

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

MEMORANDUM

DATE: June 5, 2003

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
DALY CITY, CALIFORNIA

Respondent

and

Case No. SF-CA-02-0068

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 3172, 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 service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

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

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| SOCIAL SECURITY ADMINISTRATION DALY CITY, CALIFORNIA Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 3172, AFL-CIO Charging Party | Case No. SF-CA-02-0068 |

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 her 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 **JULY 7, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

SUSAN E. JELEN
Administrative Law Judge

Dated: June 5, 2003
Washington, DC

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

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|--|------------------------|
| SOCIAL SECURITY ADMINISTRATION DALY CITY, CALIFORNIA Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 3172, AFL-CIO Charging Party | Case No. SF-CA-02-0068 |

Wilson Schuerholz
For the Respondent

Stefanie Arthur, Esquire
For the General Counsel

Michael B. Codon
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 3172, AFL-CIO (Union or Local 3172) against the Social Security Administration, Daly City, California (Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (FLRA). The complaint alleges that the Respondent violated Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (Statute) by terminating the practice of taking "smoke breaks" in addition to the regular 15 minute rest breaks allowed during the morning and the afternoon, without providing notice and the opportunity to bargain to the Union.

A hearing in this matter was held in San Francisco, California on August 29, 2002. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent submitted a timely brief.

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.

Finding of Facts

The American Federation of Government Employees (AFGE) is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the Social Security Administration (SSA). Local 3172 is an agent of the AFGE, and represents bargaining unit employees at SSA facilities in California. (G.C. Ex. 1(b), 1(e))

Social Security Administration, Daly City, California (Respondent) is an agency under 5 U.S.C. 7103(a)(3). (G.C. Ex. 1(b), 1(e))

AFGE and SSA are parties to a collective bargaining agreement. Article 9 covers Health and Safety and includes Section 17, which calls for a Smoke Free Environment in all

SSA facilities.¹ There is no specific language that deals with "smoke breaks".

Article 10, Section 1, deals with Hours of Work and allows for two rest periods:

B. A rest period of fifteen (15) minutes duration will be allowed each employee twice **a day provided the employee works seven hours.** A rest period of ten (10) minutes duration will be allowed each employee during each period of extended shift overtime of at least 2 hours duration. On days when all work is overtime, a rest period of fifteen (15) minutes will be allowed for each period of 4 hours worked. Rest period will not be appended to period of leave or the beginning or end of the employee's workshift. Management will not restrict employee mobility during rest breaks. (R. Ex. 1, bold in original)

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Section 17 - Smoke Free Environment

In keeping with the parties' concern for the health, safety and well-being of all SSA employees, there shall be "no smoking" in any SSA facility.

The parties agree that they will intensify efforts to assist those employees who are interested in breaking the smoking habit. We are committed to making cessation programs available to each and every employee who wishes to participate in them. The cost of SSA-sponsored or approved programs will be paid by SSA, not by the employees. SSA-sponsored programs will be offered on the clock unless not available during duty hours. Programs approved by or sponsored by SSA will include or be similar to programs conducted by the American Lung Association or the American Heart Association. The parties recognize that these programs will be more easily developed in the large installations, e.g., PSCs, Headquarters and DOCs.

Employees who wish to stop smoking but who are unable to successfully complete a smoking cessation program, or who have quit smoking but are experiencing related difficulties, may seek additional assistance through the Employee Counseling Service. Employee participation in counseling or cessation programs related to smoking is strictly voluntary.

(R. Ex. 1, page 9) Similar language is found in the 1993 (R. Ex. 2) and 1990 (R. Ex. 3) collective bargaining agreements.

Article 1, Section 2 of the 2000 Agreement states that "It is agreed and understood that any prior benefits and practices and understandings which were in effect on the effective date of this Agreement at any level (national, council, regional and local), and which are not specifically covered by this Agreement do not detract from it shall not be changed except in accordance with 5 U.S.C. 71." (G.C. Ex. 6) A Memorandum of Understanding, attached to Article 4 of the 2000 Agreement, states "Unless it is clear that a matter at issue is set forth explicitly and comprehensively in the National Agreement or existing MOU, the subject is appropriate for mid-term bargaining." (G.C. Ex. 6) The same language is also found in the 1996 Agreement. (G.C. Ex. 7)

The Daly City office is a branch office within the San Mateo District. Adria Leslie has been the Branch Manager since March 2001 and Arceli Alvaro has been the Operations Supervisor since 1995. (G.C. Ex. 1(b), 1(e); Tr. 76, 77, 129) Ed Chin had been the Branch Manager from about 1992 until February 2001. (Tr. 46, 77) The Daly City office has moved several times since 1981, most recently in January 1995 to the current location at 355 Gellert Boulevard in Daly City. The Daly City office is on the second floor of the building. The Daly City office is open to the public from 9:00 a.m. until 4:30 p.m. each day. Employees are on flex schedules and may report as early as 7:00 a.m. (Tr. 11, 15)

Employees are allowed one 15 minute break in the morning, one 15 minute break in the afternoon and a 30 minute lunch break. The employees do not have a fixed schedule for breaks and generally take them whenever interviewing and dealing with the public allow. Employees cannot smoke in the building, but can smoke in an area away from the building. (Tr. 113, 115) Employees are also allowed to get water or coffee and go to the bathroom on times other than their breaks or lunch. (Tr. 151) Management does not normally keep track of such activities. (Tr. 151)

In September 2001, there were only two employees, Kerry Coleman and Peggy West, in the Daly City office who smoked. (Tr. 33) They often smoked together. Coleman has worked in the Daly City office as a service representative since 1999. As a service representative, she deals directly with the public on a face-to-face basis. She also sometimes answers the telephone. She works at a specific window in the front of the office and generally will close her window when she goes on break. Coleman asserted that there is no problem if she slips away from her work for 5 minutes as long as it does not interrupt coworkers and the public. Until

September 12, 2001, she had never been told that she could not take smoke breaks. (Tr. 11, 12, 14)

According to Coleman, she generally works from 7:00 a.m. to 5:30 p.m., working two credit hours each day. Before September 12, 2001, she would take a break at 8:55 a.m., before the office was open to the public. Then she would smoke on her morning break, at lunch, and on her afternoon break. Generally after her last client of the day, she would take another quick smoking break. The office is on the second floor and employees enter from the front lobby, through an employee entrance. Since smoking is not allowed in the building, Coleman would leave by either the front or back door. Most of the time she used the back door, and would go down the steps to a patio area in which smoking was allowed. (Tr. 15, 26) If there was a scheduled 8:00 a.m. staff meeting (generally used for training), she would smoke before that meeting, usually out the back door since it was closer to the lunchroom where meetings were held. (Tr. 16)

Coleman asserted that she did not hide the fact that she was going out for a smoke. "I have at times just said to my coworkers, I'm going to go have a quick smoke, but I don't generally announce it, and I don't really make a big deal out of it. I just do it." (Tr. 17) Coleman acknowledged that she was different from her coworkers since she went outside to smoke on an extra break while they stayed inside. (Tr. 23) In general she took extra breaks to smoke before 9 a.m. or after 4:30 p.m. (Tr. 28) She usually averaged two smoke breaks a day (other than her morning and afternoon breaks), anywhere from 5 to 7 minutes each. (Tr. 34) Coleman testified that her supervisor Alvaro was aware that she smoked and that she took extra breaks to smoke, since Alvaro had talked to her about how bad smoking was for her health and because Alvaro had come to get her outside for a phone call. (Tr. 37)

Peggy West has worked as a claims representative in the Daly City office. (Tr. 45) In addition to her regular breaks and lunch period, West took extra smoke breaks every day, generally only 3 to 5 minutes each time. (Tr. 50, 57) Her supervisor was aware of these breaks and knew where to look for her if she wasn't in the office. (Tr. 54)

On September 12, 2001, Coleman began work at 7 a.m. She and West went outside to smoke before a scheduled staff meeting at 8 a.m. Her manager, Adria Leslie, came looking for Coleman while she was smoking. Leslie told her that she was late for the meeting and had held everyone up. According to Coleman, Leslie had opened the back door just

as Coleman was walking up the stairs back to work. (Tr. 19, 20)

After the staff meeting, Leslie called Coleman into her office. According to Coleman, Leslie told her that they were not allowed to have smoke breaks and were not allowed to have breaks before 9:30 a.m. anyway. (Tr. 19, 20) Coleman believed that she had been reprimanded and had been told that she could no longer take smoke breaks. (Tr. 20)

According to West, on September 12, 2001, Leslie called West into her office and told her that she had two 15 minute breaks, one in the morning and one in the afternoon, and she could not split up her break times to smoke. (Tr. 57, 58, 60, 100). The manager did not say that she was not entitled to additional breaks other than those 15 minute breaks. (Tr. 60)

The Branch Manager, Leslie, testified that training was scheduled for certain employees, including Coleman, on September 12, 2001, at 8 a.m. Coleman was not present at the training, but Leslie had seen her earlier in the day and knew that she was in the office. Leslie went looking for Coleman and saw her outside smoking. Leslie called Coleman in for the training. (Tr. 117)

After the training, Leslie pulled Coleman aside and told her that breaks needed to be taken during the core hours and that breaks are not allowed at 8 a.m. (Tr. 118) According to Leslie, Coleman told her that she wasn't on a break because she was smoking and smoking did not count as a break. Leslie told her again that she needed to take her breaks during the core hours, and not before 9 a.m. (Tr. 118) Coleman told Leslie that she had always been allowed to smoke whenever she wanted and asked to speak to the Union representative. (Tr. 118) Leslie also spoke to West since she had been outside with Coleman. Both employees told her that this was not a break because it was smoking and smoking did not count as a break. (Tr. 118)

According to Leslie, this was the first time this issue had come to her attention. There is no prohibition about employees smoking on their regular breaks or lunches. They do have to go outside the facility to smoke. (Tr. 120) Leslie acknowledged that she had seen Coleman and West, the two smokers in the office, smoking prior to September 12, but she had assumed they were on their breaks and/or lunch. She did not see them outside smoking prior to 9 a.m. (Tr. 120)

Karen Sims is the San Mateo Manager, which includes the Daly City office. Employees are not allowed to smoke in any SSA facility and there are no specific smoke breaks, just breaks. (Tr. 147) Sims is also a smoker and testified that she had been at the Daly City office and had asked the employees if she could join them for a smoke. She testified that it was either the morning or afternoon break when this occurred. It was not before 9 a.m. or after 3:30 p.m. (Tr. 149) Sims testified that she was not aware of employees smoking except on regular breaks. (Tr. 150)

John Jimenez is Local 3172 president designee and is on 100% official time. He works at the Daly City office. He has seen employees take smoke breaks in addition to their regular breaks. (Tr. 75, 76, 79) He does not smoke.

Jimenez was told by West about the incident with Leslie. On September 13, 2001 he sent an email to Adria Leslie, requesting to bargain over any proposal to change working conditions currently in place. (G.C. Ex. 2)

Leslie replied by email on September 17, 2001, stating:

You have requested to bargain over a change in working conditions. I believe that you are referring to a discussion that I held with several employees in which I reminded them that they are limited to two fifteen minute breaks per day, during core hours. This has been the consistent practice in Daly City. We have never condoned smoking breaks or other additional break periods. We are not changing any conditions of employment. We therefore deny your request to bargain.

(G.C. Ex. 2)

A series of emails between John Jimenez and Adria Leslie then followed. On October 5, 2001, Leslie wrote:

Management's policy has been to make all employees aware of the rules, and to trust all employees to follow the rules regarding breaks and lunches. However, whenever a specific incidence (sic) comes to the attention of management, the employee is reminded of the rules. The incident involved occurred on September 12. The training calendar showed IVT for SRs and T16 CRs at 8:00a.m. Kerry had signed in for work at 7am, but she did not come to training at 8:00. Kerry was outside smoking with Peggy. Therefore, it was my

obligation to remind Kerry and Peggy of the contractual rules regarding breaks.

(G.C. Ex. 3-1)

On October 5, Michael B. Codon, President of Local 3172, responded to Leslie, stating:

Requiring an employee to be on time to a meeting is one thing; unilaterally changing smoke breaks is another. All of you in San Mateo management are being very uncooperative on this matter. We need you to specifically delineate your position-- were you merely informing an ee to be at a training sessions, and not on a smoke break, or were you informing them that they are not allowed to take smoke breaks?

(G.C. Ex. 3-1)

After further correspondence, on October 5, 2001, Leslie wrote to Codon:

Mike, my position is that there has not been a past practice to allow any more than two fifteen minute breaks a day. I have checked with some former managers and found several memos that address breaks. I also found the memo you sent Karen that discussed the smoking on the stairs.

(G.C. Ex. 3-3)

No further discussions took place and on October 23, 2001, the Union filed the unfair labor practice in this matter.

Since September 12, 2001, Coleman has continued to take breaks to smoke as she had always done. She stated "I don't used (sic) to hide the fact that I was going outside to smoke, but I tried to be casual about leaving the office. . . . since I felt it wasn't fair to my coworkers who weren't taking the extra smoke breaks". (Tr. 22, 23) She did state that she only smoked about 3 times between October 2001 and February 2002, but has now returned to smoking. (Tr. 35, 39)

After September 12, 2001, West also continued to take two 15 minute breaks and continued to take additional smoke breaks. West asserted that the manager did not tell her that she could not take smoke breaks. (Tr. 100)

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent violated Section 7116(a)(1) and (5) of the Statute when Adria Leslie, Manager of the Daly City office, terminated the practice of employees taking smoke breaks in addition to their regular 15 minute morning and afternoon breaks, without providing notice and the opportunity to bargain to Local 3172. The General Counsel argues that there is no dispute that smoke breaks are conditions of employment, *American Federation of Government Employees, AFL-CIO, National Council of Social Security Field Office Locals and Department of Health and Human Services, Social Security Administration*, 24 FLRA 842, 844 (1987) (proposal establishing rest breaks held to be negotiable), and it is well settled that conditions of employment of bargaining unit employees which are established by past practice may not be changed without the Activity providing the Union with notice and the opportunity to bargain. *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 8098 (2000); *United States Immigration and Naturalization Service*, 43 FLRA 3 (1991); *Internal Revenue Service and Brookhaven Service Center*, 6 FLRA 713 (1981).

The General Counsel argues that there was an established past practice at the Daly City office in which employees took smoke breaks in addition to their regular 15 minute morning and afternoon rest periods, with management's knowledge and consent. The evidence established that this practice had been consistently exercised over a significant period to time and followed by both parties, or followed by one party and not challenged by the other. *United States Patent and Trademark Office*, 57 FLRA 185, 191 (2001).

The General Counsel further argues that the Daly City office manager, Adria Leslie, terminated the long established practice at the Daly City office of employees being permitted to take smoke breaks. Further, the General Counsel submits that the fact that the employees may have continued to take smoke breaks does not affect the finding that Leslie implemented a change in the past practice, as the employees are now subject to discipline for failure to comply with Leslie's order and may now find themselves placed on AWOL or subjected to a requirement that they take leave or use credit hours for their smoke breaks. Since Respondent, by the actions of Leslie, did not inform the Union that she intended to terminate the employees' smoke breaks prior to her announcement to the employees and that she thereafter refused to bargain over the change in past

practice, General Counsel asserts that a violation of Section 7116(a)(1) and (5) must be found. *United States Immigration and Naturalization Service*, 43 FLRA 3 (1991) and *Defense Distribution Region West, Tracy, California*, 43 FLRA 1539 (1992).

The General Counsel further asserts that Respondent's defense that the collective bargaining agreement somehow allows it to terminate the practice of employees' taking smoke breaks must be rejected. Smoke breaks were a well-established past practice in the Daly City office; are not inconsistent with the rest periods allowed under the plain language of Article 10 or Article 38; and are not set forth "explicitly and comprehensively" in the National Agreement. Thus Respondent had no basis for terminating the smoke break practice without providing the Union notice and the opportunity to bargain.

Respondent

Respondent denies that it has violated the Statute as alleged in the complaint. It asserts that there was no established policy or past practice in the Daly City office that allowed employees to take smoke breaks in addition to the regular 15 minute rest breaks provided in the National AFGE/SSA Agreement. Respondent argues that the managers in the Daly City office never even knew that these smoke breaks were being taken and that the two employees out of a staff of seventeen who did take such breaks continued to do so even after they had been told not to. Further, Respondent argues that the matter of breaks and the matter of smoking are explicitly and comprehensively contained in and covered by the collective bargaining agreement in place in 2001, and therefore further dealings in these areas should be foreclosed. Even assuming a smoke break practice did exist, Respondent argues that it is free to bring any smoking or break practice into conformance with the Article 9, Section 1 and 17, and Article 10, Section 1, without any further negotiations.

Conclusions

The evidence clearly establishes that bargaining unit employees in Respondent's Daly City office are entitled to two 15 minutes breaks each day, one in the morning and one in the afternoon. These breaks are set forth in the parties' national agreement, which does not discuss any other type of breaks. Just as clearly, the bargaining unit employees in Respondent's Daly City office are entitled to a certain amount of personal time during the work day, in which they leave their work area and go to the bathroom, go

to the break room for coffee or some other drink, and chat with their co-workers. Management in the Daly City office is aware of these activities and has no problem with such activities, as long as employees work in a professional manner.

The evidence further establishes that the Respondent's Daly City office is a smoke-free environment and no smoking is allowed in the office. Therefore any employee who wishes to smoke must leave the office to do so. The evidence further shows that Respondent has no problem with the type of activities employees engage in on their breaks and they are free to leave the office and smoke within the confines of the time restraints.

The Daly City office is open to the public from 9:00 a.m. to 4:30 p.m., and both contractual breaks and a lunch period fall within these time frames. The real issue in this matter concerns the time period before 9:00 a.m. and after 4:30 p.m., and whether employees have smoked during these times. The General Counsel argues that a past practice has developed in which employees were allowed to leave the office prior to 9:00 a.m. and after 4:30 p.m. in order to smoke. The Respondent argues that management was unaware of any such practice.

With regard to whether a past practice has been established in this case, it is axiomatic that the General Counsel bears the burden of establishing each and every allegation of the alleged unfair labor practice in order to establish a violation of the Statute. See *U.S. Department of Commerce, Patent and Trademark Office*, 54 FLRA 360, 370 (1998). In order to show that a past practice existed herein it was necessary to demonstrate that there was a practice which was consistently exercised or followed over an extended period of time with the knowledge and express or implied consent of responsible management officials. *Defense Distribution Region West, Tracy, California*, 43 FLRA 1539 (1992); *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899 (1990).

The evidence clearly shows that there has been a past practice at the Daly City office in which employees left the office in order to smoke prior to 9:00 a.m. and after 4:30 p.m. I credit the testimony of Coleman and West regarding their smoking activities before 9:00 a.m. and after 4:30 p.m., specifically that they took such smoking breaks on a regular and consistent basis. I further credit their testimony that they took smoke breaks with the knowledge of management officials, including Operations Supervisor Jay Whitehead, Manager Ed Chin and Operations Supervisor Arceli

Alvaro. (Tr. 14, 17, 50, 52, 71)² The current management apparently chose not to acknowledge or deal with this situation until the specific incident on September 12, 2001. One of the two employees was late for scheduled training and held the training up for all the employees. The manager went to find her and found her outside smoking when she should have been at the scheduled training. The evidence shows that the employees did not consider their leaving the office to smoke to be an official break, but rather more in line of the personal time that they and other coworkers took throughout the day. I do not doubt that both smoking employees also took extra time during the day to go to the bathroom, get coffee and chat with coworkers. In addition they also took additional time to smoke. While the General Counsel notes that these employees might have felt "put upon" because of the nature of their breaks, it is apparent that they did what they pleased.

Respondent's manager did in fact remind the employees that they were only allowed two breaks during the day, one in the morning and one in the afternoon. And she reminded them that there was no such thing as a smoke break. Since the collective bargaining agreement contains no language referencing a smoke break, it appears to me that she is correct in this matter. However, that is of no consequence, since there was in fact a past practice of personal breaks for a variety of reasons, including smoking.

However, in order for there to be a violation of the Statute, the Respondent must have actually terminated a condition of employment. In this regard the evidence clearly shows that the employees in question have continued to smoke prior to 9:00 a.m. and after 4:30 p.m. I find it inconceivable that the management of the Daly City office was not aware of their continued practice, even if they were "sneaking around" to do it. However, management has only spoken to the employees about the practice one time and has allowed it to continue at least through the date of the hearing.

Under these circumstances, I find that the Respondent did not actually change a condition of employment.

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In agreement with the Counsel for the General Counsel, I find the Respondent's failure to call Ed Chin, the former Daly City manager, as a witness, requires the adverse inference that his testimony would not have contradicted that of Coleman and Wills and would have supported the conclusion that the practice was well established with management's full knowledge. *Internal Revenue Service, Philadelphia Service Center*, 54 FLRA 674 at 682 (1998).

Accordingly, it is concluded that the Respondent did not terminate the past practice of employees smoking prior to 9:00 a.m. and after 4:30 p.m. Consequently, it is found that Respondent had no obligation to provide notice to Local 3172, and therefore, did not violate section 7116(a) (1) and (5) of the Statute.³

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in SF-CA-02-0068 be, and it hereby is, dismissed in its entirety.

Issued, Washington, DC, June 5, 2003.

SUSAN E. JELEN
Administrative Law Judge

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I further find that since smoke breaks were a well-established condition of employment, the Respondent could not change such a condition of employment without meeting its statutory obligation to provide notice and the opportunity to bargain to the Union prior to implementing any change. I do not find the Respondent's contract arguments persuasive. Smoke breaks are not specifically addressed in either Article 10 or Article 9, Section 17, but are not inconsistent with the plain language of the collective bargaining agreement. Therefore the collective bargaining agreement does not allow for the unilateral termination of such a past practice without first meeting the obligations of the Statute.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-02-0068 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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3214

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Dated: June 5, 2003
Washington, DC