OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

NATIONAL GALLERY OF ART

Respondent

and

Case No. WA-CA-30380

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1831, AFL-CIO

Charging Party

Meredith A. Weiser

For the Respondent

Laurence Evans, Esquire

For the General Counsel

Ralph Wright

For the Charging Party

Before: BURTON S. STERNBURG

Administrative Law Judge

DECISION

Statement of the Case

his is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on February 10, 1993, by American Federation of Government Employees, Local 1831, AFL-CIO, (hereinafter called the Union), against the National Gallery of Art, (hereinafter called the Respondent), a Complaint and Notice of Hearing was issued on February 25, 1994, by the Acting Regional Director for the Washington, DC Regional Office, Federal Labor Relations Authority. The Complaint alleges that the Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by refusing to meet with the Union for purposes of negotiating the impact and manner of implementation of Respondent's newly instituted uniform dress policy.

A hearing was held on June 7, 1994 in Washington, DC. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Counsel for the Respondent and Counsel for the General Counsel submitted post hearing briefs on July 7, 1994, which have been fully considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining. Included in the unit are the guards who protect the Gallery and the art therein.

Prior to October 1, 1992 the dress code for the guards was governed by Guard Force Order No. 12 dated April 1, 1982. The aforementioned three page document, for the most part, concerned the uniform to be worn by the guards and the care thereof. No mention was made of such items as the wearing of jewelry, hair length and uniform accountability.

In the early part of 1991, Mr. Jay Chambers, who at the time was the Chief of the Office of Protection Services, determined that the existing uniform policy was inadequate with respect to appearance and security, and that changes in the policy were in order. Determined to rewrite the exist- ing Order governing the guards employed at the Gallery, Mr. Chambers collected the various publications covering the guards and/or uniformed police employed by the Federal Protection Services, the Uniformed Secret Service, Metropolitan Police Department, U.S. Park Police and GAO Uniform Police and then selected therefrom the best policies and/or provisions which would be most applicable to the guards employed by the Gallery.

Having selected what he thought were the best provisions of the policies, Mr. Chambers then instructed Mr. James Davis, who at the time was Deputy Chief of the Office of Protection Services, to select a committee for purposes of developing a new uniform policy for the Gallery. Subsequently, Mr. Davis selected an eight member committee composed of three supervisory guards and five rank and file guards. One of the rank and file guards selected was the Union President, Mr. Ralph Wright. According to both Mr. Chambers and Mr. Davis, Mr. Wright was selected for the committee because of his position with the Union.[(1)] According to Mr. Wright, the three supervisors on the committee had never in the past conducted labor relations negotiations with him.

Thereafter, Mr. Chambers gave the committee a draft of a uniform policy that met with his approval and urged the committee to work from the draft. The committee, as requested, utilized the draft and met a number of times during working hours to formulate a new uniform dress policy. The scheduling of the meetings was determined by the Respondent. Eventually, the committee submitted a new uniform dress policy to Mr. Chambers for his approval.(2) According to Mr. Chambers, while the committee might have submitted various comments on various provisions of the draft, it was he who made the final decision with respect to how the new uniform dress policy would read.

On August 10, 1992, Respondent notified the Union that it would implement a new uniform dress policy effective October 1, 1992. The Respondent, which enclosed a copy of the new uniform dress policy, gave the Union until August 24, 1992, to submit its "comments or concerns" on the enclosed uniform dress policy.

The new uniform dress policy which was substantially longer than the old uniform dress policy, i.e. 14 pages as opposed to 3, contained a number of significant changes involving hair length, wearing of jewelry and earrings, and uniform accountability.(3)

On August 22, 1992 Mr. Wright sent a memo to Chief Chambers wherein he requested negotiations with respect to the impact and manner of implementation of the new uniform dress policy. Mr. Wright also requested "official time" for the Union's negotiation team in order to prepare counter proposals. Lastly, Mr. Wright requested that management meet with the Union for purposes of clarifying various provisions of the new uniform dress policy so that the Union would be able to formulate meaningful counter proposals.

By memorandum dated September 1, 1992, Chief Chambers replied to Mr. Wright's August 22, 1992 memo. Chief Chambers' memorandum reads in pertinent part as follows:

> You have been involved in the development of the revised uniform policy from the start as a member of the team that I assigned to the task. In my opinion, there should be no need for you to obtain ". . . clarification on numerous sections . . ." of the policy and as a member of the development team you had plenty of opportunity to present the union position. I also went the additional step in my August 10, 1992 memo to you by inviting you to make any additional comments or express concerns regarding the policy. As I indicated above, Mr. O'Neill [of the Personnel Office] has informed us that we have fulfilled our obligation to the union.
>
> However, as part of my continuing effort to establish a cooperative working relationship with the union, I will contact you soon to arrange a meeting and to clarify any sections of the policy you wish to question.

On September 3, 1992 Mr. Wright responded to Chief Chambers' September 1, 1992 memo and informed him that arrangements had not been made for the Union's negotiating team to be released on Official time and that ground rules had not been agreed upon. Mr. Wright also listed six employees who would compose the Union's negotiating team. Not having heard from Chief Chambers, Mr. Wright again wrote him a memo on September 7, 1992 urging negotiations on the uniform policy.

On September 9, 1992 Chief Chambers responded to Mr. Wright's September 3, 1992 memo as follows:

> For the reasons specified in my memorandum to you dated 9/1/92, we believe that our obligation to bargain has been fulfilled.
>
> * * *
>
> While I am always open to suggestions, I believe I have more than met any bargaining obligation. However, please feel free to send me any written comments or concerns about the policy and I will give them appropriate consideration.

By memoranda dated September 9 and 11, 1992, Mr. Wright took issue with Chief Chambers' position and repeated his request for a discussion of both ground rules for bargaining and negotiations over the impending change in the uniform policy.

On October 2, 1992 Chief Chambers replied to the memoranda from Mr. Wright stating in pertinent part as follows:

> . . I will herein summarize the management position:
>
> First, you were a member of the team that developed the revised uniform policy.
>
> Second, on August 10, 1992 I provided you with the final version and invited you to give me any final comments or concerns by August 24, 1992.
>
> Third, you were given 8 hours off on Saturday August 22, 1992 to prepare your comments or concerns.
>
> Fourth, on Monday, August 24, 1992 at 4:56 p.m., I received a memorandum from you which in essence stated that you wanted to negotiate the policy but first you wanted to meet ". . . for the purpose of obtaining clarification on numerous sections of . . ." the policy.
>
> Fifth, as you requested, on September 2, my secretary scheduled a meeting for 4:00 p.m. on September 3, 1992. At noon on September 3, you informed my secretary that you would not be able to attend the meeting because you were not prepared. Sixth, on September 9, in response to a memo from you, I stated in part: ". . . I believe I have more than met any bargaining obligation. However, please feel free to send me any written comments or concerns about the policy and I will give them appropriate consideration." I have not received any comments or concerns from you.
>
> In conclusion, I am informed by the Personnel Office that we have met our bargaining obligation to you; you have not properly filed a request to the Impasse Panel and in any case

> your request is not timely. However, if you wish to discuss this matter further please contact my secretary to arrange a meeting.

While the new policy became effective on October 1, 1992, Respondent did not begin enforcing it until several months later. In this connection the record indicates that based upon events occurring in March 1993, the Respondent suspended five employees[4] for failure to adhere to the new uniform policy and insubordination in connection therewith.[5]

With respect to Ms. Latina Bailey the specifications underlying her five day suspension read in pertinent part as follows:

> On March 22, 23, 24, 25, 28 and 29, 1993, you reported to duty wearing your hair over your collar in violation of Uniform Policy, Guard Force Order #12. Specifically you violated Section 2, para-graph 6 . . . which states that officers, when in uniform, shall wear their hair "so that it does not extend over the collar". On each of these six days, you were asked by Sergeant Manuel or myself to arrange your hair so that it was above the bottom of your collar to comply with the Uniform Policy. You refused to comply. You were then ordered to arrange your hair to comply with the policy. You again refused to arrange your hair to meet the required uniform standards. Accordingly, you were sent home on these six days because you were not ready, willing and able to work. In addition, on each day that you were sent home, you were directed to report back to work the following day with your hair in compliance with the Uniform Policy.

> You were issued a copy of the Uniform Policy in October 1992 when the policy went into effect and again in February 1993. You have also been instructed and counseled about the Uniform Policy on various occasions during February and March 1993 . . . . You knew the policy and deliberately refused to comply. On March 22, 23, 24, 25, 28 and 29, 1993, you are charged with insubordination and failing to follow specific verbal orders because you willfully and intentionally refused to comply with my orders and the orders of Sgt. Manuel to adjust your hair to meet the required uniform standards. In addition, because your hair did not comply with the Uniform Policy on these six days, you are charged with six instances of failing to carry out specific written orders.

Although the dates might vary and the Uniform Policy infractions might have involved the wearing of earrings rather than the length of hair, the specifications issued to the four other named employees were couched in language almost identical to that quoted above. The penalties, i.e. suspensions of 3 to 10 days, took into consideration the past indiscretions or infractions committed by the respective employees. Those who had disciplinary problems in the past received larger suspensions than the employees who did not have any past disciplinary problems.

There is no evidence whatsoever in the record contradicting the specifications appearing in GC Exhibits 15(a) through 19(b). On the other hand, the testimony of Mr. James Davis, Chief of Protection Services and Mr. James Thompson, Day Captain, supports the specifications to the extent that it is alleged that the named employees continually refused to obey various orders issued to them with respect to complying with the new uniform standards.

Discussion and Conclusions

The General Counsel takes the position that the Respondent violated Sections 7116(a)(1) and (5) of the Statute by failing and refusing to meet with the Union for purposes of negotiating the impact and manner of implementation of Respondent's newly developed uniform policy. In this connection, the General Counsel would find no merit in Respondent's contention that by having the Union President, Ralph Wright, on the committee which was charged with the responsibility for developing a new uniform policy it fulfilled the bargaining obligation mandated by the Statute. As a remedy, the General Counsel, in addition to a bargaining order and notice posting, seeks a status quo ante remedy and an order directing the Respondent to make the affected employees "whole for any and all losses incurred by virtue of Respondent's unlawful implementation of its October 1, 1992, Uniform Dress Policy".

Respondent, on the other hand, based upon the fact that Mr. Wright was on the committee which developed the new uniform policy, takes the position that it fulfilled its bargaining obligation. However, should an opposite conclusion be reached, it strenuously objects to a status quo ante remedy on the grounds that it would be disruptive. It also objects to a make whole order since any discipline meted out to the employees was based on insubordination, i.e. repeated failure to obey an order of a supervisor to comply with the newly installed uniform policy. In support of its position, Respondent relies on the Authority's decision in VA, West Los Angeles Medical Center and AFGE, Local 1061, 23 FLRA 278, wherein the Authority found that the Medical Center had failed to bargain in good faith when it implemented a new uniform policy without bargaining with the union over the impact and manner of implementation. In refusing to make the employees whole from any discipline imposed for insubordination, i.e. failing to obey a supervisor's order to comply with the new uniform policy, the Authority stated that "Procedures exist to remedy breaches of bargaining obligations, and the Union pursued them in this case. Self help . . . that is, disobeying supervisory instructions . . . cannot be condoned if the purposes and policies of the Statute are to be met."

It is well established that prior to changing a condition of employment management is required to give the exclusive representative of its employees appropriate notice and, at a minimum, the opportunity to bargain over any adverse impact occasioned by the change on unit employees and the manner of implementation of the change. While both parties to the proceeding appear to acknowledge the state of the law, as noted above, they have different opinions with respect to whether the requisite bargaining did in fact occur.

In agreement with the General Counsel and contrary to the contention of the Respondent, I find that Respondent failed and refused to bargain with the Union with respect to the impact and manner of implementation of the new uniform policy. The fact that Union President Wright was a member of the committee charged with responsibility for developing the new uniform policy does not alter such finding. In this latter connection the record indicates that the committee was dominated by the supervisors and that decisions on the various provisions of the new uniform policy were made by consensus and not the Union. Mr. Wright, although selected because of his position in the Union, was at all times acting as a mere rank and file employee and not in his capacity of Union President. Finally, Respondent's Chief of the Office of Protection Services, admittedly, made the final decision with respect to how the new uniform dress policy would read. Accordingly, in view of the foregoing considerations, I cannot find, as urged by the Respondent, that the Union was given an opportunity to engage in meaningful bargaining with respect to the various provisions of the new uniform dress policy.

Having concluded that Respondent violated the Statute by failing and refusing to bargain with the Union with respect to the new uniform dress policy, the sole issue remaining for determination is the appropriate remedy. As noted above, the General Counsel, in addition to a bargaining order and posting, also seeks a return to the status quo ante remedy, and an order making the affected employees whole for any lost wages which may have been occasioned by the discipline imposed upon them for failure to obey the orders of their respective supervisors with respect to complying with the newly established uniform dress policy. The General Counsel takes the position that the employees should be made whole since the discipline was a result of the illegally established uniform policy. In support of his position the General Counsel cites the Authority's decision in U.S. Department of Justice, Immigration and Naturalization Service, El Paso District Office, 34 FLRA 1035, where disciplinary actions against employees for failure to comply with illegally made changes were ordered to be rescinded. Additionally, the General Counsel citing Federal Correctional Institution, 8 FLRA 604, takes the position that a status quo ante remedy would not be disruptive of Respondent's operation.

As noted above, Respondent takes the position that the discipline should not be rescinded since the Authority has made it clear that employees are not free to ignore the orders of their supervisors with respect to complying with policies that may have been unilaterally established by management in violation of the Statute. In this connection, Respondent relies on the Authority's decision in VA, West Los Angeles Medical Center, supra, and U.S. Department of Justice, Immigration and Naturalization Service, El Paso District Office, 39 FLRA 1431. In this latter case the Authority granted in part Respondent's Motion for Reconsideration of its earlier decision, (reported at 34 FLRA 1035), which is relied upon by the General Counsel, and found that discipline based upon insubordination, i.e. failing to follow an order to comply with an illegally establish condition of employment, should not be rescinded. In reaching this latter conclusion the Authority cited its earlier decision in VA, West Los Angeles Medical Center, supra. Respondent also objects to a status quo ante remedy on the grounds that it would be disruptive to its operation.

In agreement with Respondent, I find that the VA, West Los Angeles Medical Center, supra, and the U.S. Department of Justice, Immigration and Naturalization Service, El Paso District Office 39 FLRA 1431 are controlling and that a make whole remedy is not in order.

However, with respect to the status quo ante remedy requested by the General Counsel, I find, after applying the standards set forth in Federal Correctional Institution, supra, to the facts presented herein that such remedy is in order. Thus, the record discloses, among other things, that Respondent refused to bargain over the impact and manner of implementation, attempted to escape its bargaining obligation by including a Union officer on the management appointed committee, and that a return to the status quo ante remedy would not significantly disrupt or impair the efficiency of the activity's operation.

Accordingly, having concluded that Respondent violated Sections 7116(a)(1) and (5) of the Statute, by failing and refusing to bargain with the Union over the impact and manner of implementation of the new uniform policy, it is hereby recommended that the Authority issue the following Order designed to effectuate the policy and purposes of the Statute.

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that the National Gallery of Art, Washington, DC, shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in the uniform dress policy applicable to the guards employed at the National Gallery of Art without first notifying the American Federation of Government Employees, Local 1831, AFL-CIO, the exclusive representative of its employees, of the changes and providing it with the opportunity to bargain over the impact and manner of implementation of such changes.

(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) Rescind the changes in the uniform dress policy which were put into effect subsequent to October 1, 1992.

(b) Notify the American Federation of Government Employees, Local 1831, AFL-CIO, prior to effecting any future changes in conditions of employment, including changes to the uniform dress policy applicable to the guards working at the National Gallery of Art, and upon request negotiate in good faith with the American Federation of Government Employees, Local 1831, AFL-CIO, with respect to procedures which management will observe in effecting such changes and appropriate arrangements for employees adversely affected by such changes.

(c) Post at its facilities in Washington, DC, 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 the Director of the Gallery, 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.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington, DC Regional Office, West End Court Building, 1255 22nd Street, NW, Suite 400, Washington, DC 20037-1206, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, November 30, 1994

BURTON S. STERNBURG

Administrative Law Judge

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 implement changes in working conditions of bargaining unit employees by unilaterally instituting a new uniform dress policy without giving notice to the American Federation of Government Employees, Local 1831, AFL-CIO, the exclusive representative of certain of our employees, and affording it the opportunity to bargain with respect to the procedures which management will observe in effecting such changes and appropriate arrangements for employees adversely affected by the changes.

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 rescind the changes in the uniform dress policy which were put into effect subsequent to October 1, 1992.

WE WILL notify the American Federation of Government Employees, Local 1831, AFL-CIO, the exclusive representative of our employees, of any intended changes in conditions of employment, including changes in the uniform dress policy applicable to the guards working at the National Gallery of Art, and upon request, afford it the opportunity to bargain with respect to procedures which management will observe in effecting such changes and appropriate arrangements for employees adversely affected by the changes.

(Activity)

Date: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of this 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, DC Regional Office, West End Court Building, 1255 22nd Street, NW, Suite 400, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

1. While it is clear that Mr. Wright was selected for the committee because of his position as Union President, the record is devoid of any evidence indicating that Mr. Wright was acting other than a mere rank and file employee while on the committee. In other words, he was not acting in his capacity as Union President.

2. According to the credited testimony of Mr. Wright, to the extent that there might have been disagreement with respect to any particular provision of the draft uniform policy, the position of the three supervisors always prevailed. When asked to explain why, Mr. Wright pointed out that the rank and file employees on the committee were afraid to challenge or take issue with the positions advocated by the supervisors. While Mr. Wright was not in agreement with a number of the positions advocated by the supervisors, he did not necessarily express his disagreement on any particular provision since he knew that in his position as Union President he would subsequently have the opportunity to bargain over any final uniform policy issued by Respondent.

3. The new uniform dress policy prohibits dangling earrings of any size and the wearing of hair below the collar. Additionally, an officer's hair was to be styled in such a manner that the uniform cap would sit squarely on the officer's head.

4. Latina A. Bailey, Tawania Harvey, Valarie Mathis, Altina

Sumter, and Juanita Batson.

5. The evidence surrounding the discipline imposed on the five guards for failing to follow the new uniform policy and alleged insubordination in connection therewith is contained in GC Exhibits 15(a) through 19(b). Exhibits 15(a) through (19)(b) are the notices of proposed and actual suspensions, and the reasons therefore. Other than the foregoing exhibits, there is very little probative evidence in the record concerning the suspensions. Accordingly, in the absence of any probative evidence to the contrary, we are bound by the content of, and allegations made in, the exhibits.