UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

56TH COMBAT SUPPORT GROUP (TAC) MACDILL AIR FORCE BASE, FLORIDA Respondent	
and	Case No. 4-CA-00465
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 153 Charging Party	

Major Phillip Tidmore, Esq.
For the Respondent

Richard S. Jones, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. § 7101 et seq., (herein called the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (herein called the Authority), 5 C.F.R., Chapter XIV, Part 2423.

On April 19, 1990 and August 31, 1990 respectively, the National Federation of Federal Employees, Local 153 (herein called the Union), filed an unfair labor practice charge and amended charge against the 56th Combat Support Group (TAC), MacDill Air Force Base, Florida (herein called Respondent). Pursuant to the aforementioned charges, the Regional Director of the Atlanta, Georgia Region of the Authority, issued a Complaint and Notice of Hearing on August 31, 1990 alleging

that Respondent violated section 7116(a)(1), and (5) of the Statute by implementing a smoking ban in its Building 242 without providing the Union with notice and an opportunity to negotiate over either the substance or the impact and implementation of the change.

The matter was originally set for hearing on November 27, 1990. At that time, the hearing was indefinitely postponed because the parties executed a settlement in the case calling for certain actions by the Respondent. Since Respondent failed to take the actions described in the settlement agreement, the Chief Administrative Law Judge on January 15, 1991 ordered the hearing rescheduled. The rescheduled hearing was held before the undersigned on March 26, 1991 in Tampa, Florida. All parties were represented and afforded the full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were timely filed by the parties and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor and my evaluation of the evidence, I make the following:

Findings of Fact

1. The Union is the exclusive representative for a bargaining unit of Respondent's employees at its Florida facilities.

2. At least two of these bargaining unit employees work in Building 242, one smokes and one does not smoke. Until February 1990, the designated smoking area in Building 242 was the break room. In February 1990, Respondent's Division Chief, Captain Robert Richard, informed Anthony S. Leonard, the bargaining unit employee who smokes that smoking would no longer be allowed in the building. A few days later, Leonard was told that the reason for his not being permitted to smoke in the building was that another employee, Ms. Maria Sandt, had an asthmatic condition. Although it seems to have been general knowledge, prior to the above ban, Sandt had never complained to Leonard or anyone else that smoking bothered her. On February 23, 1990, Union President T. F. Ellingson learned about the new ban on smoking for the first time, while conducting a safety orientation session for newcomers in Building 242.

3. Upon learning about the change, Ellingson immediately contacted Respondent's Labor Relations Chief, Joyce Jett, to

inform her that Respondent had implemented a unilateral change without notice or bargaining. Jett said she would look into it. On February 26, 1990, Ellingson followed up with a letter to Jett, referencing their February 23 conversation and requesting bargaining notwithstanding the fact that the Union viewed the change as a fait accompli. In the letter, the Union also requested "to negotiate the substance, impact and implementation of [the] change in smoking policy," named its negotiating team, requested that Respondent bring with it documented evidence as to the reasons for the change, and submitted bargaining proposals. Further, the Union indicated that due to a heavy workload, it would be mid-April before negotiations could be scheduled.

4. Respondent never answered the Union's proposals or provided the requested documentation; however, two weeks later, on March 12, 1990, Jett sent Ellingson a copy of a letter from Lt. Colonel Roger Laman, its Safety Division Chief. The letter from Laman purports to announce his intention to implement a total smoking ban in Building 242. Curiously, however, Laman's letter, dated February 28, 1990, came after the Union and affected employees had already been told about the smoking ban and Ellingson had already complained to Respondent about the matter. Laman's letter actually came in response to an inquiry from Respondent's labor relations office, asking if Laman had in fact implemented a smoking ban. According to Jett's March 12 letter, the already-implemented smoking ban applied only to non-bargaining unit employees.

5. Jett then proposed a negotiating date of March 21, although the Union had informed her that its negotiators would not be available until at least mid-April. The Union's reply suggested an alternative date of April 11, 1990. Laman responded by letter of March 20, 1990, agreeing to the April 11 date, but also announcing immediate implementation of the total smoking ban in Building 242 on March 20, 1990.1/ Laman contended that immediate action was necessary because of the "lengthy delay, and the documented medical condition

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1/ In this regard, Laman contradicts Respondent's denial of paragraph 10 of the Complaint, alleging that March 20, 1990 was the date of Respondent's implementation of the smoking ban. Of course, whether the ban occurred in February or March, there is no dispute that it occurred prior to any bargaining.

of a building employee." However, at the hearing, Laman conceded that he had not been proceeding with this matter with any sense of urgency. Indeed, he testified that many months previously, in mid-1989, he read an article about the dangers of smoking and about that time began considering making Building 242 a no-smoking area. According to Laman, he told other supervisors about the article and began canvassing the building about the situation. He further states that, through his supervisors, he obtained input from bargaining unit employees without involving the Union. On cross-examination he said, "I didn't want to do it unilaterally on my own, I wanted to have everybody be able to voice their opinions whether it be pro or negative" -- everybody, that is, except the Union. Even Laman's testimony reveals the Union was not involved in the matter until it found out about Laman's plans for the smoking ban from someone else and notified the labor relations office. Thus, it appears that only after the Union expressed an interest in what was going on concerning the ban that Laman's implementation plans developed an urgency to them.

6. Although the Union showed up at the agreed-upon April 11 negotiation session, Laman refused to negotiate because his labor relations people did not show up. Respondent provided no explanation or excuse at the hearing as to why it was not prepared to negotiate an allegedly urgent matter. On April 25, negotiations did begin.

7. Thereafter, on April 19, 1990, the Union filed the instant unfair labor practice charge, alleging that Respondent had unilaterally implemented the ban on smoking. Subsequent to the filing of the charge, the parties met to negotiate and reached impasse on the ban. The matter was submitted to the Federal Service Impasses Panel (FSIP). On December 20, 1990, the FSIP issued a decision, ordering the parties to adopt the employer's proposal. Aside from the fact that these post-charge developments have no bearing on whether Respondent violated the Statute in February and March 1990, the parties themselves in no way felt bound by the Panel's Order. Indeed, on November 27, 1990, while the case was still pending before the FSIP, the parties entered into a tentative agreement providing for the construction of two outside walls to give smokers protection from the elements. The agreement, as already noted, constituted the basis for a failed settlement attempt in the case. And, even after the FSIP decision, as late as January 15, 1991, Respondent apparently still fully intended to construct the area.

Conclusions

There is no dispute in this case that the substance of the smoking policy is negotiable.[2/] Furthermore, Respondent does not raise as anticipated by the General Counsel, any question about the involvement of FSIP in this case.

Respondent raises only two issues for consideration here: (1) whether there was a valid Union waiver allowing it to implement a no smoking policy in Building 242 and, (2) whether there was a serious/emergency situation requiring a smoking ban. The General Counsel maintains that both the waiver and serious/emergency issues lack merit. Reliance on contract provisions to unilaterally implement changes in conditions of employment, particularly where those proposals are negotiable, is at the agency's peril. See, U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 39 FLRA 258, 263 (1991). The case boils down to whether Respondent gave the Union notice and an opportunity to bargain before implementing this change in smoking policy in Building 242. It is my view, as expressed below that Respondent violated section 7116(a)(1) and (5) of the Statute.

The Authority does not take waiver issues lightly. It recently reiterated its long-standing position that a "clear and unmistakable" relinquishment of a claim or privilege must be based on expressed agreement, bargaining history or inaction.[3/] This standard reflects the long established view that waivers of statutory rights are not easily inferred. See Metropolitan Edison, 460 U.S. 693, 708

2/ Recently the Authority found that smoking policies are a substantively negotiable condition of employment. U.S. Department of the Air Force, 832d Combat Support Group, Luke Air Force Base, Arizona, 36 FLRA 289 (1990); See also National Association of Government Employees, Local R14-32 and Department of the Army, Fort Leonard Wood, Missouri, 26 FLRA 593 (1987); National Treasury Employees Union and Internal Revenue Service, Los Angeles District, 32 FLRA 182 (1988).

3/ Department of Veterans Affairs, Veterans Administration Medical Center, Boise, Idaho, 40 FLRA 992 (1991); See also U.S. Department of Treasury, Customs Service, 38 FLRA 1300 (1991).

(1983). In Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060 (1991) the Authority reaffirmed its holding in Internal Revenue Service, 29 FLRA at 167, as follows:

> . . . the fact that a mid-term proposal may relate to a general subject area covered in a collective bargaining agreement will not relieve an agency of its obligation to bargain. Rather, the determinative factor is whether the particular subject matter of the proposals offered during contract and mid-term negotiations is the same. MCLB, Albany, supra.

Here Respondent contends that two articles in the collective bargaining agreement together constitute a waiver of the Union's right to prevent Respondent from eliminating smoking in Building 242 without adequate notice and bargaining. Those articles are Article 13.6 which states, "The Employer agrees to take every reasonable precaution to insure that employees are not working under conditions which would be detrimental to their health." And, Article 13.9 which contains language allowing the appropriate safety or health official to "act expeditiously to reduce, abate or remove verified unsafe or unhealthy circumstances." In my view, nothing in those articles suggests a waiver of the Union's right to bargain about smoking bans at Respondent's facilities.

To Respondent's credit, a lively imagination is required to think up this waiver argument. Essentially, Respondent maintains that the broad and general health and safety articles of the collective bargaining agreement apply to any safety condition which might occur and that they constitute a waiver to negotiate on a very specific subject matter. The facts of the case dispel such a notion. There is no record evidence that the issue of smoking bans ever surfaced during negotiations of the collective bargaining agreement herein. Nor is there any evidence to show that the parties even remotely considered smoking as an unsafe or unhealthy condition requiring use of the health and safety articles. In this regard, it is noted that the agreement was first signed off on during 1988, a time when smoking policies were becoming an emotional and sometimes touchy issue in the Federal sector. It is difficult to envision that the parties would have overlooked this issue or that the Union would have waived bargaining with respect to smoking policies without specifically calling attention to its

position in the agreement. To now argue that a particular subject matter was waived, without showing that it was even discussed during negotiations is hardly enough to establish a waiver of a right to get notice and have an opportunity to negotiate over a negotiable subject matter prior to its implementation. Furthermore, no other agreement by the parties was offered to establish Respondent's right by virtue of a waiver to implement a smoking ban in any of its facilities. Thus, if Respondent is relying on the two articles cited above to make its case of waiver, then it has not succeeded. Accordingly, it is found that Respondent did not establish that a "clear and unmistakable" waiver of the Union's right to bargain over the no smoking ban in Building 242 by expressed agreement, bargaining history or inaction, in this case.

Respondent's next argument is that a serious/emergency situation existed in the case requiring it to create a totally smoke free environment in Building 242. As with its waiver contention, the record does not support the argument. There is no evidence that the person for whom the smoke free environment was being created ever complained that she needed a smoke free environment. True the employee for whom the smoke free environment was allegedly created suffers from bronchial asthma. Although testifying that a smoke free environment would help her condition, she also testified that she never sought a smoke free environment for that reason. Further, she testified that the medical certificate from her doctor was obtained only when her supervisor requested that she get it. Therefore, the certificate was not support for a complaint by her about conditions which could invoke the health and safety articles of the collective bargaining agreement. Even the certificate does not prescribe a totally smoke free environment, but says only that such an environment would be "conducive" to her health. The evidence also disclosed that she was already working in a smoke free area and that she lives with her husband, who smokes at home. While there may have been an unhealthy situation created by others smoking, either in the break room or outside Building 242, the evidence falls far short of establishing the existence of an serious/emergency situation requiring the implementation of a complete smoking ban, particularly before the exclusive representative was given any notice or an opportunity to bargain about this change. Based on the above, it is found that no serious/emergency situation existed which required Respondent to totally ban smoking in Building 242.

Accordingly, it is found and concluded that Respondent violated section 7116(a)(1) and (5) of the Statute by implementing a smoking ban in Building 242 without providing the Union with notice and an opportunity to negotiate over either the substance or the impact and implementation of the change.

Therefore it is recommended that the Authority adopt the following:

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 56th Combat Support Group (TAC), MacDill Air Force Base, Florida, shall:

1. Cease and desist from:

(a) Instituting changes in the working conditions of bargaining unit employees, by implementing a smoking ban in its Building 242 without giving notice to the National Federation of Federal Employees, Local 153, the exclusive representative of certain of its employees, and affording it an opportunity to bargain concerning the substance and impact and implementation of said changes.

(b) In any like or related manner, interfering with, restraining, or coercing 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 smoking ban in Building 242 which was implemented sometime around March 20, 1990.

(b) Notify and upon request negotiate with the National Federation of Federal Employees, Local 153 the exclusive representative of its employees of any intended changes in conditions of employment including smoking bans.

(c) Post at its facility 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 Commanding Officer of the base 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 Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 26, 1991

ELI NASH, JR.
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 institute changes in the working conditions of bargaining unit employees, by implementing a smoking ban in Building 242 without giving notice to the National Federation of Federal Employees, Local 153, the exclusive representative of certain of our employees, and affording it an opportunity to bargain concerning the substance and impact and implementation of said changes.

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

WE WILL rescind the smoking ban in Building 242 which was implemented sometime around March 20, 1990.

WE WILL notify and upon request negotiate with the National Federation of Federal Employees, Local 153 the exclusive representative of our employees of any intended changes in conditions of employment including smoking bans.

_____

(Activity)

Dated: _____ 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 of the Atlanta Regional Office, whose address is: 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.