Office of Congressional Workplace Rights
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Washington, DC 20540-1999

UNITED STATES CAPITOL POLICE, Respondent, and FRATERNAL ORDER OF POLICE, DISTRICT OF COLUMBIA LODGE NO. 1 U.S. CAPITOL POLICE LABOR COMMITTEE, Charging Party.	)	Case No. 20-LMR-01 (CA)

Before the Board of Directors: Barbara Childs Wallace, Chair; Susan S. Robfogel; Alan V. Friedman; Roberta L. Holzwarth; Barbara L. Camens, Members.

DECISION OF THE BOARD OF DIRECTORS

This case was initiated pursuant to a Complaint issued by the General Counsel (GC) of the Office of Congressional Workplace Rights (OCWR). The Complaint, based upon an Unfair Labor Practice (ULP) Charge filed on March 23, 2020, by Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee (FOP or Union), alleges that United States Capitol Police (USCP) engaged in certain violations of 5 U.S.C. §§ 7116(a)(1), (5), and (8), when it suspended the parties' current collective bargaining agreement (CBA) during the COVID-19 pandemic and thereafter failed to negotiate to resolution or impasse regarding changed working conditions for bargaining unit employees.

The Hearing Officer granted summary judgment for the GC and the Union on all counts in the Complaint, and the USCP has now petitioned the Board for review. Upon due consideration of the Hearing Officer's Decision on Motions for Summary Judgment, the parties' briefs and filings, and the record in these proceedings, we AFFIRM the Hearing Officer's Decision IN PART and adopt the Hearing Officer's findings and conclusions only to the extent consistent with this Decision.

I. Background and Procedural History

Unless otherwise indicated, the following facts are undisputed.

The USCP is an "employing office" within the meaning of sections 101(9) and 220(a)(1) of the Congressional Accountability Act (CAA), 2 U.S.C. §§ 1301(9), 1351(a)(1). The FOP is a labor organization that has been duly certified pursuant to CAA section 220(c)(1) as the exclusive representative of the USCP's officers who are included in the bargaining unit.

On or about March 18, 2020, USCP Chief of Police Steven Sund notified the FOP that he was considering suspending the parties' CBA due to the COVID-19 pandemic. At a meeting between the USCP and the Union on the following day, FOP officials stated that suspending the entire CBA was unnecessary, and requested an opportunity to discuss the USCP's COVID-19 response plan.

On March 20, 2020, Chief Sund sent Union Chairman Gus Papathanasiou a memorandum via email, which stated that the USCP was suspending the entire CBA. The memorandum stated:

> This memorandum serves as the official Department notice, consistent with Article 8 of the Parties' collective bargaining agreement ("CBA"), that the Chief of Police is suspending the CBA. . . .
>
> I have determined that the COVID-19 pandemic is an emergency that requires suspension of the CBA. Suspending the CBA is necessary to ensure the essential functions of the Department. The CBA will remain suspended until I am satisfied that the COVID19 pandemic emergency has ceased.
>
> Based on the emergency presented by the COVID-19 pandemic, the provisions of the CBA will be suspended in accordance with Article 8, Section 08.04 of the CBA[1] and in accordance with 5 U.S.C. §7106(a)(2)(D) of the Federal Service

[1] Section 08.04 provides:

Suspension of Provision(s) of the Agreement

1. The Union recognizes and fully supports the Department's mission to provide protective operations and law enforcement services for the Legislative Branch of the United States Government. The Union further recognizes that in order to carry out the Department's mission during emergency situations it may be necessary to suspend temporarily the implementation of provisions of the Agreement that would prevent or impede accomplishment of the mission.

> Labor Relations Management Statute [sic], as incorporated by the Congressional Accountability Act.

In the email attaching the memorandum, the Chief of Police further stated that, "Provided the potential scope and duration of the pandemic, it is imperative that the Department have the ability to expeditiously modify its posture and ensure the continuity of its essential services." Neither the email nor the memorandum from the USCP described any changes to conditions of employment that the USCP had made or intended to make as a result of the CBA suspension.

The Union Chairman's March 20, 2020 email in response to the USCP memorandum expressed agreement that "the present circumstances are 'exceptional.'" However, he reiterated the Union's opposition to suspending the entire CBA, and noted that section 8.02 of the CBA, which addresses the procedures that apply when the USCP wishes to make changes in working conditions, permitted a shortened notice period during "exceptional or unforeseen circumstances."

On March 23, 2020, the Union filed an ULP Charge with the OCWR GC alleging that the USCP had violated 5 U.S.C. §§ 7116(a)(1), (a)(5) and (a)(8) of the Federal Service Labor-Management Relations Statute (FSLMRS), as incorporated by 2 U.S.C. § 1351, when it failed to provide proper notice, failed to negotiate the USCP's emergency response plan to COVID-19, and unilaterally suspended the entire CBA.

Emergency situations include, but are not limited to, riots, demonstrations, fires, floods and other disasters/events.

2. The Chief of Police or his designee will make any necessary determinations of the existence of an emergency that will result in the suspension of any provision(s) of this Agreement.

3. The Department recognizes the Union's need to be notified promptly of the existence of an emergency, which would result in the temporary suspension of any provisions of the Agreement. The Department will notify the Union as soon as possible, in writing, whenever the Chief, or his designee, determines the need for temporary suspension of any provision of this Agreement. In the event an emergency requires the suspension of the Agreement for more than thirty (30) days, the Department will review the continued need for the suspension and promptly provide notification and the reasons to the Union in writing.

4. Nothing in this Agreement will affect the statutory authority of the Department under 5 U.S.C. § 7106(a)(2)(D) to take whatever actions may be necessary to carry out the mission of the Department during emergencies.

On April 17, 2020, the USCP emailed a letter to the FOP extending the CBA suspension for 30 days. Again, the email provided no notice to the Union of any changes to conditions of employment, either contemplated or already effected.

In the course of the underlying ULP proceedings, the USCP provided the OCWR GC with a copy of a letter dated May 7, 2020, which the USCP had sent to Congressman Steny H. Hoyer regarding the suspension of the parties' CBA and changes to USCP operations. In the letter, the USCP Police Chief listed "some, but not all, of the significant changes the Department implemented in response to the COVID-19 crisis since mid-March 2020." The letter admitted that "[m]ost of the changes described" are likely "changes in working conditions." (The 35 changes detailed in the May 7 letter are included at the end of this Decision.)* Among the noted operational changes detailed in the letter were changes to scheduling and staff assignments, the suspension of the grievance-arbitration process and multiple changes to health and safety protocols. The Union did not receive notice of the nature or scope of the operational changes set forth in Chief Sund's letter to Representative Hoyer until it was provided with a copy of that letter.

In the May 7, 2020 letter to Congressman Hoyer, the Police Chief also offered the following explanations as to why it was necessary to suspend the entire CBA in order to address the pandemic:

> The CBA does not allow for the Department to adapt quickly to evolving and unpredictable circumstances presented during an emergency, such as the COVID-19 pandemic, as its substantive provisions generally require the Department to adhere to certain administrative processes and timelines, and either negotiate, respond to grievances about, and/or arbitrate certain management decisions. It is for this very reason that the Department negotiated to have the right to unilaterally suspend the CBA because of an emergency, and that federal law permits employers to take actions that may contravene a collective bargaining agreement in times of emergency.

Chief Sund's letter further stated with respect to the CBA's provisions for addressing changes in working conditions:

> Generally, the CBA requires the Department to notify the Union of a change in working conditions. Most of the changes described above likely are changes in working conditions. Once the Department notifies the Union of a decision to make a change, the Union has 14 days in which to submit negotiable proposals related to the change in condition. Meanwhile, the Department is unable to implement the change, pending negotiations. If the Union submits proposals that are negotiable, a team of Department officials must meet with a team of Union representatives to negotiate the proposals until an agreement is reached or the parties reach an

impasse. If impasse is reached, the matter is referred to the OCWR for further impasse proceedings. The Department may not implement the new procedure until agreement is reached or a final decision is made in the impasse proceedings. This process generally takes months, if not longer. In a pandemic situation when individuals may become symptomatic after 14 days, the Department cannot wait months, or longer, to implement changes intended to maintain the health of its workforce.

On May 15, 2020, the USCP emailed another letter to the Union extending the suspension of the entire CBA for an additional 30 days. On June 15, the USCP sent a third letter to the FOP extending the suspension for an unspecified period. Again, neither of these communications provided notice of any changes to working conditions that had been undertaken by the USCP in response to the COVID-19 pandemic.

On July 15, 2020, the USCP sent a letter to the FOP advising that it was reinstating certain articles of the CBA, and on August 14, 2020, the USCP sent another letter to the FOP advising that it was reinstating additional articles of the CBA. On September 14 and October 14, and November 30, and December 11, 2020, the USCP sent additional memoranda to the FOP confirming the continued suspension of the parties' CBA, with previous modifications reinstating certain Articles.

On November 13, 2020, the OCWR GC filed a Complaint alleging that the USCP committed ULPs when it suspended the entire CBA without impact and implementation bargaining and when it refused to reinstate provisions of the CBA, including those relating to grievance and disciplinary procedures. The Hearing Officer thereafter issued an Order determining, after considering the pre-hearing memoranda filed by the parties and considering the positions of all parties at the pre-hearing conference, that no genuine issue exists as to any material fact in this case, and that the matter could be decided on motions for summary judgment. The parties thereafter filed cross motions for summary judgment, including statements of the undisputed facts that would allow entry of judgment as a matter of law.

On January 21, 2021, the Hearing Officer granted summary judgment in favor of the OCWR GC and the Union, and denied the USCP's cross-motion for summary judgment, concluding that the USCP committed ULPs in violation of CAA § 220(a) and 5 U.S.C. §§ 7116(a)(1), (5), and (8) when it: (1) suspended the parties' entire CBA without permitting any bargaining with the FOP or explaining why such action was necessary to carry out the agency's mission during the COVID-19 pandemic; (2) refused to reinstate provisions of the parties' CBA that did not interfere with carrying out its mission during the COVID-19 pandemic; (3) refused to engage in any bargaining with the FOP over changes to conditions of employment that it unilaterally implemented after suspending the parties' CBA; and (4) suspended and refused to reinstate the grievance

and arbitration provisions contained in Article 32 of the parties' CBA. This petition for review followed.[2]

II. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c); *Katsouros v. Office of the Architect of the Capitol,* Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (OOC Jan. 21, 2011).

We review a decision granting a motion for summary judgment *de novo*. *United States Capitol Police, & Fraternal Order of Police, District of Columbia Lodge No. 1 U.S. Capitol Police Labor Committee,* 2017 WL 4335144 at **2-3 (OOC Sep. 25, 2017); *Patterson v. Office of the Architect of the Capitol,* No. 07-AC-31 (RP), 2009 WL 8575129, at *3 (OOC Apr. 21, 2009). Summary judgment is appropriate if there are no genuine issues of material fact, and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); OCWR Procedural Rule 5.03(d). In determining whether the nonmoving party has raised a genuine issue of material fact, the Board must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *U.S. Capitol Police & Lodge 1, FOP/U.S. Capitol Police Labor Comm.*, No. 16-LMR-01 (CA), 2017 WL 4335144, at *3 (OOC Sep. 26, 2017); *see also Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011).

III. Analysis and Conclusions

For the reasons set forth below, we affirm that part of the Hearing Officer's decision in which he found that the USCP committed an unfair labor practice when it

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[2] As of January 29, 2021, (the date of the Hearing Officer's decision in this case) the following articles of the parties' CBA remained suspended:

> Article 2-Governing Laws, Policies and Regulations; Article 3-Management Rights; Article 4-Bargaining Unit Officer Rights; Article 5-Union Rights and Responsibilities; Article 8-Changes in Conditions of Employment; Article 15-Locker Rooms/Showers/Break Rooms; Article 17-Assignments, Transfers and Details; Article 18-Basic Work Period and Overtime; Article 19-Leave; Article 26- Safety and Health; Article 32-Grievances/Arbitration Procedures; Article 38-Contracting Out.

failed to engage in good faith bargaining after its suspension of the CBA. We find it unnecessary to take a position on the interpretation to be given to Section 8.04 of the parties' CBA or on whether there was an obligation to bargain over the decision to suspend the CBA itself. Rather, we conclude that, even assuming that Section 8.04 of the CBA and Section 7106(a)(2)(d) of the FSLMRS gave the USCP the right to suspend some or all of the CBA unilaterally as the USCP contends, the USCP violated its statutory obligation to bargain over the resulting changes in conditions of employment.

A. The USCP's Changes in Conditions of Employment Triggered an Obligation to Bargain.

Section 7116(a)(5) of the FSLMRS makes it an unfair labor practice for an agency to refuse to bargain in good faith with an exclusive representative of its employees. *U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Memphis, Tennessee,* 42 FLRA 712, 713 (1991). An agency's bargaining obligation may arise when management proposes to change existing conditions of employment. *Department of the Army Material Command Wright-Patterson Air Force Base, Ohio,* 51 FLRA 1532, 1535 (1996). Absent a waiver of bargaining rights, even if the subject matter of the change is outside the duty to bargain, an agency must bargain about the impact and implementation of a change in conditions of employment that has more than a *de minimis* impact on unit employees. *Veterans Administration Medical Center,* 42 FLRA at 713*; Federal Bureau of Prisons, Bastrop Texas,* 55 FLRA 848-52 (1999); *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut,* 41 FLRA 1309, 1317 (1991); *see also American Federation of Gov't Ees. v. FLRA,* 25 F.4th 1 (D.C. Cir. 2022).

As noted above, the USCP's March 20, 2020 memorandum cites 5 U.S.C. § 7106(a)(2)(D)[3] as authority for unilaterally suspending the CBA and effecting changes in conditions of employment. That statutory language grants the USCP the management right to "take whatever actions may be necessary to carry out the agency mission during emergencies." For purposes of this Decision we assume, *arguendo*, that the USCP's unilateral actions in suspending the collective bargaining agreement fell within the ambit

[3] Subsection 7106(a) provides, in relevant part:

> Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . (2) in accordance with applicable laws . . . (D) to take whatever actions may be necessary to carry out the agency mission during emergencies."

of section 7106(a)(2)(D). Nonetheless, the plain language of 5 U.S.C. § 7106(b)[4] expressly preserves the collective bargaining right of the Union whenever the USCP exercises a management right, including the right to take actions during an emergency. Indeed, in *United States Capitol Police v. Office of Compliance*, 908 F.3d 776, 782-83 (Fed. Cir. 2018), the U.S. Court of Appeals for the Federal Circuit recognized that the USCP has a duty to bargain over procedures and appropriate arrangements covered by sections 7106(b)(2) and(3). Accordingly, because section 7106 expressly preserved the Union's collective bargaining right when the USCP invoked its management rights under section 7106(a)(2)(D), at minimum, the USCP had a duty to bargain over the implementation and impact of any changes in conditions of employment that it sought to implement as part of its COVID-19 response plan.[5]

Here, the USCP acknowledges in its memorandum in support of its Petition for Review that it had a statutory obligation to bargain the impact and implementation of changes in working conditions following its suspension of the CBA, in accordance with section 7106(b)(3). We agree. Therefore, even assuming the USCP's declaration of emergency was valid and allowed for suspension of the entire CBA as a matter of

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[4] Subsection (b) provides:

> Nothing in this section shall preclude any agency and any labor organization from negotiating—
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[5] The USCP contends on review that the Hearing Officer's definition of "emergency" at note 3 of the Decision necessitates that it be overturned. We disagree. The Hearing Officer did not conclude that the COVID-19 pandemic was not an emergency. Instead, he concluded that, even if it was an emergency pursuant to section 7106, it did not foreclose the possibility of notice and bargaining: "Assuming arguendo, the suspension of the parties' CBA was a true emergency, requiring impact and implementation bargaining as discussed above is warranted to reconcile the rights of the exclusive representative to bargain over changes in conditions of employment."

management right, the USCP nonetheless had a statutory obligation to engage in bargaining over any changes to conditions of employment.

B. The Undisputed Evidence in the Record Establishes that the USCP Failed to Satisfy its Duty to Bargain under the FSLMRS.

The USCP's obligation to bargain in good faith required it to provide the Union with adequate notice of the changes in working conditions being made so that the Union could make an informed decision whether it wanted to engage in bargaining over those changes. Thus, it is well established that an agency must provide the exclusive representative with adequate notice of the changes and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *U.S. Army Corps of Engineers Memphis District,* 53 FLRA 81-82 (1997); *Veterans Administration Medical Center, Memphis,* 42 FLRA at 713; *Department of Health & Human Services, Indian Health Service, Oklahoma City, Oklahoma,* 31 FLRA 498, 508–09 (1988).

On review, the USCP contends that it satisfied this obligation. In support of its position, the USCP states that on March 18 and 19, 2020, Chief Sund verbally informed Union leadership that the Department would suspend the entire CBA in response to the pandemic. Moreover, the USCP asserts that "since March 19, 2020 and continuing onward, the Department and the Union have been in constant communication regarding the CBA suspension and the Department's emergency response measures." It contends that it notified the Union of changed working conditions "via email, text, telephone, in person or through bulletins issued to the workforce." In addition, the USCP notes that on March 20, 2020, it provided the Union Chairman with written notice of the CBA suspension.

None of the above support a determination that the USCP satisfied its bargaining obligation. Notice of any change in conditions of employment must be sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining. *Army Corps Memphis District,* 53 FLRA at 82; *Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright–Patterson Air Force Base, Ohio,* 41 FLRA 690, 698 (1991). Accordingly, the notice must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change. *See, e.g., Army Corps Memphis District,* 53 FLRA at 83-84 (record did not establish that the agency provided the union with specific and definitive notice of its decision to eliminate position in bargaining unit); *Ogden,* 41 FLRA at 699 (notice of a furlough that did not specify either the number of employees to be furloughed or the expected date of the action was legally inadequate); *Indian Health Service,* 31 FLRA at 508–09 (although the union was aware of impending changes in one hospital, notice was legally inadequate because union was never informed of the area-wide application of the change), *aff'd as to other matters,* 885 F.2d 911 (D.C. Cir. 1989); *Internal Revenue Service (District, Region and National Office Unit and Service Center*

Unit), 10 FLRA 326, 327, 340 (1982) (notice that was conditional and qualified was not adequate). The notice must be sufficient to inform the exclusive representative of what will be lost if it does not request bargaining. *Army Corps Memphis District,* 53 FLRA at 82; *cf. American Distributing Co., v. NLRB,* 715 F.2d 446, 451 (9th Cir.1983) (mere statements of disagreement during informal meetings were insufficient to inform the union of the consequences of failure to seek bargaining).

The undisputed facts of this case establish that the USCP failed to provide legally sufficient notice to the Union of the changes to conditions of employment effected through its COVID-19 response plan. The USCP failed to give the Union specific and definitive notice of the scope and nature of the changes in conditions of employment, the certainty of those changes, and the planned timing of those changes. The communications from Chief Sund repeatedly notifying the Union of the unilateral suspension of the entire CBA, and the continued suspension of the agreement, lacked any description whatsoever of the resulting changes in conditions of employment that would be effected as a result of the contract suspension. Merely providing the Union with notice of the suspension of the CBA did not satisfy the USCP's statutory obligation to provide adequate notice of the changes in conditions of employment to allow for bargaining under section 7116.

The USCP cites its written communications with the Union regarding its intent to stop disciplinary investigations and terminations and to extend the time to dispute disciplinary action as fully discharging its statutory obligation to notify the Union regarding changes to employment conditions. But it is undisputed that the USCP failed to give the Union notice of the nature, scope and timing of the wide-ranging operational changes it had made and documented in the letter to Representative Hoyer, including changes to work assignments, staffing procedures and health and safety protocols.

Indeed, it is undisputed that, despite written communications from Union officials requesting more information on all changes to working conditions, the FOP was not made aware of the specific changes set forth in the May 7, 2020 letter to Representative Hoyer until it obtained a copy of that letter. The USCP concedes in that letter that the listed changes represent some, but not all, of the operational changes that had already been effected. There is no evidence in the record that the USCP provided the Union with notice of those changed working conditions, let alone notice that was specific and definitive as to the timing, nature and scope of the changes. We further note that, during the investigation of the unfair labor practice charge, the GC asked the USCP, "How were the emergency measures communicated to the union and when were they communicated?" The USCP's response to the GC contained no answer to this question. GC Exhibit 11.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for hearing. *Anderson*, 477 U.S at 256. That is, the non-moving party must

present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* Having failed to present evidence of legally adequate notification to the Union of the changes to working conditions undertaken in response to the COVID-19 pandemic, despite a full and fair opportunity to do so, the USCP has failed to demonstrate that there is a genuine issue of material fact for hearing on this issue.

It is unnecessary for us to opine on when notice of those changes should have been given in this case because notice of the changes was never given to the Union even after the changes were implemented. One can imagine an emergency in which action must be taken instantaneously in order to safeguard the mission of the agency, and management's only option is to advise the union after the fact. But that is not the case here, where USCP never advised the Union of the nature, scope and timing of the changes that were made.

The USCP also contends on review that the Hearing Officer erroneously failed to consider record evidence that the parties engaged in impact and implementation bargaining concerning the CBA suspension, and that the Union did not submit any negotiable proposals regarding the Department's emergency response measures. The USCP contends that it explained its rationale for suspending the CBA; the Union submitted proposals; the Department responded to those proposals, and satisfied its duty to bargain. It further asserts that, as for bargaining, the Department engaged the Union in impact and implementation bargaining when the FOP submitted proposals concerning disciplinary actions and term negotiations. The USCP further argues that, although it did not bargain over the Union's opposition to its decision to suspend the CBA, such was not required under Section 7106(a)(2)(D) as a management right. Finally, the USCP asserts that, although the Union submitted proposals regarding the Department's specific emergency response measures, the USCP had no obligation to bargain over those proposals because they were non-negotiable.

Again, the USCP's contentions lack merit. First, the issue here is not whether the parties engaged in impact and implementation bargaining concerning the decision to suspend the CBA—it is whether the USCP provided the Union with sufficiently specific notice of the *resulting changes in conditions of employment* to allow the Union a reasonable opportunity to request bargaining. *Army Corps Memphis District,* 53 FLRA at 82. As stated above, it clearly did not.

Second, even assuming that the Union made certain proposals and the USCP responded to them, this does not satisfy the USCP's obligation to provide the Union with adequate notice of all changes in conditions of employment. It is legally adequate notice of changes in conditions of employment, including the scope and nature of the changes, and the certainty and timing of those changes, that triggers the Union's responsibility to request bargaining over the change. *Army Corps Memphis District,* 53 FLRA at 82; *National Federation of Federal Employees v. Federal Labor Relations Authority,* 369

F.3d 548, 552 (D.C. Cir. 2004). In the absence of adequate notice, as here, the Union had no obligation to request bargaining in order to avoid waiving its right to bargain. *Army Corps Memphis District,* 53 FLRA at 84 n.3.

Third, to the extent that the USCP is contending that the Union waived its right to engage in impact and implementation bargaining by virtue of its failure to submit additional bargaining proposals, its position clearly lacks merit. In asserting an alleged waiver of the Union's bargaining rights as an affirmative defense to a failure to bargain over changes in conditions of employment, the USCP bears the burden of establishing that the Union received adequate notice of the changes. *Army Corps Memphis District,* 53 FLRA at 82-83; *Dep't of the Navy Philadelphia Naval Shipyard & Philadelphia Metal Trades Council,* 18 FLRA 902, 916 (1985) (ALJ correctly rejected agency's contention that "a union must submit . . . proposals, as a sine qua non, before an employer is obliged to meet and confer re any contemplated change in working conditions"); *accord, American Distributing Co.,* 715 F.2d at 450 (in unfair labor practice proceedings under the National Labor Relations Act, employer must show that union had clear notice of employer's intent to institute change); *Oklahoma Fixture Co.,* 314 NLRB at 960 ("When relying on a claim of waiver of a statutory right to bargain, an employer has the burden of proving a clear relinquishment of that right."). Because the Union was not provided with adequate notice of the changes in conditions of employment undertaken as emergency measures, the USCP cannot establish that the Union waived its right to bargain over those changes.

Finally, the USCP's position that it had no obligation to bargain over proposals that concern management rights or were nonnegotiable is plainly incorrect. As stated above, even if the subject matter of the change is outside the duty to bargain, the USCP must bargain about the impact and implementation of a change in conditions of employment that has more than a *de minimis* impact on unit employees. *Veterans Administration Medical Center,* 42 FLRA at 713. The USCP does not contend that the changes in conditions of employment that it effected while the CBA was suspended were *de minimis,* and there is no evidence in the record to support the USCP's position that it engaged in impact and implementation bargaining.

Because the undisputed record establishes that the USCP failed to give the Union specific and definitive notice of the USCP's unilateral changes in conditions of employment implemented as part of its COVID-19 response plan, including the scope and nature of those changes and the certainty and timing of those changes, we affirm the Hearing Officer's determination that the Union was not afforded an adequate opportunity to bargain concerning those changes in conditions of employment. Consequently, we conclude that the USCP failed to bargain in good faith in violation of sections 7116(a)(1) and (5) of the FSLMRS. *Indian Health Service,* 31 FLRA at 509. Because this determination is adequate to sustain the Hearing Officer's conclusion that the USCP

violated the FSLMRS, the Board need not reach the Hearing Officer's alternative grounds for reaching this conclusion.

Conclusion

We AFFIRM the Hearing Officer's Decision on Motions for Summary Judgment IN PART and adopt the Hearing Officer's findings and conclusions only to the extent consistent with this Decision.

ORDER

The Respondent, United States Capitol Police, Washington, DC, its officers, agents, successors, and assigns, shall.

1. Cease and desist from

(a) Failing or refusing to bargain with the Fraternal Order of Police (FOP or Union), the exclusive representative of bargaining unit employees, on the changes in conditions of employment resulting from or occurring during the indefinite suspension of the parties' CBA.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Federal Service Labor-Management Statute, as applied by Section 220 of the CAA.

2. Take the following affirmative action necessary to effectuate the policies of the CAA:

(a) Upon the request of the Union, reinstate the status quo ante conditions of employment of the bargaining unit, and continue those terms in effect until the parties have bargained to agreement or a good faith impasse.

(b) make the employees whole for any and all losses they have incurred as a result of the unilateral changes to their conditions of employment resulting from or during the indefinite suspension of the CBA, with interest, in accordance with (a) above;

(c) Notify and, upon the Union's request, afford the FOP an opportunity to bargain concerning any change in conditions of employment for bargaining unit employees resulting from or occurring during the indefinite suspension of the parties' CBA.

(d) Upon the Union's request, engage in substantive or impact and implementation bargaining, as appropriate, over any changes to conditions of employment for bargaining unit employees resulting from or occurring during the indefinite suspension of the parties' CBA.

(e) Within 14 days after service, post at its facilities in Washington, D.C. copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the

Office of Congressional Workplace Rights, after being signed by the Respondent's Chief Administrative Officer, shall be posted immediately upon receipt, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. *Picini Flooring,* 356 NLRB 11 (2010). *U.S. DOJ, FED. BOP, Transfer Ctr., Oklahoma. City, OK,* 67 FLRA 221 (2014). Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service, file with the Office of Congressional Workplace Rights a sworn certification of a responsible official attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Issued, Washington, DC, April 4, 2022

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the Office of Congressional Workplace Rights

The Office of Congressional Workplace Rights has found that we violated the Congressional Accountability Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured them by the CAA.

WE WILL notify and, upon request, restore and maintain the status quo ante and afford the FOP an opportunity to bargain concerning any change in conditions of employment for bargaining unit employees resulting from or occurring during the USCP's indefinite suspension of the parties' CBA, until agreement or good faith impasse is reached.

WE WILL engage in substantive or impact and implementation bargaining, as appropriate, over any changes to conditions of employment for bargaining unit employees resulting from or occurring during the indefinite suspension of the parties' CBA, until agreement or good faith impasse is reached.

United States Capitol Police, Employing Office

Dated by:

Representative

Title _____

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* Chief Sund's May 2020 letter listed the following 35 items regarding operational changes impacting bargaining unit employees:

1. Precluding any employee who has tested positive for COVID-19 or who exhibits symptoms of COVID-19 from reporting to work;

2. Implementing the "Ready Reserve Program," a temporary staffing posture within each Bureau and Office that promotes social and physical distancing, and maintains a constant reserve of employees able to support the continuity of Department operations. Under the Ready Reserve Program, sworn bargaining unit employees rotate from reporting to duty with their team for a designated number of weeks to being in "ready reserve status," allowing them to be at home on paid administrative leave and "on call" to return to duty if necessary;

3. Implementing for all eligible civilian and sworn employees, an emergency telework status, requiring employees to work from home, where possible, to facilitate social and physical distancing;

4. Implementing social and physical distancing practices at daily roll calls to reduce the potential for transmission of the virus;

5. Requiring police officers to coordinate with the Office of the General Counsel to determine whether to issue a citation release in lieu of custodial arrest for specific offenses;

6. In conjunction with the United States Attorney's Office (USAO) and the District of Columbia's Office of the Attorney General (DCOAG), implementing a remote papering process, which provides for officers to provide key information related to any arrest to the USAO and DCOAG via an online process rather than an in person process;

7. Restricting authorized gatherings, including for demonstrations and special events, to groups of nine or less;

8. Implementing a procedure for conducting temperature tests of arrestees to determine whether they have symptoms of the COVID-19 virus, and to isolate them from officers and others to help prevent transmission;

9. Creating a "COVID-19 response hotline," which gives employees 24/7 access to Office of Human Resources executives to report COVID-19;

10. Implementing a detailed "contact tracing" process for identifying employees who may have been exposed to a person with COVID-19 and providing administrative leave so that they may self-quarantine;

11. Temporarily suspending all investigations and disciplinary actions concerning bargaining unit employees;

12. Staying deadlines related to disciplinary appeals;

13. Ceasing the processing of any terminations of employment during the COVID-19 pandemic;

14. Providing hotel accommodations to sworn employees to reduce the risk of community transmission of the virus to family members;

15. Providing employees with meals on a daily basis during their shift to reduce the need for them to leave the Capitol Complex to obtain food during their breaks, thereby further promoting social and physical distancing;

16. Arranging for USCP sworn employees exhibiting symptoms of the COVID-19 virus to receive priority testing through the District of Columbia's First Responders COVID-19 testing program;

17. Expediting voluntary medical qualification and fit-testing for N95 respirators for sworn employees;

18. Postponing all training during the pandemic crisis to promote social and physical distancing;

19. Extending deadlines for sworn employees to qualify with their handguns, and imposing limitations on the number of sworn employees permitted to attend range qualifications to promote social and physical distancing;

20. Using contact tracing to identify facilities, posts, or other areas in which an employee, who has tested positive for COVID-19, has worked or had significant contact;

21. Closing facilities in which the ability to practice social and physical distancing is limited, or in which there is a greater risk of transmission of the COVID-19 virus, such as the Department's gyms;

22. Eliminating "open range" at the firing range;

23. Sanitizing and disinfecting all goggles and hearing protection equipment at the beginning and at the end of each shift and following each use;

24. Temporarily closing all locker rooms to allow for a deep cleaning and disinfecting;

25. Developing enhanced cleaning schedules for USCP facilities, to include multiple cleanings per day for areas most frequented by officers;

26. Procuring and issuing to each sworn employee personal protective equipment (PPE) to include nitrile gloves, goggles, surgical masks, and N95 respirators.

27. Procuring and distributing to each sworn employee a personal bottle of hand sanitizer that can be attached to their uniform and refilled at their assigned division office;

28. Procuring and issuing to each Bureau and Office 25,355 ounces of hand sanitizer, 1,340 bottles of disinfectant wipes, 38,050 surgical masks, and over 15,000 pairs of nitrile gloves;

29. Implementing new cleaning and disinfecting criteria for sworn employees on posts, in USCP vehicles, and/or in USCP offices;

30. Modifying the screening process to temporarily eliminate the bowls used to send items through the X-ray machines, replacing them with plastic bags that visitors may keep to reduce the potential for community transmission;

31. Providing clarification as to the temporary suspension of the Department's Collective Bargaining Agreement;

32. Creating an "Ask the Chief" communications tool that permits any employee to submit a question, concern, or recommendation directly to the Chief of Police and receive a response on an expedited basis;

33. Issuing responses to "Frequently Asked Questions," received through the "Ask the Chief" forum to ensure that employee questions and concerns and the Department's solutions are shared with the entire workforce.;

34. Providing timely notification to the workforce (and stakeholders) when a USCP employee has tested positive for COVID-19; and

35. Issuing numerous communications to the workplace concerning CDC or Office of Attending Physician guidance on COVID-19, changes in the Department's operations due to COVID-19, or new administrative processes or functions implemented to address COVID-19 concerns.