OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

VETERANS AFFAIRS MEDICAL CENTER HUNTINGTON, WEST VIRGINIA

Respondent

and

Case No. WA-CA-20369

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2344, AFL-CIO

Charging Party

Peter A. Niceler, Esquire

For the Respondent

Christopher M. Feldenzer, Esquire

For the General Counsel

Mr. Carl H. Blevins

For the Charging Party

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 two unilateral changes: one involved the stopping of annotating on posted work schedules leave usage, overtime, unscheduled time, etc., which Respondent asserts it stopped because public disclosure of such information violated the Privacy Act and it was not required to bargain concerning a

change in practice to comply with law; the other involved the use of VA seniority for selection of vacations rather than total government service, and Respondent asserts it was not required to bargain about a change in practice to conform to the terms of a negotiated agreement.

This case was initiated by a charge filed on February 19, 1992 (G.C. Exh. 1(a)), which alleged violations of §§ 16(a) (1), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued on May 29, 1992 (G.C. Exh. 1(b)), alleged violations of §§ 16(a)(1) and (5) only and set the hearing for a date, time and place to be determined later. By Order dated July 9, 1992 (G.C. Exh. 1(d)), the hearing was scheduled for September 24, 1992, in Huntington, West Virginia. By Notice, dated September 10, 1992 (G.C. Exh. 1(f)) pursuant to motion of Respondent, to which there was no objection, for good cause shown, the hearing was rescheduled for October 7, 1992, pursuant to which a hearing was duly held on October 7, 1992, in Huntington, West Virginia, 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 conclusion of the hearing, November 9, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to December 9, 1992. Respondent and General Counsel each timely delivered, or transmitted by facsimile, a brief on December 9, 1992, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

A. Change of seniority for vacation selection.

The Master Agreement between the Veterans Administration and American Federation of Government Employees, effective August 13, 1982, in Article 17, "TIME AND LEAVE" in Section 2 C. provides as follows:

> "C. If conflicts arise between employees' annual leave requests, they shall be resolved consistent with present practices or as otherwise negotiated in supplemental agreements." (G.C. Exh. 2(a), Art. 17, Section 2 C., p. 31).

The Local [supplemental] Agreement between Respondent and AFGE, Local 2344 (G.C. Exh. 2(b)) became effective March 3, 1978[2], and in Article XI, "LEAVE" Section 3 provided as follows:

> "Section 3: Where there is a conflict of choices for annual leave for the same time, the employees concerned will attempt to resolve the situation by private discussion. If, after this discussion a mutual agreement cannot be reached, the employee with the longest total VA Service will be given first choice. . . ." (G.C. Exh. 2(b), Art. XI, Section 3) (Emphasis supplied).

Notwithstanding Article XI, Section 3, it is undisputed that the practice throughout the bargaining unit, including the Nursing and Dietetic Service, from 1982 had been that Service Computation Date, rather than VA Service, was used for the choice of vacation time (Tr. 29, 30, 33, 53; G.C. Exh. 5(a)). Although "Service Computation Date" includes all federal government employment, the significant factor here was the inclusion

of active duty military service (Tr. 30, 33).

Respondent concedes that in, or about, November 1991, it unilaterally changed the practice in the Nursing and Dietetic Services of using Service Computation Date to the use of VA Service only[(3)] for selection of vacations (Tr. 34, 53, 54). The VA Service Computation Date list (G.C. Exh. 5(b)) when compared to the Service Computation Date list (G.C. Exh. 5(a)) shows that the change affected every employee in some manner, although for some, such as Keith Mays and Gary Whitley, their relative position on the list was unchanged, others such as Ray Collinsworth, who lost about ten years seniority, moved down on the seniority list, while some, such as Louise Warren, who had no military service, moved up on the seniority list (Tr. 32, 33). Mr. Thacker stated that the change was made to comply with the Local Agreement (Tr. 53, 54) and Respondent asserts, in part, that it was not obligated to bargain about a matter already negotiated (Tr. 41; Respondent's Brief, pp. 2, 3).

Procedures for resolving conflicts between employee leave schedules is a condition of employment. National Association of Government Employees, Local R4-75, 24 FLRA 56, 57 (1986). Although the parties in 1978 negotiated as the procedure for resolving conflicts in the selection of vacations the use of VA service, since 1982 the parties have followed a different procedure, namely the use of Service Computation Date. Obviously, the parties over a period of many years engaged in a practice that differed from the contractual procedure. As the practice constituted a condition of employment within the meaning of § 3(a)(14) of the Statute, it could not be unilaterally altered. U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana, 36 FLRA 567, 570 (1990). Respondent by its unilateral action in changing an established condition of employment violated §§ 16(a)(1) and (5) of the Statute. Respondent's assertion that the change was "a de minimis change" (Respondent's Brief, p. 3) is without merit. The Authority has made it clear that where, as here, the decision to make a change is negotiable,

> ". . . the question is whether the statutory obligation to notify and negotiate with the exclusive representative concerning the change was fulfilled, not the extent of impact . . . upon the unit employees." (Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 19 FLRA 1085, 1088 (1985).

B. Discontinuance of annotating posted work schedules in Dietetic Service.

It also was undisputed that it had long been Respondent's practice to annotate the posted work schedules in Dietetic Service to show sick leave taken, annual leave taken, hours worked outside scheduled hours, change of days off, and for part-time employees hours of unscheduled work (UNS). The annotated work schedules, which as annotated showed all hours worked, charged to annual or sick leave, or AWOL, were initialed by the supervisors to certify the correctness of the information and constituted the pay records from which the timekeeper transferred the data shown to the time cards for payroll purposes (G.C. Exh. 3; Res. Exh. 2; Tr. 45, 46-47, 48, 49). For example, for the second week of payroll period 15 [July 28 - August 10, 1991] General Counsel Exhibit 3 shows, inter alia, as follows: the regular schedule for full-time employees is shown to the right of their names (Blevins 6-2½, i.e. 0600-1430); scheduled days off shown by the typed "xs"; annotations for Mr. Blevins show sick leave (SL) on Thursday and Friday; an annotation for Mr. Perry also shows two days of sick leave; for Mr. Adkins an annotation shows that he worked on Saturday 0930-1800, rather than his scheduled hours of 1030-1900; and annotations for Mr. Smith show that he took 6 hours sick leave on Wednesday (1300-1900), and that he took annual leave on Thursday. The scheduled hours for part-time employees, beginning with Mr. Collinsworth, are for the most part the typed hours. Thus, Mr. Collinsworth was scheduled to work 0600-1000 on Sunday, 0700-1100 on Monday when, in addition, he worked

unscheduled hours 1130-1430 (3 UNS), he worked the same hours on Tuesday, on Wednesday he had 3 unscheduled hours, i.e. hours outside his regular schedule for that day of 0600-1000, which in fact were scheduled in advance (Tr. 24), as well as his regularly scheduled hours, on Thursday, his scheduled day off, he had eight hours unscheduled time (0600-1430) and on Saturday had three unscheduled hours (1130-1430) in addition to his scheduled hours (0600-1000). Of course, sick leave and annual leave was shown where applicable, e.g. Mr. Carr: annual leave on Monday, sick leave on Friday. (G.C. Exh. 3; Tr. 23-25).

In late November 1991, Mr. Thacker, Chief of Food Production and Service, told Mr. Ray Collinsworth he could not make Xerox copies of the (annotated) work schedule (Tr. 44). Another employee told Mr. Thacker that Mr. Dallas Crabtree regularly made copies of the work schedules, whereupon, Mr. Thacker went to Mr. Crabtree and told him he was not allowed to make copies of the work schedules and that he was not to do it again. In the meantime, Mr. Collinsworth had gone to Personnel to find out what regulation Mr. Thacker based his decision that the schedules could not be copied (Tr. 45). Mr. Thacker told Personnel he knew only that he had been told throughout his sixteen years with VA that it should not be done and suggested that Personnel check with Fiscal.

Mr. Samuel S. Stewart, Assistant Chief, Fiscal Service received the call from Personnel and when he learned that Dietetic Service was annotating the posted work schedules he told Personnel that that was not proper, but that he would call VA's Central Office in Washington, D.C., to verify his statement. VA Central Office responded that the information annotated on the work schedules fell under the Privacy Act and should not be published for public consumption (Tr. 56). Washington Central Office's advice was confirmed in writing (Res. Exh. 1, second page; Tr. 57) and Personnel was sent a written confirmation (Res. Exh. 1; Tr. 57). Veterans Affairs Regulation MP-6, Part V, Supp. No. 2.2, Change 7, Section 102.04 "TIME AND ATTENDANCE REPORTS" provides in part as follows:

> "(2) **Privacy Act.** The Time and Attendance Report (VA Form 4-5631), as well as the information contained on this report, is protected by the Privacy Act. . . .
>
> . . .
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> "(3) **Use of Subsidiary Records.** VA Form 4-5631 is a preprinted, computer-generated form and is the official record used for time, attendance, and leave for all employees on the rolls. No other record is required; however, when a subsidiary record is used, it must bear the signature of a responsible employee . . . that the employees whose names appear thereon have performed the hours or days of duty for which credited, or the hours or days charged for absence from duty. . . ." (Res. Exh. 3).

Upon verification by Fiscal that the practice of annotating the posted work schedules was in violation of the Privacy Act, Mr. Thacker discontinued the annotation practice and posted a "blank schedule" for public view (G.C. Exh. 4; Tr. 45). The so called "blank" schedule shows, of course, the scheduled hours of each employee and the scheduled days off for each employee. Mr. Blevins testified that the change occurred in November 1991 (Tr. 25). Mr. Thacker stated that his conversation with Mr. Collingsworth occurred on November 29, 1991, so that the change probably did not occur until the very end of November or the first of December 1991.

This is borne out by the Union's letter dated December 12, 1991 (G.C. Exh. 6(a)). Since the change, as General Counsel Exhibit 4 shows, there has been no annotation to show leave or unscheduled hours (Tr. 21, 22, 23).

Mr. Stewart testified that the annotations on the posted work schedules were improper; VA's Central Office confirmed Mr. Stewart's conclusion that the information annotated on the work schedules fell under the Privacy Act and should not be published for public consumption; and VA's regulations plainly state that: (a) Time and Attendance Reports, and the information contained thereon, are protected by the Privacy Act; and (b) Subsidiary Records, when used, are part of the Time and Attendance Reports (Res. Exh. 3). Plainly, the annotated time sheets, signed by the responsible supervisors, constituted Subsidiary Records (Res. Exhs. 2, Paragraph 5; 3, Sec. 102.04(3)). General Counsel offered no testimony or evidence and cites no authority to refute Respondent's testimony and evidence that public disclosure of the data constituting the employees time and attendance record (all hours worked, all leave taken, all unexcused time, etc.) violated the Privacy Act and that the practice was, therefore, unlawful. On the basis of the record, I find that the public disclosure of the employees time and attendance by the annotation of the data onto the posted work schedules was in violation of the Privacy Act, 5 U.S.C. § 552a, and the Regulations of Department of Veterans Affairs. Because the practice was unlawful, Respondent had no obligation to bargain concerning its decision to terminate the practice; neverthe-less, Respondent was obligated to give the Union notice of the change and an opportunity to request bargaining over the impact on unit employees of its decision to discontinue the unlawful past practice and, as it failed to do so, Respondent violated §§ 16(a)(5) and (1) of the Statute. Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543, 545-546 and n.9 (1982); Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, 17 FLRA 394, 395-396 (1985); U.S. Department of Interior, Bureau of Reclamation, 20 FLRA 587, 588-589 (1985); U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 44 FLRA 343, 353 (1992).

There is no dispute concerning the posting of work schedules. As noted above, Respondent continues to post work schedules (G.C. Exh. 4). It is only the annotation of posted work schedules that Respondent has terminated. Indeed, the supervisors maintain in their office, out of public view, an annotated work schedule for payroll purposes (Tr. 45). Because this is not an information case there is no question of balancing competing interests.

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute by its unilateral decision to change the long established practice of using Service Computation Date for the choice of vacation time and by its failure to give the Union an opportunity to bargain over the impact of its decision to terminate in the Dietetic Service its unlawful dissemination of time and attendance data, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that the Veterans Affairs Medical Center, Huntington, West Virginia, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the American Federation of Government Employees, Local 2344, AFL-CIO (hereinafter, "Union"), the exclusive representative of its employees, concerning any decision to change the established practice of using Service Computation Date for the choice of vacation time and refusing to provide an opportunity for the Union to bargain, to the extent consonant with law and regulation, with respect to the impact and/or implementation of a legally required change in its practice of disseminating time and attendance data in the Dietetic Service by annotating such information on posted time schedules.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Forthwith withdraw and rescind its November or December 1991, decision to use VA Service Computation Date for the selection of vacations and immediately reinstate the established practice of using Service Computation Date for the selection of vacations; provided, however, that the reinstatement of the use of Service Computation Date for vacations already scheduled to be taken during the present calendar year will avoid, to the fullest extent possible, any adverse impact for employees who have chosen vacations on the basis of VA service only.

(b) Bargain in good faith with the Union on any proposed change of the use of Service Computation Date for the selection of vacations.

(c) Upon request, negotiate with the Union concerning the impact and implementation of discontinuing the practice of annotating posted work schedules in the Dietetic Service.

(d) Post at its facilities at the Veterans Affairs Medical Center, Huntington, West Virginia, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by Medical Center Administrator, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: September 20, 1993

Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with the American Federation of Government Employees, Local 2344, AFL-CIO (hereinafter, "Union"), the exclusive representative of our employees, concerning any decision to change the established practice of using Service Computation Date for the choice of vacation time.

WE WILL NOT refuse to provide an opportunity for the Union to bargain, to the extent consonant with law and regulation, with respect to the impact and/or implementation of a legally required change in our practice of disseminating time and attendance data in the Dietetic Service by annotating such information on posted time schedules.

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

WE WILL forthwith withdraw and rescind our November or December 1991, decision to use VA Service Computation Date for the selection of vacations and WE WILL immediately reinstate the established practice

of using Service Computation Date for the selection of vacations; provided, however, that we will avoid, to the fullest extent possible, any adverse impact for employees who have vacations scheduled in the current calendar year selected on the basis of VA service only.

WE WILL bargain in good faith with the Union on any proposed change of the use of Service Computation Date for the selection of vacations.

WE WILL, upon request, negotiate with the Union concerning the impact and implementation of discontinuing the practice of annotating posted work schedules in the Dietetic Service.

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(Activity)

Date: _________________________ By: _________________________________

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037, and whose telephone number is: (202) 653-8500.

Dated: September 20, 1993

Washington, DC

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)".

2. Article XII, "HOURS OF WORK AND SHIFT SCHEDULING", Section 6 was amended as to Nursing Service employees only,effective September 5, 1978 (G.C. Exh. 2(b), final page). As amended, Section 6 provides, in part, that, "Assignment to shifts will be made on the basis of senority [sic] in VA service, (choice of shift given to employees with the most senority [sic])." This case does not involve shift selection and there was no testimony or evidence concerning seniority used for shift selection in the nursing service.

3. Although the policy was changed in November or December 1991 (Tr. 52), Mr. Jackie Dale Thacker, Chief of Food Production and Service, stated that vacations, already selected for 1992, were not changed (Tr. 53); but, see Tr. 32.