Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEWFALLS CHURCH, VA Respondent

and

Case No. WA-CA-00554

NATIONAL ASSOCIATION OF IMMIGRATIONJUDGES, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS AFL-CIO Charging Party

Bruce Waxman Counsel for the Respondent Sally M. Tedrow Counsel for the Charging Party Lisa Belasco 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 the 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), since on or about February 24, 2000, by refusing to meet face-to-face with the National Association of Immigration Judges (NAIJ), International Federation of Professional And Technical Engineers (IFPTE),

AFL-CIO (the Union) to continue negotiations over a collective bargaining agreement.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute. The Respondent defends on the grounds that at all times it has been willing to schedule face-to-face negotiations with the Union subsequent to the parties exhaustion of the mail, electronic mail, and telephone process for the narrowing of the issues which process the parties agreed to at the conclusion of their negotiation session of March 15-19, 1999.

For the reasons explained below, I conclude that a preponderance of the evidence does not establish the alleged violations and recommend that the complaint be dismissed.

A hearing was held in Washington, D.C. The parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The parties filed helpful briefs.

The General Counsel presented the testimony of three witnesses, Judge Bruce W. Solow, President of the Union from 1995 to mid-June 1999, Judge Patricia Sheppard, President of the Union from mid-June 1999 to the present, and Judge John F. Gossart, Jr., President of the Union from 1985 until 1989. All were members of Union's contract bargaining team during the March 15-19, 1999 negotiation session. The Respondent also presented the testimony of three witnesses who were members of the Respondent's bargaining team during the same period: Judge Henry Jere Armstrong, Deputy Chief Immigration Judge; Judge Thomas L. Pullen, Deputy Chief Immigration Judge; and Daniel Echavarren, Associate General Counsel.

Based on the entire record[1], including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Union is the exclusive representative of a bargaining unit of approximately 210 immigration judges throughout the United States. The Union was certified as the exclusive representative in 1979 but has never had a collective bargaining agreement.

After agreeing to ground rules in September 1998 (Jt. Exh. 8), the parties exchanged proposals for a comprehensive agreement in early 1999 (Jt. Exhs. 14, 20), and began their negotiations on March 15 through March 19, 1999.[2]

The negotiations were constrained by a representation petition filed by the Respondent on March 8, 1999 seeking to

clarify the unit to exclude all immigration judges in the bargaining unit as management officials. The parties deferred their consideration of controversial issues but did reach tentative agreement on some less controversial proposals. It was understood that the parties would not sign off on such provisions until the representation petition was decided.

At the conclusion of their negotiation session of March 19, 1999, the parties verbally agreed to use written

and telephone communications to narrow the issues before returning to the table. In making this finding on a crucial issue in the case, and determining that the Respondent has established this affirmative defense by a preponderance of the evidence, I have credited the testimony of the Respondent's witnesses. Their testimony was mutually corroborative in essential respects on the key issue of Respondent's offer

and the Union's assent to Respondent's proposal, their recollections were more detailed and precise than the Union witnesses on this issue, and the agreement was consistent with actions by the Respondent and certain statements by Union officials after the negotiation session. On May 1, 2000, Judge Sheppard, while insisting that neither Union records nor negotiator recollections confirmed such an agreement wrote, in part, "The understanding of the NAIJ negotiators was that management would be sending us a number of written proposals and that there could be some telephone and e-mail dialogue for a time, but that certainly the parties would be returning to the bargaining table for face-to-face discussions within a reasonable period." (Jt. Exh. 27). Also, the IFPTE's General Counsel, in a letter dated May 31, 2000, stated that the Association "committed to use telephone, electronic mail, or any other communications method to narrow the issues to the maximum extent possible." (Jt. Exh. 32).

In accordance with that agreement, on May 17, 1999, Mr. Echavarren sent four Union negotiators, including Judges Solow and Sheppard, a proposed grievance procedure. In his cover memorandum, he wrote "I believe this procedure would work whether the NAIJ is determined to be a union or an association" and asked that the Union reply with its comments at its earliest convenience. (Jt. Exh. 22).

Judge Sheppard was elected President of the Union during the middle of June 1999, and thereby became the Union's chief contract negotiator. She received the envelope containing

the Respondent's grievance proposal, but put it aside and subsequently misplaced it. She was busy with preparations for the hearing on the representation petition which was held during the last week of June 1999.

No response to the Respondent's grievance proposal was made by the Union at that time. The Respondent did not forward any additional proposals and did not contact the Union

when it did not receive a response from any of the Union negotiators. The Respondent's negotiators were similarly busy with other matters.

On August 3, 1999, President Sheppard sent Judge Armstrong an e-mail message proposing, in part, that the parties test a compressed work schedule, something to which the parties had agreed in principle during their negotiations. Judge Armstrong denied this request in an e-mail response on the basis of item 11 of the 1998 ground rules, stating "all proposals have not been disposed of, ratified, or approved as contemplated by that rule . . . ." (Charging Party Exh. 1).

On February 24, 2000, President Sheppard sent Judge Armstrong a letter demanding that collective bargaining resume immediately. (Jt. Exh. 23). When she did not receive a response, she sent him another letter on March 17, 2000. (Jt. Exh. 24).

On March 23, 2000, Judge Armstrong sent President Sheppard an e-mail message in which he wrote, in relevant part:

At the conclusion of the face-to-face negotiation session in late March of last year, the parties agreed to continue the negotiation process through the exchange of written proposals. To that end, we sent to you a proposal detailing a grievance procedure that would be unique to Immigration Judges and which would address many of the issues that we discussed at the table. Our records do not show any response from you to that proposal. We are pleased to see your renewed interest in resuming negotiations, but wish to continue the negotiations in the manner that we had agreed and do not see the value of a precipitous return to the bargaining table that you now suggest. There is still a number of issues that can be resolved through exchange of written proposals. Let's build on the agreements in principle that we reached at the table before getting back together for another round of formal face-to-face negotiations. Once we can reach agreement on a grievance procedure, maybe we could move on to some of the other issues that we have already discussed. (Jt. Exh. 25).

In an April 14, 2000, e-mail message to Chief Judge Creppy, President Sheppard referred to her outstanding demand that the Respondent return to collective bargaining which, she wrote, seemed to have been ignored. (Jt. Exh. 26). On April 27, 2000, Chief Judge Creppy responded by e-mail, stating, in relevant part:

As to your "outstanding demand for a return to collective bargaining", we have not ignored your demand. We responded to your last e-mail on this subject by e-mail of March 23, 2000, in response to your letters of February 24, 2000, and March 17, 2000. We reminded you then, and I do so again now, that the ball has been in the Association's court since we sent our last proposal to you on a special grievance procedure for Immigration Judges. If you sincerely wish to resume the process, you should at least respond to our last proposal. (Jt. Exh. 26).

In a reply to Chief Judge Creppy on May 1, 2000, Judge Sheppard insisted that the Union had no record of receiving a grievance procedure proposal from management (as noted, she had misplaced it unopened) and requested another copy of the proposal. She also stated:

I have carefully reviewed the NAIJ's records of the March 1999 negotiations in light of management's assertion that a return to the bargaining table would be inconsistent with some agreement reached at that time. Neither our records nor the recollections of the NAIJ negotiators confirm the existence of such an agreement. The understanding of the NAIJ negotiators was that management would be sending us a number of written proposals and that there could be some telephone and e-mail dialogue for a time, but that certainly the parties would be returning to the bargaining table for face-to-face discussions within a reasonable period. (Jt. Exh. 27).

President Sheppard also proposed that the parties schedule bargaining meetings the week of May 15, 2000. (Jt. Exh. 27).

The Respondent sent President Sheppard another copy of Mr. Echavarren's May 17, 1999, proposed grievance procedure.

On May 11, 2000, President Sheppard replied, in relevant part:

The May 17, 1999 memorandum and attachment are unfamiliar to me and I still have no record or recollection of receiving them. Be that as it may, the proposed grievance procedure embodied in the attachment is incomplete and was obviously drafted in anticipation of the possibility that the Agency's unit clarification petition would succeed, which it has not. [On May 9, 2000, the Chicago Regional Director of the FLRA issued a decision and order finding that the immigration judges were not management officials.(3)] The NAIJ cannot agree to any grievance procedure that does not, at a minimum, culminate in binding arbitration before a neutral party. (Jt. Exh. 29).

The Union had affiliated with IFPTE in April 2000, and President Sheppard and Julia Clark, IFPTE's General Counsel, had previously arranged to meet with Judge Armstrong on May 15, 2000. In her May 11, 2000, letter, President Sheppard requested that they schedule bargaining dates at the May 15 meeting. She stated, "Piecemeal bargaining by mail, which you continue to propose, is inconsistent with our ground rules and is particularly inappropriate given that we have no collective bargaining agreement in place at this time." (Jt. Exh. 29).

During the May 15, 2000 meeting and up to the date of the hearing, the Respondent has refused to agree to a date certain to return to the bargaining table for face-to-face negotiations until the parties have completed negotiating in the manner agreed to on March 19, 1999. (Tr. 166-67, 198).

Discussion and Conclusions

The General Counsel and the Union contend that the Respondent failed to bargain in good faith in violation of section 7116 (a)(1) and (5) of the Statute(4) by refusing to schedule face-to-face meetings to continue negotiations over a collective bargaining agreement. They contend that there is a statutory duty to bargain face-to-face pursuant to section 7114(b)(3) of the Statute(5)

and that the Union did not limit or waive this statutory right.

The Respondent defends on the basis that it did not fail or refuse to bargain in good faith because it was willing at all times to schedule meetings *after* the parties met their commitment to use written and telephone communications to narrow the issues before returning to the

table.

In determining whether a party has fulfilled its bargaining obligation, the Authority considers the totality of the circumstances in a given case. *U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990).

The record reflects that the Respondent has refused to agree to a date certain to return to the bargaining table for face-to-face negotiations. However, the Respondent has established by a preponderance of the evidence its affirmative defense that the parties verbally agreed to use written and telephone communications to narrow the issues before returning to the table. Therefore, it is unnecessary in this case to decide whether the statutory requirement to "meet at reasonable times" means to meet face-to-face and, therefore, that a refusal to meet face-to-face establishes a *per se* absence of good faith.[(6)]

Section 7114(a)(4) clearly provides that the parties may determine appropriate techniques, consistent with the provisions of section 7119, to assist in any negotiation.[(7)] The parties' agreement to use written and telephone communications to narrow the issues before returning to the table for face-to-face negotiations is such an appropriate technique. The Respondent's insistence on the use of this agreed upon procedure did not amount to a failure to bargain in good faith.

It is concluded that the Respondent did not violate section 7116(a)(1) and (5) of the Statute as alleged. Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, July 31, 2001

GARVIN LEE OLIVER

Administrative Law Judge

1. The Charging Party's unopposed request to correct the transcript is granted. The Charging Party's motion to strike portions of Respondent's post-hearing reply brief is denied.

2. Among other things, the ground rules for this session provided that management would submit its proposals by October 16, 1998 and that the parties would meet for two

weeks commencing November 30, 1998. Changes concerning the dates and duration were confirmed in writing. (Jt. Exhs. 8, 9, 12, 13, 17-19, 20).

3. The Respondent filed an application for review of the Regional Director's decision and order. The Authority denied the application on September 1, 2000.

4. Section 7116(a)(1) and (5) provide:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

5. Section 7114(b)(3) of the Statute provides:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]

6. In *Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California*, 35 FLRA 764, 769 (1990), the Authority found it unnecessary to decide "whether face-to-face bargaining is required under the meaning of section 7114(b)(3) of the Statute."

7. Section 7114(a)(4) provides:

Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.