

82 FLRR 1-1603

**Naval Amphibious Base, Little Creek,
Norfolk, VA and American Federation of
Federal Employees, Local 1625**

Federal Labor Relations Authority

3-CA-1449; 9 FLRA No. 97; 9 FLRA 774

August 4, 1982

Judge / Administrative Officer

**Before: Haughton, Chairman; Frazier,
Applewhaite, Members**

Related Index Numbers

**44.5221 Subjects of Bargaining, Management
Rights, Title VII/Civil Service Reform Act of 1978,
Section 7106(b)(1), Numbers/Types/Grades
Assigned**

**72.611 Employer Unfair Labor Practices,
Unilateral Change in Term or Condition of
Employment, Indicia of Change**

Case Summary

THERE WAS NO DUTY TO BARGAIN OVER IMPACT AND IMPLEMENTATION OF THE ACTIVITY'S ADVERSE ACTIONS. The employer did not violate 5 U.S.C. 7116(a)(5) by refusing to negotiate with the union over the impact of its decision to change the status of two employees from regular part-time to intermittent. The employer had already bargained with the union to establish procedures for the effectuation of adverse actions. Since the employer adhered to these procedures in taking its adverse action, there was no change in personnel policies, practices, or matters affecting working conditions.

Full Text

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this

case, including the parties' stipulation of facts, accompanying exhibits, and briefs submitted by the Respondent and the General Counsel, the Authority finds:

The General Counsel alleges that the Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when, beginning on or about August 25, 1980, it failed and refused to negotiate with regard to the impact and implementation of a change in working conditions.

At all times material herein the Charging Party, American Federation of Government Employees, Local 1625, AFL-CIO (the Union) has been the exclusive representative of a unit consisting of non-appropriated fund employees in the Recreational Services Department of the Naval Amphibious Base, Little Creek, Norfolk, Virginia (the Respondent), and a collective bargaining agreement between the parties has been in effect. On or about August 20, 1980, an agent of the Respondent notified the Union telephonically of its intention to issue an "Advance Notice of Proposed Adverse Action" to two employees. The specific adverse action was a change in their status from regular part-time to intermittent. The Union, in writing, requested negotiations regarding what it contended was a proposed change in working conditions and requested that all actions be held in abeyance pending the completion of the bargaining process. The Respondent replied that the matter involved the exercise of a reserved management right, particularly as it was integrally related to the numbers and types of employees assigned to a work project or tour of duty and, hence, was not within the duty to bargain since the Respondent "did not elect to bargain" on the matter.*1 A "Notice of Adverse Action" was issued to the two employees involved on September 5, 1980, indicating an effective date of September 26, 1980. As a consequence of their change in status, the two employees suffered a reduction of working hours; lost their eligibility for paid annual, sick and holiday leave, and health benefits; were excluded from the

bargaining unit; and fell into a lower retention group for reduction-in-force purposes.

The General Counsel contends that, pursuant to sections 7106(b)(2) and (3) of the Statute,*2 the Respondent was obligated to afford the Union reasonable notice of, and an opportunity to negotiate over, the procedures to be used in exercising its authority, and appropriate arrangements for employees adversely affected by its decision to change the status of the two employees. The General Counsel further contends that, while the parties' collective bargaining agreement contains a provision relating to the procedures to be followed in effectuating non-disciplinary adverse actions such as those involved herein, the agreement does not constitute a clear and unmistakable waiver of the Union's right to bargain, and that the Respondent's failure to fulfill its bargaining obligation constituted a violation of the Statute. As a remedy, the General Counsel requests that the Authority order the Respondent to: (1) return to the status quo ante; (2) make the employees whole for their losses; and (3) cease and desist from its actions and post an appropriate notice.

The Respondent contends, inter alia, that its actions did not constitute a change in existing personnel policies, practices or working conditions, and that it had no obligation to bargain absent such a change. In this regard, the Respondent asserts that, while there is a duty to bargain concerning both the procedures to be followed in effectuating non-disciplinary adverse actions and appropriate arrangements for employees adversely affected thereby, "the parties did, in fact, bargain into their agreement such PROCEDURES and ARRANGEMENTS specifically applicable to the effectuation of non-disciplinary adverse actions involving any unit employees." (Emphasis in original.)*3 Moreover, the Respondent asserts the record evidence demonstrates that the agreed-upon procedures and arrangements were interpreted and applied herein exactly as they had been in all previous adverse action cases since the execution of the parties'

agreement, and therefore no change in personnel policy occurred.

The Authority concludes that the Respondent did not violate sections 7116(a)(1) and (5) of the Statute in the circumstances of this case. The record does not establish that the Respondent, in implementing the two nondisciplinary adverse actions, established new, or changed existing, personnel policies, practices or matters affecting working conditions. On the contrary, the record evidence establishes that the procedures followed by the Respondent herein were in no different from those prescribed by the parties' negotiated agreement or those which had been utilized in previous instances of nondisciplinary adverse actions resulting in changes of employee status or category. Thus, it cannot be found that the Respondent incurred any obligation to bargain by its effectuation of nondisciplinary adverse actions against the two employees. In the absence of evidence that the Respondent's actions constituted a change in personnel policies, practices or matters affecting working conditions, it has not been established that a violation of the Statute occurred.*4

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 3-CA-1449 be, and it hereby is, dismissed.

Ronald W. Haughton, Chairman
Henry B. Frazier III, Member
Leon B. Applewhaite, Member
FEDERAL LABOR RELATIONS AUTHORITY

1. Section 7106(b)(1) of the Statute provides:
Sec. 7106. Management rights

.....

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty

2. Sections 7106(b)(2) and (3) provide as

follows:

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --

.....

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

3. Specifically, the Respondent cites Article XX of the parties' agreement, entitled "Adverse Actions," which provides in pertinent part:

Section 1. For purposes of this Agreement, adverse actions are those described in Section 2 below when taken against regular full time and regular part time employees.

Section 2. Adverse actions include both disciplinary and nondisciplinary types.

.....

b. Nondisciplinary types are:

(1) furlough

(2) reduction in rank or compensation, except termination of temporary promotion.

(3) separation or demotion due to reduction in force.

Section 4. Grievances against the above described nondisciplinary adverse actions may be filed only on the basis of alleged procedural errors. Complaints against these actions alleging discrimination must be processed under the Civil Service Regulations contained in book 713 of the Federal Personnel Manual System.

Section 5. For all adverse actions, except reduction in force, the employee will be given advance written notice proposing the action. The advance notice will contain specifically and in detail, the full charges and full supporting reasons for proposing the action. The notice shall inform the employee of his right to a ten (10) day answering

period within which he may reply to the charges orally and/or in writing. The advance notice proposing adverse action will be delivered to the employee at least thirty (30) calendar days in advance of any action taken as the result of the proposal contained therein.

Section 6. After all evidence relating to the charges has been considered, including the employee's oral and/or written reply, if any, the deciding official will inform the employee in writing of his decision. The written decision must be made and delivered promptly on expiration of the employee's ten (10) day answering period or within ten (10) calendar days after receipt of his oral and/or written reply, whichever occurs first. The decision letter will state what charges are sustained and give the date on which the action is to become effective. In the decision letter, the employee must be fully advised of his grievance rights.

Section 7. The employer agrees to furnish the employee an extra copy of all proposals and decision letters on adverse actions for delivery to the Union, if the employee so chooses. Where the employee grieves such action, copies of all correspondence thereafter will be sent to the Union.

4. See Department of Treasury, Internal Revenue Service, Cleveland, Ohio, 3 FLRA 656 (1980), wherein a complaint alleging a failure to bargain over a change in existing conditions of employment was dismissed on the basis that it had not been established that such a change had actually occurred.