

IN THE MATTER OF ARBITRATION BETWEEN

**UNITED STATES)
DEPARTMENT OF LABOR,)
Management)
AND)
NCFLL, LOCAL 2139,)
Union)**

**FMCS Case # 08-2251
Issue: Performance
Standards**

APPEARANCES

**Arbitrator: Fred Moore, FMCS Arbitrator
For Management: Carmen Gaffney,
Regional Labor Relations
For the Union: Jeffrey Darby, Vice President**

HEARING DATE

The hearing on the merits of the above matter was convened on Tuesday, December 16, 2008. The hearing was held at A. Maceo Smith Federal Building, 525 South Griffith Street, Dallas, Texas. The Department of Labor, herein after referred to as the Department, and NCFLL Local 2139, herein after referred to as the Union, both had a full opportunity to call witnesses, present testimony, and evidence. The parties mutually agreed to the framing of the issue. Both the Department and the Union chose to close the case by giving closing arguments on the sixteenth.

ISSUE

Did management violate Article 1, Sections 1 D and 1 E-1 through 1 E-3, and Article 43, Sections 8 A and 10 of the parties' collective bargaining agreement? If so, what is the appropriate remedy?

BACKGROUND

The Department and the Union were operating under a national agreement, which became effective October 1, 2006 and remains in effect until September 30, 2011. In January of 2008 the department issued *Performance Elements and Standards* directly to bargaining unit members. (Performance elements and standards are written standards utilized by supervisors to determine an employee's job performance. How well an employee performs under these guidelines directly impacts his/her pay.) The Department's implementation of the *Performance Elements and Standards* at the Dallas district was grieved by the Union. The grievance was processed through the grievance procedure and ultimately ended up in arbitration on December 16th, 2008.

PERTINENT CONTRACT LANGUAGE

Article 1 Coverage and Recognition

Section 1 – Recognition

- D. The NCFLL shall be given the opportunity to be present at formal discussions between Management and bargaining unit employees concerning grievances, personnel policies and practices, and other matters affecting general

working conditions of the employees in the bargaining unit. The parties agree that if a formal discussion between one or more representatives of the Department and one or more employees within the bargaining unit consist of mere reiteration of existing personnel policies and practices and other matters affecting general working conditions, the NCFLL need not be given the opportunity to be present.

- E. The following procedures will be used in providing notice to the NCFLL of a formal discussion and for the NCFLL to provide representation during any formal discussion.
1. The NCFLL will specify a designated representative(s) in each DOL Region of the DOL-NCFLL Agreement, to be notified of a formal discussion initiated by the Department.
 2. The Department's notification will state the DOL Agency and component, date, time, location of the formal discussion, and include a brief description of the subject to be discussed.
 3. The designated NCFLL Representative(s) in 1. above will specify an NCFLL Representative (Steward, Regional Official, or National Official) normally within the commuting area of the meeting site to attend any formal discussion for the purpose of representing the NCFLL and/or affected employee(s).

Article 43

Performance Management System

Section 8 – Initiation of a New Appraisal Period

- A. After receiving the tentative elements and standards from the supervisor, the employee will have a period not to exceed ten working days within which to examine and consider this material and to meet with the supervisor to discuss these elements and standards. During this period, the employee, upon request, will be granted a reasonable amount of time to consult with the Union Steward concerning the elements and performance standards.

Section 10 – Information Sharing

Management agrees to share Agency prototype elements and standards developed at the regional or national level for similar or common positions within the bargaining unit with the NCFLL in a timely manner. The NCFLL will have a minimum of 30 calendar days to submit comments on standards before their implementation.

“Prototype elements and/or standards” are performance elements and standards that apply to several positions with similar duties, responsibilities, and job requirements. Usually they are developed centrally for all positions in a particular mission-critical occupation and grade.”

ANALYSIS AND AWARD

The Union argued that the Department issued new prototype elements and standards to employees at the Dallas district in January 2008. They made the argument that these new elements and standards were developed on a regional basis. They further argued that the Department's actions violated the agreement in three (3) areas.

The first violation was that the Department conducted formal meetings with bargaining unit members when it handed out and discussed the new elements and standards with groups of members. The Union pointed out that the agreement, under Art. 1 Sec. 1D, stated basically that the Union will be present at formal discussions between the Department and bargaining unit members concerning working conditions.

The second violation was that the members were informed at these meetings, by the Department, that any complaints by members could result in consequences. The Union argued that this was a violation of Art. 43 Sec. 8 A of the agreement because such a threat would keep employees from making any objection or suggestions. Art. 43 Sec. 8 A in essence grants each employee a period of one to ten days after receipt of tentative elements and standards to examine, consider, and discuss any concerns with their supervisor.

The third violation was that the Union was not notified by the Department and given time to respond prior to the implementation of the new elements and standards per the agreement. The Union pointed out that the agreement, under Art. 43 Sec. 10, requires the

Department share new prototype elements and standards developed on a regional level for similar or common positions within the bargaining unit with the Union and that the Union will have 30 days to submit comments on the standards and the implementation of same.

The Department made no argument that the elements and standards given employees at the Dallas district were not new. They stated that the new elements and standards were not prototype elements and that they were not developed on a regional basis. The Department stated that the Dallas district manager developed the elements and standards. The Department further stated that it distributed the elements and standard to employees and allowed the employees time to review and discuss with supervisors any concerns they had. The Department denied that any employees were threatened.

A full review of all the evidence and testimony in this case leads to the following conclusions. Allegations by the Union that bargaining unit members were threatened by the Department were not substantiated. The Union presented only one witness that testified to this allegation. Such an allegation would require a preponderance of evidence to sustain. The Union's allegation that the Department violated Art. 43 Sec. 8 A was not supported by the evidence. There was not any documented evidence that the employees were not granted time to review or discuss with their supervisor any concerns they had with regard to the impact of the new distributed elements and standards. The Department provided evidence that written concerns were given back to supervisors by employees.

The Union allegation that the Department violated Art. 1 Sec. 1D, 1E1-E3 when it met with groups of employees regarding the new elements and standards raises two questions. Was the meeting with employees by Department supervisors formal and did the meeting involve employee's working conditions? The answer to these questions is yes. Members were required to be present at said meetings. Employees at the meetings were given new elements and standards. The new elements and standards laid out by management at said meeting effect the employee's job and pay. *i.e.* working conditions. This falls under the definition contained in the agreement of a *formal meeting*. The Department's argument that the new elements and standards were not prototype and that they were developed at the district level does not avoid a contract violation. Union evidence clearly showed that employees at the Dallas district office and the Denver district office, which perform identical work, were provided with identical performance elements and standards. Given the fact that these two district offices are in the same region along with the fact that workers performing the same work are held to the same standards meets the definition of prototype contained in the contract language. Further, it is inconceivable, given the make up of the Department, that district managers would be given the authority to implement new standards without the approval of the regional director. A clear reading of the language regarding prototype elements and standards strongly indicates that the Union is to be notified and given an opportunity to at least be involved to the extent of studying and commenting on the standards and their impact on its members before implementation occurs. If one were to follow the

logic of the Department that there was no violation of the contract as long as new elements and standards were developed at the district level, it would render the language contained in Art. 43 Sec. 10 meaningless and unenforceable. Therefore, the grievance is sustained in regards to Art. 1 Sec. 1D, 1E-1E3, and Art. 43 Sec. 10. It is denied in regards to Art. 43 Sec. 8 A.

Award

The grievance is sustained as a violation of Article 1 Section 1D, 1E, and Article 43 Section 10. The Department shall rescind the new elements and standards given employees in January of 2008 and submit those new elements and standards to NCFLL for the 30-calendar day comment period per the agreement. The Department will not reduce any employee's pay as a result of this award. The Department will correct any employee's pay that was adversely affected because of the new elements and standards.

Submitted January 20, 2009



Fred Moore

Arbitrator