

**OFFICE OF PERSONNEL
MANAGEMENT**

NOTES ON FLRA SMOKING DECISIONS SINCE 1988

Refusal to Bargain over Smoking Policy

NTEU, CHAPTER 230 VS HHS, REGION V (45 FLRA NO. 64)

We conclude that the Agency's exceptions provide no basis for finding the award deficient. Accordingly, we will deny the exceptions.

The grievance in this case alleged that the Agency's refusal to negotiate over the decision to ban smoking at its facilities violated the parties' agreement and the Statute. The Arbitrator found that by unilaterally banning smoking and refusing to bargain over that decision, the Agency violated the parties' agreement and section 7116(a)(1) and (5) of the Statute. The Arbitrator directed the Agency to bargain with the Union over its decision to ban smoking and ordered a restoration of the former smoking policy at one Agency location and the creation of designated smoking areas at another location where bargaining unit employees are located.

NFFE, LOCAL 153 VS AIR FORCE, COMBAT GROUP, 56TH, AIR FORCE BASE, MACDILL, FL (44 FLRA NO. 90)

The complaint alleged, and the Judge found, that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a smoking ban in Building 242 of the Respondent's facilities without providing the Union with notice and an opportunity to negotiate over either the substance or the impact and implementation of the change in working conditions. The Judge recommended that the Authority issue an order requiring the Respondent to, among other things, rescind the smoking ban and bargain with the Union upon request concerning any intended changes in conditions of employment, including smoking bans.

We have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed.

AFGE, LOCAL 2904 VS MARINE CORPS, WASHINGTON D.C., RESERVE SUPPORT CENTER, KS (44 FLRA NO. 4)

The complaint alleges that the Respondents violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally prohibiting smoking in two rest rooms that had previously been designated as smoking areas without providing the Union notice and an opportunity to bargain over the substance, impact and

implementation of the decision. The Judge found that the Respondents did not violate the Statute and recommended dismissal of the complaint.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed. We affirm the rulings.

other similar cases

- HHS, HCFA VS FLRA (91-1068 (4TH CIR))
- AFGE, NATIONAL INS COUNCIL, LOCAL 2076 VS JUSTICE, INS, WASH. D.C., PORTLAND, MAINE, ST. ALBANS, VT (43 FLRA NO. 23)
- AFGE, LOCAL 997 VS AIR FORCE, AIR FORCE BASE, MAXWELL, 3800 ABW/AU, ALABAMA (39 FLRA NO. 128)
- AFGE, LOCAL 1923 VS HHS, HCFA (39 FLRA NO. 9)
- AFGE, LOCAL 2429 VS AIR FORCE, SPACE SYSTEMS DIVISION, CONTRACT MANAGEMENT DIV (38 FLRA NO. 119)
- AFGE, LOCAL 1547 VS AIR FORCE, 832D COMBAT SUPPORT GROUP, AIR FORCE BASE, LUKE (36 FLRA NO. 38)
- AFGE, COUNCIL 236 VS GSA, REGION VII, FORT WORTH, TEXAS (35 FLRA NO. 144)
- IFPTE, LOCAL 12 VS NAVY, NAVAL SHIPYARD, PUGET SOUND, BREMERTON, WA (35 FLRA NO. 18)

Provisions for Outdoor/Indoor Smoking Facilities

AFGE, LOCAL 2281 VS VA, VA MEDICAL CENTER, KERRVILLE, TEXAS (45 FLRA NO. 36)

The Arbitrator determined that the Medical Center had failed to make available at its facilities a sufficient number of adequate outdoor smoking shelters, as required by the decision and order of the Federal Service Impasses Panel. As a remedy, the Arbitrator directed the Medical Center to (1) enclose two additional outdoor shelters that can accommodate twenty persons at one time and provide these two shelters with heating and ventilation equipment; and (2) redesignate part of the canteen as a smoking area until it provides the two additional adequate smoking shelters and gives three days notice that it has done so.

For the following reasons, we find that the exceptions fail to establish that the Arbitrator's award is deficient. Accordingly, we will deny the exceptions.

AFGE, LOCAL 2025 VS AIR FORCE, 814TH COMBAT SUPPORT GROUP, BEALE,
CALIFORNIA (43 FLRA NO. 96)

The Judge found that the Respondent violated the Statute by failing to give the Union notice of the change and an opportunity to bargain over the impact and implementation of the elimination of the smoking room in Building 2539, but concluded that the Union had waived its right to negotiate over the change itself. The Judge recommended a status quo ante remedy, which reinstated the smoking room in Building 2539.

Management unilaterally designated outdoor smoking areas for unit employees without first giving the Union notice and the opportunity to bargain over the changes. The complaint also alleges that the Respondent violated the Statute by bypassing the Union and soliciting directly from unit employees their proposals for the establishment of outside smoking areas. We have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed. We affirm the rulings. Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings, conclusions and recommended Order, as modified by this decision.

AFGE, LOCAL 2317, 2904 VS MARINE CORPS, MARINE CORPS FINANCE CENTER,
KANSAS CITY, MO (42 FLRA NO. 1)

The General Counsel contends that the Authority failed to address the allegation raised in the complaint "that implementation of the designation of smoking and nonsmoking areas at local Marine Corps facilities without bargaining with the appropriate exclusive representatives violated 5 USC 7116(a)(1) and (5)." General Counsel's Motion for Reconsideration (motion) at 2.

We grant the General Counsel's motion. On reconsideration, we find that the Respondents committed unfair labor practices in violation of section 7116(a)(1), (5) and (6) of the Statute by implementing the designation of smoking and nonsmoking areas at local Marine Corps facilities without bargaining with the appropriate exclusive representatives and while impasse proceedings were pending before the Federal Service Impasses Panel.

PATENT OFFICE PROFESSIONAL ASSOCIATION VS COMMERCE, PTO
(41 FLRA NO. 72)

Provision 11, which concerns the assignment of offices to employees who smoke, does not interfere with management's rights to assign and direct employees and is negotiable.

NFFE, LOCAL 414 VS HHS, INDIAN HEALTH SERVICE, OKLAHOMA CITY,
OKLAHOMA (38 FLRA NO. 71)

This case is before the Authority on a negotiability appeal filed by the Union under Section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability of one proposal that would require the designation of at least two smoking areas in each Agency facility.

For the reasons discussed below, we find that the proposal is negotiable.

Interference by Other's Rules and Regulations

AFGE, LOCAL 3430 VS HHS, PHS, CDC, NIOSH, APPALACHIAN LABORATORY
(39 FLRA NO. 115)

In Case No. 3-CA-00190, the complaint alleges that Respondents U.S. Department of Health and Human Services (HHS) and Public Health Service, (PHS) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by **disapproving a provision negotiated between the Appalachian Laboratory for Occupational Safety and Health, National Institute for Occupational Safety and Health (NIOSH) and the Union concerning the designation of smoking areas.** The complaint further alleges that Respondents Centers for Disease Control (CDC) and NIOSH violated section 7116(a)(1) and (5) of the Statute by refusing to negotiate over Union proposals that are substantially identical to proposals previously held to be negotiable by the Authority.

In Cases Nos. 3-CA-00409, 3-CA-00410 and 3-CA-00411, the complaints allege that: (1) **Respondents HHS and PHS unlawfully interfered with the bargaining relationship between Respondent NIOSH and the Union by directing Respondent CDC to discontinue the designated smoking areas at the NIOSH, Morgantown, West Virginia facility;** (2) Respondent CDC violated section 7116(a)(1) and (5) of the Statute by directing Respondent NIOSH to rescind the parties' Memorandum of Understanding (MOU) and discontinue its designated smoking areas; and (3) Respondent NIOSH violated section 7116(a)(1) and (5) of the Statute by repudiating the (MOU) and discontinuing the designated smoking areas at its Morgantown, West Virginia facility.

For the reasons, we find, in Case No. 3-CA-00190, that Respondent PHS committed the unfair labor practices alleged, but that the complaint against Respondents CDC, NIOSH and HHS should be dismissed. In Cases Nos. 3-CA-00409, 3-CA-00410 and 3-CA-00411, we find that Respondent PHS committed the unfair labor practices alleged, but that the complaint against the Respondents CDC, HHS and NIOSH should be dismissed.

NTEU VS TREASURY, CUSTOMS (33 FLRA NO. 20)

This case concerns the negotiability of two proposals. The proposals address the Agency's proposed smoking policy. We find both proposals to be negotiable.

Proposal 1: The Employer agrees to negotiate over the specific areas to be designated as smoking or non-smoking.

Proposal 2: Should the Employer decide to make changes in the facilities to implement the GSA policy, the Employer will notify the Union prior to implementing any change and provide the Union with an opportunity to bargain.

State Laws and Ordinances Requiring Smoke-Free Workplaces

NFFE, LOCAL 1379 VS INTERIOR, BLM, OREGON STATE OFFICE, PORTLAND, OREGON (44 FLRA NO. 103)

According to the Agency, since 1984 it has leased two open bays in the Lane County Fleet Maintenance Facility, which is owned by Lane County, Oregon. The Agency states that the dispute in this case resulted from the application of smoking restrictions imposed by the Oregon Indoor Clean Air Act, the Eugene Municipal Code, and the Lane County Administrative Manual. The Agency claims that upon renegotiation of its lease with Lane County, the county insisted that the Agency comply with the smoking restrictions that had been imposed in the facility as a consequence of the above authorities. According to the Agency, the imposed restrictions prohibit smoking in the bays that it leases.

Section 7106 of the Statute removes from the duty to bargain specified management rights. Section 7117 excludes from the duty to bargain matters that are inconsistent with Federal law, Government-wide rule or regulation, or an agency regulation for which a compelling need exists.

Nowhere does the Statute exclude from the duty to bargain matters that are inconsistent with state, county, and local law. Consequently, the Agency's claim that the proposal is nonnegotiable because it is inconsistent with state, county, and local law does not present a ground for concluding that the proposal is not within the duty to bargain. See also 5 C.F.R. 2424.1.

AFGE, NATIONAL VETERANS ADMINISTRATION COUNCIL VS VA, WASHINGTON, D.C (40 FLRA NO. 95)

We conclude that the first proposal in dispute, Proposal 14, which permits employees to refuse to follow a physician's orders permitting a patient to smoke in a smoke-free unit,

excessively interferes with management's right under section 7106(a)(2)(B) of the Statute to assign work. The portion of the second proposal remaining in dispute, **Proposal 15, which provides that only volunteers will be required to accompany patients who wish to smoke to an outside smoking shelter, excessively interferes with management's right to assign work.** The sentence remaining in dispute in the third proposal, Proposal 16, which provides that employees who smoke will not be discriminated against, is negotiable. **The fourth proposal, Proposal 19, which obligates the Agency to provide smoking shelters that are accessible to and secured for employees only, is negotiable.** The last proposal, Proposal 33, which requires the Agency to provide designated smoking areas for certain employees in close proximity to their duty locations, is negotiable.

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The Employer agrees to negotiate over the specific areas to be designated as smoking or non-smoking.

Proposal 2:

Should the Employer decide to make changes in the facilities to implement the GSA policy, the Employer will notify the Union prior to implementing any change and provide the Union with an opportunity to bargain.

Hazard Pay or Environmental Differential Pay

NAGE VS VA (43 FLRA NO. 42)

We find that Proposal 2, which would require that GS and WG employees receive hazard pay differentials or environmental differential pay for exposure to tobacco smoke, is negotiable.

Removal of Smoking Paraphernalia

**AFGE, LOCAL 85 VS VA, VA MEDICAL CENTER, LEAVENWORTH, KANSAS
(40 FLRA NO. 55)**

The Administrative Law Judge issued the attached decision in the above-entitled proceeding, finding that the Respondent did not violate section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally removing all smoking-related products from sale at the hospital canteen without providing the Union an opportunity to bargain over the substance, impact and implementation of the change.

We have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed.