

AMERICAN FEDERATION OF	)	
GOVERNMENT EMPLOYEES	)	
National Veterans Affairs Council	)	
Union	)	FMCS-04-54983
vs.	)	
DEPARTMENT OF VETERANS AFFAIRS	)	
(Agency)	)	

**ARBITRATION AWARD**

**I. INTRODUCTION**

On October 16, 2004, Jonathan E. Kaufmann, Arbitrator, heard a grievance filed by the American Federal of Government Employees, National Veterans Affairs Council, (Union or AFGE) against the Department of Veterans Affairs (Agency or VA). Each side had an opportunity to present evidence and examine witnesses. The parties submitted written briefs.

**II. ISSUE**

Did the VA breach the ground rules when its Chief Negotiator declined to initial off on Article 30, Staff Lounges, upon the Union's demand on April 1, 2004?

**III. APPLICABLE CONTRACT LANGUAGE AND STATUTORY LANGUAGE**

**61 -- DURATION OF THE AGREEMENT**

**Section 1 -- Effective Date**

This agreement will be implemented to become effective when it has been approved, ratified, and signed by the parties, including review pursuant to 7114c of 5 USC Chapter 71. The effective date of this Agreement is March 21, 1997.

**Section 2 -- Duration of the Agreement**

This Agreement shall remain in full force and effect for a period of three (3) years after its effective date. It shall be automatically renewed for one (1) year periods unless either party gives the other party notice of its intention to renegotiate this Agreement no less than sixty (60) nor more than one hundred and twenty (120) days prior to its termination and date. Negotiation shall begin no later than thirty (30) days after these conditions have been that. If renegotiation of an agreement is in progress but not completed upon the termination date of this agreement, this agreement shall be automatically extended until new Agreement is negotiated.

### **Section 3 -- Reopener**

Negotiations initiated by either party during the term to add to, amend, or modify this Agreement may be conducted only by mutual consent of the parties. If mutual consent is reached, such notice to renegotiate must be accompanied by the revised proposals for the article(s) a party wishes to renegotiate. The parties will be for the purpose of negotiating the amendments all modifications within thirty (30) days of the receipt of the proposals from the moving party.

### **Section 4 - Negotiation Schedule**

Arrangements for negotiating both the reopener or renegotiation of the Section 2 or 3 above shall be in accordance with Article 44, Mid-term Bargaining.

### **Section 5 -- Amendments and Modifications**

This agreement the only be amended, modified, or renegotiate in accordance with the provisions of this Agreement.

## **MEMORANDUM OF UNDERSTANDING-GROUND RULES**

(signed July 17, 2003)

### **I. Preamble**

- B. This MOU you shall govern the procedures for negotiating a Master Agreement between the Department and the Union for all Title 5 this, and Title 38 employees included in the consolidated VA-AFGE bargaining units as certified by the Federal Labor Relations Authority (FLRA). The parties may amend in writing any provisions of these Ground Rules for any initialed Article, by mutual consent.

## II. Procedures

- E. VA will submit its initial proposals within 45 days of the signing of the ground rules. AFGE will submit its initial proposals the later than 120 days after the sound signing of the ground rules. Either party may submit additional proposals thereafter. The first bargaining session will begin no later than 150 days after the date of the signing of the ground rules. The effective date of the ground rules is the date this signed by all parties.
- G. The Chief Negotiators are currently responsible for the following:
- Determining the starting and quitting times for all bargaining sessions.
  - Expanding the negotiating team
  - initialing-off on all articles to which the Master Negotiating Committee has reached consensus.
  - Agreeing to the presence of an observer (S.).
  - Recognizing the Department and AFGE's commitment to Alternative Dispute Resolution, the parties agree to utilize it in these negotiations to attempt resolution of issues they were unable to resolve by themselves.

## IV. BACKGROUND AND UNDISPUTED FACTS

1. On March 31, 1997, the Union and the Agency entered into a nation-wide agreement.
2. In November 2002, Ms. Alma Lee, Union President, forwarded a letter to Ron Cowles, VA Associate Director for Labor Management Relations, that it was open but not committed to looking at the renegotiation of limited articles in the nationwide agreement. She further stated that the Union would like to meet to develop and negotiate ground rules no later than December 2, 2002. Union Exhibit 2
3. On January 15, 2003, Mr. Cowles formally notified the Union that the VA wished to renegotiate the master agreement. In that letter, Mr. Cowles noted that the Agency was developing ground rules. Union Exhibit 4
4. On July 17, 2003, the parties signed off on ground rules for the new negotiations. Union Exhibit 7
5. In August of 2003, the Agency submitted to the Union its initial proposals covering 61 of the Articles in the 1997 agreement. The Agency's proposal for the new contract addressed procedures for local bargaining in Articles 43 and 44. In

November of 2003, the Union submitted proposals covering 20 of the 61 articles in the 1997 agreement. Local bargaining was not addressed in the Union's package of proposals.

On December 19, 2003, Maureen Humphrys, Chief VA Negotiator, sent a letter to Ms. Lee asking where the other Union proposals were. Ms. Lee responded on December 30, 2003, that the ground rules only required the Union to make "initial" proposals at the beginning of negotiations and allowed for AFGE to offer additional proposals as bargaining proceeded forward.

7. Substantive negotiations on a new contract began in January of 2004. The parties met four times, for one week at a time. Starting in February of 2004, the parties exchanged proposals on Article 30, Staff Lounges. On the morning of April 1, 2004, the parties exchange several proposals on the issue of Staff Lounges. After lunch, Union negotiator Lee submitted a document to the Ms. Humphrys. The document was entitled Article 30 -- Staff Lounges, Union #4. Ms. Lee had signed it and dated it April 1, 2004. Ms. Humphrys declined to sign the language. Ms. Lee wrote at the bottom that "management refused to sign their own proposed language."

## **V. SUMMARY OF WITNESS TESTIMONY**

### **Union Witnesses**

Ms. Lee testified that the parties had bargained back and forth on March 31 and April 1, 2004 regarding the issue of staff lounges. She stated that by late in the morning of April 1, the Agency's last proposal was very close to that of the Union's position. After reviewing the matter with her bargaining team, they decided to accept the Agency's last proposal. Accordingly, they took the language from the Agency proposal #3 and called it Union proposal #4. She stated that they took the identical language and changed the management's use of letters for the sections into numbers.

At the beginning of the afternoon bargaining session, Ms. Lee submitted a copy of the new proposal from the Union that adopted the Agency's language. She signed it and passed across the table to Ms. Humphrys. She stated that she did not recall whether or not she said to Ms. Humphrys' that the parties had reached consensus or that her proposal was the same as what appeared in the last Agency proposal.

David Cox, First Vice President, AFGE, stated that he has considerable experience bargaining with VA. He noted that, in the past, the parties would negotiate over various issues and when they reached agreement the Chief Negotiators would sign off on them. He stated that later on in negotiations, the parties might reopen certain issues based on further proposals made by each side.

Mr. Cox stated that he was present during the negotiations that took place on March 31 and April 1, 2004. He recalled that both sides made proposals regarding staff lounges and submitted language back and forth. During lunch on April 1, 2004, Mr. Cox stated that Union decided to accept management's last proposal. He stated that thinking of Union side was that staff lounges was an easy issue that would allow the parties to see that they could make progress in negotiations. He stated that Ms. Lee signed the provision and gave it to Ms. Humphrys. He asserted that Ms. Humphrys handed the proposal back to Ms. Lee without signing it. Ms. Lee stated, "Are you going to sign that?" He alleged that Ms. Humphrys stated "no."

Bill Wetmore, a Vice President at AFGE, also stated that he was present during the negotiations in question. He recalled Ms. Lee offering one copy of the signed agreement to Ms. Humphrys and being rebuffed. He stated that Ms. Humphrys indicated that she wanted to see all the proposals before she would agree the language on this specific one.

### **Agency Witnesses**

Mr. Cowles stated that the term "consensus" appeared in the ground rules but was not really defined. He stated that the general idea was for the parties to bargain over various issues and where they reach agreement they would initial the terms and then would move to other issues.

Mr. Cowles noted that during the negotiations over the staff lounges management believed that the parties had to address the issue of local bargaining before this matter could be finalized. He stated that the Union had not provided any proposals on Local Supplemental Bargaining at the time the issue of staff lounges was being discussed in late March and early April of 2004.

Ms. Humphrys stated that management was hampered during negotiations because the Union had not provided all the proposals that it intended to make at the time they were bargaining. She stated that she asked the Union what their intent was and Ms. Lee indicated that additional language would be forthcoming at a later date.

Ms. Humphrys stated that the Union's refusal to provide additional proposals was what caused some of the problems with its offer regarding staff lounges. She noted that proposals they discussed envisioned bargaining at the local level regarding various VA work sites. She asserted that VA staff lounges vary from location to location based on what was available. Accordingly, management wanted to know what types of things would be negotiated at the local level and its relationship to the national agreement. However, the Union provided not language regarding local bargaining. Based on this, she stated that management decided that they were not prepared to finalize agreement on this article

when the Union had not at least given them a proposal to review.

On the afternoon of April 1, 2004, Ms. Humphrys stated that the parties were meeting in separate caucuses. She stated that after they reconvened Ms. Lee came around the table to her and placed a paper in front of her and said something to the effect that she (Ms. Humphrys) would like this proposal. Ms. Humphrys stated that she pushed the paper to the side of the table and the parties went on to discuss other issues.

Ms. Humphrys stated that eventually they began discussing the Union's proposal that Ms. Lee had handed to her. Ms. Humphrys stated that the parties had done a lot of "good work" on this article but that she was reluctant to sign it because of the lack of the Union proposal on local bargaining.

At this point, Ms. Humphrys stated that Ms. Lee asked for her proposal back. She stated that Ms. Lee was upset and commented that "this was your own language." Ms. Humphrys claimed, however, that the Union did not provide her with an opportunity to even look at the language nor did it offer copies so that the other management bargaining team members could review it as well. She alleged that Ms. Lee took the paper back and negotiations broke down. She noted that the Union filed an unfair labor practice complaint on the following day.

Leslie Wiggins, Assistant Director, Detroit Medical Center, stated that she was present during the negotiations on April 1, 2004. She recalled Ms. Lee handing the paper to Ms. Humphrys and commenting that it was something that she would like. She noted that Ms. Humphrys indicated that she would review the proposal later. She stated that initially Ms. Lee was happy when she handed her proposal to management. After Ms. Humphrys refused to sign, she claimed that Ms. Lee became upset. According to Ms. Wiggins, Ms. Humphrys indicated that she did not wish to sign it because the parties had not sufficiently bargained over the other issues.

## **VI. THE POSITIONS OF THE PARTIES**

The Union contends that the parties reached consensus over Article 30. It further noted that the ground rules specifically provided that once consensus was reached it was the responsibility of the Chief Negotiators to initial off on the articles. Accordingly, it argued that Ms. Humphrys should have initialed this provision in accordance with section G of the parties' ground rules provisions.

The Union further noted that the practice of the parties over the years has been to exchange proposals and then discuss them. If consensus were reached on a particular proposal, the Chief Negotiators would initial the agree-upon language. It alleged that, in the past, if the parties determined later in the negotiation process that a particular initialed

article need to be modified, than the parties, after mutual agreement, would make the modifications as necessitated by discussions. To support this position, it cited I (B), the preamble of the parties' ground rules, which indicated that the parties "may amend in writing any provisions of these Ground Rules or any initialed Article, by mutual consent."

The VA argued that the parties had not reached consensus with respect to the article on staff lounges. It asserted that the language it submitted to the Union on this article left to local bargaining a range of potential issues. The parties had not discussed, as of April 1, 2004, the extent of negotiations that would take place at the local level. In addition, it asserted that any full agreement would have to address the issue of pre-existing local agreements and their status with respect to the new contract.

The VA further asserted that the conduct of Ms. Lee at this particular bargaining session precluded the parties from reaching consensus. Specifically, it alleged that Ms. Lee offered only one copy of the new Union proposal to management. Because of this, the management bargaining team was not in a position to review the document to determine whether or not it was the same article offered by Ms. Humphrys. Furthermore, management alleged that Ms. Lee immediately withdrew the proposed language when Ms. Humphrys did not simply sign it. In short, it argued that the Union had not provided the VA with sufficient opportunity to consider the proposed language.

In addition, the Agency claimed that the reason Ms. Humphrys did not sign off on Article 30 was because the parties had not completed negotiations over related issues that needed to be resolved as well. It alleged that even if the Union had provided proposals on these related issues, such as local supplemental negotiations, they still would not have reached consensus until they actually negotiated the terms for these provisions.

The Agency asserted that the fact that the parties in prior negotiations may have modified terms that were initialed earlier was not relevant to these negotiations. In addition, it asserted that the Union's claim that the current negotiators for management were unfamiliar with past practice supports the Agency's contention that it had no basis for nearly sign off on language when other issues had to be resolved with respect to Article 30.

Finally, the VA claimed that the management team might have initial off on Article 30 so long as there was a consensus as to the meaning of some of the terms contained in the proposed. It alleged that during discussions between Ms. Humphrys and the Union it became clear that the Union did not interpret the references to "local bargaining" in the Agency's staff lounges proposal in the same way that the VA did.

In response, the Union alleged that the problem with the situation was that Ms. Humphrys and the other management team members were not experienced. It argued this was completely inappropriate for such a difficult negotiation. Had they been experienced,

AFGE contended that the management team would have understood that they could initial this provision and still returned to it later to make any necessary changes.

## **VII. FINDINGS OF FACTS**

Based on the testimony of Ms. Lee, Ms. Humphrys, and the other witnesses, I find that the following occurred:

1. Management and the Union exchanged proposals on staff lounges in the morning of April 1, 2004. After some discussion, the Union decided to accept the Agency last proposal but changed the numbering and format.
2. Ms. Lee submitted the Union's proposal (adopting the VA's last proposal) to Ms. Humphrys with the comment that she would like what Ms. Lee was giving her. Ms. Lee did not explain to Ms. Humphrys what was in the proposal and why it would be viewed in that manner. Ms. Lee provided only one copy of the proposal to Ms. Humphrys.
3. Ms. Humphrys did not request any explanation as to what she was being given. The testimony of the witnesses, as a whole, indicates that she did not carefully study the Union proposal.
4. Ms. Humphrys' actions conveyed to Ms. Lee that she was not going to address the proposal at that time. Ms. Lee questioned Ms. Humphrys as to whether she would sign the Union proposal. Ms. Humphrys said she would not sign the proposal.
5. Ms. Lee then took the proposal back.
6. Ms. Humphrys testified in a credible manner that she was not aware the Union had adopted management's last position on staff lounges. This was consistent with the testimony of both Union and management witnesses. She also credibly testified that she had concerns that management and the Union's understanding as to what constituted local bargaining were different.

## **VIII. DISCUSSION AND ANALYSIS**

The Union has asked this arbitrator to review the circumstances surrounding the events of April 1, 2004, and make a determination that "consensus" had been reached and that the VA should be directed to sign off on the proposal regarding staff lounges. In order to make such a determination, the undersigned arbitrator would have to determine that the parties

had, in fact, reached consensus and that the ground rules or other contractual language required management to initial the agreed-upon language.

### **Do the ground rules provisions require Chief Negotiators to initial language?**

According to Article II of the ground rules, the Chief Negotiators are "jointly responsible" for "initialing off" all of the articles in which the "Master Negotiating Committee" had reached "consensus." In the circumstances here, Ms. Lee did not provide the other management committee members with copies of the Union proposal. All of them testified that they did not review the language. In order to adopt the Union position, I would have to find that because the management negotiating team had previously discussed the language and offered this provision, this was sufficient to find an agreement and that consensus had been reached. This argument is not without some merit although I am concerned that the management team was never given the last Union's proposal.

I next considered whether the ground rules language compelled Ms. Humphrys to initial Article 30. Generally for an Arbitrator to make such a determination, the contractual provision in question must be very explicit as to how and when the parties can be required to take a specific action.

In this case, the ground rules do not state that these individuals "must" initial off at a particular time or in a specific circumstance. Instead, Article IIG uses terms like "jointly responsible" to state what might take place. This type of provision seems to be describing the duties of the Chief Negotiators rather setting out some type of mandatory conduct.

In sum, the language in question is less than specific. Rather than make any final determination, I next went on to consider the circumstances surrounding this negotiation to see if I could conclude that the Union's requested relief was supportable.

### **Did the parties reached consensus?**

The parties' ground rules provisions do not define what constitutes "consensus." The various witnesses made some general comments but did not offer any specific support for a particular interpretation of this language. Webster's Dictionary states that consensus means "agreement." Blacks Law Dictionary states that consensus means a "meeting of the minds." I considered both definitions in evaluating this grievance.

The Union argues that the parties reached an agreement on staff lounges when it decided to adopt the last VA proposal. Although the Union proposal changed the format and numbering, a careful reading of that proposal and management's last offering indicates that the language is identical. Management did not dispute that the language the Union offered was the same as its last proposal.

The Union's claim is akin to a contract theory of "offer and acceptance." That is, management offered language on staff lounges and the Union accepted it. Under contract law, this might be sufficient to establish an agreement.

In this case, I am not sure this is sufficient to make a finding that the parties reached a full agreement on this issue. First of all, negotiations that take place for collective-bargaining agreements involve considerable give and take.

In keeping with the Blacks Law Dictionary definition, I believe that the parties have to recognize that they have reached some type of understanding or agreement (a meeting of the minds so to speak). The first problem with the situation is that Ms. Lee was not, by her own account, particularly informative as to what was contained in her proposal. As noted above, the Union team members had reformatted and changed the numbering on the management proposal. Accordingly, Ms. Humphrys would have to study it to see that it was the same proposal. The above findings indicate that she did not do this.

To further complicate the situation, Ms. Humphrys did not ask for any explanation as to what was in the Union proposal. Then she used indirect messages, such as pushing the proposal away and moving on to other subjects, to indicate she did not wish to deal with this. Ms. Humphrys did not explain why she was choosing not to address this proposal. Furthermore, Ms. Lee did not engage in any extended conversation with her. It appears that Ms. Lee could have stated that the Union was accepting the management proposal but she did not do this.

In some negotiations where the parties are very familiar with each other and have bargained on many occasions, it is possible to have exchanges like this that will effectively convey what each side is trying to say and advance the negotiating process. In this case, however, Ms. Humphrys was a new negotiator. The testimony indicates that the parties had limited experience working with each other. It appears that using this shorthand type of communication was not effective given the apparent lack of experience each side had with the other. In essence, the testimony of the parties indicates they were having a "failure to communicate."

In addition, the VA had a different concept as to what it was going to take to reach agreement on this issue. Ms. Humphrys' testimony indicates the Agency was taking a cautious approach during the negotiations. She was not prepared to sign off on language unless it had been completely worked through. In the case of the issue regarding staff lounges, her position was that the parties needed to reach some additional understandings regarding how negotiations would proceed at the local level. In this regard, the portion of the proposal in question reads as follows:

Local bargaining to implement this provision is appropriate and will include, but not be limited to, arrangements and facilities where there is insufficient space for dedicated lounges. Other topics appropriate for local bargaining include, but are not limited to, access to microwaves, refrigerators, storage, coffee pots, and furniture. However, local agreements must be consistent with the authorized use of appropriated funds.

No agreement had been reached on the provision regarding local bargaining. In fact, the Union had not yet made a proposal on that issue. Ms. Humphrys argued that she could not reach an agreement on staff lounges without knowing what the language would be for the provision covering local bargaining. This is supported by the language in the paragraph above, which indicates that the scope of bargaining at the local level could be adjusted based on additional negotiations.

### **Could the Agency have initialed Article 30 and renegotiated later?**

The Union argued that the Agency could have initialed Article 30 since AFGE had adopted management's proposal. It alleged that the past practice always allowed that any provision could be reopened should later negotiations require such an action. In reviewing the procedures for ground rules, section IB does provide that the parties may amend initialed articles during subsequent negotiations. However, this provision states that such amendments must be "by mutual consent."

Therefore, neither party can be assured that they will be able to reopen an initialed provision unless the other side agrees.

The Union's perception regarding the past practice may be accurate and correct. As discussed above, however, the management team did not have substantial prior bargaining experience in negotiating a national agreement. Accordingly, it apparently was not willing to rely on such language absent some greater firsthand experience with it.

## **IX. CONCLUSIONS**

During the afternoon of April 1, 2004, the Union submitted a proposal that adopted the language of the management proposal but in a different format. The Union President did not explain this to the management Chief Negotiator or its team. The management Chief Negotiator did not request any clarification of the proposal. The Union President withdrew the proposal before there was any clarification. Therefore, the parties did not have sufficient communication to recognize that they had reached the same point in terms of acceptable language on staff lounges.

Even if Ms. Humphrys was aware of the Union proposal adopting her team's language, this

still did not form the basis for requiring her to initial off on this provision at this point in time. In this regard, the management team had apparently decided that it did not want to finalize any issues such as staff lounges unless other related articles such as supplemental local bargaining were also resolved. The evidence indicates that these other articles were not discussed and, in fact, the Union had not made any proposals. Therefore, I conclude that management articulated a reasonable explanation as to why it was not willing to sign the language in question.

The language the Union relies on in the ground rules does not specifically require Chief Negotiators to initial off even if consensus is reached. It merely indicates what the duties of Chief Negotiators are. The circumstances surrounding these negotiations do not, in my view, warrant a determination that the Union had been harmed by the management decision to such a degree that it is entitled to some type of equitable relief.

Based on this, I conclude that the parties had not reached a "consensus" as to staff lounges that would require management to initial this provision without further discussion.

**IX. AWARD**

The grievance is denied.



Jonathan E. Kaufmann  
Arbitrator

1/25/05

Date