UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. PENITENTIARY

FLORENCE, COLORADO

Case No. DE-CA-60694

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 1301

Charging Party

Octavia R. Johnson

Counsel for the Respondent

Thomas Van Acker

Representative for the Charging Party

Hazel E. Hanley

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by issuing and implementing an Institution Supplement, changing the practice whereby bargaining unit employees nominated and/or voted for their peers to receive three annual awards, without providing the Charging Party with advance notice and/or an opportunity to negotiate to the extent required by the Statute.

Respondent's answer admitted the allegations as to the Respondent, the Charging Party, and the charge, but denied any violation of the Statute.

For the reasons explained below, it is concluded that a preponderance of the evidence does not support the alleged violations.

A hearing was held in Colorado Springs, Colorado. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record,[(1)] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Respondent, Union, and the Master Agreement

The American Federation of Government Employees, National Council of Prison Locals (AFGE) is the exclusive representa-tive of a nationwide consolidated unit of Federal Bureau of Prisons employees. The Federal Bureau of Prisons and AFGE negotiated a master collective bargaining agreement (Master Agreement) which became effective on September 1, 1992. The Charging Party, AFGE Local 1301 (Local or Union) represents unit employees at the Respondent, the U.S. Penitentiary, Florence, Colorado, an activity or component of the Federal Bureau of Prisons (BOP). Article 9, "Negotiations at the Local Level," Section e of the Master Agreement provides as follows:

Institution Supplements which derive from Bureau-level policy issuances, and which change local working conditions or personnel policies and practices for members of the unit, will be subject to negotiation with the local Union, where required by 5 USC Sections 7106, 7114 and 7117, subsequent to the issuance and implementation of the policy. When institution supplements are issued, the Employer at the local level will send copies of all such supplements to the Local President. When institution supplements are issued, the Employer will insure the Local President receives a copy of all such supplements (i.e., through institution routing, hand delivery, etc.)

The local Union will have up to 30 days from the date of receipt to submit a written request to negotiate. Failure to timely submit a written request to negotiate will be considered a waiver of the local Union's right to bargain. It is understood by the parties that changes to institution supplements which change personnel policies or practices or conditions of employment will not be made through the use of oral or written directives outside the local Employer's formal policy issuance system.

Any other local issuances, either oral or written, which change personnel policies or practices, or conditions of employment, shall be subject to local negotiations prior to implementation.

Awards for Correctional Officer of the Year, Correctional Worker of the Year, and Rookie of the Year

The Respondent, as a new prison facility, began acquiring employees in 1993 and received its first inmates in February 1994. Since 1994, the Respondent has celebrated National Correctional Officers week in May of each year. In May 1994, bargaining unit employees nominated and/or voted for employees to receive awards for Correctional Officer of the Year, Correctional Worker of the Year, and Rookie of the Year. The Respondent's answer admits that "[t]he practice . . . developed with the knowledge and/or acquiescence of Respondent."

1994 and 1995 Institution Supplements

On October 1, 1994, under Warden Patrick Whalen, and November 1, 1995, under Warden Joel Knowles, the Respondent issued Institution

Supplement FLP3000.2-451A and B, respectively, titled, "Incentive Awards Program" (1994 Supplement and 1995 Supplement, respectively). The 1994 Supplement noted that it was rescinding Institution Supplement FLP3000.1-451A of the same title dated July 1, 1993. The 1994 and 1995 Supplements each stated that it "must be read in conjunction with Program Manual 3000.2 and Program Statement 3451.3 [BOP Incentive Awards Program, dated November 6, 1989]." The Supplements, among other things, set forth the criteria for the Correctional Officer of the Year, Correctional Worker of the Year, and Rookie of the Year "as seen by his/her peers and other staff members"[(2)] and provided that selections would be made by ballot to the Human Resources Manager.

On each occasion the Union either was provided by the Respondent, or learned of, the 1994 and 1995 Supplements, and was satisfied with the changes that were made (which were unrelated to the issue herein), and did not request to bargain. In May of 1995, Dale Lewsader, President of the Union, and former Chief Steward Malcolm Lane received tie votes by their peers as Correctional Officer of the Year and each received the award. Receiving the approval of peers in this manner was considered very significant by Lewsader and added to the honor of the award.

The 1996 Institution Supplement

On April 15, 1996, Warden Joel Knowles issued and implemented Institution Supplement FLP3000.2-451C, titled "Incentive Awards Program" (1996 Supplement). The Supplement rescinded the previous supplement and again noted that it "must be read in conjunction with Program Manual 3000.2 and Program Statement 3451.3 [BOP Incentive Awards Program, dated November 6, 1989]." The 1996 Supplement changed the procedure for selection of Correctional Officer of the Year, Correctional Worker of the Year, and Rookie of the Year. No longer were they to be selected by the vote of their peers and other staff. The Correctional Officer of the Year would be nominated by the Captain and Lieutenants and selected by the Warden and Associate Wardens. The Correctional Worker of the Year would be nominated by Department Managers and selected by the Warden and Associate Wardens, and the Rookie of the Year would be nominated by the Department Heads and selected by the Warden and Associate Wardens.

The Warden and the executive staff decided to make the changes because they concluded (1) that the balloting process had become a popularity contest; (2) the previous awardees were not reflective of the standards in the supplement; (3) the relatively inexperienced staff did not have access to the performance levels of the individuals for whom they were voting; and (4) supervisors and department heads had more direct knowledge of the overall performance and contributions of particular staff members.

No Advance Notice to Union

The Respondent did not give the Union advance notice of the issuance and implementation of the 1996 Supplement on April 15, 1996, basing that decision on Article 9, Section e of the Master Agreement. The Respondent did provide the Union a copy on April 22, 1996.

On May 7, 1996, the Union advised the Respondent that it had not been given the opportunity to negotiate the changes in the Supplement. The Union objected to the selection by management for the three awards instead of by the vote of peers and requested to know when ballots would be given to the staff under the previous procedure.

1996 Awards Made

On May 8, 1996, the awards for Correctional Officer of the Year, Correctional Worker of the Year and Rookie of the Year were made by the Respondent without any vote by employees and pursuant to the 1996 Supplement.

Post-Implementation Bargaining Offered

On May 9, 1996, the Respondent informed the Union that the changes set forth in the 1996 Supplement were used in making the selections for the 1996 awards. The Union was advised to contact management if it desired to negotiate on the Supplement. The Union did not request or desire to engage in post-implementation bargaining. Instead, it filed the unfair labor practice charge on May 17, 1996.

Discussion and Conclusions

Positions of the Parties

The General Counsel contends that the Respondent violated section 7116(a)(1) and (5) of the Statute by issuing and implementing the 1996 Institution Supplement, thereby changing the practice whereby bargaining unit employees nominated and/or voted for their peers to receive three annual awards, without providing the Union with advance notice and/or an opportunity to negotiate to the extent required by the Statute. The General Counsel contends that the Union had 30 days to submit its request to negotiate and did not have adequate advance notice

between receipt of the Supplement on April 22, 1996, submission of its request on May 7, 1996, and the Respondent's presentation of awards pursuant to the new Supplement on May 8, 1996. The General Counsel requests status quo ante relief and remedial training in the Statute for the responsible management officials and supervisors.

The Respondent defends on the basis that it acted in accordance with Article 9, Section e of the Master Agreement by issuing and implementing the 1996 Institution Supplement, sending it to the Union, and being willing to negotiate *subsequent* to the issuance and implementation of the Supplement upon receiving a request from the Union within 30 days of receipt. The Respondent also contended at the hearing that it did not change working conditions or personnel policies and practices for members of the unit but only the process by which such awards were made.

Duty to Negotiate

Section 7116(a)(5) of the Statute makes it an unfair labor practice for an agency to fail or refuse to bargain in good faith with an exclusive representative of its employees. As a result, an agency must provide the exclusive representa-tive with notice of proposed changes in conditions of employment affecting unit employees and an opportunity to bargain over those aspects of the changes that are negotiable and not covered by or contained in an agreement between the parties. Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana, 48 FLRA 6, 21 (1993), vacated in part on other grounds, 56 F.3d 273 (D.C. Cir. 1995).

Change in Condition of Employment

The determination of whether a change in conditions of employment occurred involves an inquiry into the facts and circumstances regarding the Respondent's conduct and employees' conditions of employment. U.S. Department of Transportation, Federal Aviation Administration, Washington, D.C. and Michigan Airway Facilities Sector, Belleville, Michigan, 44 FLRA 482, 493 n.3 (1992). The Respondent acknowledges that the 1996 Institution Supplement changed the practice whereby bargaining unit employees have nominated and/or voted for employees to receive the three awards. (General Counsel's Exh. 1(h), Amended Answer, paragraph 1). The Authority has held that a proposal relating to incentive awards concerns a condition of employment within the meaning of section 7103(a)(14) of the Statute. Department of Veterans Affairs Medical Center, St. Louis, Missouri, 50 FLRA 378, 379-80 (1995)(holding award program a condition of employment and that agency violated the Statute by terminating the employee of the month award program without prior bargaining with the union over the substance, impact and implementation of that decision). See also International Federation of Professional and Technical Engineers, Local No. 1 and U.S. Department of the Navy, Norfolk Naval Shipyard, 38 FLRA 1589, 1593 (1991) and National Treasury Employees Union and Internal Revenue Service, 27 FLRA 132, 136-37 (1987)(incentive award proposals concerned conditions of employment). Therefore, a change occurred in this case which involved a condition of employment. The remaining inquiry is whether the parties' collective bargaining agreement allowed the Respondent's action.

The Authority's Approach

In U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (SSA), the Authority established a three-pronged approach for determining whether it should sustain a respondent's assertion that it has no duty to bargain based on the terms of the existing negotiated agreement. First, the Authority looks to the express language of the provision of the agreement to determine whether it reasonably encompasses the subject in dispute. Id. at 1018. In this connection, an exact congruence of the language is not required. Id. Thus, the requisite similarity will be found if a "reasonable reader would conclude that the provision settles the [subject] in dispute." Id. If the provision does not expressly encompass the subject in dispute, the second prong will be applied. In this regard, the Authority determines whether the subject in dispute is "'inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract.'" Id. (citing C & S Industries, Inc., 158 NLRB 454, 459 (1966). In other words, the Authority determines if the subject in dispute is "so commonly considered to be an aspect of" a subject set forth in a provision of a contract that negotiations over that subject are presumed foreclosed. Id. Third, in cases where it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated, the Authority will examine all of the record evidence, including the parties' bargaining history, and decide whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. SSA, 47 FLRA at 1019.

Applying the Analytical Approach

Applying the analytical approach in SSA, I conclude that the Respondent had no obligation to bargain with the Union before implementing the 1996 Institution Supplement. In this connection, I find that the general subject matter of the dispute is inseparably bound up with the provisions of Article 9, Section e of the parties' agreement, which concern negotiations at the local level over institution supplements.

As set forth in detail above, Article 9, Section e provides that institution supplements "which derive from Bureau-level policy issuances, and which change local working conditions" will be subject to negotiation "subsequent to the issuance and implementation of the policy." In the absence of any testimony as to the intended meaning of the term, Webster's Third New International Dictionary 608 (1971) defines "derive" as "to take or receive from a source." The 1996 Institution Supplement (and all previous supplements) reflects that it "establish[es] local procedures" and "must be read in conjunction with" Bureau of Prisons Program Statement 3451.3, Incentive Awards Program, dated November 6, 1989. Therefore, I conclude that the 1996 Institution Supplement was derived from a Bureau-level policy issuance. The phrase "Institution supplements which derive from Bureau-level policy issuances," is modified by "and which change local working conditions." Thus, the contemplated change emanates from the Institution supplement so derived and there is no requirement in the agreement that the Bureau-level policy issuance be the specific source of the local change. The agreement provides that such Institution supplements are subject to negotiation *subsequent* to their issuance and implementation.

No Contrary Past Practice

The record fails to establish the existence of a binding past practice modifying the terms of the parties' agreement. To find the existence of such a past practice, there must be a showing that the practice was consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent. For example, U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky, 42 FLRA 137 (1991). The prison opened in 1993 and, except for possibly the 1994 awards, the record indicates that all awards since that time have been governed by the terms of an applicable Institution Supplement issued in a manner consistent with the Master Agreement. Therefore, there has been no past practice consistently exercised for an extended period of time at variance with the terms of the parties' agreement.

Notice Also Covered By Contract

The adequacy of the notice to the Union is also a matter contained in or covered by the parties' agreement. Article 9, Section e provides that "[w]hen institution supplements are issued, the Employer will insure the Local President receives a copy[.]" The Local then has 30 days from the date of receipt to submit a written request to negotiate. In this case, the 1996 Institution Supplement was issued and implemented on April 15, 1996, and received by the Union on April 22, 1996. The Union's request to bargain of May 7, 1996 was within the 30 day period provided by the agreement. Even though the awards were presented pursuant to the new supplement on May 8, 1996, the agreement provided that such bargaining occurs *subsequent* to the issuance and implementation of the policy. Therefore, even though it would have been better practice for the Union to have received earlier notice of the change, the notice was adequate under the terms of the agreement since the agreement foreclosed bargaining on the changes except *subsequent* to the issuance and implementation of the policy.

No Violation of the Statute

As the subject of the Union's bargaining demand is covered by procedures contained in the parties' agreement, the Respondent was not obligated to bargain except under the agreement's terms. Accordingly, the Respondent's failure and refusal to bargain did not violate the Statute, as alleged.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, May 13, 1997

GARVIN LEE OLIVER

Administrative Law Judge

1. Counsel for the General Counsel unopposed motion to correct the transcript is granted; the transcript is corrected as set forth therein.

2. "Other staff" referred to bargaining unit employees assigned to other than correctional services, including medical services, ISM, Unicore, recreation, and education.