IN THE MATTER OF AN ARBITRATION BETWEEEN

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FCI SCHUYLKILL, PENNSYLVANIA

AND

RE: FMCS 08-56342

AMERICAN FEDERATION OF
GOVERNMENT EMPLOEES (AFGE)
LOCAL 3020

APPEARANCES:

Pati Manbeck on behalf of the Union
Chung-Hi Yoder on behalf of the Employer

A hearing in this matter was conducted on June 11 and July 22, 2009 during the course of which the parties presented evidence and arguments in support of their respective positions. Briefs were thereafter filed and the record was closed on 10/16/09. Based upon a review of this record the undersigned hereby renders the following arbitration award.

ISSUE:

Did the Employer violate the parties' Agreement and pertinent Statutes by its conduct related to its' removal of portable heating/air conditioning units from its Schuylkill facility, and if so, what is the appropriate remedy?

PERTINENT CONTRACTUAL/STATUTORY PROVISIONS:

Article 3 Governing Regulations

. . . .

Section a 1

c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

d. . . . If the provisions contained in the proposed policy manual and/or program statement change or affect any personnel policies, practices, or conditions of

employment, such policy issuances will be subject to negotiation with the Union, prior to issuance and implementation.

1. when national policy issuances are proposed, the Employer will ensure that the President, Council of Prison Locals, each member of the Executive Board of the Council of Prison Locals, and each local President receives a copy of the proposed policy issuance . . .

2. after the last Council of Prison Locals Executive Board member receives the proposed policy issuance, . . .the Union, at the national level, will have thirty (30) calendar days to invoke negotiations regarding the proposed policy issuance. . . .

3. should the Union invoke their right to negotiate the proposed policy issuance, absent an overriding exigency, the issuance and implementation of the policy will be postponed pending the outcome of negotiations.

. . . .

5. When locally-proposed policy issuances are made, the local Union President will be notified as provided for above, and the manner in which local negotiations are conducted will parallel this article.

Section e. Negotiations under this section will take place within thirty (30) calendar days of the date that negotiations are invoked. . . . .

BACKGROUND:

In 2001 the Employer installed the units in question in the facility's staff offices.

On 10/31/2007 the Bureau of Prisons promulgated a policy prohibiting space heaters in its' prisons. It is not disputed that said policy was agreed to by this Local's parent Union.

Very shortly thereafter, the Employer (at the facility level) concluded that the units in question constituted space heaters within the meaning of said policy, and that they could not be modified without jeopardizing their safety ratings.

When the Union learned of the Employer's conclusions in this regard, and of it's intent to remove the units in question, in mid January 2008 it requested a meeting to establish ground rules and a date to negotiate the Employer's anticipated action in this regard.

In response to the Union's aforementioned request, the Employer, in late January, notified the Union of it's intent to remove the units, and requested that the Union submit to it proposals regarding the matter by 2/8/08. The Union submitted four proposals shortly thereafter. The proposals, summarily, requested replacement of the units, that the units remain until replaced, that air temperatures for all unit employees be maintained at established temperatures, and that in the event air temperatures cannot be controlled staff will be permitted to be placed on administrative leave.

On 2/22/08 the Employer responded, indicating that it would consider purchasing air conditioning units should funding become available, and that removal of the units would take place on 2/25/08 unless additional proposals were received. The deadline was later postponed to 3/10/08. On 2/29 the Union responded by requesting that the status quo be maintained until all phases of bargaining are completed.

In essence, the Employer's responses to the Union's aforementioned proposal were as follows: Replacement of the units was not possible because of budgetary restraints, but would be considered in the future if funding became available. Retention of the old units was not possible under Federal Bureau of Prisons Policy, relevant Federal safety laws and regulations. Management would make all reasonable efforts to maintain comfortable air temperatures, and that the Union's specific proposals in this regard either were not related to the removal of the units or were addressed in national policy. And lastly, that removal of the units was vitally important to occupational safety, environmental compliance, and fire protection, and therefore, the status quo could and would not be maintained.

On 3/12 the Employer removed 22 units from the facility offices.

Several months thereafter, at the parties' regularly scheduled labor-management meeting, the parties discussed and agreed that the Employer would provide staff at the facility with fans in good working order.

UNION POSITION:

The Employer failed to negotiate, declare the Union's proposals non negotiable, or submit that it had no duty to bargain. The latter two positions would have enabled the Union to pursue negotiability appeals with the FLRA. At no time prior to the arbitration hearing in this matter did the Employer raise objections about the negotiability of the Union's proposals.

Furthermore, in response to the Union's request to negotiate the change in working conditions the Employer demanded that proposals be submitted in an unreasonably prompt fashion, which the Union did, twice. Without negotiations, the Employer dismissed the Union's proposals, provided no counterproposals, and removed the units.

The Employer never responded to the Union's request to bargain. At no time did it respond to the Union that it believed the Union's proposals were not appropriate negotiable issues. In fact, it failed to communicate anything to the Union regarding its obligation to bargain this matter. It is clear that had it clearly communicated its position regarding the Union's proposals, the Union would have had the right to appeal the Employer's decisions in that regard. (Citations omitted) Furthermore, it is well established that if a Federal employer refuses to bargain about proposals based upon a contention that a union's proposals are non negotiable, the employer acts at its peril if it implements changes in conditions of employment without meeting its' bargaining obligations. (Citation omitted) If any proposal made by a union in such cases is held to be negotiable, an agency may be found to have violated its statutory obligation to bargain, even if some, or even most of the proposals submitted by the Union are found to be not appropriately negotiable. (Citation omitted)

The parties never intended, nor did they agree that the subsequent providing of fans to staff by the Employer constituted a resolution of the Union's request to bargain about the removal of the units. Indeed, there was no discussion of the instant dispute during the "fan" discussion, and the Union clearly did not withdraw its' grievance regarding this matter at that time.

In fact, no written agreement exists regarding the resolution of this matter.

Although there have previously been situations where the parties have entered into agreements without having technically negotiated such settlements, in such cases such formal negotiations were not necessary since the Employer simply agreed to the Union's proposals. Clearly that was not the case here.

Generally speaking, under the law, the duty to bargain a unilateral change in conditions of employment contemplates an obligation to meet. (Citation omitted) Here, no such meeting occurred.

EMPLOYER POSITION:

The Local's allegation of a statutory violation is without merit because the Local has not been accorded exclusive recognition on an agency basis. 5 U.S.C. 7113 addresses the rights of labor organizations with national consultation rights—in this case, the Council of Prison Locals, not Local 3020.

On the merits of the grievance, the Union's proposals were not appropriate arrangements. The Union's statutory right to bargain is limited by management rights. When management exercises such rights, it only has a duty to bargain over the procedures to be utilized in the exercise of such rights, or on appropriate arrangements for those adversely affected, (5 U.S.C. 7106 (b)(2) and (3)) so long as such negotiations do not prevent management from exercising its' statutory rights.

The Union's proposal that permanently installed air conditioners and heating units be purchased to replace removed units infringed on management's right to determine it's own budget. Management properly and reasonably responded to this proposal by indicating that budgetary constraints prevented it from replacing the units.

The Union's proposal that the units not be removed until their replacements were installed infringed on management's right to comply with safety regulations.

The Union's proposal that air temperatures where all bargaining unit members work remain at established temperatures for government buildings improperly addressed the rights of all bargaining unit employees.

Its' proposal that staff be placed on administrative leave if air temperatures could not be controlled would also have prevented management from exercising its right to assign and direct work, as well as its right to determine internal security practices.

Here, the Employer simply implemented a policy that brought it into compliance with existing safety laws and regulations.

Given the history of the parties' method of negotiations, i.e., verbal and written exchanges, management reasonably concluded it had properly engaged in impact and implementation negotiations in this matter.

DISCUSSION:

The issue as to whether or not there was a duty to bargain in this matter, at least under the parties' Agreement, is not really in dispute. In that regard, it seems clear, and undisputed, that the Employer had a duty to negotiate at least the impact of its decision to remove the units since their removal constituted a change in affected employees' conditions of employment.

There is a dispute however over whether the Employer had a duty to negotiate the decision to remove the units. Relatedly, there is a dispute as to whether the Employer had to satisfy its duty to negotiate prior to implementation of the change.

Both under FLRA law and the parties' Agreement it seems clear that the Employer conceded that it had to give notice of its proposed change, and that it had to

negotiate, at least, the impact on working conditions of the proposed change, prior to implementation of the change. The issues raised in this matter pertain to whether it had to negotiate just impact issues, or whether instead, it had to negotiate implementation issues, and, once that question is answered, what specifically such a duty to negotiate required of the Employer.

With respect to the first question, absent evidence and persuasive argument that the Employer's decision to remove the units was made in bad faith, and/or that the units did not pose a legitimate safety hazard, and/or that they could have been modified to have eliminated potential safety hazards, the undersigned finds no basis in this record for concluding that the Employer's decision to remove the units was not a legitimate exercise of its management rights to minimize safety risks in the institution. Accordingly, the undersigned also finds that the Employer had no duty to negotiate the decision to implement the change in working conditions that resulted from the removal of the units to bring the institution into compliance with Bureau policy and Federal laws and regulations.

Thus, the undersigned concludes that the Employer's duty to bargain in this matter was limited to impact bargaining, i.e., bargaining about the impact of the proposed change on working conditions of adversely affected employees.

Having so concluded, the undersigned, based upon the FLRA law referred to in this record, also concludes that there are several relevant well-established legal principles pertinent to the disposition of this case (Citations omitted)

One, that an agency must respond to a bargaining demand in such cases; two, that the agency must advise the union if it believes it has fulfilled its duty to bargain, and if so, why, including why it might believe a union's proposals are not negotiable, thereby affording the union an opportunity to modify its proposals or to take legal action to attempt to effectuate its rights; three, an agency's bargaining responsibilities are not simply nullified if and because a union submits non negotiable proposals; and lastly, four, that if an agency implements a change before satisfying its bargaining obligations, it must demonstrate that delayed implementation would have impeded its ability to carry out its mission (e.g., safely).

In this matter, the Employer failed to meet its bargaining responsibilities in a number of ways. Most dramatically, although it technically responded to the Union's proposals in writing, it failed to communicate to the Union in a fair and clear manner, that it considered most of Union's proposals non negotiable, and why, and that it considered the decision to implement the change the exercise of a non negotiable management right. Also, importantly, it mischaracterized a union proposal as being non negotiable because it believed it to be too costly/not affordable. The negotiations process is intended precisely to provide parties a venue to attempt to reconcile such differences, to find solutions to problems that are affordable, and to afford parties an opportunity to address, if not solve such problems/issues in a shared, constructive way.

The Employer's response to the Union's proposals in this case, for the aforementioned reasons, did not manifest such an intent and violated its' duty to bargain the impact of its decision to remove the units in a good faith manner, in violation of Article 3 d 5 of the parties' Agreement.

Having so found, the undersigned need not address the statutory/jurisdiction issue raised by the Employer for the first time in its' post hearing brief. The decision not to address said issue is being made primarily because the issue was not raised by the Employer in a timely manner and the Union had no opportunity to litigate the issue. Secondly, it is not necessary to address the issue since the substance and merits of the issue in dispute are addressed by the terms of the parties' Agreement and the record evidence presented in this arbitration proceeding.

Perhaps it should be noted that the Employer did not contend in this proceeding that it satisfied its' bargaining duty when it subsequently provided fans in good working order to all employees, with the Union's approval. Clearly, although this action addressed the impact issue, it was not the result of negotiations, nor did it reflect a settlement agreement. In that regard, no written agreement exists, and clearly, as evidenced by this proceeding, the Union did not withdraw any of its demands/proposals in this matter.

The more perplexing issue for the undersigned to decide in this matter pertains to the issue of remedy.

The traditional, least controversial remedy for a refusal to bargain finding in cases like this is an order to bargain, which shall be the main component of the remedy prescribed herein.

Although no legal authority has been cited in this record regarding an arbitrator's remedial power to award a return to the status quo ante until bargaining occurs, even if such power exists, the undersigned could and would not do so here in view of the finding herein that the removed units constituted legitimate safety hazards that violated the Bureau's policies, as well a Federal law and regulations.

Which leaves unanswered the question how to encourage if not compel the Employer to address the adverse effects of the changed working conditions it imposed on affected employees in a good faith manner through the collective bargaining process. This is a particularly difficult problem to resolve fairly at this time since the decision that changed the working conditions cannot be undone, and the Union's only apparent right to have the adverse effects of the decision addressed is through the bargaining and impasse procedures afforded to it by the FLRA.

Without clearly established precedent supporting the proposition that arbitrators in matters such as this have the authority to compel meaningful bargaining, at least by retaining jurisdiction in such cases until the bargaining duty has been satisfied, the undersigned feels compelled herein to limit the relief available to the Union to an order to bargain the impact issue, subject to any rights the Union may have to utilize impasse procedures available to it under the FLRA.

Based upon all of the foregoing considerations the undersigned hereby renders the following:

ARBITRATION AWARD

The Employer did not fulfill its obligations to bargain the impact of its decision to remove the heating/cooling units in question on adversely affected employees. It is directed to do so at the request of the Union, which shall also have the right to utilize impasse procedures available to it under the FLRA.

Dated this 22nd day of October, 2009 at Chicago, IL 60660

Byron Yaffe
Arbitrator