
In The Matter of Arbitration Between *

UNITED STATES DEPARTMENT
OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION *

(Agency/Employer) *

and *

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

(Union/Labor Organization) *

FMCS Case No. 04-05421

Grievant: National Council of Field
Labor Locals, AFGE,
AFL-CIO

OPINION AND AWARD OF
S. JESSE REUBEN, ESQ., ARBITRATOR

APPEARANCES

For United States Department of
Labor, Mine Safety and Health
Administration:

M. Yusuf M.
Mohamed
and
Joseph N. Blake

For National Council of Field
Labor Locals, American Federation
Of Government Employees, AFL-CIO:

Richard W. Coon
and
Hugh V. Smith

STATEMENT OF THE CASE

This arbitration proceeding was held pursuant to the provisions of Article 16 of the parties' 2002 collective bargaining agreement. The Arbitrator conducted the hearing in this matter on October 13, 2004, in Arlington, Virginia. Both parties had the opportunity to examine and cross-examine witnesses, as well as present evidence in support of their respective positions. A verbatim transcript was made of the hearing. At the conclusion of the hearing both parties indicated that they desired to file post-hearing briefs. The parties' briefs were subsequently received by the undersigned and were

duly considered in reaching a decision in this matter.

FACTS

The Agency has maintained a Safety Awards Program for its employees since the 1970's. The Program has been in writing and contained in the Agency's Administrative Policy and Procedures Manual. It provided for various monetary and non-monetary awards to employees who worked accident-free.

In 1993, the Agency and the Union agreed to form a joint committee which would look at updating the Safety Awards Program. Following a series of meetings, on July 25, 1994, the Committee's Chairperson submitted the Committee's proposed revisions to the Agency's Occupational Safety and Health Manager. On August 8, 1998, the Department of Labor's Director of its Labor-Management Relations Center submitted to the Union the Agency's revised Safety Awards Program. Thereafter, on June 16, 2000, the Union was informed by the Agency that the Safety Awards Program, as revised, had been approved by the Agency's Assistant Secretary and that the Departmental approval process would take approximately two weeks.

On September 27, 2000, the Agency transmitted to its employees an Information Bulletin containing questions and answers regarding the revised Safety Awards Program. On October 11, 2000, the Union wrote the Agency's Director of Administration and Management requesting that management honor its commitment to start the awards process retroactive to October 1, 1998. Following a series of e-mails, the Union transmitted to the Agency's Labor Relations Officer five issues which the Joint Committee had addressed but were not included in the revised Safety Awards Program.

As a result of an institutional grievance filed by the Union on September 1, 2000 over the failure of the Agency to implement the Safety Awards Program as revised, a settlement agreement was entered into by the Agency and the Union in which the Agency agreed to immediately begin the processing of payments for safety awards for all employees who were eligible and did not receive them in FY 1999 and FY 2000. The Agency also agreed to begin forwarding FY 2001 safety awards

packages for the processing of payments in accordance with the Safety Awards Program after September 30, 2001.

On June 27, 2001, the Union met with the Agency's new Assistant Secretary. Among the items discussed by the Union was the Safety Awards Program and the problems it had experienced in getting the revised Program implemented. When the Assistant Secretary was assured by the Agency's Labor Relations Officer that the Agency had agreed to the Program, the Assistant Secretary advised the Union that the Agency would honor the agreement and implement the revised Program immediately.

On September 23, 2002, the Department of Labor and the Union executed another settlement agreement pursuant to a Union grievance in which the Agency agreed to publish the revisions to the Safety Awards Program within 60 days. Further, the Agency agreed to give eligible employees in several Agency field offices the opportunity to decide if they wanted to keep their monetary awards for safe driving or if they would rather have a time-off award for safe driving.¹

In November 2003, pursuant to a Union grievance, the Agency and the Union executed another settlement agreement in which the Agency agreed to afford eligible employees the time-off option consistent with the Safety Awards Program.

The Department of Labor and the Union executed a new collective bargaining agreement on May 1, 2002. The agreement was effective July 1, 2002 and had a termination date of June 30, 2006 unless extended by mutual agreement.

On September 11, 2003, the Union was advised by the Agency that the Safety Awards Program was being discontinued in its entirety effective October 1, 2003. In this regard, the Agency noted that it had determined that there had been no appreciable reduction in employee accidents and injuries in proportion to the cost of the Program. Thereafter, the Union requested to bargain over the proposed termination of the Safety Awards Program. However, on September 29, 2003, the Union's President advised the Department of Labor's Director of the Office of Employee and Labor--

¹ Under the Safety Awards Program, eligible employees were to be given the option of a monetary award or a time-off award. In the field offices involved in the settlement agreement, Agency management had not given the affected employees the option of taking time-off.

Management Relations that since the Safety Awards Program was a policy which was in existence at the time the new collective bargaining agreement became effective, the policy became part of the new collective bargaining agreement in accordance with Article 2, Section 1 of the agreement.² Under these circumstances, and because there was no showing that the termination of the Safety Awards Program was mandated by law, Executive Order, higher regulations, judicial decision by a court of appropriate jurisdiction, or higher authority, the Union indicated that since the policy involved was covered by the parties' collective bargaining agreement, it did not wish to reopen the policy and bargain at that time. Consequently, the Union withdrew its previous request to bargain.

In the absence of a request to bargain, the Agency discontinued the Safety Awards Program in its entirety. On December 2, 2003, the Union filed the grievance in this matter alleging that the Agency's termination of the Safety Awards Program violated Article 1, Section 1C and Article 2, Sections 1, 4A and 6 of the parties' collective bargaining agreement.

ISSUE

The parties in this matter stipulated that the issue involved herein is whether the Agency violated Article 1, Section 1C and Article 2, Sections 1, 4A and 6 of the collective bargaining agreement when it terminated the Safety Awards Program?

UNION'S POSITION

The Union contends that the evidence in this matter demonstrates that the Agency violated the parties' collective bargaining agreement when it terminated the Safety Awards Program which had been in effect for over 30 years. In this regard, the Union notes particularly Article 2, Section 6, entitled Past Practices, of the collective bargaining agreement which provides:

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.

² Article 2, Section 1 of the collective bargaining agreement provides, in relevant part, : "In the administration of all matters covered by this Agreement, officials and employees are governed...by published Department and/or Agency policies and regulations in existence at the time this Agreement was approved..."

In the Union's view, where, as here, there was no mutual agreement by the parties to terminate the past practice of granting employees safety awards under the Safety Awards Program, the Agency's action in terminating the Program violated Article 2, Section 6 of the collective bargaining agreement. Nor, in the Union's opinion, was it necessary that the Safety Awards Program be reduced to a writing negotiated by both parties. In this regard, the Union notes that Article 2, Section 6 of the parties' 1997 collective bargaining agreement contained language concerning "...prior benefits and practices and understandings which have been reduced to writing..." but that the article in the 2002 collective bargaining agreement no longer required past practices to be reflected in a writing in order to be covered by the contract provision.

The Union further contends that the Agency's conduct in terminating the Safety Awards Program violated Article 2, Section 1 of the parties' collective bargaining agreement which, in relevant part, is set forth in footnote 2 above. In the Union's view, since the Safety Awards Program was an Agency policy that was in existence when the collective bargaining agreement was approved and there was no subsequently published Agency policy terminating the Program that was necessitated by law or the regulations of any appropriate authority, the Agency was required under Article 2, Section 1 to maintain the Safety Awards Program for the term of the collective bargaining agreement.

With respect to the alleged violations of Article 1, Section 1C and Article 2, Section 4A of the collective bargaining agreement cited in its grievance, the Union notes that the Agency offered no proof that the termination of the Safety Awards Program was mandated by law, Executive Order, higher regulation, judicial decision by a court of appropriate jurisdiction, or other higher authority.

In sum, the Union contends that under the circumstances of this case, the Union was not compelled to bargain over the proposed management change in policy that was in existence when the collective bargaining agreement was negotiated, had been in place for over 30 years, and where the Past Practices provision of the collective bargaining agreement requires mutual agreement by the parties before any changes can be made.

In view of the Agency's violative conduct in terminating the Safety Awards Program, the Union requests that the Agency be ordered to reinstate the Program retroactive to FY 2004 and to reimburse all affected employees.

AGENCY'S POSITION

The Agency contends that the Safety Awards Programs was a product of a partnership between the Agency and the Union under Executive Order 12,871 which was revoked on February 17, 2001 by President Bush by Executive Order 13,203. Since Executive Order 12,871 did not create any right to administrative or judicial review and the Union takes the position in this matter that the Safety Awards Program at issue herein is the product of a partnership within the meaning of Executive Order 12,871, the Union cannot be given access to this administrative forum to litigate the enforceability of the partnership.

The Agency further contends that the parties did not intend to be bound by the Safety Awards Program in the same manner they would be bound if they had executed a supplemental agreement concerning the Program following traditional collective bargaining. In the Agency's view, Article 2, Section 1 of the collective bargaining agreement does not render Agency policies immutable during the term of the agreement. In this regard, the Agency notes the use of the term "subsequently" in Article 2, Section 1 which shows that the parties recognized that Agency policies can change over time, and only during the time that they are in effect do the parties agree to be governed by them.

The Agency argues that by not seeking through the traditional collective bargaining a supplemental agreement concerning the Safety Awards Program and by instead utilizing the partnership mechanism in this connection, the legal protection resulting from a collectively bargained arrangement does not exist here. Consequently, the Agency contends that it did not violate Article 2, Section 1 of the collective bargaining agreement since the evidence establishes that it simply exercised its right under the agreement to rescind a policy that was subject only to the willingness of the parties continued voluntary participation.

The Agency further contends that while it was obligated to bargain over the impact and implementation of its decision to end the Safety Awards Program, it was not obligated to bargain over the substance of its decision which it contends is non negotiable under section 7106(a)(1) of the Federal Service Labor-Management Relations Statute. (Statute). Nor did Article 2, Section 4 apply in this matter since, the Agency argues, the Safety Awards Program was not included in the collective bargaining agreement and all the Agency did in this case was exercise an exclusive management right to determine its own policies.

As to the Union's contention that the Safety Awards Program constituted a past practice which under the collective bargaining agreement could not be changed unless mutually agreed to by the parties, the Agency argues that the Union offered no facts to prove that the Program constituted a past practice. In this connection, the Agency contends that there is no basis for equating a management policy, especially one resulting from a

partnership, with a past practice. Moreover, the Agency argues that the Safety Awards Program does not constitute a past practice as it has been documented in writing and has not been long standing in its present form. Thus, for a working condition to become a practice it must, in the Agency's view, occur in the absence of written guidance. Here there was written guidance in that the Safety Awards Program was contained in the Agency's Administrative Policy and Procedures Manual.

The Agency further contends that the Safety Awards Program did not constitute a past practice because in its most recent form it did not continue over a long period of time. In this regard, the Agency asserts that the Safety Awards Program in its most recent form was implemented in 2001 and that, at best, the Union could point only to two discrete payments that were made under the Program. Such a short history, in the Agency's view, cannot establish a past practice.

Since the Union was afforded timely notice of the Agency's intent to terminate the Safety Awards Program and the Union elected not to bargain in this regard, the Agency takes the position that it was free to terminate the Program. Consequently, in the Agency's view, its conduct in terminating the Program was not violative of the parties' collective bargaining agreement. Therefore, the grievance in this matter should be denied.

DISCUSSION AND ANALYSIS

The facts in this case are not in dispute. For approximately 30 years the Agency has administered a Safety Awards Program for its employees. The Program has been in writing and contained in the Agency's Administrative Policy and Procedures Manual. Under the Program, employees, including the unit employees involved in this case, were granted various monetary and non-monetary awards when they attained the safety goals set forth in the Program.

The Safety Awards Program was not a product of collective bargaining and therefore, its terms did not appear in any collectively bargained agreement. Over the years, the Union appeared to be satisfied with this arrangement.

In 1993, the Agency and the Union agreed to form a joint committee made up of Union and management representatives for the purpose of reviewing the Agency's current Safety Awards Program and developing recommendations for improving the Program. Thereafter, the committee met on several occasions and ultimately developed proposed revisions to the Safety Awards Program. After much delay concerning the

implementation of the proposed revisions to the Safety Awards Program, the Agency agreed to a settlement agreement with the Union in March 2001 resulting from a Union grievance. Under the settlement agreement, the Agency would immediately begin the processing of payments for safety awards for all employees who were eligible and did not receive them in FY 1999 and FY 2000.³ Thereafter, as noted above, on September 11, 2003, the Agency advised the Union that the Safety Awards Program was being ^Scontinued in its entirety effective October 1, 2003.

It is clear to the undersigned, based on the facts set forth above, that a past practice involving the working conditions of unit employees has existed for approximately 30 years of employees receiving safety awards when they have attained the goals set forth in the Safety Awards Program contained in the Agency's Administrative Policy and Procedures Manual. Thus, during a period of approximately 30 years, unit employees achieving prescribed safety goals have received monetary and non-monetary awards.

The fact that the Safety Awards Program may have applied also to non unit employees, was contained in an Agency document, and was not the product of collective bargaining did not, in my view, make it any less a past practice affecting conditions of employment since such Program, which gave unit employees monetary and non-monetary awards when they attained safety goals, had a direct effect on their conditions of employment. In this regard it was particularly noted that section 7103(a)(14) of the Statute defines conditions of employment. It provides in part:

'Conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions... (emphasis added.)

Nor do I find that certain revisions in the Safety Awards Program agreed to by the Agency in 2001 in effect eliminated the past practice. Thus, while there were some modifications to the Program, the basic policy of granting employees awards for meeting prescribed safety goals continued as before.

Under all of the circumstances, therefore, I find that granting monetary and non-monetary awards to unit employees who have achieved the goals set forth in the Agency's Safety Awards Program constituted a past practice involving their conditions of employment within the meaning of section 7103(a)(14) of the Statute.

In its grievance, the Union contends that since the Safety Awards Program was an Agency policy that

³ As noted above, the Agency entered into additional settlement agreements with the Union in 2002 and 2003 in which the Agency agreed to comply with the terms of the revised Safety Awards Program.

was in place when the parties' 2002 collective bargaining agreement became effective and there was no subsequently published Agency policy that was required by law or by the regulations of any appropriate authority, Article 2, Section 1 of the collective bargaining agreement (set forth in part in footnote 2 above) precluded the Agency from changing or eliminating that policy during the term of the agreement.

While it is accurate that at the time the parties' 2002 collective bargaining agreement was approved the Safety Awards Program, an Agency policy, was in place, because the policy was not expressly included as a provision in the parties' collective bargaining agreement (or in any other negotiated document), I find that the Agency was not precluded by Article 2, Section 1 from seeking, during the term of the collective bargaining agreement, to modify or eliminate the policy after affording the Union prior notice of its intention and providing the Union with the opportunity to bargain. Thus, in my view, Article 2, Section 1 does not constitute a clear and unequivocal waiver of the Agency's right to effect changes in conditions of employment of unit employees where such conditions of employment are not expressly covered by the parties' collective bargaining agreement. As noted above, however, when seeking to make such changes in conditions of employment, the Agency has a statutory duty to provide the Union with prior notice of the changes contemplated and afford the Union the opportunity to bargain before the changes are effectuated.

As indicated above, the Union also contends that Article 2, Section 6 of the parties' collective bargaining agreement (set forth above) requires the mutual agreement of the parties before any change can be made in prior working conditions, practices and understandings which are not specifically covered by the agreement. And since there was no mutual agreement to eliminate the Safety Awards Program, which constituted a prior past practice and working condition, the Union argues that the Agency's action in eliminating the Program violated the collective bargaining agreement.

At the hearing in this matter, the Agency representative testified that Article 2, Section 6 was not applicable in this case because the Safety Awards Program did not constitute a condition of employment as it is intricately tied to the delivery of the Agency's mission "as opposed to a pure working condition."

The language contained in Article 2, Section 6 is, in my view, unambiguous. As noted above, it provides "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." (emphasis added.) Contrary to the Agency's position noted above, I find that the policies set forth in the Safety Awards Program in connection with granting employees safety awards have a direct effect on the working

conditions of unit employees. Moreover, such working conditions existed prior to the approval of the parties' 2002 collective bargaining agreement. Since the subject of safety awards for unit employees is not covered by the parties' collective bargaining agreement or in conflict with it, I find that under the terms of Article 2, Section 6 the policies contained in the Safety Awards Program which involve a past practice affecting the working conditions of unit employees could not be changed or eliminated as was done in this case, "unless mutually agreed to by the parties." As clearly, the Union did not agree to the elimination of the Safety Awards Program, I find that the Agency's action in terminating the Program violated Article 2, Section 6 of the parties' collective bargaining agreement.⁴

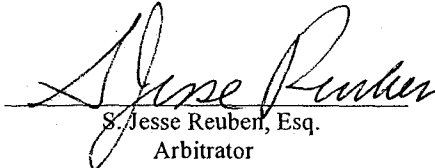
AWARD

Consistent with the above Discussion and Analysis, the grievance in this matter is sustained.

Accordingly, I hereby order the Agency:

1. To reinstate retroactively the Safety Awards Program as to unit employees as of the date of the Program's termination.
2. To commence processing retroactively safety awards for eligible unit employees.

January 21, 2005
Potomac, Maryland


S. Jesse Reuben, Esq.
Arbitrator

⁴ Since, upon the expiration of the parties' collective bargaining agreement, Article 2, Section 6 would no longer be in effect, the Agency at that time would not be precluded from terminating the Program after affording the Union notice and an opportunity to bargain.

The fact that the partnership regime established under Executive Order 12,871 was utilized by the parties in developing the proposed revisions to the Safety Awards Program was not considered to require a contrary result in this matter. Thus, while the partnership regime was revoked by Executive Order 13,203, such revocation did not, in my view, afford the Agency the right, during the term of the parties' collective bargaining agreement, to revoke the substantive matters agreed to by the parties in connection with the Agency's revision of the Safety Awards Program or to terminate the entire Program without the mutual agreement of the parties.