FEDERAL LABOR RELATIONS AUTHORITY
OALJ 16-39
Office of Administrative Law Judges .WASHINGTON,

D.C. 20424

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
HERLONG, CALIFORNIA

RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1217, AFL-CIO

CHARGNG PARTY

case No. SF-CA-15-0752

Cara Krueger
For the General Counsel

Darrel C. Waugh
For the Respondent

James Fennel
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION 0N MOTIONS FOR SUMMARY JUDGMENT

The issue in this case is whether a prior Federal Service Impasses Panel (FSIP) decision provides a legal basis for refusing to bargain over a subsequent proposal related to the same issue. The General Counsel (GC) filed a Motion for Summary Judgment to which the

Respondent filed an Opposition and a Cross-Motion for Summary Judgment and subsequently, the GC filed a response to the cross-motion for summary judgment. After a careful review of the pleadings, I find that the Respondent violated S 7116(a)(1) and (5) of the Federal Service LaborManagement Relations Statute (Statute), by failing to bargain over the proposal for a Compressed Work Schedule (CWS). As a result of the violation, the Respondent is ordered to cease and desist from failing or refusing to bargain with the American Federation of Government Employees, Local 1217, AFL-CIO, over a CWS schedule in the Facilities Department, and interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured by the Statute.

As a remedy, the Respondent shall: (1) bargain with the Union over a CWS for the Facilities Department; (2) post copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority, signed by the Warden, and posted for sixty (60) consecutive days thereafter; (3) disseminate a copy of the Notice signed by the Warden through the Respondent's e-mail system to all bargaining unit employees; and (4) provide the Acting Regional Director, of the San Francisco Region, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken. .

STANDARDS FOR SUMMARY JUDGMENT

Motions for summary-judgment filed under 2423.27 of Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), serve the same purpose and have the same requirements as motions for summary judgment filed with the United States District Courts pursuant to Rule 56 of the Federal Rule of Civil Procedure. Dep 't of VA, VA Med. Ctr., Nashville, Tenn., 50 FLRA 220, 222 (1995). As the GC and Respondent filed motions for summary judgment, the parties agree that a question of law is presented with no genuine issue of material fact. Therefore, I find that summary judgment is appropriate in this matter.

FINDINGS OF FACT

1. The U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Herlong, California (Respondent/FCI Herlong) is an agency under 7103(a)(3) of the Statute. (Compl. at l).

2. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide unit of employees of the Federal Bureau of Prisons, Washington, D.C., appropriate for collective bargaining.

   Local 1217 (Union/Charging Party) is an agent of AFGE for the purpose of representing employees within the unit at FCI Herlong. (Compl. at 1).

3. The charge was filed by the Charging Party with the Acting San Francisco Regional Director on July 24, 2015, and a copy of the charge was served on the Respondent by certified mail. (Compl. at 1).

4. At all material times, Israel Jacquez held the position of Assistant Warden and has been a supervisor or management official of the Respondent within the meaning of § 7103(a)(10) and (11) of the Statute and an agent of the Respondent acting upon its behalf. (Compl. at 1).

5. On March 24, 2015, the Union requested that Respondent negotiate over a compressed work schedule for the Facilities Department. (Compl. at 1).

6. On June 24, 2015, Respondent, through Jacquez, refused to negotiate with the Union over a compressed work schedule for the Facilities Department. (Compl. at 2).

7. Respondent, through Jacquez, based its refusal to negotiate in part, on a prior decision issued by the FSIP in 2007. (R. Opp'n at 2).

8. In the 2007 decision, the FSIP found that it was likely that a prior Union proposal for a compressed work schedule in the Facilities Department would have an adverse agency impact. (GC Ex. 3; 06 FSIP 89 (2007)).

9. Specifically, the decision found that in a ten hour workday there would be insufficient amount of inmate supervision needed to allow employees to perform their duties for a full work day and thus productivity of the Facilities Department would likely be reduced. (GC Ex. 3).

10. The U.S. Department of Justice, Federal Bureau of Prisons and CounciLof Prison Locals, AFGE, established a new collective bargaining agreement (CBA) effective July 21, 2014, replacing the 1998 CBA between the parties when the FSIP considered the Union's prior proposal. (GC Ex. 4).

POSITIONS OF THE PARTIES

General Counsel

The GC asserts that the Respondent's refusal to bargain over the proposal for a compressed work schedule for the Facilities Department at FCI Herlong violates 7116(a)(1) and (5) of the Statute. In support of its position, the GC argues that the Respondent's claim that a 2007 FSIP decision excuses its refusal to bargain is misguided, as FSIP considerations occur only after the parties have fulfilled their statutory obligations to bargained in good faith to impasse.

In response to the Respondent's cross-motion, the GC contends that FSIP decisions do not bind the parties in perpetuity because the 2007 FSIP decision upon which the Respondent relies was issued under the 1998 CBA and not the current master agreement. As such, the 2007 FSIP decision no longer binds the parties.

Finally, the GC argues that even if the 2007 FSIP decision has some binding force on the parties for an unlimited duration, the proposal considered in the 2007 decision differs from the current proposal in that the prior proposal involved fewer employees and provided greater latitude in the scheduling of regular days off which could have impeded sufficient shift coverage.

Respondent

The Respondent claims that it is entitled to summary judgment as a matter of law because it has no duty to bargain with the Union regarding the CWS based upon the prior 2007 FSIP decision.

Additionally, the Respondent states that the GC has not cited any governing authority to support its claim that the Respondent refused to bargain over a mandatory subject because the facts included in the two cases that are cited by the GC are not similar to those present here.

Lastly, the Respondent claims that the GC's argument regarding the precedential effect of the 2007 FSIP decision is misguided and ignores FSIP's statutory authority because the FSIP made its finding of likely adverse agency impact under the exact same facts present in the new proposal. Therefore, the issue was already litigated and res judicata should prevent re-litigation.

DISCUSSION

Parties Are Not Bound by Prior FSIP Decision

The 2007 FSIP decision was based upon a different CWS proposal presented under a different CBA, and does not preclude all future negotiation on the issue of implementing a CWS within the Respondent's Facilities Department. The Statute makes it clear that "[n]otice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The 2007 decision by FSIP was decided under the terms of a CBA executed in 1998. Thus, the claim made by the Respondent that the GC "seeks to ignore and disregard FSIP's statutory authority, as well as the careful findings FSIP previously made between these exact same parties when presented with the exact same facts" is without merit. The new CBA made applicable to the parties in 2014, essentially terminated the 2007 FSIP decision regarding a proposal made under terms

agreed to in the 1998 CBA. The decision ceased to bind either party when the CBA under which it was considered by the FSIP ceased to apply to the parties.

The Authority has held that matters pertaining to compressed work schedules are fully negotiable and enforceable, subject only to the Act itself or other laws superseding it. U.s. Dep't ofthe Treasury, IRS, Austin, Tex., 60 FLRA 606, 608 (2005) (Treasury). Thus, absent an agreement that already covers compressed work schedules, the Respondent has an

obligation to meet and negotiate over any new CWS proposal made under the terms of the new CBA. Furthermore, the Agency and the Council of Prison Locals, AFGE, agreed in Article 1 8, Section b, of the 2014 CBA that implementation of a CWS would be negotiated at the local level. (GC Ex. 4). Therefore, pursuant to the bargaining obligation established in the new CBA, an obligation that did not exist when the FSIP considered the earlier CWS proposal, FCI Herlong was required to negotiate over the implementation of a CWS in the Facilities Department. If the Respondent wanted the results of the prior FSIP decision to remain in effect beyond the term of the expired CBA to preclude negotiation over a CWS within the Facilities Department at FCI Herlong, such a provision should have been included in the new CBA by bargaining and agreement of both parties on that issue.

Facts Related to the 2007 Decision Were Different

Aside from the clear statutory CBA term limitation placed upon every FSIP decision, the Respondent's reliance on the 2007 FSIP decision is also misguided in that the facts related to the earlier decision differ from those presented by the new CWS proposal. The proposal in the earlier decision provided that fourteen employees would work a four day week, ten hours a day schedule.. It included days off for employees across the entire work week. In deciding that case, the FSIP noted that the 2007 proposal created a burden on the Facilities Department as it was likely to reduce productivity. However, the 2015 proposal provides that all twenty-one employees will be scheduled to work on Tuesdays, Wednesdays, and Thursdays, with employees only getting either Monday or Friday off in addition to the normal weekend days. While involving the same subject of a compressed work schedule, the current proposal is not identical to the proposal considered by the FSIP in the 2007 decision.

Further, 2472.4(a)(4) of the FSIP regulations makes clear that any request for Panel consideration must include a copy of the collective bargaining agreement between the parties. Since the prior decision by the FSIP relied upon the 1998 CBA and that agreement has since been replaced, the FSIP would be considering tenns within a new CBA when reviewing the current proposal. In addition, S 2472.7(b) of those regulations provides the parties opportunity to present their positions, including supporting evidence. Therefore,

additional and different facts not presented in the first proceeding could be introduced at a consideration of the current proposal.

In that regard, I note that while it is not absolutely clear from the record, there is evidence that the single eight hour work shift for inmates that was in effect for the prior FSIP decision and which was a key part of the consideration given to the earlier proposal, has changed, and that inmates at FCI Herlong now work morning and evening shifts. (GC Ex. 2). That assertion was not denied by the Respondent, in fact, it was somewhat confirmed by Agency Exhibit 1. If that is the case, such a change would invalid the prior decision by the FSIP even if the original CBA was still in effect. Agency Exhibit 1 is a memorandum from Assistant Warden Jacquez, and while it focused upon the tool room hours not changing, it also seems to acknowledge the existence of AM and PM shifts for inmates. Given that the prior FSIP decision turned upon the inefficiency of having employees who supervise inmates for an eight hour work shift remaining on duty for an additional two hours with no inmates to supervise, such inefficiency is not present if inmate work is spread over two shifts that exceed eight hours. While it is not entirely clear from the record if such a change has occurred, the possibility of such a change demonstrates why the factual determinations made by the FSIP in one adverse agency impact consideration do not rise to the level of a final judgment to which res judicata or collateral estoppel should apply.

As any new FSIP consideration in response to a bargaining impasse would involve a different proposal, a different CBA, and potentially different facts presented by the parties, the 2007 FSIP decision is not applicable and does not bind the parties post execution of a new CBA.

Factually Analogous FSIP Decisions

The argument made by the Respondent that the General Counsel failed to cite factually analogous authority for the proposition that CSW proposals are fully negotiable misses the point. The mere fact that Authority precedent upon the issue did not involve a prior consideration by the FSIP, does not mean the negotiability of CWS proposals is in question. Upon this question the Authority has made it clear, CWS proposals are negotiable. Treasury, 60 FLRA at 608.

Furthermore, the contention that a prior decision of the FSIP regarding a proposal about a particular subject should foreclose negotiations between the parties on any subsequent proposal related to the same subject fails to acknowledge the fact specific determinations made by the FSIP. As every proposal reviewed by the FSIP is considered upon the facts established by the parties for that proposal, even the same parties cannot use a prior decision to bind the other unless it involves an identical proposal with the very same facts made under the same CBA.

FSIP Decisions

Recent decisions issued by FSIP involving application of 5 U.S.C. 6131 (b), the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Act) have found that the agencies failed to meet their burden of demonstrating the adverse agency impact required to justify a refusal to implement compressed work schedules. See Dep 't ofthe Air Force, 355th Mission Support Group, Davis-Monthan AFB, Ariz., 14 FSIP 080 (2014); DHS, U.S. Customs & Border Prot., Port ofSavannah, Savannah, Ga., 13 FSIP 135 (2014). However, not every agency has failed to meet its burden. Dep 't ofDef., DLA, DLA Distrib. Anniston, Anniston, Ala., 14 FSIP 11 (2014).

CONCLUSION

When an agency refuses to provide federal employees with the benefits bestowed by the Act, it must be able to demonstrate that implementation of a CWS is likely to cause an adverse agency impact. The fact that an Agency was able to meet such a burden with-respect to one proposal made under a different CBA does not mean the Agency will always be able to demonstrate such likelihood in the future, when a different form of CWS is presented as a proposal. The mere fact that it demonstrated the likelihood of an adverse agency impact in one situation involving a CWS proposal does not mean that every subsequent proposal for implementation of a CWS would present the same likelihood of an adverse impact on the agency. Whether an agency meets its burden is a question for the FSIP to resolve, and the fact that the Act requires the FSIP to resolve such questions and places the burden upon the agency to prove such adverse impact, does not give an agency the right to refuse to negotiate over proposals involving compressed work schedules. Authority precedent encourages agencies and unions to negotiate and requires it when the subject is a compressed work schedule. While there is no obligation to agree upon any proposal, refusing to negotiate when bargaining is required not only violates the Statute, it is a waste of government time and money. An agency may refuse to agree to a CWS proposal and refuse to implement a CWS, electing instead to take the proposal to impasse and letting the FSIP resolve the matter under the Act. However, an agency may not refuse to negotiate a CWS proposal from inception without violating the Statute, unless the exact same CWS proposal is made under the exact same facts, pursuant to the same CBA. As none of these factors are present in this case, the Respondent violated the Statute when it refused to bargain upon the Union's new compressed work schedule proposal.

Accordingly, the General Counsel's Motion for Summary Judgment is Granted, and Respondent's Cross-Motion for Summary Judgment is Denied.

Therefore, I recommend 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. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Herlong, California, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain in with the American Federation of Government Employees, Local 1217, AFL-CIO (Union), over a compressed work schedule in the Facilities Department.

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

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

(a) Bargain with the Union over a compressed work schedule for the Facilities Department.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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 Warden, FCI Herlong, California, and shall be posted and maintained for sixty (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 ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of the paper notices, notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

(d) Pursuant to 2423.41 (e) of the Rules and Regulations of the Authority, notify the Acting Regional Director, San Francisco 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., August 12, 2016

CHARLES R. CENTER
CHARLES R. CENT
Chief 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. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Herlong, California, 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 fail or refuse to bargain with the American Federation of Government Employees, Local 1217, AFL-CIO (Union) over a compressed work schedule within the

Facilities Department.

WE WILL bargain with the Union over a compressed work schedules for bargaining unit employees in the Facilities Department.

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

_____

(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 its provisions, they may communicate directly with the Acting Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 470, San Francisco, CA, and whose telephone number is: (415) 356-5000.