UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-000

SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS LEXINGTON, KENTUCKY Respondent	
and ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, IFPTE, AFL-CIO Charging Party	Case No. CH-CA-02-0347

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 1, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 30, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: January 30, 2004

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
LEXINGTON, KENTUCKY

Respondent

and Case No. CH-CA-02-0347

ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES, IFPTE, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the transmittal form sent to the parties, and the service sheet. Also enclosed are the pleadings, motions, exhibits and briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 04-12

SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS LEXINGTON, KENTUCKY Respondent	
and ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, IFPTE, AFL-CIO Charging Party	Case No. CH-CA-02-0347

Mr. Lionel J. Hall
For the Respondent

Honorable John Lawrence
For the Charging Party

Sandra LeBold, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(5) and (1) of the Statute by refusing to bargain on the removal of hand held metal detectors (wands) at its Lexington and Hazard, Kentucky, offices.

1 For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "§ 16(a)(5)".

This case was initiated by a charge filed on April 5, 2002 (G.C. Exh. 1(a)); the Complaint and Notice of Hearing issued on December 6, 2002 (G.C. Exh. 1(b)); the hearing was set for March 12, 2003, at a place to be determined in Lexington, Kentucky; and by Notice dated February 28, 2003, the place of hearing was fixed, pursuant to which a hearing was duly held on March 12, 2003, in Lexington, Kentucky, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument which each party waived. At the close of the hearing, April 14, 2003, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended to April 30, 2003, and Respondent and General Counsel each timely mailed an excellent brief, received on or before, May 5, 2003, which have been carefully considered. On that basis of the entire record, I make the following findings and conclusions:

Findings

1. The Association of Administrative Law Judges, IFPTE, AFL-CIO (hereinafter, "Union"), is the exclusive representative of Respondent's Administrative Law Judgesnationwide. Respondent and AALJ have entered into a National Agreement, effective August 30, 2001 (G.C. Exh. 5).

2. There is no question that entry security was negotiated at the national level; that neither party delegated this issue for local negotiation; that the Union wanted, inter alia, magnetometers, wands and x-ray equipment; and that the Union wanted OHA hearing offices to be classified as Class IV for security purposes, rather than Class II and Class I, under the Department of Justice Vulnerability Assessment Report of June 28, 1995 (Res. Exh. 3) (hereinafter, "DOJ Report"). Under the DOJ Report, x-ray and magnetometer equipment is not applicable to Class I and, while desirable at Class II, are not required; are standard at Class III and IV, based on facility evaluation; and are minimum standard at Class V (id.). Most, if not all, OHA hearing offices are Class II and its remote hearing sites are Class I. The highest security classification is Class V, examples being: CIA Headquarters, the Pentagon, the White House, Respondent's National Computer Center. Most agencies are Class IV, such as Respondent's Headquarters in Baltimore, the Department of Labor or the Department of Justice.

3. Ms. Marybeth Pepper, one of Respondent's negotiators in the national negotiations, stated that the

Union’s proposal from the beginning of negotiations, in September, 2000, had been that OHA hearing offices be considered level [Class] IV facilities which, inter alia, would have meant, “. . . magnetometers for the hearing offices, wands for the hearing office, guards. It would mean that all of our parking would have to be adjacent. It would have to be patrolled. It would have to have lighting, special lighting. It was very -- when we looked at it, it was very costly.” (Tr. 137). She said Respondent was willing to give tier one security [such as duress button alarms, peepholes, panic bars, intrusion detection systems] which were included in Respondent’s Space Allocation Standard. She stated that Respondent had conducted a study of its offices for a five year period and there had been only one incident of violence reported and it had involved a disgruntled claimant who picked up a chair and hit the judge over the head (Tr. 138). The act, regrettable as it was, had not involved a weapon brought onto the premises (Tr. 138). Respondent did not believe the known risk warranted the extraordinary cost of magnetometers, wands, additional personnel, etc. in its 1300 field offices. So the parties, unable to agree, ended up in mediation on this issue and were in mediation for 16 days. Finally, the mediator, Mr. John Kolb, told Judge James Horn, the Union’s Chief negotiator on this Article, and Ms. Pepper, Respondent’s Chief negotiator on the this Article, that, “. . . in his opinion -- this was just his opinion, he said -- that the union would not get magnetometers and wands because he thought -- just the cost, there was no demonstrated need, there didn’t appear to be an industry standard that needed to be met . . . .” (Tr. 139).

4. Respondent, “. . . in exchange for the union taking all of these requests off the table, such as magnetometers and wands and guards, and et cetera” (Tr. 139) offered to give a Health and Safety Committee that would make recommendations to the Associate Commissioner on Policy (id.). Eventually, the parties agreed upon Article 23 which, in relevant part, provides as follows:

“ARTICLE 23

“HEALTH AND SAFETY

“Section 1

“A. The Agency shall provide and maintain safe and healthy working conditions for all Judges in accordance with Executive Order 12196 and the Department of Labor implementing instructions.

“B. The Agency and the AALJ agree to cooperate in a continuing effort to avoid and reduce the possibility of and/or eliminate accidents, injuries, and health hazards in all areas under the Agency’s control.

“C. The Agency and the AALJ further agree to cooperate in a continuing effort to eliminate and/or reduce security concerns and otherwise enhance the personal safety of Judges in SSA/OHA hearing offices, satellite offices, and remote site locations.

“D. The Agency agrees to notify the AALJ if a deviation in the Agency’s occupational safety, health, and fire standards is requested for any facility in which Judges are required to work.

“Section 2

“A. The parties recognize that Administrative Law Judges are covered by 28 C.F.R. § 64.1 and § 64.2 (aa). This regulation designates categories of federal officers and employees who are within the protective coverage of 18 U.S.C. § 1114, which prohibits the killing of or attempted killing of such designated officers and employees. The categories of federal officers and employees covered by § 1114 are also protected, while they are engaged in or on account of the performance of their official duties, from a conspiracy to kill, 18 U.S.C. § 1117; forcible assault, intimidation, or interference, 18 U.S.C. § 111; and threat of assault, kidnap or murder with intent to impede, intimidate, or retaliate against such officer or employee, 18 U.S.C. § 115(a)(1)(B).

“B. The Agency shall provide to the AALJ twice a year (April 1 and October 1) copies of incident alerts (Incident Alert Form

SSA-3114-U2) that involve threats and/or acts of violence against any Judge. The agency shall only delete information prohibited by law from disclosure.

"C. The Agency shall promptly inform the Judge of any actual or known threat made by telephone, mail, personal contact, or by any other means, against him/her. The local association representative shall also be informed of the specifics of the threat if not precluded by privacy interest expressed to the HOCALJ or designee by the Judge against whom the threat was made.

"D. The Agency will comply with the Physical Protection and Building Security (Section E) provisions contained in the Space Allocation Standard for OHA Field Offices. It is the intent of the parties that Section 2(D) of this Health and Safety Article will apply prospectively to hearing office moves for which an initial Occupancy Agreement (OA) is signed after the date the National Agreement is in effect. This article is subject to the grievance procedure.

"E. The AALJ or the Health and Safety Labor Management Committee may submit recommendations to the OHA concerning health, safety, and security issues that reasonably affect bargaining unit employees for its consideration and, as appropriate, for presentation to the SSA/GSA in any renegotiations of the Space Allocation Standard for OHA Field Offices. The OHA will solicit any recommendations from the AALJ at least 60 days in advance of submitting recommendations to SSA.

"F. The Agency shall provide Judges, when requested in advance, an emergency use cellular phone for hearing trips to remote sites. Judges will be given a copy of the cellular phone usage policy on an annual basis.

. . .

"<u>Section 4 - Health and Safety Committee</u>

"A. Pursuant to this agreement, there shall be formed a Health and Safety Labor Management Committee. The Committee shall meet to exchange

information, study, discuss and provide recommendations for improving health and safety measures within the OHA. Entry security is the first health and safety issue the Committee will address.

"B. The Health and Safety Committee shall consist of three (3) Judges appointed by the AALJ President and three (3) members, who are not members of the bargaining unit, appointed by the Associate Commissioner for Hearings and Appeals. The President of the AALJ and the Associate Commissioner for Hearings and Appeals or their designees shall each appoint one of their committee members to serve as Co-Chairperson of the Health and Safety Committee.

"C. The committee will establish the ground rules under which it will operate. The Committee will meet quarterly for no more that (2) days. The proposed agenda items shall be forwarded to the Associate Commissioner by the Co-Chairs thirty (30) working days prior to these meetings.

"D. OHA will provide a reasonable amount of official time, not counted against the official time bank, for AALJ participants to prepare for and participate in committee meetings. AALJ participants who travel to engage in committee meetings set by agreement will be provided travel and per diem reimbursement by OHA in accordance with the Federal Travel Regulations.

"E. Establishment of this committee does not constitute a waiver of any of the AALJ's statutory rights to information, consultation, or negotiations. The activities of the H & S LMC will not replace the OHA's responsibility to provide appropriate notice and the opportunity to bargain over impact and implementation under Article 2, Mid Contract Negotiations of this agreement.

"F. Establishment of this committee does not alter the authority of the Agency to determine its internal security practices."

. . . . (G.C. Exh. 5, Art. 23, Sec. 1, 2 and 4).

Section 2.D. provides that Respondent <u>will comply with the Physical Protection and Building Security (Section E) of the</u>

Space Allocation Standard and Article 23 is subject to the grievance procedure. Section 4.A. concludes, "Entry security is the first health and safety issue the Committee will address." (Emphasis supplied) (G.C. Exh. 5, Art. 23, Sec. 4.A.).

5. Judge Joel Elliott, who is located in Portland, Oregon, is Secretary of the Union, and with Judge Horn, had been one of the Union's negotiators on Article 23, confirmed Ms. Pepper's testimony (Tr. 148-149, 150). Judge Elliott stated, "A Well, I am not sure that we dropped it. . . . We just didn't get it [magnetometers and wands] on a national level and we are still going to try to do that through our health and safety committee . . . ." (Tr. 151).

6. Judge Elliott stated that the Portland, Oregon, OHA had had a wand since at least 1998 (id.). He further stated that based on the Portland experience there was no necessity that if you have the wand you also have to have the magnetometer or vice versa (Tr. 153).

7. In October, 2001, FBI Special Agent Robert Foster suggested to Acting HOCALJ Ronald Kaiser that the OHA office use wands and loaned him the FBI's spare wand to use until OHA could purchase its own (Tr. 69). On, or about October 28, 2001, Acting HOCALJ Kaiser instructed the office Administrative Assistant, Ms. Brenda Gay, to contact the Regional Office in Atlanta and request authorization to purchase a security wand. Ms. Gay contacted Ms. Pat Mellon, who is the security officer in Atlanta (Tr. 69-70) and Ms. Mellon responded that Lexington was authorized to purchase a security wand and one wand was purchased, by requisition (G.C. Exh. 2), and was picked up by Acting HOCALJ Kaiser and the security wand loaned by the FBI was returned. Judge Kaiser's tour as Acting HOCALJ ended on October 30, 2001 (Tr. 70). Judge Kaiser stated that he understood that one month later a second security wand was purchased for the Hazard [remote] office (id.), as, indeed, it was on November 28, 2001 (G.C. Exh. 2; Tr. 20-21). The wands were used by the guards until on, or about, March 13, 2002, when ROCALJ Henry Watkins ordered them removed (Tr. 21).

8. By memorandum dated March 15, 2002, to Lexington HOCALJ Richard Bentley, Judge Lawrence demanded bargaining on the removal of the wands (G.C. Exh. 3). HOCALJ Bentley responded by letter dated March 22, 2002, that he had no discretion or authority in this matter and he had transmitted the request to bargain to the ROCALJ (G.C. Exh. 4). Judge Lawrence received no response from ROCALJ Henry Watkins.

9. Although the Lexington office acted in the best of good faith by requesting permission of the Regional Office to purchase the wands, Ms. Mellon, who approved the purchases, was without authority to approve the purchase of wands. Ms. Gloria Bozeman, Regional Management Officer testified credibly and without contradiction that Ms. Mellon had no authority to approve the purchase of wands (Tr. 108, 109) and had no authority to tell the Lexington Office it could buy the wands with supply funds (Tr. 108). In fact, no one in the Region, including Ms. Bozeman, had such authority as only Headquarters in Baltimore may allocate funds for security enhancement (Tr. 109).

Ms. Bozeman furhter testified that when she learned of the wands in Lexington and Hazard on March 13, 2002, she immediately informed ROCALJ Watkins who called HOCALJ Bently and told him, ". . . it violated Agency policy to use those [wands] and he instructed us to remove them and we did." (Tr. 122). Ms. Bozeman stated that Ms. Mellon was counseled for her unauthorized approval of the purchase of the wands.

Following the discovery and removal of wands at Lexington and Hazard, a magnetometer was removed from the Montgomery OHA office and the Fort Lauderdale and Orlando offices had their wands removed. Ms. Bozeman stated that Respondent acted in each instance as soon as, ". . . they came to our attention. . . ." (Tr. 112).

CONCLUSIONS

Use of magnetometers, wands, x-ray equipment, etc., were negotiated at the national level and the issue was resolved by the adoption of Article 23. Because the use of wands is governed by Article 23, local negotiation is not appropriate. Because entry security is the first health and safety issue the Committee [Health and Safety] will address, the Union may bring the matter before the Committee and study should take into consideration the fact Respondent has already bought two wands at Lexington; the demonstrated experience that use of a wand does not require additional guard personnel; the demonstrated experience that use of a wand does not require a magnetometer, nor does use of a magnetometer require a wand; the encountered practice of people in Kentucky carrying weapons, (Tr. 71, 80); the fact that in Eastern Kentucky, 95 percent of the claimants are unemployable (Tr. 78) and almost all have mental problems (Tr. 79); etc. Obviously, safety considerations will vary in different locations; and assurance that the Union's concerns will be considered is provided by Article 23,

Section D, which provides, "This Article is subject to the grievance procedure."

Notwithstanding that a matter is covered by a collective bargaining agreement, I held, in Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA 736, 746 (1980),

> ". . . To constitute a condition of employment contrary to a negotiated agreement, such practice must: (a) be known to management; (b) responsible management must knowingly acquiesce; and (c) such practice must continue for some significant period of time." (4 FLRA at 746).

See, also: Southwest Division, Naval Facilities Engineering Command, San Diego, California, 44 FLRA 77, 93 n.6 (1992); Social Security Administration, Regional Office of Quality Assurance and Performance Assessment, Dallas, Texas, 56 FLRA 1108, 1113 (2001).

Here, the use of wands was known by management at Lexington, indeed, it was the Acting HOCALJ who initiated the matter. But responsible management did not know of Lexington's purchase and use of a wand at Lexington and later the purchase of a second wand for use at Hazard and did not acquiesce in the use of wands. Indeed, when responsible Regional management learned that Lexington was using wands it immediately, on March 13, 2002, ordered the wands removed. While in use at Lexington about five months and at Hazard for about four months, since responsible management neither knew nor acquiesced in their use, it is immaterial whether they had, or had not, been in use for a significant period of time.

Because entry security, including wands, is covered by, and subject to, the terms of the parties Agreement, Respondent did not violate § 16(a)(5) or (1) by refusing to negotiate locally the removal of unauthorized wands. Accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. CH-CA-02-0347 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: January 30, 2004
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. CH-CA-02-0347, were sent to the following parties in the manner indicated:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED**
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Dated: January 30, 2004
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