FEDERAL LABOR RELATIONS AUTHORITY OALJ 18-05
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, D.C.

RESPONDENT

AND

NATIONAL COUNCIL OF EEOC LOCALS, NO. 216

CHARGING PARTY

Case No. AT-CA-17-0450

Patricia J. Kush
For the General Counsel

Melanie Wilson
For the Respondent

Rachel Shonfield
For the Charging Party

Before: CHARLES R. CENTER
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In this case, the General Counsel filed a motion for summary judgment asserting that based upon the Respondent's Answer to the Complaint, there are no genuine issues of material fact in dispute. After reviewing the motion and other pleadings, I find that summary judgment is appropriate as the only issues to be decided are questions of law. Therefore, a hearing will not be conducted.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135, and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA), 5 C.F.R. parts 2423 and 2429.

On May 12, 2017, the National Council of EEOC Locals, No. 216 (Union/Charging Party) filed an unfair labor practice (ULP) charge against the U.S. Equal Employment Opportunity Commission, Washington, D.C. (EEOC/Respondent). After investigation, a Complaint and Notice of Hearing was issued on August 17, 2017, by the Regional Director of the Atlanta Region, alleging that the Respondent failed and refused to negotiate over the implementation of a Table of Penalties for disciplinary and adverse actions taken against EEOC bargaining unit employees in violation of 5 U.S.C. § 7116(a)(1) and (5).

On September 12, 2017, the Respondent filed an Answer in which it admitted that on May 2, 2017, it notified the Union of its intention to formalize a Table of Penalties for EEOC managers to use as a guide with an effective date of May 15, 2017, and acknowledged that the notice contained a statement asserting that it was not required to bargain impact and implementation prior to issuing the Table of Penalties. The Answer also averred that the Respondent emailed all employees on May 3, 2017, notifying them that the Table of Penalties was posted on the Agency's internal website with an effective date of May 15, 2017.

On October 5, 2017, the General Counsel filed a Motion for Summary Judgment and a Brief (GC Br.), with exhibits 1 through 6 attached. The Respondent filed an Opposition Brief (R. Br.) on October 16, 2017, supported by exhibits 1 and 2.

Based upon the complete record, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused and failed to negotiate over the impact and implementation of the Table of Penalties prior to effectuating them for bargaining unit employees on May 15, 2017. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. Answer ¶ 2. The National Council of EEOC Locals, No. 216 is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of bargaining unit employees at Respondent. *Id.* at ¶ 3. On May 2, 2017, the Respondent notified the Union of its intention to formalize a Table of Penalties for EEOC managers to use as a guide with an effective date of May 15, 2017. *Id.* at ¶ 5. In the notice, the Respondent asserted that it was not obligated to bargain impact and implementation with the Union prior to issuing a Table of Penalties. *Id.* at ¶ 5. On May 3, 2017, the Respondent notified all Agency employees via an email that a Table of Penalties was posted on the internal website with an effective date of May 15, 2017. *Id.* at ¶ 6.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent had a duty to bargain with the Union over the impact and implementation of the Table of Penalties before effectuating them for bargaining unit employees and that their failure and refusal to bargain violated § 7116(a)(1) and (5) of the Statute. The GC submits that the appropriate remedy for the violation is the posting of a notice of violation and imposition of a status quo ante remedy.

Respondent

The Respondent contends that it had no obligation to bargain over the impact and implementation of a Table of Penalties prior to its effectuation because it was the exercise of a nonnegotiable management right and the Union did not seek a negotiability determination. The Respondent also argues that the implementation of a Table of Penalties was covered by the parties' collective bargaining agreement (CBA) because it contains Articles related to discipline (Article 37) and adverse actions (Article 38), which are the management actions for which a Table of Penalties would be utilized by supervisors within the EEOC. The Respondent further explains its refusal to engage in impact and implementation bargaining by asserting that the adoption and utilization of a Table of Penalties was not a change in personnel policy, practice, or working conditions and that it gave notice of the change only as a "courtesy". Lastly, the Respondent asserts that questions of whether it had an obligation to bargain under the Statute and whether it violated the Statute are disputes of material fact that preclude a summary judgment.

ANALYSIS

The material facts of this case are simple. The Respondent imposed a Table of Penalties to be used by its supervisors when taking disciplinary or adverse actions against bargaining unit employees, and did so without negotiating the impact and implementation of that action despite receiving a demand to bargain from the Union. However, the arguments presented by the Respondent to justify its failure and refusal to bargaining over the impact and implementation of a Table of Penalties applicable to all employees demonstrates either an ignorance or complete misunderstanding of the relevant federal labor law. Such flawed reasoning would be troubling were it exhibited by a neophyte staff attorney, that it is proffered by the Agency's Employee and Labor Relations Director gives reason to question whom within the EEOC could properly advise the Agency about its bargaining obligations under the Statute.

The Respondent correctly contends, and the GC wisely concedes, that the adoption of a Table of Penalties related to discipline or adverse action involves the exercise of a management right to discipline under 5 U.S.C. § 2106(a)(2)(A). Therefore, any proposal related thereto proposed by the Union would not be substantively negotiable. However, this case does not involve a Union proposal related to discipline. Thus, the Respondent's reliance upon the Union's failure to seek a negotiability determination and citation of precedent related to that principle is misplaced.

Non-negotiability is the justification presented by an agency when it refuses to negotiate over a proposal made by an exclusive representative. An exclusive representative only seeks a negotiability determination from the Authority when an agency refuses to negotiate because they contend the representative's proposal is a non-negotiable matter. In this case, the exclusive representative was not making the proposal, rather, the Union sought to negotiate over the Respondent's proposal to amend or supplement the existing CBA by incorporating a Table of Penalties applicable to disciplinary and adverse actions. Therefore, the Authority's negotiability review process was not available to the Union. A cursory review of the Authority's regulations related to negotiability review would have revealed to the Respondent the inanity of supporting their refusal to negotiate by citing the Union's failure to file a negotiability appeal. 5 C.F.R. § 2424 *et. seq*. But alas, this was not their lone glaring mistake.[1]

Although the Respondent properly recognized that their effectuation of a Table of Penalties constituted an exercise of management rights, they failed to appreciate that an exercise thereof does not excuse them from all duty to bargain. In fact, they are required to negotiate over the impact and implementation when they exercise a management right that changes conditions of employment in more than a de minimis way. Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999) (*U.S. Penitentiary*). When, as here, an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency nonetheless has an obligation to bargain over the impact and implementation of that decision if the resulting change has more than a de minimis effect on conditions of employment. *U.S. DOI, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015). Even if those representing the Respondent in this matter failed to become familiar with the Authority's vast precedent upon this issue, a mere review of the management rights provision relied upon would have made the error of this argument obvious. Section 7106(b)(2) and (3) of the Statute clearly state that the rights set forth in the paragraph (a) relied upon by the Respondent does not preclude negotiation over procedures and appropriate arrangements related to the exercise of a management right by management officials. 5 U.S.C. § 7106.

Aside from the Authority's extensive precedent on the impact and implementation bargaining obligation that arises when exercising a management right, a modicum of legal research by the Respondent would have revealed that not only are the procedures for the implementation of a Manager's Guide to Penalty Determinations negotiable, they can be negotiated to an impasse that is resolved by the Federal Service Impasses Panel. *Dep't of the Treasury, IRS*, 93 FSIP 168 (1993). Thus, the Respondent's contention that it had no duty to bargain because it was exercising a management right when it effectuated a Table of Penalties fails to acknowledge a plethora of existing precedent that holds to the contrary.

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[1] Among the lesser failures, the Respondent filed multiple pleadings with an incorrect case number.

Equally confounding and further demonstrating the Respondent's complete misunderstanding of federal labor relations law is the argument that it had no duty to bargain because the Table of Penalties it effectuated on May 15, 2017, was covered by the parties CBA. Much like non-negotiability, the covered by doctrine arises when a party refuses to negotiate over a proposal made by the other side because the matter was already negotiated and is covered by an existing agreement. It is not a defense an agency can use to refuse to negotiate over a change to conditions of employment it seeks to make during the term of the CBA. If the existence of a disciplinary article permitted an agency to make any change to the disciplinary process it deemed fit so long as it was related to discipline, the terms and conditions agreed to in the CBA would be rendered meaningless. The covered by doctrine does provide such latitude.

While disliked and sometimes ignored by those who believe everything should be negotiable at all times within the federal sector, the covered by doctrine serves the legitimate purpose of precluding endless renegotiation of matters already agreed upon by the parties. If a matter is covered by a prior agreement, the parties have no duty to bargain over subsequent proposals related thereto. *NTEU v. FLRA*, 399 F.3d 334, 337-38 (D.C. Cir. 2005); *Dep't of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992). The covered by test states that parties have no duty to bargain mid-term over matters "expressly contained in" or "inseparably bound up with" a contract term. *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1016-18 (1993). This doctrine is appropriate because bargaining agreements are intended to promote stability in the bargaining relationship in the federal sector. *Id.* at 1018.

In this case, it was the Respondent who wanted to modify the existing CBA by altering the process set forth therein to include the use of a Table of Penalties to guide EEOC managers in making appropriate, consistent, and uniform decisions about the penalties imposed upon EEOC employees for disciplinary or adverse actions.[2] GC Ex. 2. Thus, the Respondent cannot assert the covered by doctrine to justify its refusal to negotiate over the impact and implementation that a Table of Penalties will have upon bargaining unit employees.

To the extent the Respondent contends that it did not change the conditions of employment for bargaining unit employees, such contention is without merit. Effectuating a new method to guide supervisors when determining the appropriate level of discipline and applying it in a consistent and uniform manner throughout the entire EEOC had more than a de minimis impact upon bargaining unit employees subjected to the new guidance set forth therein. One needs to look no further than the Respondent's own conduct to conclude that this change was more than de minimis. While the Respondent was woefully mistaken in assessing its duty to bargain over the change, it correctly recognized that the change was significant enough to merit giving the Union notice prior to implementing the Table of Penalties. Given the Respondent's repeated misapplication of the relevant legal principles and precedent, the fact that the notice was

[2] Why a Union would oppose a process aimed at making discipline more appropriate, consistent, and uniform presents its own confounding question, however, the wisdom of presenting a demand to bargain is not a factor in determining an agency's bargaining obligation under the Statute.

described as an act of courtesy only further demonstrates the Respondent's utter failure to understand that giving a union notice and an opportunity to bargain over a proposed change to conditions of employment is required under the Statute, even when exercising a management right. *U.S. Penitentiary*, 55 FLRA at 715.

REMEDY

When an agency has changed a condition of employment without fulfilling its obligation to bargain over the impact and implementation of that decision, the Authority applies the criteria set forth in *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (*FCI*), to determine whether a status quo ante remedy is appropriate. The Authority examines a request for status quo ante relief by balancing the nature and circumstances of the violation with the degree of operational disruption the remedy would have on the agency. *Id.* Specifically, the Authority examines: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. *Id.*

All of the *FCI* factors favor a status quo ante remedy in this case. The Respondent notified the Union that it planned to implement a Table of Penalties on May 2, 2017, less than two weeks before the effective date of May 15, 2017, and only one day before it directly notified all employees that a Table of Penalties would be effective on May 15, 2017. GC Ex. 2, 3. That notice also asserted that there was no duty to bargain over the implementation of a Table of Penalties and was characterized by the Respondent as a mere courtesy. Upon receiving notice of the Respondent's plan, the Union promptly demanded to bargain even though the Respondent presented the implementation as a fait accompli in the May 2, notice. Further, the Respondent's refusal to bargain was willful, as it intentionally refused to bargain with the Union and the fact that the Respondent erroneously believed that it had no obligation to bargain does not render its refusal any less willful. *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000). Although the implementation of a Table of Penalties would clearly have an impact upon bargaining unit employees facing discipline by imposing new guidance to be used by supervisors, the record is bereft of evidence regarding the actual impact that has occurred since implementation. Thus, this is the weakest of the *FCI* factors when assessing the appropriateness of a status quo ante remedy.

However, the record is equally bereft of evidence regarding any disruption or impairment to the Respondent's efficiency and effectiveness that would be caused by a return to the status quo. The Respondent's brief presents no argument, let alone evidence, that a status quo ante remedy would disrupt or impair the Respondent's operations. Given the clear request for a status quo ante remedy set forth in the in the GC's brief, the Respondent's silence upon the matter in reply is construed as acquiescence upon the question and one can only conclude that

discontinuing the use of a Table of Penalties would have little to no impact upon the Respondent's operations. Which is consistent with the fact that the Agency was fully operational before a Table of Penalties was implemented.

Because the Respondent presented the implementation of a Table of Penalties as a fait accompli and inaccurately asserted a flawed understanding of its duty to bargain, imposing a status quo ante remedy will deter the Respondent from willfully failing to satisfy its bargaining obligations in the future. Thus, a status quo ante remedy is ordered and the Respondent must post a notice of the violation and distribute it to bargaining unit employees by email because the Respondent utilizes email as a means of communicating with its employees. GC Ex. 3.

CONCLUSION

The Respondent violated § 7116(a)(1) and (5) of the Statute when it failed and refused to bargain over the impact and implementation of a Table of Penalties to be applied when disciplining or taking an adverse action against bargaining unit employees. Therefore, the General Counsel's Motion for Summary Judgment is **GRANTED**.

Accordingly, it is recommended that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the U.S. Equal Employment Opportunity Commission, Washington, D.C., shall:

1. Cease and desist from:

(a) Implementing changes affecting the working conditions of bargaining unit employees without first providing the National Council of EEOC Locals, No. 216 (Union), with notice and an opportunity to bargain to the extent required by the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Rescind the Table of Penalties applied to bargaining unit employees on May 15, 2017.

(b) Review and reconsider any discipline imposed upon bargaining unit employees pursuant to the guidelines set forth in the Table of Penalties.

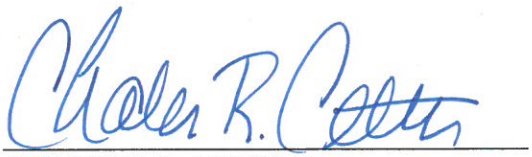
(c) Provide notice and upon request, bargain with the Union over the impact and implementation of any Table of Penalties the Respondent applies to bargaining unit employees.

(d) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Operating Officer, and shall be posted and maintained for sixty (60) consecutive days, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) In addition to physical posting of the Notice, the Notice shall be distributed to bargaining unit employees by email on the same day, as the physical posting of the Notice.

(f) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 7, 2017



CHARLES R. CENTER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Equal Employment Opportunity Commission, Washington, D.C., violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT implement changes affecting the working conditions of bargaining unit employees without first providing the National Council of EEOC Locals, No. 216 (Union), with notice and an opportunity to bargain to the extent required by the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL rescind the Table of Penalties applied to bargaining unit employees effective May 15, 2017.

WE WILL review and reconsider any discipline imposed upon bargaining unit employees pursuant to the guidelines set forth in the Table of Penalties.

WE WILL provide notice to the Union and upon request, bargain with the Union over the impact and implementation of any Table of Penalties applied to bargaining unit employees.

_____

(Agency/Respondent)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for sixty (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, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.