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

MEMORANDUM

DATE: August 4, 2010

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY FOR
ADMINISTRATION AND MANAGEMENT
DALLAS, TEXAS

RESPONDENT

AND

Case No. DA-CA-09-0273

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF FIELD LABOR LOCALS,
LOCAL 2139, AFL-CIO

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 transcript, exhibits and any briefs filed by the parties.

Enclosures

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U.S. DEPARTMENT OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION AND MANAGEMENT
DALLAS, TEXAS

RESPONDENT

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Case No. DA-CA-09-0273

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL COUNCIL OF FIELD LABOR LOCALS, LOCAL 2139, AFL-CIO

CHARGING PARTY

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 7, 2010**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

SUSAN E. JELEN
Administrative Law Judge

Dated: August 4, 2010
Washington, D.C.

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

U.S. DEPARTMENT OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION AND MANAGEMENT DALLAS, TEXAS RESPONDENT	
AND	Case No. DA-CA-09-0273
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL COUNCIL OF FIELD LABOR LOCALS, LOCAL 2139, AFL-CIO CHARGING PARTY	

Michael A. Quintanilla, Esq.
For the General Counsel

David L. Peña, Esq.
For the Respondent

Jeffrey P. Darby
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et. seq*. (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On June 18, 2009, the American Federation of Government Employees, National Council of Field Labor Locals, Local 2139, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge with the Dallas Region of the Authority against the U.S. Department of

Labor, Office of the Assistant Secretary for Administration and Management, Dallas, Texas

(Respondent/OASAM). (G.C. Ex. 1(a)) On December 22, 2009, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to engage in mid-term bargaining over parking at the Respondent's Dallas, Texas offices. (G.C. Ex. 1 (c)) On January 19, 2010, the Respondent filed an Answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(e)) At the hearing, the Respondent amended its answer to admit all but the final paragraph of the complaint. (Tr. 7).

A hearing was held in Dallas, Texas on March 10, 2010, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely Post-Hearing Briefs, which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

STATEMENT OF THE FACTS

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(d), (h)) At all times material to this matter, Kelley Pettit served as Regional Administrator and Earsie Johnson served as the Labor Relations Officer and both have been supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c), (e); Tr. 16, 49).

The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. (G.C. Ex. 1(c), (e)) Jeffrey Darby is the President of AFGE, Local 2139 and is Vice President of the National Council of Field Labor Locals. (Tr. 13).

OASAM is the consolidated agency for the Department of Labor (DOL), responsible for all administrative and management programs that serve all agencies within DOL, such as Human Resources, Financial Management, Administrative Services, Space, Telecommunications and Information Technology. (Tr. 50) The Dallas Region covers eleven states, including Texas. (Tr. 14, 50).

DOL has employees in at least two locations in downtown Dallas: 525 S. Griffin (also referred to as the A. Maceo Smith Building) and 1100 Commerce Street (also the Earle Cabell Building).[1] 525 S. Griffin has a parking lot which is managed by the General Services Administration (GSA). (Tr. 51) There are 169 spaces in the parking lot; DOL has 48 agency-paid parking spaces as part of its lease agreement. (Tr. 52) There are nine different agencies, including DOL, which occupy space at 525 S. Griffin. (Tr. 52) DOL is the largest agency in the building. Not all parking spaces are assigned to a specific agency through its

[1] Although Darby referenced the Earle Cabell Building during his testimony, the evidence reflects that the request to bargain at issue in this matter only related to the building located at 525 S. Griffin.

lease agreement, and the remaining spaces are available to individuals. The individuals pay GSA directly to park in a space and GSA administers the entire parking process. (Tr. 52-53) There is a waiting list for the next available parking spaces. (Tr. 50).

On March 17, 2009, [2] Darby sent an email to Pettit, stating the following:

> We understand the parking lot behind 525 S. Griffin will soon close. The NCFLL recognizes that the Department has absolutely no control over this situation.
>
> We propose negotiations on the parking lot located at 525 S. Griffin, specifically the spaces controlled by DOL. The NCFLL is interested in making a number of these available to BUEs in direct proportion with the size of the NCFLL BU vs. non-BUEs. It is patently unfair that non-BUEs have the lion's share of these spaces.
>
> Please let me know OASAM's position in this matter. Thank you.

(G.C. Ex. 2 at 3; Tr. 14-15).

Earsie Johnson responded on March 20, stating:

> We certainly empathize with the employees over the loss of the public parking across from the A. Maceo Smith building. As you indicated, we do not have any control over the parking availability in downtown Dallas, but have tried to be proactive in providing helpful information to our employees to assist them with locating alternative parking spots. (see attached).
>
> The parking lot behind the A. Maceo Smith building belongs to and is controlled by GSA. GSA maintains the access list and manages the process by which employees receive parking spots should one become available. Parking places that are allocated to a specific agency are determined between that agency and GSA, and are in strict accordance with DOL policy and we do not have the latitude to negotiate or break a Departmental policy.
>
> I hope this clarifies our position on this issue. Please let me know if you have any questions.

(G.C. Ex. 2 at 2; Tr. 16-17).

Darby reiterated the Union's request to bargain by emails dated March 23, April 13 and June 4. (G.C. Ex. 2; Tr. 17) The Respondent did not reply to these emails. (Tr. 17-18) Sometime in June, during a regularly scheduled labor-management meeting in Dallas, Pettit and Darby discussed the issue of parking and the Respondent assumed that the matter was concluded. (Tr. 61, 79) On June 18, however, the Union filed the unfair labor practice charge in this matter. (G.C. Ex. 1(a)).

The parties have a current National Agreement (NA)(G.C. Ex. 3) Article 2, Section 1 (Governing Laws and Regulations, Precedence of Laws and Regulations) states:

[2] All dates are in 2009, unless specifically noted.

> In the administration of all matters covered by this Agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities; by published Department and/or Agency policies and regulations in existence at the time this Agreement was approved; and by subsequently published Department and/or Agency policies and regulations required by law or by the regulations of appropriate authorities.

Section 6 – Past Practices states:

> It is agreed and understood that any prior working conditions and practices and understandings which are not specifically covered by the Agreement or in conflict with it shall not be changed unless mutually agreed to by the parties.

(G.C. Ex. 3, p. 4-6).

The NA does not contain an article on employee parking, although Article 17 does deal with GSA Vehicles or Lease Vehicles. Section 2 contains a reference to employee POVs, and specifically states "…Where parking is provided for GOVs, employees may park their POVs in vacant Agency spaces, provided that such use is not prohibited by law, regulation, or lease." (G.C. Ex. 3, p. 52).

The Department of Labor Manual Series (DLMS 2) contains the Respondent's internal regulations and policies regarding the administration and operation of the Department, including among other things, parking at DOL facilities. Chapter 520 contains the Parking Policy and was last updated on May 7, 2004. (Agency Ex. 1) Chapter 526 sets forth the parking priorities and states "The following descending order of priority will govern allocation of DOL controlled parking spaces and will include the best interests of the DOL as judged by the Director, BOC, or by delegation to the Regional Administrator, OASAM in regional offices, or other responsible administrative authorities in other facilities…." *Id.* at 4. The policy lists in order: official needs; employees with disabilities; official necessity; van pools, and carpools. *Id.*

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated section 7116(a)(1) and (5) when it refused to engage in mid-bargaining over parking with the Union. The GC asserts that the Respondent offered no legitimate defense for this failure.

Specifically, the GC asserts that the Respondent's "covered by" defense should be rejected, citing *U.S. Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004 (1993)(*SSA Baltimore*) and *Soc. Sec. Admin.*, 64 FLRA 199 (2009)(*SSA*). The GC notes that the parties' current NA (G.C. Ex. 3) does not contain an article concerning employee parking, and the matter therefore, is not expressly addressed in the parties' NA. The GC also argues that

Article 2 of the parties' NA in conjunction with DLMS 2 must also be rejected as a defense to the refusal to bargain mid-term regarding employee parking.

The GC further argues that the DLMS 2, Chapter 520, et seq., does not preclude bargaining with the Union over employee parking. Under section 7117(b) of the Statute, an agency regulation does not bar negotiation over an otherwise negotiable proposal unless the agency has demonstrated a compelling need for the regulation under Subpart F, 2424.50 of the Authority's Regulations. *See AFGE, Local 2139, Nat'l Council of Field Labor Locals*, 61 FLRA 654, 656 (2006). The Respondent has made no such assertion nor has it presented evidence to demonstrate a compelling need to issue DLMS 2, Chapter 520. Thus, the existence of DLMS 2, Chapter 520 does not bar negotiation over employee parking.

Further, the GC argues that the policy does not preclude bargaining with the Union over parking. While the parking lot is controlled by GSA, there are forty-eight parking spaces allocated to various DOL agencies that were included within the normal leasing arrangements for space and are under the control of DOL agencies. The Respondent could bargain about these particular parking spaces, even under its own policy.

Finally, the GC argues that the Respondent has not established a practice where the Union has agreed to be bound by the terms of the DLMS 2 as part of the NA. The GC therefore asserts that the Respondent has failed to offer any legitimate defense to its refusal to bargain with the Union regarding parking and a violation of the Statute as alleged in the complaint, must be found.

Respondent

The Respondent denies that it violated the Statute as alleged in the complaint, asserting that it and the Union have a long-standing past practice that matters regarding parking at DOL facilities were governed by DLMS 2. Under Authority precedent, a past practice regarding working conditions constitutes an amendment to the parties' collective bargaining agreement (CBA), and, as such, the practice is "covered by" the CBA and not subject to mid-term bargaining. Under these circumstances, the Respondent's refusal to bargain was justified and the complaint should be dismissed.

ANALYSIS AND CONCLUSIONS

This case involves the Union's request to engage in mid-term bargaining over the parking spaces under the Respondent's control at the federal building located at 525 S. Griffin Street. The parties are in agreement that employee parking can be a proper subject of bargaining. The Respondent however, asserts that in this instance, it has no obligation to bargain mid-term over parking. Specifically, as noted above, the Respondent asserts that the subject of parking has been controlled by its regulations set forth in the DLMS 2 for a considerable period of time and such practice has become a part of the NA. Therefore, the Respondent is not obligated to bargain over the Union's mid-term bargaining request because the matter is "covered by" the parties' agreement.

The "covered by" doctrine is set forth in *SSA Baltimore* and applies only in cases alleging an unlawful refusal to bargain. *SSA,* 64 FLRA at 202. In particular, the doctrine is "available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue." *U.S. Dep't of Energy, Western Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000). The doctrine has two prongs. *U.S. Customs Serv., Customs Mgmt Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). Under the first prong, a party properly may refuse to bargain over a matter that is expressly addressed in the parties' agreement. *Id.* Under the second prong, a party properly may refuse to bargain if a matter is inseparably bound up with, and thus, an aspect of a subject covered by the parties' agreement. *Id.* Although not expressly limited to situations like the instant case where an agency refuses to engage in union-initiated, mid-term bargaining, the covered by doctrine derives from, and is most naturally applied in, this type of scenario. *SSA, 64 FLRA* at 202.

The parties have engaged in little negotiation regarding parking. There is no evidence that there have been any previous requests by the Union for mid-term bargaining regarding parking. The one case cited by both parties, *AFGE, Local 2139*, 64 FLRA at 654, concerned the negotiability of a proposal to continue to pay for employee parking at the El Paso location. The Respondent relies on this case to assert that the Union was in agreement that the DLMS 2 was the proper source for dealing with parking issues, while the Union denies that its request that DOL follow the DLMS 2 was any sort of waiver of its right to bargain. In that case, the Union proposed that "The Agency will provide parking at the El Paso Field Office for bargaining unit employees who use their privately owned vehicles (POV) a majority of the time on Government business." The Union argued before the Authority that the proposal conformed to DLMS 2, Chapter 525.

As stated by both parties, in order to find the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001). While the evidence indicates that the Respondent has followed the practice of using the DLMS 2 with regard to employee parking at its various locations, there is no evidence that the Union has acquiesced to this practice. A review of DLMS 2 does not reveal any prohibition against bargaining with the exclusive representative on the issue of parking. I do not find, that the single proposal noted above, although consistent with the DLMS 2, is sufficient to show that the Union has agreed to follow the DLMS 2 in all aspects of employee parking at various DOL facilities or that the Union has waived its right to bargain mid-term about parking.

Therefore, the Respondent's defense that resolution of parking issues by reference to the DLMS 2 has been established by past practice and has been incorporated into and covered by the parties' current NA, is rejected. *See AFGE, Local 2128 and U.S., Dept of Defense, Def. Cont. Mgmt. Agency, Dist. West, Hurst, Tex.,* 58 FLRA 519, 523 (2003). The issue of parking is not expressly addressed in the parties' agreement. The Respondent does not point to any specific article in the NA that deals with parking, rather it looks to Article 2, Section 1 as incorporating the DLMS 2 into the NA. I do not find, however, that Article 2, Section 1 of the agreement is sufficient to incorporate the DLMS 2, Chapter 525 into the agreement and therefore, it is not inseparably bound up with, and thus, an aspect of, a subject

covered by the parties' agreement. *SSA,* 64 FLRA at 202.

Even assuming the evidence was sufficient to establish a past practice, I would reject the Respondent's covered by defense. In that regard, Article 2, Section 1 is inadequate to establish that the issue of parking is covered by the parties' agreement. The language has been carried over intact from contract to contract, except for elimination of the reference to Federal Personnel Manual. (*See* G.C. Ex. 4 at 4; G.C. Ex. 5 at 4; G.C. Ex. 6 at 4; G.C. Ex. 8 at 3) The language of the article itself, with its generalized references to policies and regulations, is not sufficient to incorporate the parking regulations into the NA. Therefore, the Respondent has failed to meet either prong of the covered by doctrine, since there is no specific article in the agreement related to parking, and the evidence fails to show that parking is inseparably bound up with and thus, a part of the agreement.

In this case, the Union has requested mid-term bargaining over the apportionment of parking spaces controlled by the Respondent. Since the subject of parking is not covered by the parties' agreement, the Respondent was obligated to bargain. The Respondent's refusal to bargain mid-term over parking arrangements at 525 S. Griffin was therefore in violation of section 7116(a)(1) and (5) of the Statute.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Dallas, Texas (Respondent), shall:

1. Cease and desist from:

(a) Refusing to bargain mid-term with the American Federation of Government Employees, National Council of Field Labor Locals, Local 2139, AFL-CIO (the Union), the exclusive representative of certain of our employees, regarding employee parking at 525 S. Griffin, Dallas, Texas.

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

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

(a) Upon request, bargain in good faith with the Union, to the extent required by law, regarding employee parking at 525 S. Griffin Street, Dallas, Texas.

(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 Regional Administrator, and shall be posted and maintained for 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) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. August 4, 2010

SUSAN E. JELEN
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 Labor, Office of the Assistant Secretary for Administration and Management, Dallas, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with the American Federation of Government Employees, National Council of Field Labor Locals, Local 2139, AFL-CIO (the Union), the exclusive representative of certain of our employees, regarding employee parking at 525 S. Griffin, Dallas, Texas.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, bargain in good faith with the Union to the extent required by law, regarding employee parking at 525 S. Griffin, Dallas, Texas.

(Agency/Activity)

Dated: _____ By:_____
(Signature) (Title)

This Notice must remain posted for 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 any of its provisions, they may communicate directly with the Regional Director, Dallas Region, Federal Labor Relations Authority, and whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, Texas 75202, and whose telephone number is: (214)767-6266.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-09-0273, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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_____
Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: August 4, 2010
Washington, DC