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U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Fairton, N.J. and American Federation of Government Employees, Council of Prison Locals AFL-CIO, Local 3975

62 FLRA 187

Federal Labor Relations Authority

BN-CA-05-0123

62 FLRA No. 44

October 26, 2007

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72.664 Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Permitted by Contract

Judge / Administrative Officer

Dale Cabaniss, Chairman, and Wayne C. Beyer and Carol Waller Pope, Members

Ruling

Overruling its administrative law judge, the FLRA found that the matter of changes in work assignments was expressly contained in the agreement giving the agency the right to make changes without notice.

Meaning

The covered-by doctrine is a defense to a claim that an agency failed to bargain over a change in conditions of employment. It excuses parties from bargaining on the ground that they already bargained and reached agreement on the matter at issue.

Case Summary

The agency notified the union that it would assign non-custodial employees to cover custodial posts on the same shift, when needed. It implemented the change before reaching agreement with the union. Before the ALJ, the agency raised the covered-by defense. The judge found the matter wasn't covered by the agreement and concluded that the union didn't waive its right to bargain over assignment changes. An agreement provision provided that "work assignments on the same shift may be changed without advanced notice." The judge found the term "work assignments" unclear. He concluded that it applied only to shift changes rather than changes in regular duties. The FLRA disagreed, finding this conclusion inconsistent with the plain language of the agreement. The FLRA explained that prong one of the covered-by test provides that a matter is outside the duty to bargain if it is already expressly contained in an agreement.

The FLRA noted that the language of the article in question expressly addressed shift changes and also expressly addressed work assignments. The judge's statement that it was unclear as to whether the term "work assignment" addressed both shift changes and assignment of duties was irrelevant, the FLRA explained. By its plain terms, the provision was not limited only to shift changes.

An article cited by the judge wherein the agency agreed to make work assignments in accordance with law and precedent does not limit the express provision allowing the agency to change work assignments without notice to the union, the FLRA explained. The covered-by doctrine excuses parties from bargaining over matters contained in an existing agreement. The doctrine is part of FLRA precedent. Consequently, this agreement provision didn't preserve the union's right to bargain.

Full Text

Decision and Order Dismissing Complaint

I. Statement of the Case

This case is before the Authority on an exception to the decision of the Administrative Law Judge (the Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exception, a motion to strike, and a cross-exception.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a new assignment policy without completing negotiations. The Judge found that the Respondent violated the Statute as alleged, but denied the GC's request for a status quo ante remedy. For the following reasons, we deny the GC's motion to strike and we dismiss the complaint.

II. Background and Judge's Decision

The Respondent, a correctional facility, employs bargaining unit members in both custodial and non-custodial positions. Employees in custodial positions primarily supervise or have direct contact with inmates, while employees in non-custodial positions do not. However, all employees are trained in custodial duties and are considered to be correctional workers.

The Respondent notified the Charging Party of its intent to begin regularly assigning non-custodial staff during the day watch to cover custodial posts when needed and offered to bargain over the impact and implementation of the change.[1] One bargaining meeting was held during which the Charging Party submitted 15 proposals to the Respondent. During the meeting, the Respondent informed the Charging Party that non-custodial staff would not be used to fill in at certain custodial posts and asked the Charging Party for impact and implementation proposals. When the Charging Party responded that it had already submitted its proposals, the Respondent stated that the Charging Party had until a certain date to submit proposals. The meeting ended without resolution, and the Charging Party never amended or supplemented its proposals. Subsequently, the Respondent implemented the new assignment policy as proposed. The Charging Party filed an unfair labor practice (ULP) charge, and the GC issued a complaint, alleging that the Respondent violated the Statute by implementing the new assignment policy without completing negotiations.

The parties stipulated that the new assignment policy caused a change in conditions of employment that was more than de minimis. Thus, the Judge found that the Respondent was required to bargain over the Charging Party's proposals unless all of the proposals were non-negotiable or the subject matter of the change, as argued by the Respondent, was covered by the agreement. The Judge found that at least two of the Charging Party's proposals were negotiable.[2]

Turning to the Respondent's "covered by" defense, the Judge considered two provisions of the agreement. First, the Judge found that Article 16, § c establishes a contractual basis for the assignment of non-custodial staff to custodial duties.[3] However, the Judge found that this provision also requires the Respondent to comply with applicable laws and Authority precedent. Thus, the Judge concluded that the provision did not demonstrate that the Charging Party waived its right to bargain over the impact and implementation of the new assignment policy. Second, the Judge considered Article 18, § o, which provides, in relevant part, that "[w]ork assignments on the same shift may be changed without advance notice."[4] Judge's Decision at 10. Because the Judge found that the meaning of the term "work assignments" was unclear, he considered the meaning in light of the title of the section (Hours of Work) and in conjunction with the Respondent's obligation under Article 16, § c to comply with applicable laws and Authority precedent when assigning work. The Judge found that Article 18, § o was "only intended to govern shift changes rather than changes of regular duties." *Id.* at 11.

Furthermore, the Judge found that the Respondent's new policy was not inextricably bound

up with Articles 16 and 18 of the agreement. In reaching this conclusion, the Judge considered witness testimony about the bargaining history of both provisions. *See id.* One GC witness who negotiated the agreement on behalf of the Union testified that Article 16 was adopted without much discussion and with only minor changes from the prior agreement. That witness also testified that Article 18 was designed to require the Respondent to provide employees with as much notice as possible before changing their shifts and was primarily applicable to custodial staff. Another witness for the GC, the Union President, testified that he considered the change in work assignments within the same shift referenced in Article 18, § o as being "limited to the Correctional Services Department[,]" although such a limitation, he admitted, is not contained in the language of the provision. *Id.*

Based on the foregoing, the Judge concluded that the Respondent's new assignment policy was not covered by the agreement and the Respondent was, therefore, obligated to bargain over the impact and implementation of the new assignment policy. Because the Judge found that the Respondent did not complete bargaining over the Charging Party's negotiable proposals, he concluded that the Respondent violated the Statute as alleged. As a remedy, the Judge recommended only a cease and desist Order because he found that a status quo ante remedy was "not necessary to effectuate the purposes and policies of the Statute." *Id.* at 15.

III. Positions of the Parties

A. Respondent's Exception

According to the Respondent, the FLRA's Boston and Dallas Regional Directors (RD) have both dismissed ULP charges in cases similar to the one here. The Respondent claims it submitted the Boston RD's dismissal letter to the Judge below, but asks the Authority to take official notice of two dismissal letters of the Dallas RD, copies of which the Respondent has submitted with its exception. See Exception at 7, 10.

The Respondent disputes the Judge's finding that the new assignment policy was not covered by the parties' agreement, arguing that the Judge did not interpret the relevant contract provisions reasonably. According to the Respondent, Article 16 of the agreement gives it the right to change employees' work assignments and Article 18 explicitly permits it to do so "without advance notice of any kind." *Id.* at 8. As such, the Respondent asserts that the subject matter of changing work assignments is expressly covered by the agreement, which it claims satisfies the first part of the Authority's "covered by" test, as set forth in *United States Dep't of Health and Human Services, Soc. Sec. Admin., Balt., Md*, 47 FLRA 1004, 1018 (1993) *(SSA)*.

The Respondent also claims that the second part of the "covered by" test is met because "changing the work assignments of non-custodial employees is 'inseparably bound up with' and 'plainly an aspect of the issue of changing work assignments that is explicitly addressed in the [a]greement." *Id.(citing SSA)*. Therefore, the Respondent claims that, under either part of the "covered by" test, it was not obligated to bargain over the new assignment policy.

B. GC's Opposition, Motion to Strike, and Cross Exception

The GC disputes the Respondent's reliance on the Boston RD's decision dismissing a ULP charge in a similar case because that decision, the GC argues, is both factually distinguishable and non-precedential. Based on 5 C.F.R. § 2429.5, the GC moves to strike the two Dallas RD dismissal letters that the Respondent submitted with its exception because the GC claims that the Respondent had the opportunity to, but did not, submit those letters to the Judge below. Opposition at 13-14.

According to the GC, "[e]ven if this matter were found to be covered by Article 16, the [Judge] correctly found that Article 16, § c contains a provision preserving the Union's right to negotiate the assignment of any work" including "changes to work assignments like this one." *Id.* at 9. In this connection,

the GC asserts that "an agreement may cover a matter, but nevertheless ... evince a reservation of bargaining rights." *Id.* at 10 *(citing Soc. Sec. Admin., Balt., Md, et al.,* 60 FLRA 674, 680-81 (2005)). As such, the GC asserts that the Judge acted as a "reasonable reader" by interpreting the agreement as reserving the Charging Party's right to bargain over assignment changes and concluding that the change, therefore, was not covered by the parties' agreement. *Id.*

The GC also claims the Judge correctly found that the new assignment policy was not covered by Article 18 of the agreement. In this connection, the GC asserts that "nothing in the language of Article 18 expressly contains language concerning" the Respondent's new assignment policy. *Id.* at 11. According to the GC, Article 18 establishes notice requirements for making shift changes only and "does not give the Respondent the right to make any work assignment change without regard to any other statutory or contractual obligation it may have." *Id.* In addition, the GC claims that the Respondent's new assignment policy is not inseparably bound up with a subject expressly covered by Article 18.

The GC filed a cross exception to the portion of the Judge's decision denying a status quo ante remedy. Specifically, the GC argues that the Judge improperly weighed the factors relevant in determining whether a status quo ante remedy is appropriate. According to the GC, the nature and circumstances of the violation support a status quo ante remedy.

IV. Preliminary Issue

Although the Authority normally "will not consider evidence offered by a party [that] was not presented in the proceedings before the ... Judge," the Authority may "take official notice of such matters as would be proper." 5 C.F.R. § 2429.5. Here, the GC asserts without dispute that the Respondent could have submitted the Dallas RD dismissal letters below, but did not. Nevertheless, the Authority consistently has found it appropriate to take official notice of the record of other FLRA proceedings, including dismissal letters of an RD. *See, e.g., AFGE, Local 3911,* 58 FLRA 101 (2002) (denying union's motion to strike, and taking official notice of, an RD's dismissal letter). Consequently, we deny the GC's motion to strike the Dallas RD's dismissal letters that the Respondent submitted with its exception.

V. Analysis and Conclusions

The Judge found that the Respondent was required to bargain over the new assignment policy because the subject matter of this policy is not covered by the parties' agreement. For the following reasons, we disagree.

The "covered by" doctrine is a well established defense to a claim that an agency failed to provide a union with notice and an opportunity to bargain over changes in conditions of employment. *See United States Dep't of the Interior, Wash., D.C.,* 56 FLRA 45, 53 (2000). In this regard, the "covered by" doctrine excuses parties from bargaining on the ground that they have already bargained and reached agreement concerning the matter at issue. *See SSA,* 47 FLRA at 1015, *see also AFGE, Local 225,* 56 FLRA 686, 689 (2000) ("covered by" doctrine operates to prevent, not require bargaining). A subject matter for negotiation is covered by a collective bargaining agreement if the matter is expressly contained in the agreement. *See SSA,* 47 FLRA at 1018. If the agreement does not expressly contain the matter, then the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *Id.*

As relevant here, Article 18 provides that "[w]ork assignments on the same shift may be changed without advance notice." Judge's Decision at 10. There is no dispute that the change in work assignments at issue here occurred on the same shift. *See id.* at 6 (citing testimony in which the Union President acknowledged that the new policy did not concern changes in shifts or hours of work). The Judge found that Article 18 was "only intended to govern shift changes rather than changes of regular duties." *Id.* at 11. The Judge's conclusion is

inconsistent with the plain language of the agreement. In this regard, Article 18 not only expressly requires the Respondent to provide notice before making "shift changes[,]" it also expressly permits the Respondent to change "work assignments on the *same shift"* without notice. *Id.* at 10 (emphasis added). The Judge found that it was not clear "whether 'work assignment' means a change of duties or merely a change of work location within the same shift." *Id.* at 11. However, this ambiguity is irrelevant to the issue of whether, as the Judge found, Article 18 governs only shift changes. By its plain and unambiguous terms, it is not so limited. The plain and unambiguous terms of Article 18 also are not limited to custodial employees assigned to the Correctional Services Department. Nothing in the bargaining history cited by the Judge provides a basis to ignore these plain and unambiguous terms. As such, the Respondent's new policy addressed a matter -- namely, changes in work assignments on the same shift -- that is expressly contained in, and therefore covered by, Article 18 of the parties' agreement.

Article 16 of the parties' agreement does not alter the express language of Article 18, which permits the Respondent to change work assignments on the same shift without notice. In this regard, Article 16, in relevant part, requires the Respondent, "[i]n the assignment of any work, [to] comply with applicable laws, including" Authority precedent. Master Agreement, GC Ex. 2. Standing alone, as the Judge found, Article 16 does not provide a basis for the Respondent to refuse to bargain in this case. However, as already explained, Authority precedent excuses parties from bargaining over matters, such as the work assignments at issue here, that are already covered by the parties' agreement. Therefore, contrary to the GC's argument that Article 16 preserves the Charging Party's right to bargain in this circumstance, that provision expressly requires bargaining consistent with Authority precedent, which includes the "covered by" doctrine that is applicable here.

Based on the foregoing, we find that the Judge erred in concluding that the Respondent's new work assignment policy was not covered by the agreement. As such, we dismiss the complaint.[5]

VI. Order

The GC's motion to strike the Dallas RD dismissal letters is denied and the complaint is dismissed.

[1]Previously, "non-custod[ial] staff would only perform custod[ial] duties in emergency situations ... and during annual refresher training for the custod[ial] staff." Judge's Decision at 6.

[2]The Respondent does not except to this finding of the Judge and, in fact, concedes that one of the proposals is negotiable.

[3]Article 16, § c of the agreement provides the following:

In regard to the phrase "other duties as assigned," or its equivalent, as used in position descriptions, it is understood that it will not be used to regularly assign work to an employee that is not reasonably related to the employee's basic job description. This does not preclude the Employer from detailing employees to other assignments in accordance with applicable laws. In the assignment of any work, the Employer will comply with applicable laws, including 5 USC and the decisions of the Federal Labor Relations Authority.

Judge's Decision at 10.

[4]Article 18, § o provides, as relevant here, that "[e]mployees shall be given at least twenty-four (24) hours notice when it is necessary to make shift changes .... Work assignments on the same shift may be changed without advance notice of the parties' agreement." Judge's Decision at 10.

[5]In light of this decision, it is unnecessary to address the GC's cross-exception.

APPEARANCES:

Laurie R. Houle, For the General Counsel

Paul M. Schneider, For the Respondent

David F. Gonzalez, For the Charging Party

Decision

Statement of the Case

This case arises out of an unfair labor practice charge which was filed on December 28, 2004, by the American Federation of Government Employees, AFL-CIO, Local 3975 (Union) against the Federal Bureau of Prisons, Federal Correctional Institution, Fairton, New Jersey (Respondent). On February 3, 2006, the Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by implementing a policy of assigning non-custody staff employees to custody posts during the day watch without completing negotiations, thereby depriving the Union of the opportunity to negotiate to the extent required by the Statute.

A hearing was held in Philadelphia, Pennsylvania on March 22, 2006.[1] All parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that, on or about December 26, 2004, the Respondent implemented a policy of requiring non-custody staff employees to fill in for custody staff employees on the day shift who were absent because of such reasons as annual and sick leave. According to the General Counsel this action was taken by the Respondent after it had wrongfully terminated negotiations with the Union and had informed the Union that the Respondent had no obligation to bargain over the policy. The General Counsel further maintains that, although non-custody staff employees are qualified to fill custody posts, the Respondent had never before required them to do so on a regular basis. While the policy was an exercise of the Respondent's management rights under § 7106 of the Statute, the Respondent was still obligated to bargain over its impact and implementation. The Union had not waived its right to negotiate inasmuch as it had submitted negotiable proposals which constituted an appropriate arrangement.

The Respondent maintains that, in implementing the procedure for assigning non-custody staff employees to custody positions, it was exercising its management right to determine internal security practices and to assign work. The Respondent further argues that its action was covered by the terms of its Master Agreement with the Union, thereby eliminating any bargaining obligation. Even if the Respondent's action were not covered by the Master Agreement, the Union waived its right to bargain by virtue of its failure to submit proposals regarding impact and implementation in spite of the fact that the Respondent had invited the Union to do so on several occasions and had extended the deadline for the submission of such proposals.

Findings of Fact

The Respondent is an agency as defined by § 7103(a)(3) of the Statute. The American Federation of Government Employees (AFGE) is a labor organization within the meaning of § (a)(4) of the Statute and is the certified representative of a unit of employees which is appropriate for collective bargaining. The Union is the agent of the AFGE for the purpose of representing bargaining unit members who are employed by the Respondent.

The Respondent's bargaining unit employees perform various functions, not all of which involve supervision of or contact with inmates. Some of the non-custodial positions are as teachers, maintenance foremen, recreation specialists and food service workers (Tr. 21). However, all bargaining unit employees have been trained in custodial duties and are considered to be correctional workers (Tr. 51-54, 100-102). Furthermore, all employees are given annual refresher training in custodial duties (Tr. 101).

Bargaining Between the Parties

By memorandum dated February 26, 2004[2], from Jonathan C. Miner, Warden, to David F. Gonzalez, the Union President (GC Ex. 4) the Respondent requested that the Union:

... enter into negotiations over the procedures and arrangements (Impact and Implementation) in utilizing non-custodial staff during day watch to cover/fill custodial posts when needed.

By memoranda dated October 1 (GC Ex. 6) and October 12 (GC Ex. 7) from Karl J. Belfonti, the Assistant Warden (Operations), to Gonzalez, the Respondent answered various information requests from the Union concerning the new assignment procedure.

On December 8 representatives of the parties met to negotiate the impact and implementation of the new procedure.[3] Gonzalez and Belfonti were, respectively, the heads of the Union's and Respondent's negotiating teams. At the meeting the Union presented the Respondent with a memorandum from Gonzalez to Miner (GC Ex. 9) which contained 15 proposals including the following:

I. All non-custody staff will receive a clothing allowance.[4]

K. Union Officials will have access upon request to the relief roster to ensure and verify fair and equitable distribution of assignments.

During the course of the meeting Gonzalez told Belfonti that the Union's proposals were not "etched in stone" and that every proposal was open to discussion (Tr. 39, 41; Resp. Ex. 1, p.5).

During the morning session there was a discussion of some of the Union's proposals. At one point management called for a caucus after which a management representative stated that non-custody employees would not be used to fill in at Sierra Control, Control #1, Rear Gate, SHU 1 and Compound 1 (Resp. Ex. 1, p.2). Later, after a break for lunch, Belfonti asked for the Union's impact and implementation proposals. When Gonzalez stated that the Union's proposals had been presented that morning, Belfonti responded that the Union had until December 10 to submit its proposals; Belfonti then stated that the meeting was over, at which point the Respondent's negotiators left the room (Tr. 48, 49, 135; Resp. Ex. 1, pp.5 and 6). It is undisputed that the Union neither amended nor supplemented its proposals and it is unclear whether the Respondent followed through with its statement of intention regarding the exclusion of certain posts from the new procedure.

The Implementation of the New Procedure

By memorandum of December 17 to Gonzalez (GC. Ex. 10) Belfonti asserted that the Union had not submitted impact and implementation proposals in spite of the fact that the December 10 deadline had been extended to December 14. Belfonti further stated that, "December 26, 2004 has been established to start assigning non-custody staff to work vacant custody posts during day watch." On December 17 Miner issued a "MEMORANDUM FOR ALL STAFF" (GC Ex. 11). In the memorandum Miner stated that the budget was "very, very tight" and that:

Consequently, starting December 26, 2004, I will require non-custody staff to fill in for custody posts on the day watch that become vacant for a number of reasons (sick leave, FFLA, annual leave, training, jury duty, etc.). Assignments will be made on an equitable basis and will not effect [sic] days off or compressed work schedules. Should an assignment be needed, the lieutenant will contact your supervisor who will direct you to report to the lieutenant's office for assignment.

After receiving our complete budget at the end of January 2005, a thorough analysis will be completed to see if the above new procedures will be sufficient. Further changes might be necessary to ensure we live within our means. I will keep you posted.

The new procedure was put into effect on or about December 26 (GC Ex. 1(b) and 1(c), ¶ 13).

The Master Agreement and Local Supplement

At all times pertinent to this case the Union and the Respondent were parties to a Master Agreement

between the Federal Bureau of Prisons and the Council of Prison Locals of the AFGE (GC Ex. 2)[5]. There is also a Supplemental Agreement between the parties which is applicable only to FCI Fairton and which is subordinate to the Master Agreement (GC Ex. 3).

The Effect of the New Procedure

Gonzalez testified without challenge that, beginning on December 26, non-custody staff were assigned to custody duties much more frequently than before. Prior to the implementation of the new system, non-custody staff would only perform custody duties in emergency situations, such as in response to a fight or an assault, and during annual refresher training for the custody staff. Beginning on December 26 non-custody staff were, in Gonzalez's words, "regularly" assigned to custody duties. Such assignments later occurred "occasionally", which Gonzalez defined as from 10 to 12 times a month (Tr. 50-52). Gonzalez acknowledged that non-custody staff were not transferred out of other shifts in order to perform custody duties on the day watch. He further stated that the Union was not alleging that the new procedure caused a change in any employee's hours of work (Tr. 65, 66).

Neither the General Counsel nor the Union have challenged the Respondent's assertion that non-custody employees have been trained to fill custody posts and that their obligation to do so is supported by language in their job descriptions. However, the specific language in the job descriptions is not in evidence and the Respondent has not refuted Gonzalez's testimony to the effect that, prior to the implementation of the new procedure, non-custody employees were only assigned to custody posts in the event of emergencies or to free custody personnel for annual refresher training (Tr. 50, 51). The new procedure, by its own terms, requires non-custody employees to perform custody duties in routine and regularly occurring situations such as for absences resulting from annual and sick leave.[6] The Respondent has not cited any language, either in the Master Agreement or in employees' job descriptions, which addresses the conditions under which non-custody staff are to be assigned to custody posts. The manner in which the new procedure was announced to employees and the Respondent's requests for proposals from the Union strongly suggests that the Respondent itself considered the new assignment procedure to be a significant change in the conditions of employment of the non-custody staff. The weight of the evidence, and, in particular, the actions of the Respondent's representatives at the December 8 meeting, indicates that the Respondent initially assumed that it was required to bargain over impact and implementation. The idea that it was under no such obligation, either because of the language of the Master Agreement or the nature of the Union's proposals, appears to have been an afterthought. However, the Respondent's duty to bargain was neither enlarged nor reduced by its change of position at the December 8 meeting or by the fact that its notice to the Union of the new assignment system was accompanied by an invitation to submit proposals.

Discussion and Analysis

The Duty to Bargain

The General Counsel has acknowledged that the assignment of non-custody staff to custody duties is an exercise of management rights within the meaning of § 7106 of the Statute. Nevertheless, the Respondent was obligated to bargain over matters concerning procedures by which management representatives would exercise their authority and over appropriate arrangements for employees adversely affected by the exercise of management authority, *United States Department of the Air Force, 913th Air Wing, Willow Grove Reserve Station, Willow Grove, Pennsylvania, 57 FLRA 852, 855 (2002) (Willow Grove).*

The Respondent's duty to negotiate did not preclude it from challenging the negotiability of any or all of the Union's proposals.[7] The Union would then have had the option of either amending its proposals or seeking the aid of the Authority, either by initiating negotiability proceedings pursuant to

Part 2424 of the Rules and Regulations of the Authority or by filing an unfair labor practice charge as it did in this case. However, the Respondent acted at its peril when it refused to bargain altogether because of a belief that none of the Union's proposals were negotiable. As stated in *United States Department of Housing and Urban Development,* 58 FLRA 33 (2002) *(HUD):*

If all pending proposals are nonnegotiable, the agency will not be found to have violated the Statute by implementing the change without bargaining over them. However, if any pending proposals are negotiable, the agency will be found to have violated the Statute by implementing the change without bargaining over the negotiable proposals and either reaching agreement or declaring impasse. *(Id.* at 34)

The Union's Proposals

In view of the holding in *HUD* it is not necessary to assess the negotiability of each of the Union's proposals, but only to determine if any are negotiable. Belfonti testified that when, on December 8, he asked the Union to submit proposals regarding impact and implementation, he anticipated proposals on such subjects as a clothing allowance (Tr. 114).[8] Contrary to the Respondent's assertion (Resp. Brief, p.20), the tabling of proposal I did not justify its repeated calls for additional proposals as a condition for resuming bargaining prior to the implementation of the new assignment procedure. The Respondent is partially correct in its assertion that it did negotiate over proposal I. However, it did not complete such negotiations as is required by the Statute.

The Respondent's assertion that the subject of a uniform allowance was covered by the Master Agreement is unpersuasive. While Article 28, Section h of the Master Agreement limits eligibility for a uniform allowance to "those staff occupying positions outlined in policy" (GC Ex. 2, pp.60, 61), the policy itself is not in evidence. More significantly, the section also states that "Policy will not be changed or implemented until negotiated with the Union." Therefore, the Master Agreement itself contemplates negotiation on the subject of uniform allowances.

The stated purpose of proposal K (GC Ex. 9) is to ensure the fair and equitable assignment of custody duties to non-custody staff.[9] That proposal is similar to one which was held to be negotiable in *Colorado Nurses Association and Veterans Administration Medical Center, Ft. Lyons, Colorado,* 25 FLRA 803, 822 (1987) *(Colorado Nurses).*[10] It is difficult to imagine how, even if the Respondent had accepted the proposal as submitted (which it had no obligation to do), it would have interfered with the exercise of a management right. While certain of the Union's proposals might have infringed upon the Respondent's management rights, it is clear that, at the very least, proposals I and K were negotiable. Either one of those proposals was sufficient to trigger the Respondent's duty to bargain.[11]

The Effect of the Master Agreement

In *U.S. Customs Service, Customs Management Center, Miami, Florida,* 56 FLRA 809, 813 (2000) *(Customs Service)* the Authority clarified the "covered by" doctrine which had been enunciated in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland,* 47 FLRA 1004, 1018 (1993). According to *Customs Service* a party is relieved of the obligation to engage in mid-term bargaining if the matter at issue is either specifically addressed in a collective bargaining agreement or is inextricably bound up with a subject covered by the agreement. The Authority further stated that bargaining history may be considered in evaluating the applicability of the second prong of the "covered by" test.

The Respondent relies upon the following two portions of the Master Agreement in support of its position. In ascertaining the meaning of such contract language, the Authority follows the standards and principles applied by arbitrators and by federal courts, *Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina,* 57 FLRA 495, 498 (2001).

Article 16 of the Master Agreement (GC Ex. 2),

entitled "Position Description and Review", states, in pertinent part:

Section c. [page 36] In regard to the phrase "other duties as assigned," or its equivalent, as used in position descriptions, it is understood that it will not be used to regularly assign work to an employee that is not reasonably related to the employee's basic job description. This does not preclude the Employer from detailing employees to other assignments in accordance with applicable laws. In the assignment of any work, the Employer will comply with applicable laws, including 5 USC and the decisions of the Federal Labor Relations Authority.

The above provision establishes a contractual basis (in addition to the statutory basis under § 7106(a)(2)(B) of the Statute) for the assignment of non-custody staff to custody duties. However, it also confirms the Respondent's obligation to comply with, "applicable laws, including 5 USC and the decisions of the Federal Labor Relations Authority." Therefore, it cannot validly be construed as supporting a waiver of the Union's right to bargain over the impact and implementation of a new procedure. In any event, this provision falls far short of constituting the clear and unmistakable statement of intent that is necessary for it to operate as a waiver of the Union's right to bargain over the impact and implementation of changes in conditions of employment, *Social Security Administration and American Federation of Government Employees, AFL-CIO* (Leahy, Arbitrator), 31 FLRA 1277, 1279 (1988) *(SSA).*

Article 18, entitled "Hours of Work", states, in pertinent part:

Section o. [page 42] Employees shall be given at least twenty-four (24) hours notice when it is necessary to make shift changes ... Work assignments on the same shift may be changed without advance notice. [12]

It is not absolutely clear whether "work assignment" means a change of duties or merely a change of work location within the same shift. However, the title of the section, especially when considered in conjunction with Article 16, Section c, which obligates the Respondent to comply with applicable laws and decisions of the Authority, suggests that the section is only intended to govern shift changes rather than changes of regular duties.

There is nothing in the language of either of the contractual provisions cited by the Respondent to indicate that the change in the assignment procedure is inextricably bound up with the provisions of the Master Agreement. The most that can be said about the Respondent's "covered by" defense is that the new assignment procedure was not a contractual violation; the General Counsel has not alleged such a violation.

The evidence of the bargaining history of both sections does not support the Respondent's position. Philip W. Glover, a current officer and a former President of the AFGE Council of Prison Locals, participated in the negotiation of the Master Agreement. Glover testified that Article 16 was negotiated without much discussion and that there were only minor changes from the prior agreement (Tr. 82). According to Glover, Article 18, Section o was designed to require the agency to provide employees with as much notice as possible before changing their shifts and was primarily applicable to custody staff (Tr. 87, 88). During the course of negotiations it was not contemplated that non-custody staff would fill in for custody positions on a routine basis (Tr. 89). Gonzalez testified that he considered the language in Article 18, Section o regarding the change of work assignments within the same shift as being limited to the Correctional Services Department. However, he acknowledged that there is no language in Article 18, Section o by which such a limitation is expressed (Tr. 66).

Although the new assignment procedure did not violate the contractual provisions upon which the Respondent relies, those provisions do not relieve the Respondent of the duty to bargain with the Union over the impact and implementation of the new assignment procedure. I therefore conclude that the Respondent has failed to satisfy either of the prongs of the test established by the Authority in *Customs*

Service for the applicability of the "covered by" doctrine.

The Respondent maintains that parol evidence and the "law of the shop" may not be used to justify a departure from clear and unambiguous contract language. While that is true, it is also true that the contractual language upon which the Respondent relies does not support the proposition that, in entering into the Master Agreement, the Union surrendered its statutory right to negotiate over the impact and implementation of the increased use of non-custody staff to fill custody positions.

In concluding that the terms of the Master Agreement did not relieve the Respondent of the duty to bargain, I am mindful of the letter of November 24, 2003, from the Regional Director of the Boston Region of the Authority to Tim Mindock, President of the American Federation of Government Employees, Local 1325 (Resp. Ex. 5). In that letter the Regional Director stated that the issuance of a complaint was not warranted in Case No. BN-CA-03-0550. That case arose out of an unfair labor practice charge filed by Local 1325 against the Federal Bureau of Prisons, FDC Philadelphia, Pennsylvania. The Regional Director partially based his conclusion on a determination that the agency was not obligated to bargain over a management decision to assign certain non-custody employees to fill in for custody employees during off-site training exercises which were to be conducted over two days. According to the Regional Director, management's action was covered by Article 16, Section c and Article 18, Section o of the Master Agreement, the same portions of the agreement upon which the Respondent relies in this case.[13]

A decision by a Regional Director not to issue a complaint in an individual case is not binding either on the Authority or the General Counsel in another case, regardless of the similarity.[14] The letter upon which the Respondent relies indicates that the agency's action was not a long-term change in procedure, but only a temporary measure to ensure adequate coverage of custody posts during a two-day training exercise. (Such assignments are analogous to the Respondent's practice of assigning non-custody staff to fill custody posts during refresher training.) The Regional Director's conclusion in the prior case was made on the basis of his assessment of evidence which would have been presented at a hearing if a complaint had been issued. The evidence in this case, which I have evaluated after a full adversarial hearing and the consideration of post-hearing briefs, indicates that the change in the assignment procedure, which was to be of indefinite duration (GC Ex. 6, ¶ 4), was not covered by the Master Agreement. Furthermore, at least some of the Union's proposals were negotiable.

If the Respondent relied upon the Regional Director's decision in the prior case, such reliance was misplaced. The Respondent's belief that it was under no legal obligation to bargain does not detract from the willful nature of its refusal to do so, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado,* 56 FLRA 9, 13 (2000).

The Remedy

The General Counsel seeks a status quo ante (SQA) remedy whereby the Respondent would be compelled to rescind the new assignment procedure pending completion of negotiations over its impact and implementation. The Authority has held that, in determining the appropriateness of a SQA remedy, the facts of each case must be carefully considered and a balance struck between the circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy, *Willow Grove,* 57 FLRA at 857. In *Federal Correctional Institution,* 8 FLRA 604, 606 (1982) *(FCI)* the Authority set forth five factors to be considered, among other factors, in determining whether an agency should be required to rescind a change in conditions of employment which was caused by the exercise of management rights. Each of those factors will be considered as it relates to the circumstances of this case:

1. Whether, and when, notice was given to the union by the agency concerning the action or change decided upon. It is undisputed that the Respondent gave the Union approximately four months notice, from August 25 to around December 26, before implementing the change in the assignment procedure and that it gave the Union an opportunity to revise its proposals, although such revision was not necessary to trigger the Respondent's duty to negotiate. This factor does not support the imposition of a SQA remedy.

2. Whether, and when, the Union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change. In this case it was the Respondent which requested bargaining by virtue of Miner's memorandum of February 26 to Gonzalez (GC Ex. 4) which was delivered on August 25. The Union did not present its proposals to the Respondent until December 8, which was almost two months after the Union had received the Respondent's answer to its second request for information (GC Ex. 7). This factor does not support the imposition of a SQA remedy.

3. The willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute. Although the Respondent apparently came to believe that it was under no obligation to negotiate over the Union's proposals, it terminated negotiations on all of the proposals in spite of the fact that its chief negotiator, Belfonti, admitted that at least one of the proposals (proposal I concerning uniforms) was negotiable. The Respondent's unjustified reliance on the letter from the Regional Director in another case does not detract from the willful nature of its failure to complete bargaining. This factor supports the imposition of a SQA remedy.

4. The nature and extent of the impact experienced by adversely affected employees. Although it was stipulated that the effect of the change in conditions of employment was greater than de minimis, there was no evidence of the frequency of the assignment of individual non-custody staff members to custody posts (Gonzalez stated that it occurred "occasionally"), nor was there evidence of adverse impact other than general allusions to the possibility of discipline for not wearing uniforms or of unfavorable evaluations because of missed deadlines in non-custodial jobs. The General Counsel has offered nothing to show that any adverse effects actually occurred other than the possible reluctance of non-custodial staff to perform custodial duties. This factor does not support the imposition of a SQA remedy.

5. Whether, and to what degree, a SOA remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. It is undisputed that the Respondent was under severe budgetary restrictions and that the use of non-custody staff to fill custody positions would reduce the Respondent's overtime expenses (Tr. 105, 106). However, the Respondent produced no direct evidence of the likelihood of the impairment or disruption of its operations if a SQA remedy were imposed or if the new assignment procedure had never gone into effect. The most that can be said is that the new assignment procedure was an acceptable, and probably an effective, means of reducing costs. There is no evidence to show that it was the only way in which the Respondent could have cut expenses or that it was essential to the Respondent's efforts to stay within its budget. This factor supports the imposition of a SQA remedy.

Upon consideration of the evidence and upon review of each of the factors set forth in FCI, I have concluded that a SQA remedy is not necessary to effectuate the purposes and policies of the Statute.

In view of the foregoing, I have concluded that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute by failing to bargain to completion, to the extent required by the Statute, prior to implementing a new procedure for the assignment of non-custody staff to custody posts. Accordingly, I recommend that the Authority adopt the following Order:

Order

Pursuant to § 2423.41 (c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Fairton, New Jersey (Respondent) shall:

1. Cease and desist from:

(a) Unilaterally changing the conditions of employment of its bargaining unit employees without fulfilling its obligation to bargain with the American Federation of Government Employees, Council of Prison Locals, AFL-CIO, Local 3975 (Union).

(b) Refusing to bargain upon request with the Union, to the extent required by the Statute, over the impact and implementation of the policy of assigning non-custody staff to custody positions which was implemented on or about December 26, 2004.

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

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

(a) Bargain upon request with the Union, to the extent required by the Statute, over the impact and implementation of the policy of assigning non-custody staff to custody positions which was implemented on or about December 26, 2004.

(b) Post at its facilities at the Federal Correctional Institution, Fairton, New Jersey, copies of the attached Notice on forms to be furnished.by the Authority. Upon receipt of such forms, they shall be signed by the Warden and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places," including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Region of the Authority, in writing, within 10 days from the date of this Order, as to what steps have been taken to comply.

[1]The Respondent's motion for summary judgment was denied by Order dated March 13, 2006.

[2]It was stipulated that this document was presented to the Union on August 25, 2004 (Tr. 31). All subsequently cited dates are in 2 004 unless otherwise indicated.

[3]At the hearing the Respondent submitted a transcript of the December 8 meeting (Tr. 121, 122; Resp. Ex. 1), the accuracy of which was not disputed.

[4]This proposal was tabled after a brief discussion (Tr. 45; Resp. Ex. 1, p.2).

[5]Although the term of the Master Agreement was from March 9, 1998, to March 8, 2001, neither of the parties alleged that it was no longer in effect.

[6]Although there is no evidence as to how often individual non-custody employees were assigned to custody duties, it has been stipulated that the new assignment procedure caused a change in conditions of employment that was greater than de minimis (Tr. 6, 7).

[7]As stated in § 7103(a)(12) of the Statute, the duty to bargain does not "compel either party to agree to a proposal or to make a concession."

[8]On direct examination, Belfonti stated that proposal I was recognized to be negotiable but that "Management tabled that" (Tr. 120, 121). Neither Belfonti nor any other witness for the Respondent explained why there were no further negotiations over proposal I.

[9]Article 7 of the Supplemental Agreement (GC Ex. 3, p.3), entitled "RIGHTS OF THE UNION", provides, in Section b, that "The Employer agrees that the Union may have access to any roster, schedule and/or post order."

[10]The portion of the proposal at issue in that case was, "Relief p.m. and night duty will be distributed as equitably as possible."

[11]The following comment by the Authority in *Colorado Nurses* confirms the proposition that the duty to bargain does not include the obligation to acquiesce to any proposal:

In finding these proposals to be within the duty to bargain, we make no judgment as to their merits.

25 FLRA at 823, n.5.

[12]A review of the language of the Master Agreement and of the above testimony leads to the conclusion that Article 18, Section o may have a greater effect on the custody staff, since most non-custody employees do not perform shift work (Tr. 27). Nevertheless, for the purposes of this Decision, I will assume that Section o generally applies to all bargaining unit employees.

[13]The Regional Director also concluded that a complaint was not warranted by the charging party's allegation that the agency had bypassed the union by negotiating directly with members of the bargaining unit. That conclusion was based on a finding of insufficient evidence.

[14]It is unclear whether Local 1325 appealed the Regional Director's decision to the General Counsel pursuant to § 2423.11 of the Rules and Regulations of the Authority.

Statutes Cited

5 USC 7116(a)

Regulations Cited

5 CFR 2429.5

Cases Cited

47 FLRA 1004
60 FLRA 674
58 FLRA 101
56 FLRA 45
56 FLRA 686

