Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS AIR FORCE MATERIEL COMMAND

WRIGHT-PATTERSON AIR FORCE BASE, OHIO

OGDEN AIR LOGISTICS CENTER

Case No. DE-CA-90707

HILL AIR FORCE BASE, UTAH

Respondents

and

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 1592

Charging Party

James C. Wecker, Esquire

For the Respondent

Hazel E. Hanley, Esquire

For the General Counsel

Daniel Minahan, Esquire

Troy Tingey, President AFGE, Local 1592

For the Charging Party

Before: Eli Nash, Jr.

Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. § 2423.

Based upon unfair labor practice charges, as amended, filed by the American Federation of Government Employees, Local 1592 (the Union), against the Respondents, Department of the Air Force, Headquarters Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (AFMC) and Ogden Air Logistics Center, Hill Air Force Base, Utah (OALC), a Complaint and Notice of Hearing was issued on January 7, 2000. The complaint alleged that the Respondents violated section 7116(a)(1) and (5) of the Statute by permanently filling 23 positions within the Aircraft Repair Enhancement Program (AREP) without completing negotiations to the extent required by law.[(1)] Although Respondents' answer denied that the alleged violation had occurred, their subsequent documents including the parties' joint stipulation of facts, establish that the alleged violation was committed. Accordingly, the only issue to be determined in this case is what remedy should be ordered.

A hearing was held at Hill Air Force Base, Utah, on March 23, 2000, to address the issue of remedy. All parties were represented and afforded a full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses. Counsel for the Respondents, the General Counsel and the Union filed timely post-hearing briefs.[(2)]

Based on the entire record, including my observation of the witnesses and their demeanor, and the parties' stipulation of facts, I make the following findings of fact, conclusion of law, and recommended Order.

Findings of Fact

As set forth in the parties' stipulation, the American Federation of Government Employees, Council 214, is the exclusive representative of a nationwide consolidated unit of AFMC employees appropriate for collective bargaining, and AFGE Local 1592 (the Union) is Council 214's agent for purposes of representing the bargaining unit employees located at OALC. At all times material herein, AFMC and Council 214 have been parties to a Master Labor Agreement (MLA). The parties began negotiations with respect

to the AREP in 1997,[3] but to date have not completed bargaining. At the local level, OALC and the Union entered into a Memorandum of Agreement in August 1997 to test AREP for one year, specifying that unit employees would be detailed to the program in accordance with the parties' MLA.

On or about September 3, 1998, General Stanley A. Sieg, AFMC's Director of Logistics, issued a memorandum to various component activities within AFMC including OALC, concerning the need for immediate implementation of AREP in anticipation that a formal agreement with Council 214 would be completed in a few weeks. As previously indicated, no such agreement has yet been reached. However, on or about May 13, 1999, OALC issued a promotion certificate for Production Controllers, GS-01152-11.[4] In June, OALC permanently promoted 23 employees from the certificate to the GS-11 AREP positions.[5] OALC filled the positions without bargaining with the Union, thereby violating section 7116(a)(1) and (5) of the Statute.[6]

At the hearing in this case, all parties addressed the remedy issue. Kirby Mosser is an experienced WG-12 Integrated Systems Mechanic who was detailed in 1997 for three years to work on the implementation team for AREP as a representative of the Union. Mosser participated at the AFMC level in the development of 18 AREP position descriptions, including one for the GS-11 ALS position at issue in this case. He also had negotiated the local agreement with OALC concerning the one-year AREP test period at Hill Air Force Base and the detailing of unit employees to it.[7] When Mosser became aware that OALC intended to fill the GS-11 ALS positions permanently rather than continue the details, he objected verbally and by e-mail that the matter of permanent promotions had to be negotiated at the AFMC-Council 214 level. However, he received only one reply (by e-mail dated May 20, 1999) from a management official, Rick Mazeika, who suggested that Mosser should take his concerns to Browning as the source of the directions to fill the positions permanently, since Mazeika did "not want to be placed in the middle of this."[8] On or about June 7, 1999, the positions were filled permanently with no further input from the Union or Council 214.

Mosser, despite his experience as a mechanic, 18 months as a planner/developer of AREP with in-depth knowledge of the procedures to be adopted under that program, and his 3 years on detail as a coordinator/planner, was not included on the merit promotion certificate for the GS-11 ALS position. Accordingly, he was not even considered for one of the 23 new slots in AREP. Four or five other unit employees who had been part of the team that established AREP and got it going either were not considered or were not selected for the permanent ALS positions. Some of these employees had years of experience as GS-9 planners and had received "excellent" performance ratings and awards in the immediately preceding years. Other employees within OALC were not within the area of consideration for inclusion on the promotion certificate because they were not within LAO, irrespective of their qualifications. All of these

employees, who were not considered for or selected to fill a GS-11 ALS position, lost pay raises and related benefits, as well as further promotional opportunities.

Predictably, the parties were in disagreement over the appropriateness of a *status quo ante* order. Thus, Browning testified that if AREP were eliminated as part of such an order, it would be a "disaster." Mosser, on the other hand, testified that it would not be a disaster if a *status quo ante* remedy were ordered, because the incumbent GS-11 selectees who were not re-selected could be "lateraled" to other vacant GS-11 positions and compete favorably for future promotions by virtue of the experience they have gained to date in AREP. In the General Counsel's opening statement and again in its post-hearing brief, a retroactive bargaining order was requested under which the parties would be required to bargain over the impact and implementation of AREP and apply whatever agreement they were to reach retroactively unless they mutually agreed otherwise. These approaches will be discussed below.

Conclusions

As indicated above, the parties herein disagree on the most appropriate remedy in the circumstances of this case. It even appears that the parties may not accurately perceive each other's positions. Thus, in arguing forcefully against the imposition of a *status quo ante* order as requested by the Union, the Respondents appear to believe that such an order would require AREP to be dismantled. The Union's request for a *status quo ante* remedy, however, does not extend to the elimination of AREP in its entirety, but only to the selection of the 23 permanent GS-11 ALS positions within AREP. Even so, it is not entirely clear whether the Union seeks the removal of all 23 incumbents of those positions while the parties bargain over the impact and implementation of Respondents' decision to fill the positions permanently, or to leave the incumbents in place while the parties negotiate and then remove only those who are not re-selected under the procedures and criteria jointly fashioned at the bargaining table. While the Union's post-hearing brief suggests the latter scenario, it would then be difficult to discern why the Union has strongly opposed the General Counsel's requested retroactive bargaining order under which the parties would bargain the impact and implementation of Respondents' decision to fill permanently the 23 AREP GS-11 positions and apply retroactively whatever agreement they reach. Such an approach would leave the incumbents in place while the bargaining process is completed, and would require the removal of one or more incumbents only if the parties' post-implementation agreement so required. Respondents have not commented directly on the General Counsel's requested retroactive bargaining order, but it appears that such a remedy is viewed as less disruptive to agency operations than a *status quo ante* order would be and therefore is preferable.

Fortunately, it is within the Authority's broad remedial discretion to fashion an appropriate order rather than to choose from the alternatives requested by the parties. *See generally National Treasury Employees Union v. FLRA*, 910 F.2d 964 (D.C. Cir. 1990)(*en banc*). *See also United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 922 (1998)(*AFMC*) and cases cited. For the reasons set forth below, I conclude that a retroactive bargaining order would best effectuate the purposes and policies of the Statute in the this case.

First, I reject the Union's request for a *status quo ante* bargaining order, even though the consequences of such an order would not require the dismantling of AREP as Respondents have argued.[(9)] It is undisputed, and I find that the extent of Respondents' duty to bargain in this case is over the impact and implementation of the decision to fill permanently the GS-11 AREP positions at OALC rather than the substantive decisions whether to fill such positions permanently, how many positions to fill, and at what grade level. Therefore, it is necessary, in determining whether to issue a *status quo ante* order to remedy Respondents' unlawful failure to bargain over impact and implementation, to apply the criteria set forth by the Authority in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982)(*FCI*).

Specifically, although management's decision to create AREP was shared with the exclusive representative and the parties were engaged in bargaining over various aspects of the program, it appears that no formal advance notice was given that the GS-11 AREP positions were to be filled permanently. Mosser did become aware of management's plan to fill the positions and complained about it, but there was no evidence that prior notice was provided to the Union. Accordingly, no opportunity was afforded the exclusive representative to submit proposals before OALC issued the promotion certificate and the 23 OALC employees were selected to fill those positions.

However, I find that Respondents' actions were not willful. Thus, as previously indicated, General Sieg's memorandum directing implementation of AREP referred to his belief that ongoing negotiations with Council 214 would result in an agreement very soon. While General Sieg's optimism turned out to be misplaced since the parties did not complete negotiations before AREP positions were permanently filled at OALC and elsewhere throughout AFMC, I conclude that he had a reasonable basis to believe that AFMC and Council 214 would reach agreement on AREP shortly in light of the progress they had made to that point. I further note that when Mosser complained in writing about management's plan to fill the AREP positions permanently and was told to contact Deputy Director Browning directly as the management official who had made the decision to proceed with the selections, there is no evidence that Mosser did so. Accordingly, there is no way to determine what would have happened if

Mosser had spoken with Browning about deferring the selection process. Mosser's failure to follow up in no way excuses Respondents' actions, but it would have been much clearer that management was acting willfully if Browning were contacted and ignored Mosser's admonitions.

As to the fourth *FCI* factor, I find that the unit employees at OALC who were never considered for promotion because they were outside the area of consideration chosen by management and the employees who were on the promotion certificate but were not selected for other reason(s), have been adversely affected both financially and in terms of future career opportunities as a result. Nevertheless, I find that a *status quo ante* order requiring the 23 incumbent GS-11 employees to be removed from their positions while the parties bargained the impact and implementation of management's decision to fill the positions permanently, would unduly disrupt agency operations by bringing the highly successful AREP operations to a halt in the interim. Therefore, applying the *FCI* factors in this case requires rejection of the Union's request for a *status quo ante* remedy.

In my opinion, a retroactive bargaining order such as the General Counsel has requested is appropriate to remedy the unfair labor practice in this matter. A retroactive bargaining order is appropriate where an agency's unlawful conduct has deprived the exclusive representative of a chance to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees. *See AFMC*, 54 FLRA at 922; *Federal Aviation Administration, Northwest Mountain Region, Renton, Washington*, 51 FLRA 35, 37 (1995)(*FAA, Renton*). *See also Federal Deposit Insurance Corporation, Washington, DC and Federal Deposit Insurance Corporation, Oklahoma City, Oklahoma*, 48 FLRA 313, 330-31 (1993)(*FDIC*), *petition for review denied sub nom. FDIC v. FLRA*, No. 93-1694 (D.C. Cir. 1994). As the Authority has observed, a retroactive bargaining order affords the parties the ability to bargain and retroactively implement the results of their agreement, "thereby approximating the situation that would have existed had the respondent fulfilled its statutory obligations." *AFMC*, 54 FLRA at 923; *FAA, Renton*, 51 FLRA at 37. Moreover, a retroactive bargaining order is appropriately used when it is clear that some employees have been harmed by management's unlawful conduct, but there is no way to determine their identity through compliance proceedings. *AFMC*, 54 FLRA at 923; *FDIC*, 48 FLRA at 330-31.

In this case, there is no question that the Respondents' failure to notify the Union that a promotion certificate was being issued to fill permanently the 23 AREP positions at OALC took away any opportunity to submit proposals and bargain over the impact and implementation of that decision. I need not speculate how the selection process might have been affected if such bargaining had taken place in a timely manner, or the negotiability of any specific proposals which might have been proffered. However, a bargaining order that gives retroactive effect to any

agreement reached by the parties at this time is appropriate because it permits the parties to determine-- through negotiations--the best way to provide relief for employees who were adversely affected by the Respondents' unlawful refusal to bargain. It also avoids the disruption to management's AREP operations that would be caused by a *status quo ante* remedy by maintaining the 23 incumbents in their AREP positions until bargaining has been completed and the results of any agreement reached has been applied to determine the final selectees. Moreover, by allowing the parties to reach agreement and retroactively apply the results, the identity of those employees to be considered and/or selected (some now unknown, perhaps) will be determined.

The General Counsel further requested, and Respondents opposed, an order requiring that the remedial notice in this case be posted throughout AFMC rather than within OALC at Hill Air Force Base. I conclude that such a posting is appropriate under the circumstances. Thus, AREP is a Command-wide program which General Sieg's memorandum directed all components within AFMC to implement in anticipation of an agreement with Council 214 covering all employees in the nationwide bargaining unit exclusively represented by Council 214. Moreover, the parties herein stipulated that in addition to the 23 GS-11 AREP positions permanently filled at OALC without the requisite bargaining, at least 22 additional AREP positions have been filled at Warner Robins ALC and another 50 positions at Oklahoma City ALC in a similar manner. Based on these factors, my view is that a unit-wide posting is warranted.

Accordingly, it is recommended that the Authority adopt the following Order to remedy the conceded violation of section 7116(a)(1) and (5) of the Statute.

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of the Air Force, Headquarters Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio and Ogden Air Logistics Center, Hill Air Force Base, Utah, shall:

1. Cease and desist from:

(a) Implementing the Aircraft Repair Enhancement Program (AREP) at Ogden Air Logistics Center, Hill Air Force Base, Utah, by selecting about 23 employees for promotion to the Aircraft Logistics Specialist GS-1152-11 positions, within AREP without first notifying the exclusive

representative, the American Federation of Government Employees, Council 214 and American Federation of Government Employees, Local 1592, the designated agent of the exclusive representative, and fulfilling the obligation to bargain regarding the impact and implementation of that decision.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the American Federation of Government Employees, Local 1592, to the extent required by law, the impact and implementation of the decision to promote approximately 23 employees at OALC into the Aircraft Logistics Specialist GS-1152-11 positions, within AREP, and apply retroactively the results of such bargaining, unless otherwise agreed.

(b) Post at all locations within the Air Force Materiel Command where bargaining unit employees 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. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 10, 2000.

_____

ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, Headquarters Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio and Ogden Air Logistics Center, Hill Air Force Base, Utah, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement the Aircraft Repair Enhancement Program (AREP) at Ogden Air Logistics Center, Hill Air Force Base, Utah, by selecting about 23 employees for promotion to the Aircraft Logistics Specialist GS-1152-11 positions, within AREP without first notifying the exclusive representative, the American Federation of Government Employees, Council 214 and American Federation of Government Employees, Local 1592, the designated agent of the exclusive representative, and fulfilling the obligation to bargain regarding the impact and implementation of that decision.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees, Local 1592, to the extent required by law, the impact and implementation of the decision to promote approximately 23 employees at OALC into the Aircraft Logistics Specialist GS-1152-11 positions within AREP, and apply retroactively the results of such bargaining, unless otherwise agreed.

_____

(Respondents/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 its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204, and whose telephone number is: (303)844-5226.

1. These 23 positions are variously referred to by the parties as "Production Controllers," "Air Logistics Specialists," "GS-1152-11" positions, or some other combination of words, letters and numbers. All such designations refer to the same positions and should be so understood.

2. Upon the General Counsel s unopposed motion, the time for filing such briefs was extended to April 14, 2000, due to the temporary unavailability of the hearing transcripts.

3. The undisputed testimony of Thomas Browning, the Deputy Director of OALC s Aircraft Directorate, is that AREP was designed to integrate the supply, maintenance and engineering functions into a cohesive entity, thereby decreasing the amount of time it took to process aircraft and return them to service, and improving the quality level of work performed by decreasing the defect rate. AREP has been highly successful in achieving these goals, reducing the turn-around time by 20% and virtually eliminating defects. In addition, although not an initial goal, AREP has reduced costs by 10% thus turning an operating loss into a sizable profit and making OALC more competitive in seeking new aircraft maintenance contracts.

4. - According to the undisputed testimony, AREP required the creation of this new GS-11 team leader position to coordinate the performance of several functions that had previously been part of the first-line supervisor s responsibilities and which, along with the supervisor s other duties, placed too much of a burden on one individual and thereby slowed down the accomplishment of the overall goal by rendering the process less efficient than it could have been. According to Deputy Director Browning, the newly-created Air Logistics Specialist (ALS) position was designed for the incumbent to manage the aircraft as a partner of the first-line supervisor, whose role was to manage the mechanics working on the aircraft. The ALS is responsible for managing complex work including material, tooling and equipment, rather than just whether ordered parts have arrived for use by the mechanics.

5. It appears that there were 34 names listed on the promotion certificate for consideration. The criteria used in compiling the list are unspecified, but the area of consideration was limited to the "LAO" rather than base-wide.

6. AFMC has implemented AREP at the Warner Robins and Oklahoma City Air Logistics Centers also, having filled at least 22 and 50 such ALS positions at those locations, respectively.

7. As Mosser explained, the precise duties of the ALS position had not yet been determined, and it was unclear whether the theory behind the AREP reorganization would work out well in practice.

8. There is no record evidence that Mosser ever followed up Mazeika s suggestion by contacting Browning about the decision to fill the GS-11 positions permanently without negotiating the matter with Council 214.

9. The establishment of AREP involved considerable input from Council 214 at the national level and Union participation by Mosser and others at OALC. Such participation included the creation of procedures that AREP would be using and position descriptions describing the AREP employees duties (including the PD for the GS-11 ALS positions at issue in this case). It is also noted that the complaint herein alleges only that the Respondents violated section 7116(a)(1) and (5) of the Statute by filling the 23 AREP positions without bargaining with the Union, but does not allege that AREP itself was established without the requisite bargaining. Finally, no party herein is asserting that AREP should be eliminated

pending negotiations.