bargain to the extent permitted by law and regulation prior to changing conditions of employment of bargaining unit employees.

(d) Post at its 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 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the

San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, 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 27, 1995

GARVIN LEE OLIVER

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 bargain with the American Federation of Government Employees, Local 1931, AFL-CIO (Union), the exclusive representative of three units of our employees, to the extent consistent with law and regulation, concerning (1) maintaining keys to any office spaces provided for the use of the Union, (2) prohibiting the Union from changing its locks without permission, and (3) requiring that Union offices remain unlocked during normal working hours while Union personnel are present and that Respondent be notified of any extenuating circumstances.

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 rescind our memorandum to the Union dated February 4, 1993 requiring that Union offices remain unlocked during normal working hours while Union personnel are present and that Respondent be notified of any extenuating circumstances.

WE WILL bargain with the Union to the extent permitted by law and regulation on the impact and implementation of our decision to maintain keys to any office spaces provided for the use of the Union and prohibiting the Union from changing its locks without our permission.

WE WILL provide the Union appropriate notice and the opportunity to bargain to the extent permitted by law and regulation prior to changing conditions of employment of bargaining unit employees.

____

(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 San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791.

1. The details of the incident are in dispute and were not litigated at the hearing; the parties agreed that they were not relevant to the issues in the case.

2. Captain Nibbs testified at the hearing that the requirement to keep the doors unlocked during normal working hours also related to security; for example, if there were a problem in the Union offices, it could be easily resolved if security personnel could move in quickly. In addition to the February 2, 1993 incident, during which security personnel were denied entrance, the record reflects that in 1991 an employee of the Union office made sexual harassment charges against a Union official. There is no evidence that security personnel were called to the Union office and denied entrance in connection with the matter. The charges were contested and are still in litigation.

3. Captain Nibbs and Labor Relations Officer Eres testified that on these occasions they understood Mr. Wright to only be requesting the status quo with regard to the return of the key, which they advised him was not negotiable. Captain Nibbs acknowledged that he had "subsequently come to learn that there is i&i [impact and implementation negotiations] and that's perhaps what he was [initially] discussing. That's not what I was discussing." (Tr. 168-69). Inexplicably, neither Captain Nibbs nor Ms. Eres saw Mr. Wright's subsequent E-mail message as a final request to bargain on the issues in the memoranda, which it clearly was. In view of the importance of this issue to the Commanding Officer and his personal involvement in the matter, Respondent's positions that the Union should not have attempted to deal with him and did not request to bargain with the proper person, are without merit. In any event, Captain Nibbs immediately sent the E-mail message to Labor Relations Officer Eres.

4. Wilfred J. Scott, a supervisor since 1991 and a former Union President (1975-81) and First Vice President (1981-89), testified that the Union door was never locked during normal business hours while he was a Union official. Scott could not testify about the practice of locking the Union office door during normal business hours from the period after he left the Union (1989) until February 4, 1993, except for his occasional visits to the office when he found the doors open. I credit the testimony of James Wright and Fred C. Gamble that there were occasions during normal business hours when the Union locked its doors. Mr. Wright's testimony was uncontroverted that Respondent's manager, Robert Anderson, Operations Superintendent of the Waterfront Division and responsible for the custody of Building 181, had knowledge that the Union office was locked on occasion during normal duty hours and that when this occurred, Anderson knocked on the door to conduct business with the Union.