UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: September 7, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS
DWIGHT D. EISENHOWER VETERANS
AFFAIRS MEDICAL CENTER
LEAVENWORTH, KANSAS

Respondent

and Case No. DE-CA-04-0491

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 85

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

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U.S. DEPARTMENT OF VETERANS AFFAIRS DWIGHT D. EISENHOWER VETERANS AFFAIRS MEDICAL CENTER LEAVENWORTH, KANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 85 Charging Party	Case No. DE-CA-04-0491

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 10, 2006**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

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RICHARD A. PEARSON
Administrative Law Judge

Dated: September 7, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRS DWIGHT D. EISENHOWER VETERANS AFFAIRS MEDICAL CENTER LEAVENWORTH, KANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 85 Charging Party	Case No. DE-CA-04-0491

Steven B. Thoren, Esq.
For the General Counsel

Susan M. McCalla, Esq.
Michael E. Anfang, Esq.
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

The case was initiated on August 9, 2004, when the American Federation of Government Employees, AFL-CIO, Local 85 (the Union or Charging Party) filed an unfair labor practice charge against the U.S. Department of Veterans Affairs, Dwight D. Eisenhower Veterans Affairs Medical Center, Leavenworth, Kansas (the Agency or Respondent). After an investigation, the Acting Regional Director of the Denver Region of the Authority issued an unfair labor practice complaint on November 19, 2004, and an amended complaint on January 19, 2005, alleging that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing the Union's request to negotiate over a one-hour lunch break for bargaining unit employees. The Respondent filed a timely answer, admitting that it had refused to negotiate but denying that it had any legal obligation to do so.

A hearing in this matter was held in Kansas City, Missouri, on February 17, 2005, at which all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The American Federation of Government Employees, AFL-CIO, (AFGE) is the exclusive representative of a nationwide bargaining unit of certain classes of employees of the Department of Veterans Affairs (VA). Joint Ex. 5, Article 1. AFGE Local 85 is an agent of AFGE for representing nonprofessional employees at certain facilities of the Respondent in and near Leavenworth, Kansas. Tr. 25-28. At all relevant times, AFGE and VA have been parties to a nationwide collective bargaining agreement (CBA) (Joint Ex. 5) that covers the employees involved in this case.

Article 20 of the CBA is entitled "Hours of Work and Overtime." Section 1(B) of this article allows employees working an eight-hour work day to have two 15-minute rest periods, one in the first half and one in the second half of their shifts. The length of employees' lunch breaks is not fixed under the agreement; instead, Section 2(H), "Lunch Breaks," provides:

> The Department [i.e., VA] will continue the existing lunch and break arrangements. If the Department determines that an adjustment to lunch and/or breaks is necessary to solve any significant public service or operational problems caused by the AWS [Alternate Work Schedules] Plan, the Union will be given the opportunity to bargain on such changes in working conditions.

Article 44 of the CBA is entitled "Mid-Term Bargaining." Section 1(C) provides:

> Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each

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[1] Along with its post-hearing brief, the General Counsel filed a Motion to Correct the Transcript, which was not opposed by the Respondent. The motion is hereby granted, and the transcript is corrected as noted.

> subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded from mid-term bargaining will be identified within each Article.

Testimony at the hearing established that employees at the Agency's Leavenworth facilities were permitted an unpaid 30-minute lunch period. Tr. 25, 28-29, 72, 81, 102-03. In the summer of 2004,[2] however, several employees complained to Union President Debra McDougal that they were being counseled for returning from lunch a few minutes late, while employees in another department were allegedly permitted to take a full hour for lunch. Tr. 25. Therefore, on July 30, McDougal sent a memo to Patrick Shea, the Respondent's Employee and Labor Relations Specialist, "formally requesting to negotiate a one hour lunch break for all of our bargaining unit." Joint Ex. 1. In his response dated August 2, Shea first cited the language in Article 20, Section 2(H) regarding the continuation of existing lunch and break arrangements. He continued: "In order for the Agency to determine if this issue is negotiable, please provide a list of bargaining unit positions currently with one hour lunch breaks . . . ." Joint Ex. 2.

McDougal followed up with another memo to Shea on August 4, informing him that "all of the Dom Assistants under the supervision of Dora Robinson have been allowed to take one hour lunches," as well as some nonbargaining unit Dom employees. "As far as the union knows no other bargaining unit employees are allowed to take over thirty minute lunch breaks. We are requesting to negotiate one hour lunch breaks for the remainder of our bargaining unit." Joint Ex. 3. Shea responded on August 5 that he had researched McDougal's allegation and "discovered that Dom Assistants have not been granted one-hour lunches." He therefore denied the request to negotiate one-hour lunches for employees, although he offered to meet with McDougal to discuss the issue informally. Joint Ex. 4.

Dora Robinson, Acting Chief of the hospital's domiciliary residential rehabilitation program (commonly referred to as the Dom), explained the origin of the lunch practice that McDougal had complained of. Of the department's 34 employees, 11 are domiciliary assistants (or rehabilitation technicians), who assist patients with their

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2 Hereafter, all dates are 2004 unless otherwise noted.

administrative needs but do not engage in direct health care. Tr. 69-75. The patients eat their lunch in the dining room, which is located one floor upstairs and directly above the Dom. Dom employees work in offices that are directly accessible to the patients; so in order to get some privacy, some employees leave the building for lunch, while some other employees began eating in a conference room in the Dom area. Tr. 70-71, 79-81.

Robinson first learned that some employees were using the conference room to eat lunch a few years prior to the events of this case. Tr. 93. At and prior to that time, the rehabilitation technicians took turns monitoring the patients in the dining room while the patients ate lunch, but Robinson and the prior Chief of the domiciliary program found that procedure to be unsatisfactory. The supervisors found it difficult to keep track of which employees were responsible for the job on any given day, and the employees were rarely needed in the dining room. Tr. 72, 76-77, 94. Instead, Robinson and her predecessor decided to allow the three or four rehabilitation technicians who ate in the conference room to combine their two daily breaks with their lunch, with the proviso that they be on call to assist the dietary employees with any problems that might occur in the dining room. *Id.* Robinson considered this to be a "win/ win" situation for employees and supervisors, in that it gave the employees more personal flexibility while also meeting management's need to have emergency coverage for the dining room. Tr. 72, 94.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel asserts that the Respondent violated section 7116(a)(1) and (5) of the Statute by rejecting the Union's July 30 and August 4 requests to bargain. The G.C. argues that this was a legitimate request for midterm bargaining over a negotiable subject, and that the Union had a right under both the CBA and the Statute to initiate such negotiations.

The General Counsel notes first that the Authority has successfully withstood protracted legal challenges to its position that unions have the right to initiate bargaining during the term of a collective bargaining agreement. *U.S. Department of the Interior, Washington, D.C.*, 56 FLRA 45 (2000), *on remand from NFFE, Local 1309 and FLRA v. Department of the Interior*, 526 U.S. 86 (1999). The G.C. goes on to posit that lunch breaks are conditions of employment and that the length of employees' lunch breaks is

negotiable. *Department of the Navy, Naval Weapons Station Concord, Concord, California*, 33 FLRA 770 (1988). Therefore, it insists that the Union here had a statutory right to demand negotiations to change the CBA provision regarding lunch breaks.

Further, the General Counsel points to language in the CBA itself permitting midterm bargaining. Citing Sections 1 (C) and 1(D) respectively of Article 44, which permit such negotiations "on all subjects covered in the Master Agreement" and "on matters affecting the working conditions of bargaining unit employees[,]" the G.C. asserts that the CBA is particularly sweeping in its acceptance of midterm bargaining. The G.C. recognizes that the language of Section 1(C) limits such bargaining to subjects that "do not conflict, interfere with, or impair implementation" of the CBA, but it argues that such limitations must be strictly construed, because Section 1(C) also provides that "matters that are excluded from mid-term bargaining will be identified within each Article." The G.C. argues that Article 20, covering hours of work and lunch breaks, does not contain any prohibition or exclusion of union-initiated midterm bargaining, and therefore it is expressly permitted. It further argues that Section 2(H) of Article 20 expressly requires only the Agency to continue existing lunch and break arrangements, while the Union is free to seek changes through negotiation.

Finally, the General Counsel asserts that the Agency refused to even begin negotiations on the subject of lunch breaks, thus preventing the Union from making any proposals on the subject. As a result, we cannot even evaluate whether any Union proposals would have been negotiable or not. The G.C. concludes that the Agency committed an unfair labor practice by this conduct, and that it should be ordered to bargain with the Union on the issue of one-hour lunch breaks.

The Respondent, conversely, argues that neither the CBA nor the Statute requires it to negotiate on this issue. Citing the previously-quoted language of Article 20, Section 2(H), the Agency asserts that the contract fixes lunch and break procedures in their existing status and permits changes only for public service or operational problems caused by AWS. Since neither side asserts that there was an AWS-caused problem in this case, Respondent reasons that both the Agency and the Union were prohibited under the CBA from making changes in lunch or break arrangements. Although Article 44 does permit midterm bargaining under certain circumstances, the Agency argues that the Union's proposal directly conflicted with the plain

language of Article 20, and therefore midterm bargaining was not appropriate.

The Respondent further argues that the Union's proposal for a one-hour lunch break improperly interferes with management's right under section 7106(a)(2)(B) of the Statute to assign work. The Dom assistants who were combining their breaks with their lunch had work responsibilities during that time period, and thus they were not taking a "bona fide" one-hour lunch; in contrast, the other bargaining unit employees for whom the Union was seeking a one-hour lunch period were not in a similar situation, and any Union proposal to change their lunch arrangement would have infringed on the Agency's determination of their work assignments. Finally, although the Respondent did not expressly discuss in its brief the issue of the Union's proposal being "covered by" the CBA, it did specifically assert this as a defense in its answer to the complaint (G.C. Ex. 1(f)), and I consider it to be an issue that has been properly raised and litigated.

Analysis

After reviewing the record in this case, two adages come to mind: "Give 'em an inch, and they'll take a mile;" and "No good deed goes unpunished." That seems to have been the predicament that Agency management found itself in, upon receiving Union President McDougal's bargaining demand. Ms. Robinson and her predecessor in charge of the Domiciliary Department had permitted a few day shift employees to engage in a practice that was apparently not commonly followed elsewhere in the hospital, a practice that was beneficial both to the Domiciliary employees involved

and to management.[3] These mutual benefits were attributable to specific circumstances in the Dom, but the Union sought to expand the practice to the entire bargaining unit. Federal managers are often criticized for hesitating to accommodate one employee, out of fear of "setting a precedent," but this case is a cautionary tale for supervisors who let their guard down.

McDougal explained that she made her bargaining request after some employees complained of being counseled for taking 32 or 33 minutes for lunch, while the Dom employees were seemingly taking a full hour. She testified that "the only thing I could do was request to negotiate it [a full hour's lunch period] for them." Tr. 25. Accordingly, McDougal sent a bargaining demand to the Agency, and her demand was quite specific: "The union is also formally requesting to negotiate a one hour lunch break for all of our bargaining unit." Joint Ex. 1; *see also* Joint Ex. 3, which has similar language. While it is seemingly trivial, it is worth noting the difference between the Union's bargaining request and the allegation in paragraph 10 of the General Counsel's complaint: the Union asked to "negotiate a one hour lunch break", but the complaint alleges that the Union "requested to negotiate with Respondent over a one-hour lunch break" (emphasis added). The General Counsel (consciously or unconsciously) sought to generalize a bargaining demand that was quite specific: McDougal was not asking to talk about the general issue of lunch breaks, but rather she was asking that every bargaining unit employee be

[3] There was discussion and dispute at the hearing as to whether employees were expressly prohibited from combining either or both of their break periods with lunch, but there was no actual proof on this point. McDougal insisted that there was a specific policy (emanating either from the VA or the Federal government) prohibiting this, while Shea was not aware of any direct prohibition. *Compare* Tr. 44-45 *and* 106. Article 20, Section 1(B) of the CBA allows employees two break periods, "normally one in the first half and one in the second half of the shift[,]" and prohibits employees from adding break periods to the beginning or end of their shift, but it is silent on whether breaks can be combined with meal periods. In the absence of proof that this practice violated some law or government-wide regulation, I consider this to have been a mutually-accepted past practice that constituted an "existing lunch and break arrangement" within the meaning of Article 20, Section 2(H) of the CBA. Moreover, if the practice did violate a Federal regulation or statute, that would hardly help the Union's case, as the Agency could not be required to continue and to expand an illegal practice.

entitled to a one-hour lunch break. Regardless of whether the Dom assistants were being allowed to do something that other employees could not do, the Union was demanding (in the words of Article 20 of the CBA) that "the existing lunch and break arrangements" for all other employees be changed.

There was considerable discussion at the hearing as to whether the Dom employees were being allowed to take a "bona fide" one-hour lunch, or whether their responsibility for helping with dining room emergencies during all or part of that period constituted work for which they were properly paid; but I do not consider this question material to the case before me. It was a "lunch and break arrangement" that had been in existence and mutually observed for a significant period of time prior to the events of this case, and thus it was an arrangement which the Agency certainly was required to "continue" under the terms of Article 20, and which arguably the Union was bound to honor as well. But it is equally true that this practice was not followed, either by employees or by management, elsewhere in the bargaining unit; nonetheless, the Union was expressly seeking to change the existing lunch and break arrangements for all employees outside the Dom.

Thus, I take issue with a claim made by the General Counsel and another one made by Ms. McDougal. First, I disagree with the General Counsel's assertion that the Agency's refusal to bargain prevented the Union from making any specific proposals, which could then have been evaluated as to their negotiability. As I noted above, the Union's initial demand to bargain constituted a very specific bargaining proposal: it sought to give every employee a one-hour lunch. And while that proposal may have been, in its most general sense, negotiable, it also conflicted quite directly with the existing practice for those employees. Second, I disagree with McDougal's assertion that her demand was "the only thing [she] could do[.]" Rather than demanding that the CBA be reopened to negotiate a change in lunch and break practices for nearly the entire bargaining unit, she could have asked to meet with Shea and Robinson to discuss the general issue of combining lunch and break periods; or, she could have filed a grievance complaining that some employees were being treated inequitably with regard to their lunch and break periods. A union is entitled to choose what type of recourse it feels is most appropriate in a given situation, but it is also accountable for that choice, and in this situation McDougal's demand for midterm bargaining was not its only option. The other courses of action that I have cited might have allowed the parties to discuss the broader implications of the Dom employees' lunch practice on the rest of the bargaining unit

and to identify alternative ways of handling the problem; but the Union's demand for a very specific change in the CBA shifted the debate from a perceived problem to the proposed solution.

The underlying issue in this case is quite straightforward: does the Union's bargaining request conflict with Article 20, Section 2(H) of the CBA? If so, then Article 44, Section 1(C) excludes it from midterm bargaining. The General Counsel is certainly correct in saying that the general subject of the length of lunch breaks is negotiable, and the Respondent would be required to bargain over the Union's request, even during the term of the CBA, unless the CBA forecloses such bargaining. In this respect, the Authority's "covered by" doctrine overlaps quite closely with the CBA itself.

The "covered by" doctrine was articulated by the Authority in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA*), in large part to resolve a longstanding debate over the appropriateness of union-initiated midterm bargaining. Although the Authority refused to accept the view of some courts that agencies need not engage in such bargaining, it recognized in *SSA* that section 7114 of the Statute is intended "to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement." 47 FLRA at 1017, *citing Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992). In order to strike a balance between promoting ongoing communications between the parties to a CBA during the term of the contract and preventing the "disruption that can result from endless negotiations over the same general subject matter[,]", 47 FLRA at 1017, the Authority set forth a two-pronged test for determining whether a contract provision covers a matter in dispute. First, it looks at "whether the matter is expressly contained in the collective bargaining agreement. In this examination, we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute." 47 FLRA at 1018. If the answer to this question is no, the Authority goes on to determine whether the matter in dispute is "inseparably bound up with" a subject expressly covered in the contract. *Id.* If the answer to either question is yes, then the proposal is covered by the contract and there is no obligation to bargain over it. *See also U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809, 813-14 (2000).

Similarly, Article 44, Section 1(C) of the CBA in this case provides for "substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement." In this regard, midterm bargaining is not precluded simply because the subject of a proposal is "covered in" the CBA, but bargaining is precluded if the proposal would "conflict, interfere with, or impair implementation" of a provision of the CBA. This language may offer the Union slightly more opportunities to bargain than under the *SSA* test; nonetheless, it still forecloses mandatory bargaining over the Union's proposal to "negotiate a one hour lunch break for all of our bargaining unit." As I view the Union's request, it directly conflicts with the language of Article 20: any reasonable reader would conclude that Article 20, Section 2(H) prohibits the Union as well as the Agency from changing the lunch and break arrangements, unless there are "significant public service or operational problems" related to AWS.

The Union and the General Counsel argue that Section 2 (H) only requires "the Department" to continue the existing lunch and break arrangements, but this argument is so literalistic as to deprive the CBA of any real meaning. As the Authority noted in *SSA*, "exact congruence of language" is not necessary for a proposal to be covered by a contract. 47 FLRA at 1018. The provision only refers to "the Department" in this respect, because only the Agency has the actual ability to continue or to change such practices. Throughout the CBA, provisions refer to either the Agency (the Department) or the Union when one party in particular has control over an issue or action, but this does not mean that the other party is free to renegotiate or seek to change that provision at any time. If this were true, then the CBA would provide neither party with any appreciable degree of "stability and repose" whatever. *SSA*, 47 FLRA at 1017. For instance, Article 42, Section 7 of the CBA contains time limits for employees and the Union to file and appeal grievances. Under the General Counsel's rationale, the Agency would be free to seek to shorten these time limits in the middle of the contract term. Rights or responsibilities assigned to the Union would have no lasting significance, as the Agency could seek to withdraw the right or impose more severe responsibilities, since the provision itself does not refer to the Agency; and both the Agency and the Union could seek to change at any time rights or responsibilities assigned to employees. Such a contract loses all meaning.

Looking again at Article 20, Section 2(H), it states that "the existing lunch and break arrangements" "will

continue[.]" Although the wording requires the Agency to continue these arrangements, the clear meaning of the sentence is that the existing lunch and break arrangements will not be changed during the term of the CBA. The provision is intended to offer all parties (not only the Agency and the Union, but the employees as well) stability regarding lunch and break arrangements. A reasonable person reading this provision can only conclude that, for the duration of the agreement, the parties intended to keep lunch and break arrangements unchanged, absent significant problems related to AWS that are not present here. The Union's July 30 request to negotiate a one-hour lunch break conflicted directly with the provision. Under the framework of the *SSA* decision, the Union's bargaining proposal was expressly contained in, and thus covered by, the language of Article 20, Section 2(H). Moreover, pursuant to Article 44, Section 1(C) of the CBA, the Union's proposal was not subject to midterm bargaining. The Agency, therefore, had no obligation to reopen this issue.

For all of the reasons stated above, I conclude that the Respondent was not required to bargain with the Union over the issue stated in the Union's requests of July 30 and August 4, and the Respondent did not commit an unfair labor practice.

I therefore recommend that the Authority issue the following order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, DC, September 7, 2006.

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RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-04-0491, were sent to the following parties:

_____

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Dated: September 7, 2006
Washington, DC