Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF THE TREASURYUNITED STATES CUSTOMS SERVICE Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party

Case No. WA-CA-00346

Thomas Bianco, Esquire For the General Counsel
Marc Shapiro, Esquire For the Charging Party
Steven E. Colon, EsquireNancy Elam, EsquireMichael Service, Labor Relations Specialist For the Respondent
Before: RICHARD A. PEARSON Administrative Law Judge

DECISION

On August 30, 2000, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of its Washington Region, issued an unfair labor practice complaint, alleging that the Department of the Treasury, U.S. Customs Service (Respondent/Employer), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to provide the employees' exclusive representative, the National Treasury Employees Union (Charging Party/Union), with notice and an opportunity to bargain before ordering employees in the Office of International Affairs not to keep objects, except for healthy plants, on top of their cubicles. The Respondent filed its Answer on September 25, 2000, admitting the above allegation but asserting that it was not obligated to bargain concerning this matter.

A hearing in this case was held in Washington, D.C., on January 10, 2001, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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

The dispute in this case focuses on a rule within the Customs Service's Office of International Affairs (OIA), prohibiting employees from placing objects other than healthy plants on top of their cubicles. The Union and the General Counsel argue that the Employer unilaterally implemented this rule on February 8, 2000, thereby changing an established practice of permitting employees to keep all sorts of objects on top of cubicles; the Employer, however, argues that it had prohibited the storage of objects on cubicles since 1997, and that it merely reiterated that prohibition on February 8, 2000. A history of the agency's practice on this issue is therefore necessary.

In the fall and winter of 1997, the U.S. Customs Service relocated its headquarters office into the newly-built Ronald Reagan Building and International Trade Center in downtown Washington, D.C. Preparations for the move began several months beforehand, including union-management negotiations regarding many details of

the working conditions in the new building. An agency-wide committee, composed of a manager from each component of the agency and at least one union representative, was established to coordinate the planning of the relocation, and many offices within the agency also created their own subcommittees to coordinate details of the move specific to their own offices. David Roseman served as OIA's representative on the agency-wide committee, and Judith Funkhouser served as the chairperson of OIA's internal committee, which consisted of approximately ten employees, six or seven of whom were bargaining unit members and two of whom were appointed by the Union. OIA moved into its offices on the eighth floor of the Reagan Building in December of 1997.

One new feature of the office design in the Reagan Building was its "open space" plan, with most employees working in modular cubicles and with almost no enclosed offices. These cubicles are approximately five and a half feet high, and they contain three-walled units including a desk, computer, storage cabinets, and file cabinets. The above-desk storage cabinets have panels in front, which slide up when opened, so that the panels are parallel to the floor and flush with the top of the cubicle walls. Prior to the relocation, the agency and the Union negotiated details such as the size of employee cubicles, but it does not appear that they negotiated any rules concerning whether employees could place items on top of their cubicles or storage and filing cabinets.

On September 4, 1997, the chairperson of the agency-wide committee coordinating the relocation sent an e-mail message to all employees entitled, "Headquarters Relocation Update #7." (Resp. Exh. 3). Among a variety of topics discussed in the memo was "Workstation and Building Care." Employees were told, for instance, that they could use push pins to attach items to the inside walls, but that they were not permitted to attach any items to the outside walls of their cubicles. The memo also instructed them: "Items should not be placed on top of any of the flipper door units or lateral files so as to protrude above the workstation panels."

As OIA employees moved into their new offices in December 1997, they found a large booklet entitled, "United States Customs Service Employee's Guide to the Ronald Reagan Building & International Trade Center" on their chairs. (Resp. Exh. 2). At pages 44 and 45 of the booklet, "Workstation and Building Care" is discussed, specifically stating: "Items should not be placed on top of any flipper door units or lateral files, and should not protrude above the workstation panels."

After the office relocation was completed, the OIA committee headed by Ms. Funkhouser (initially dubbed the "move committee") continued to monitor issues related to the transition to the new building (after which time it became known as the "space committee"). These issues included the storage of empty boxes, recycling, use of phones, undelivered and damaged furniture, and maintaining the neat appearance of the office. The two Union-designated committee members continued to serve on the committee into the year 2000, although it is unclear whether the Union leadership was fully aware of the ongoing status of the committee. The committee conducted two informal walk-throughs of the office area (the first in September 1998 and the second in February 2000), after complaints were voiced about the increasingly cluttered appearance of the office and about hoarding of furniture.

After the September 1998 walk-through, a memo signed by the Assistant Commissioner in charge of OIA was sent to all OIA employees, advising them of a variety of conditions detracting from the desired appearance of the office. (Resp. Exh. 4). Accordingly, employees were told to keep their window blinds down and open, to remove clutter from walkways and under desks, and not to use push pins on cubicle walls, among other things. They were also told: "Nothing should be placed or stored on top of the tall filing cabinets." And: "In order for the sprinkling system to operate, a clearance of seventeen inches needs to be maintained between the ceiling and anything placed on top of our cubicle area." *Id.*

According to Ms. Funkhouser, employees generally complied with the instructions in the September 1998 memo, and the appearance of the office improved for a period of time, but that slowly "the place was getting junky again." (Tr. at 102-03). In early February 2000, members of the committee were walking around the

office in order to decide which pictures to hang on the walls, and the increased clutter convinced them of the need to conduct another "space inspection." *Id.* Ms. Funkhouser discussed the problem with the Assistant Commissioner and the four division directors, who reiterated to their employees that they were not permitted to store objects on top of their cubicles. At least one employee objected to this prohibition and claimed that he had been storing things on his cubicle for some time. That employee's supervisor discussed the issue with Ms. Funkhouser in February 2000 and told her that the same question had been raised in September 1998 but not resolved. Although Ms. Funkhouser testified that she could not recall this question arising in 1998, she took the complaint to the Assistant Commissioner and asked him to clarify whether there were any exceptions to the rule against putting objects on the cubicles. According to Ms. Funkhouser, he initially replied that nothing could be stored there, but when he was told that some employees felt this was the only place their plants could get sufficient light, he agreed to permit healthy plants to be kept there. Ms. Funkhouser then sent an e-mail message to division directors on February 8, 2000, explaining that only healthy plants, and not trinkets or other objects, could be stored on top of cubicles. (G.C. Exh. 2). The contents of that message spread quickly to employees in the office, and the Union President protested to agency management that same day, asserting that the prohibition of objects on top of cubicles was a unilateral change in working conditions. (G.C. Exh. 3).

A variety of witnesses testified concerning the extent to which OIA employees complied with the rule against storing items on cubicles, although they were rather ambiguous and imprecise in their descriptions. Mr. Philip Cici and Ms. Tiffany Sawers, testifying for the General Counsel, stated that it was quite common for employees to store all sorts of items, from keepsakes and pictures to work files, on their cubicles as well as their storage and file cabinets, but they could not be specific on this score. They also testified that supervisors work constantly in the same area as unit employees, and thus they must have been aware of (and acquiesced in) the widespread storage of items on the cubicles. Ms. Funkhouser and Mr. Roseman, testifying for the Employer, conceded that employees have at times kept items on the top of their cubicles and cabinets, but they testified that the practice developed gradually over time and abated when management reminded employees of the rule. Mr. Roseman further stated that the subject of office cleanliness was addressed at least every few months at supervisor meetings, at which division directors were told to remind employees of the rules (such as the rule against storing items on cubicles). There was also some disagreement among the witnesses as to the meaning of the September 1998 memo to employees (Resp. Exh. 4), specifically whether that memo prohibited storage of items only on "tall filing cabinets" or whether it prohibited storage of items on cubicles as well as cabinets.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The crucial issue in this case is quite simple: did the management of OIA change conditions of employment when it disseminated the February 8, 2000 memo prohibiting the storage of anything except healthy plants on top of cubicles? The General Counsel argues that the practice of placing items on cubicles and cabinets had become so common among employees and accepted by management, over such a period of time, that it constituted a "past practice" which could not be changed without bargaining. The General Counsel notes testimony that the practice had existed from December 1997 to February 2000, or more than two years. Testimony further reflects that supervisors must necessarily have been aware of the practice, since they work in the same area and the storage of items on top of cubicles and cabinets is, by its nature, open and apparent. The Respondent, however, argues that no change whatsoever occurred by virtue of the February 2000 e-mail. In the Respondent's view, a policy prohibiting storage of items on cubicles and cabinets had been in existence since the agency moved into the Reagan Building in 1997, and management had reminded employees repeatedly of this policy in the intervening two years; indeed, the February 2000 e-mail from Ms. Funkhouser was the same sort of reminder that management had sent on prior occasions. Alternatively, the Respondent argues that any change was *de minimis* and thus did not require bargaining.

Analysis

The law in this matter is not in dispute. The Authority has held since its earliest days that "the duty to negotiate in good faith under the Statute requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment[.]" *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981). Although the Statute does not explicitly include such unilateral actions among the unfair labor practices listed in section 7116(a), the Authority has made it clear that an agency's unilateral change in a condition of employment violates section 7116(a)(1) and (5) of the Statute.

Additionally, it has long been held that terms and conditions of employment may be established not only by a collective bargaining agreement, but also by the parties' practice or other form of informal or tacit agreement. *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987); *Department of the Navy, Naval Underwater Systems Center, Newport Naval Base*, 3 FLRA 413 (1980). Indeed, once a past practice relating to a condition of employment has become established, it cannot be unilaterally changed by the agency, "even if the condition established by practice differs from the express terms of the parties' collective bargaining agreement." *U.S. Patent and Trademark Office*, 39 FLRA 1477, 1482-83 (1991). In order to find that a condition of employment has become established by a past practice, the General Counsel must show that the practice was "consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent." *U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky*, 42 FLRA 137, 142 (1991)(*IRS Louisville*).

The first step in applying these principles is to determine whether the alleged change relates to a condition of employment. As the Authority explained in *Department of the Treasury, Internal Revenue Service (Washington, D.C.); and Internal Revenue Service Hartford District (Hartford, Connecticut)*, 27 FLRA 322, 324 (1987), practices do not "ripen" into or "become" conditions of employment. The disputed practice must involve a condition of employment for the employer to have a bargaining obligation. Thus, for example, an agency may unilaterally change the procedure it uses for filling non-bargaining unit positions, because such procedures are not a condition of employment. *Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey*, 24 FLRA 64, 68 (1986). The instant case involves a rule concerning employees' storage of items in their offices, and I find that this is a "condition of employment." The rule purports to affect both personal and work items of employees, as testimony at the hearing made clear. For example, some employees used the tops of their cubicles to store files and papers as a way of organizing their work, while some employees placed photographs and "trinkets" there. The former use of cubicles is clearly a condition of employment, as it directly affects the amount of work and storage space an employee has; but even the latter use is a matter directly affecting the employee's work. An employee's ability to have a plant or a family photograph in sight while he works can improve his morale, and it must be considered a condition of employment. Accordingly, changes in such conditions must be preceded by notice to and bargaining with the Union. Moreover, because the issue is substantively negotiable and is not subject to any of the management rights reserved in section 7106 of the Statute, it is irrelevant whether the change is *de minimis. Air Force Logistics Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 53 FLRA 1664, 1669 (1998).

In this case, the evidence reflects that two competing forces were at work in the OIA office suite: management was seeking to establish and enforce a degree of neatness and "professionalism" to the office environment, and individual employees were seeking to ignore the rule against keeping items on cubicles. Both the General Counsel and the Respondent were at least partially successful in proving aspects of their arguments. As the General Counsel argues, many employees at varying times have stored objects on their cubicles and cabinets, and this fact must have been observed by management officials. But as the Respondent notes, the rule against such conduct was surely known to employees from the time they moved into their new office in the Reagan Building, and it was reiterated to employees periodically from September 1997 to February 2000. Did the agency consistently enforce its rule, or did employees consistently ignore it? In this respect, neither side fully

proved its case, although it is the General Counsel who carries the burden of proof. *Compare*, *e.g.*, *IRS Louisville*, 42 FLRA at 142-43; *Defense Distribution Region West, Tracy, California*, 43 FLRA 1539, 1560-61 (1992); and *Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado*, 10 FLRA 235, 241 (1982).

Part of the difficulty in evaluating the arguments is the inability to quantify the issue. There are no records which measure the extent to which employees were storing items on their cubicles, or how quickly the practice abated when employees were reminded of the prohibition. Ms. Sawers' testimony paints a picture suggesting that employees almost universally ignored the rule or that they weren't even aware of the rule at all. Ms. Funkhouser's testimony suggests that employees universally complied with the rule each time it was publicized, and that items reappeared very gradually thereafter. Both accounts are equally subjective and unreliable, and although the improperly stored items were in plain view to all, the extent of the practice was no more obvious than the movement of the hour-hand on the clock on the wall.

But the burden on the General Counsel is to prove that the Respondent changed a condition of employment when Ms. Funkhouser sent the February 8, 2000 e-mail regarding storage of items on cubicles, and on this point the General Counsel has failed. Viewing the agency's actions from September 1997 to February 2000, the overall picture is of a consistent policy prohibiting the storage of items on cubicles and cabinets, and of a consistent method of enforcing the rule. The February 8 message fit squarely within the pattern and precedent OIA had been following for two years: after all Customs employees were notified of the rule by e-mail in September 1997 (Resp. Exh. 3) and in the Employee's Guide to the new building in December 1997 (Resp. Exh. 2), OIA's "move committee" took over the monitoring of office space-related issues. It was this committee, composed of unit and non-unit employees, which periodically conducted walk-throughs of the office area, making sure the aisles did not get cluttered, boxes were properly stored, employees did not hoard furniture, and cubicle tops did not become storage areas, even as the "move" to the Reagan Building became a distant memory. It was as a result of one such walk-through that the Assistant Commissioner sent his September 1998 memo to employees (Resp. Exh. 4), reminding them of the various rules on these issues. And Ms. Funkhouser's February 2000 message was a result of another such walk-through. Supervisors were also involved in reminding employees of these rules, but supervisors did not directly threaten employees with disciplinary action on such matters, and the "move committee" became OIA's primary vehicle for obtaining employee compliance. The events surrounding the committee's walk-through immediately prior to February 8, 2000 and the dissemination of the e-mail message on that date were entirely consistent with the pattern and practice that had existed in OIA since moving into the Reagan Building. The February 8 e-mail did not represent any new development or change in conditions of employment.

The General Counsel and Union officials have sought to dissociate the actions of the "move committee" from the Union itself. I agree that any actions by this committee after the office relocation was completed cannot be attributed as having the approval of the Union. The walk-throughs of the office area conducted by members of the committee, including union-appointed members, did not add the Union's imprimatur to the enforcement of various rules concerning the office environment. As General Counsel's Exhibit 2 makes clear, it was management that ultimately decided what could or could not be stored on cubicles, not the committee. Moreover, the Union did not waive its right to formal notice of changes in working conditions, or to negotiate over such changes, by virtue of its representatives serving on the committee. Nonetheless, the fact that several bargaining unit employees, in addition to two union-designated members, served on the committee, supports the Respondent's argument that OIA employees were well aware of the rule concerning storing items on top of cubicles throughout the 1997-2000 period. The participation of Mr. Holbrooke, one of the Union designees, in the walk-through in early February 2000, which alerted the committee to the increasing violations of the cubicle-storage rule and prompted Ms. Funkhouser's February 8 e-mail message to supervisors, further illustrates that the committee was attempting to monitor existing rules, not to change them, at that time.

Elements of the September 1998 memo and the February 2000 e-mail do reflect that OIA's definition of the rule concerning storage of items was not perfectly consistent. The agency-wide publications given to employees at or prior to the office relocation (Resp. Exh. 2-3) broadly prohibit the placement of any items on top of the "flipper door units or lateral files." The September 1998 memo from the OIA Assistant Commissioner (Resp. Exh. 4), however, leaves room for doubt as to whether this rule was absolute: the memo first states, "Nothing should be placed or stored on top of the tall filing cabinets." Later, the memo states, "a clearance of seventeen inches needs to be maintained between the ceiling and anything placed on top of our cubicle area." It could be argued, therefore, that items could be placed on top of cubicles, but not on top of filing cabinets. Ms. Funkhouser's February 2000 e-mail confirms that there had been ambiguity as to the extent of the prohibition: although the distinction between "cubicles" and "cabinets" is not discussed here, she seeks to clarify whether all items are prohibited, or whether "trinkets" or plants may be stored. She sought resolution of the question from the Assistant Commissioner, who agreed to permit storage only of healthy plants.

Despite these areas of uncertainty, the evidence as a whole demonstrates that the general prohibition against storing items on cubicles and cabinets was understood by employees, and management's policy was relatively consistent. I do not read the September 1998 memo as permitting storage of items on "cubicles" while prohibiting it on "cabinets." Such an interpretation does not make sense and is inconsistent with the evidence in its entirety. The flipper door units on the cubicles move up and down, and it would make no sense to permit storage on top of them, while prohibiting it on the fixed top of filing cabinets. While the choice of language in the September 1998 memo was poor, it did not alter the existing general prohibition against the use of cubicle and cabinet tops for storing items. Moreover, the Assistant Commissioner's agreement in February 2000 to permit the storage of plants on cubicles is not the "change in working conditions" which the General Counsel attacks in the complaint. The complaint asserts that the Respondent unilaterally changed working conditions by ordering employees to "cease storing items" on top of cubicles, not by permitting them to store healthy plants there. While the Assistant Commissioner may have relaxed the general rule slightly in February 2000, this fact does not help the General Counsel's case.

As I noted earlier, the burden in such cases is on the General Counsel to prove that "the practice was consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent." *IRS Louisville*, 42 FLRA at 142. The evidence offered at the hearing does not meet this standard. Although the evidence indicates that a practice existed of employees storing items on top of their cubicles and cabinets, such practice was not consistent. Rather, the evidence indicates that periodically the agency, through its move committee, patrolled the work area to monitor compliance with a variety of work environment rules and reminded employees not to store items on their cubicles and filing cabinets. After being reminded of this rule, it appears that employees would clean up their cubicles for a period of time, until they needed a new reminder. Therefore, not only was the employee practice inconsistent, but OIA also made its disapproval of the employee practice well known. Although the Respondent's enforcement of the rule was not one of "zero tolerance," it was adequately communicated to employees, so that management cannot reasonably be found to have given its implied consent to the practice.

In summary, the Respondent did not make a "change" in conditions of employment on or around February 8, 2000. An employee-management committee (with or without the ongoing, official approval of the Union) had functioned continually since late 1997 to monitor the cleanliness and appearance of the office space. This committee found in early February 2000, as it had previously found, that the office was becoming too cluttered, and it reported its findings and recommendations to the Assistant Commissioner. As a result, employees were reminded in February 2000, as they had been reminded previously, that they could not store items on their cubicles. Both the policy and the method of enforcing the policy remained essentially unchanged in February 2000 from that which existed previously. The Union appears to have newly decided in February 2000 to object to a rule which had been promulgated back in 1997 and which had been reiterated

subsequently by OIA management, and that is the only significant change which occurred in February 2000. Therefore, I do not find that the Respondent violated 7116(a)(1) and (5) of the Statute as alleged.

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C., July 5, 2001.

_____

RICHARD A. PEARSON

Administrative Law Judge