UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: June 30, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
AIRCRAFT OPERATIONS CENTER
TAMPA, FLORIDA

Respondent

and Case No. AT-CA-05-0402

NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, motions and related pleadings, and any briefs filed by the parties.

Enclosures

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U.S. DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION AIRCRAFT OPERATIONS CENTER TAMPA, FLORIDA Respondent	
and NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION Charging Party	Case No. AT-CA-05-0402

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 31, 2006**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

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RICHARD A. PEARSON
Administrative Law Judge

Dated: June 30, 2006
Washington, DC

OALJ 06-19

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION AIRCRAFT OPERATIONS CENTER TAMPA, FLORIDA Respondent	
and NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION Charging Party	Case No. AT-CA-05-0402

Paige A. Sanderson, Esquire
For the General Counsel

Michelle I. Englar, Esquire
Elise B. Steinberg, Esquire
For the Respondent

Richard J. Hirn, Esquire
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

This case was initiated on July 28, 2005, when the National Weather Service Employees Organization (the Charging Party or Union) filed an unfair labor practice charge. After investigating the charge, the Regional Director of the Atlanta Region of the Authority issued an unfair labor practice complaint on December 20, 2005, alleging that the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Aircraft Operations Center, Tampa, Florida (the Respondent or Agency) violated section 7116(a)(1), (5) and (8) of the Statute by (a) bypassing the Union in dealing directly with bargaining unit

employees appointed to an Operational Risk Management Team; (b) conducting a formal discussion with bargaining unit employees without affording the Union an opportunity to be represented; and (c) implementing changes in conditions of employment without giving the Union adequate notice or an opportunity to negotiate. On January 18, 2006, the Respondent filed its answer to the complaint, admitting some of the factual allegations and denying others, but denying that its conduct violated the Statute.

A hearing was held in Tampa, Florida, on January 31, February 1 and 2, 2006, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel, the Respondent and the Union subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The National Oceanic and Atmospheric Administration (NOAA), a bureau within the U.S. Department of Commerce, contains several line offices, including NOAA Marine and Aviation Operations, which operates fleets of ships and aircraft supporting NOAA's many activities around the world. These NOAA activities include non-severe weather projects such as monitoring whales, taking aerial photographs of land masses and oceans, and conducting snow depth surveys over the northern plains; they also carry out severe weather projects such as flights into and around all types of tropical cyclones[1] in support of the National Weather Service, the National Centers for Environmental Prediction, the National Hurricane Center, and the Hurricane Research Division (all of which are also units within NOAA). NOAA's aircraft are managed and operated by the Aircraft Operations Center (AOC) at MacDill Air Force Base in Tampa, Florida, and it is this organization that is the focus of the case at bar.

The AOC employs civilian employees such as meteorologists, engineers, technicians and maintenance workers; it also employs pilots, who are commissioned,

[1] "Tropical cyclone" is the general term to describe storm systems that form in tropical latitudes and range in strength from tropical depressions to tropical storms to hurricanes.

uniformed officers in the NOAA Corps. The Union was certified as the exclusive representative of a unit of civilian employees of the AOC in 2002, but it has not yet completed negotiations for an initial collective bargaining agreement. Tr. 350.

The AOC maintains a fleet of light (under 12,500 pounds) and heavy aircraft for its many types of missions, but it uses only the heavy aircraft for flying in severe storm environments. The two types of heavy aircraft used by AOC are the WP-3D Orion (P-3), which is a four-engine turboprop, and the Gulfstream-IV (G-IV), a twin-engine jet. Tr. 413. The P-3, a much larger, heavier plane than the G-IV, flies during storms mainly at altitudes between 1,500 and 10,000 feet and at speeds around 200 knots, or nautical miles per hour; the G-IV is a much lighter, faster plane, flying in or over storms at altitudes between 41,000 and 45,000 feet and at speeds around 400 knots. Tr. 36, 413-14. Both planes take continual measurements of various aspects of the storm environment, including the atmosphere and the ocean, through the use of their onboard radar and by dropping "expendable" instrument packages such as dropwindsondes (also called sondes), which fall through the atmosphere on parachutes and provide radio-transmitted readings twice a second to the plane's computer and by satellite to NOAA headquarters. Tr. 410, G.C. Ex. 9 at 2.

NOAA has been flying the P-3 in severe storms since at least 1981, when it added new doppler radar on the P-3 to enable researchers to study vertical wind motion as a function of altitude. G.C. Ex. 3(d) at 2. The primary type of tropical cyclone mission for the P-3 is a reconnaissance mission, in which the plane flies directly into the "guts" of the storm in order to locate the center of the storm and to measure its lowest pressure, highest wind speeds, and the radius of its maximum winds, all of which are used in helping weather forecasters. Tr. 411-12, G.C. Ex. 9 at 4.

NOAA acquired the G-IV in 1996 specifically for its high-altitude capabilities, to enable NOAA to get a better understanding of the entire storm environment, and the G-IV began flying severe storm missions in 1997. Tr. 419; G.C. Ex. 3 at 1; Union Ex. 1 at 1. Its primary type of severe storm mission is called a surveillance mission, in which it flies over and around the storm, but avoiding the most

severe weather and the storm's center.[2] In an article dated October 18, 2002, and posted on NOAA's website, the Agency described the two aircrafts' missions in this manner:

> The G-IV flies around the storm at altitudes reaching 45,000 feet, where steering currents direct the path of the storm. The data from G-IV flights give a 3-D picture of what the storm is doing, and help forecasters predict its track. The G-IV jet cannot handle severe turbulence and must avoid the worst weather. The sturdier P-3 airplanes fly directly into the guts of the storm, through the severe winds and rain of the eyewall, into the calm eye, and back through the eyewall at altitudes ranging from 1,500 to 15,000 feet. The data help forecasters determine hurricane intensity and movement.

G.C. Ex. 9 at 4. That same article compared the two types of flights to a leaf falling into a stream: "The P-3s gather data about the leaf, while the G-IV gathers data about the stream." *Id.* at 3. Both the P-3 and the G-IV fly missions in all types of storms, from small tropical depressions to Category 5 hurricanes such as 2005's Hurricane Katrina.

Although the basic mission of the G-IV has consistently been to fly in the periphery of storms, some researchers in NOAA have always viewed the G-IV as having the potential to fly into the center of storms, i.e. through the circular eyewall at the center of a storm. An early research paper written by two NOAA employees (both of whom testified at the hearing) stated:

> Presently, the planned flight patterns are around the Tropical Cyclone (TC) periphery . . . . While these missions will rarely bring the G-IV near convective or severe weather, the AOC anticipates future requests to penetrate into the TC core. . . .

G.C. Ex. 3 at 1.

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[2] *See also* G.C. Ex. 13 at 3, a chart of the flight plan for a surveillance mission flown by the G-IV in Hurricane Emily on July 16, 2005. The chart shows the plane's zigzagging path as it explores the areas around the storm's center, which is marked by a circle with two spiral arms. This was characterized as a typical flight plan for a surveillance mission. Tr. 137-39.

Robert Maxson, a G-IV pilot for many years and the director of AOC from 2000 to November 2004, wrote a letter in May 2000 to Michael Black, a research meteorologist at NOAA's Hurricane Research Division (HRD) (and one of the authors of the above-cited article), commenting on the possibility of the G-IV flying missions over or into the center of tropical cyclones. G.C. Ex. 8. The following are some excerpts from his letter:

> Our operational experience has demonstrated that the G-IV cannot safely penetrate (by flying directly through the cell) convective build ups (thunderstorms) that meet or exceed our altitude (41,000 to 45,000 feet). Without going into great detail, our high altitude flight regime is at the extreme edge of our performance envelope.
>
> . . . . .
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> We have, on operational surveillance missions, flown into convection that we thought we could avoid. In one instance, we unintentionally flew through an isolated cell that we thought we could 'top'; we encountered significant vertical velocities and were forced to give up nearly 2000 feet of altitude to recover the aircraft (Air Traffic Control was not pleased). Consecutive 'hits' taken while penetrating multiple cells could potentially lead to both engine failure and/ or aircraft departure.
>
> On the positive side, we have demonstrated to our (AOC) satisfaction that we can successfully 'see and avoid' most dangerous convection with our C-Band nose radar. . . . Much more experience needs to be gained before storm centers can be approached and transited on an operational basis. While I have serious doubts that storm 'penetrations' with the G-IV can be accomplished as an unlimited and routine operational requirement, I do believe that we should continue to explore the inner reaches of selected storms to gain more insight on this issue. . . .

G.C. Ex. 8 at 3, 4. These comments, corroborated by testimony at the hearing, indicate that even in its routine surveillance missions, the G-IV tries to avoid convective currents, where the air moves vertically as well as horizontally; it also shows that even while trying, mostly successfully, to avoid such weather (using radar as well as real-time weather reports from an on-board computer), the

G-IV crews sometimes have been forced to fly through severe convection. *Id.*; Tr. 64-65, 280-81, 504.

In the years between 1997 and 2005, the surveillance missions of the G-IV have evolved, as the flight planners gradually moved the plane's passes closer to the center of storms. Union Ex. 1 at 1. Thus, while "traditional" surveillance missions sought to keep the plane at least 150 miles from a storm's center, some flight passes brought the plane (sometimes intentionally, sometimes unintentionally) as close as 30 miles from the center. Tr. 64, 620-21, 655. This has also resulted in the G-IV flying for longer periods of time in the Central Dense Overcast (CDO), a broad region of heavy clouds that form in the upper altitudes above the center of a tropical cyclone and extends in a roughly 100-mile radius from the center. Tr. 86, 213-14, 507-08, 626-28; G.C. Ex. 3 at 1.[3]

In August 1999, and again in September 2003, the G-IV was intentionally flown into the center of a tropical storm. The decision to fly into Hurricane Dora in 1999 was made mid-flight by the crew, as a deviation from the flight plan. Resp. Ex. 15 at 1; Tr. 114-16. It was a shallow storm with an eyewall that did not extend as high as the flight altitude of the G-IV, and the plane did not experience any problem in passing over the eye. Tr. 115-16. Based on this experience, Mr. Black of HRD and two AOC crew members described the flight in a presentation to the June 2000 Conference on Hurricanes and Tropical Meteorology and noted: "This first flight into a hurricane eye by the NOAA G-IV aircraft suggests that the aircraft is capable of flying into the center of a tropical cyclone safely and effectively." Resp. Ex. 15 at 2. Black also suggested further eyewall flights to AOC director Maxson, prompting Maxson's cautionary memo quoted earlier, G.C. Ex. 8. *See also* Tr. 117-18, 725-27.

In the face of this push-and-pull of prodding by researchers and caution from pilots, AOC continued evaluating the feasibility of what it called "inner core" flights by the G-IV. On September 1, 2003, AOC made its first pre-planned flight through the eyewall of a hurricane; the crew's post-flight report on the mission into Hurricane Fabian is G.C. Ex. 14. The "background" section of the report described the discussion and planning that preceded the decision to engage in this test flight. *Id.* at 1-2. It noted that "ongoing inner core mission planning was formally put in place . . . A set of criteria was generated in

[3] While the P-3 flies in the center of storms, it flies at an altitude considerably below the CDO. Tr. 571, 627-28.

2002 . . . to minimize the risk to the aircraft and crew . . .” *Id*. at 2. Compared to the weakening Category 1 Hurricane Dora in 1999, Fabian was a Category 4 hurricane, and it produced a significantly more turbulent flight. The storm had a well-defined eye at the G-IV flight altitude, and upon encountering the eyewall, the plane experienced two minutes of moderate turbulence. The pilot sought to maintain an airspeed between Mach .75 and Mach .77 (228 knots), but the actual airspeed varied from 208 knots to 248 knots. The plane’s minimum safe speed is 190 knots. *Id.* at 5. The crew was able to identify weak spots in the eyewall for entry and exit, but shortly after exiting the eyewall they noted that it had closed completely, with a 20-mile diameter; as a result, they decided not to attempt any further penetrations. *Id*.

The Fabian crew’s flight report noted the variations in airspeed and observed that while they “did not approach the Vref (low) limit of 190 kts, they confirmed this hazard as something to be concerned about.” *Id*. at 6. They further stated:

> The most disconcerting aspect of the aircraft’s performance during the SW eyewall penetration was the tendency to perform ‘uncommanded’ rolls. As the aircraft encountered turbulence and horizontal wind shear, the aircraft rolled several times while the autopilot was engaged. . . Although AOC pilots have known that the aircraft occasionally rolls in turbulence, the frequencey and magnitude of the rolls in the west eyewall were well above previous experiences.

Id. at 6. They also observed limitations in the radar’s ability to detect turbulence at flight altitude. *Id*. at 7. The report concluded:

> Based on this single experience, G-IV penetration into a category 4 storm is a matter of luck and timing. If the G-IV had approached the storm an hour later, there would have been no weakness in the eyewall to penetrate. The turbulence encountered in the ‘weak’ spot was as much as the aircraft should intentionally be subjected.

Id. at 7. But, noting the contrast between the smooth flight into Hurricane Dora and the more turbulent Fabian flight, the crew said it was “important to obtain more experience for cases between these two storm strengths” and to penetrate other Category 1 hurricanes, to see if the Dora experience was “representative or an anomaly.” *Id*.

With this history in mind, AOC management created an Operational Risk Management (ORM) team in November of 2004, composed of both commissioned officers, managers and bargaining unit employees, to study the proposals for flying the G-IV in and near the centers of storms in the safest possible manner. *See, e.g.*, G.C. Ex. 15, 16. Occupational Risk Management is a process for evaluating and minimizing risks, using techniques developed in the Defense Department. Tr. 438-40, 588. Individuals use the principles of ORM informally in everyday life to assess ordinary risks, and the military and aviation have formalized the process for more complex projects. Tr. 783-87. In the most formalized type of ORM, such as the team that was created in November 2004, a committee meets to develop ideas and risk mitigation procedures, and then it produces a written report for the organization to utilize. Tr. 785.

Approximately eleven people were selected to serve on this particular ORM team, including four pilots (commissioned officers), three meteorologist-flight directors, one engineer, one systems analyst, and one mechanic. *Compare* G.C. Ex. 18 and G.C. Ex. 25 at 4. It appears that the latter six individuals were members of the Union's bargaining unit. Tr. 261-63. The Union was not, however, informed by the Agency of the existence of the ORM team, and it was not invited to have a representative participate in the ORM process. Tr. 331. The head of the ORM team initially was Commander Philip Kennedy, the chief of AOC's operations division. After the first or second meeting of the team, he found that he could not devote the time necessary for the project, and he was replaced by deputy operations chief Robert Poston, who was also a G-IV pilot. Tr. 484-85, 535-36. The team met approximately a dozen times between November 2004 and August 2005. Tr. 312, 536.

Before the team's first meeting, Kennedy sent the members information to brief them on their task. G.C. Ex. 16 was one of these documents. It stated that the team would "determine how Tropical Cyclone Central Dense Overcast (CDO) mission flights, into systems from Tropical Depressions to Category 2 Hurricanes, can be accomplished operationally" for mapping the CDO and to help prepare for

the installation of a new tail radar system in the G-IV.[4] After employing risk mitigation techniques, Kennedy said the team would "produce 'Rules of Engagement' for CDO missions which include parameters for tasking notification, staffing, day or night flights, distance from alternates, fuel loads, altitudes, airspeed ranges, etc. (safety)." *Id.*

G.C. Ex. 19 contains additional background given to the ORM team at their first meeting. It explained the need to develop "operational and safety criteria" for the CDO mapping missions for the 2005 hurricane season, and it noted that in the 2004 hurricane season, "the G-IV typically spent about 11% of the mission . . . within the CDO, with an average closest point of approach to the center of 82 miles (and in numerous cases within 50 miles of the center)." *Id.* at 1. It further noted that "some of the CDO mapping missions will involve crossing legs through or near the storm center". *Id.* at 2. In the minutes of the team's first meeting, on November 23, 2004, Commander Kennedy noted that their options included accepting the "plan" for flying CDO flights; rejecting it out of hand as too risky; modifying the plan to develop measures to control risk; and elevating the decision above the level of AOC's Commanding Officer, due to the risk involved. G.C. Ex. 20 at 2. The team agreed that important decisions would be made by consensus. *Id.*; *see also* Tr. 265-66.

The first step in the ORM process was to identify all the potential risks in the proposed flights. As team leader Poston explained, team members "sat around the table and . . . brainstormed and thought of every possible risk that we could think of that the aircraft might encounter on the CDO mapping mission . . . ." Tr. 536. In this manner, they identified hundreds of risks, which Poston condensed to a list of 40. Tr. 536-37; G.C. Ex. 21, 22. Then they rated the degree of risk for each, using a graph that combined the

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[4] The appropriate term for describing these missions was a point of conflict at the hearing. AOC now seems to prefer calling the proposed flights "CDO missions" or "CDO mapping missions" (Tr. 503, 655; G.C. Ex. 19), although, as noted above, the flight crew of the 2003 Fabian mission (which included Captain Maxson, who was also AOC director at the time) described the Agency's long-term study of "G-IV hurricane inner core flights" (G.C. Ex. 14 at 1), and the Agency's "mission summary" of the first such flight in 2005 called it an "inner core mission" (G.C. Ex. 13 at 2). The General Counsel's witnesses dispute the term "CDO flights" as inherently ambiguous, and they suggest that the flights being studied by AOC and by the ORM team are intended to cross the inner core of a storm and should be labeled as such. Tr. 183-84, 219-24.

probability of each risk and the severity of the consequences of that risk. Tr. 537; G.C. Ex. 25 at "Step 2". Then they did more brainstorming to discuss ways of mitigating the risks that had been identified. Tr. 540. Thus on G.C. Ex. 21, nearly 400 different suggestions were listed as ways of reducing or eliminating the various risks. These suggestions were grouped in certain categories and the team sought to rate the effectiveness of each suggested mitigation measure by examining which suggestions had the most far-reaching effect. Tr. 548; G.C. Ex. 25 at "Step 3". The most far-reaching measures were then proposed to management as the team's final recommendations. Tr. 548; G.C. Ex. 25 at "Step 4".[5]

On July 11, 2005, Commander Poston sent an e-mail to AOC managers and to employees who fly on the G-IV, notifying them of a briefing, in which he would discuss the recommendations of the ORM team. Tr. 230, 313-15, 548-50. The briefing was held the following day, July 12, and Poston gave a power-point presentation, using slides of the documents in G.C. Ex. 25. It was held in the conference room of AOC's administration building, which is located near the hangar where most crew members work. Tr. 316-17. One employee testified that both P-3 and G-IV crew members attended the meeting, but apparently employees (other than managers) who did not fly were not informed of the meeting, nor was the Union. Tr. 230-31, 330, 457-58, 548.

After Poston explained the ORM process and the various issues that the team considered in seeking to fly CDO mapping missions to minimize risk and accomplish their operational purpose, attendees asked questions and made comments, including Richard McNamara, the Union steward for AOC.[6] Tr. 383-84. McNamara objected to the fact that the Union had not been involved in the ORM process. He stated that although he had previously heard about the ORM study,

[5] The record is unclear as to how or when Agency management actually approved the team's recommendations, or whether management approved the recommendations in their entirety or only partially. *Compare* AOC Deputy Director DuGranrut's testimony at 456, 470-73 and 493-95 with Poston's testimony at 552, 566-67. It appears that AOC management agreed that all of the ORM team's recommended mitigation measures would be put into effect for the 2005 hurricane season, with the ORM team and management continuing to review the recommendations at the end of the season.

[6] Although the Union had not been sent a notice of the July 12 meeting, McNamara was told about it by another employee. Tr. 330.

he had believed the team was only considering whether to conduct the CDO mapping missions, not how to conduct them safely. Tr. 331-33. McNamara also told AOC Director Kozak, who was present at the meeting, that the Union wanted to negotiate over the safety issues related to the CDO flights. Tr. 335, 459. According to McNamara, Kozak stated toward the end of the meeting that there was still work to be done regarding preparations for the CDO missions, and that no CDO missions would be undertaken yet.[7] Tr. 334-37; *see also* Damiano's testimony at 233. McNamara pursued his request for negotiations with Kozak immediately after the meeting, and at Kozak's request he agreed to submit a bargaining demand in writing. Tr. 337-38. The deputy Union steward did, in fact, send a letter that same day to Director Kozak, objecting to the Union's exclusion from the ORM process and to the proposed change in working conditions due to the CDO flights. G.C. Ex. 40. On July 13, Kozak responded to this letter, stating that the Union had no right to be represented at the ORM meetings and that the CDO missions did not constitute a change in working conditions or conditions of employment. G.C. Ex. 41.

Also on July 12, a G-IV crew[8] was preparing to deploy from Tampa to St. Croix, where they would be based for a series of missions into Tropical Storm Emily. Tr. 385-86. The plane was originally scheduled to fly a standard surveillance mission, but because the storm was moving away from United States territory, the surveillance mission was canceled and a CDO mapping mission was planned instead. Tr. 239, 253-54; G.C. Ex. 26, 27, 28. The crew flew the G-IV to St. Croix the morning of July 13, and on arrival they consulted the latest weather data on the storm. HRD scientist Gamache prepared a flight plan (frequently called a "figure 4 pattern") that called for the plane to fly over the center of the storm three times. Tr. 239, 512; G.C. Ex. 28 at 1 and G.C. Ex. 28(a) and (b); Resp. Ex. 2. During the flight, however, they detected a significant amount of convective activity in the area above the center of the storm, and as a result the crew decided to deviate in

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7 The Agency's witnesses did not directly testify concerning this point, but according to Poston, Captain Kozak got up after Poston's presentation and stated, "okay, let's go by these -- let's use these recommendations when we go to do a mission." Tr. 552.

8 Pursuant to the ORM guidelines, this crew had three pilots rather than the standard two, and two of the pilots were aircraft commanders. There was also a flight director, flight engineer, three technicians manning the instruments, and a scientist from HRD. Tr. 510; G.C. Ex. 28 at 1.

several places from the flight plan. Tr. 247-48, 515-16, 764-65; G.C. Ex. 28. Thus on each leg in which they were supposed to fly over the storm's center, the crew flew around the center, passing as close as 60 nautical miles on the first pass, 10 nautical miles on the second pass, and 30 nautical miles on the final pass. G.C. Ex. 28 at 2, 3 and 4.[9] They encountered light turbulence at various stages during the flight within the CDO, but the greatest turbulence they encountered was outside the CDO, while nearing their descent to St. Croix. *Id.* at 4; Tr. 520, 765.

That July 13 flight proved to be the first of three CDO mapping missions that the G-IV flew during the 2005 hurricane season. Although Emily was still at a tropical storm level on July 13, it was rapidly increasing in intensity the following day, when the crew was scheduled to fly a second mapping mission. G.C. Ex. 29. One of the parameters for mapping missions, established even before the ORM team was created, was that the G-IV would not fly such missions in hurricanes above Category 2 level. Nonetheless, the G-IV taxied onto the runway to begin its mapping mission on July 14; at the last minute, when reports showed that Emily was expected to reach Category 3 status in the next few hours, the crew decided to cancel the mission. G.C. Ex. 30, 31.

The second and third CDO mapping flights occurred on July 22 and 23, in Tropical Storm Franklin. Franklin was a tropical storm that never reached hurricane level, and it did not have a defined eyewall at the altitude of the G-IV.[10] The G-IV was given a somewhat different flight plan for this mission, involving a series of east-west legs (described as a "mowing the lawn" pattern) and ending with a figure 4 to cross over the storm's center of circulation. Tr. 675-76, 769-70; G.C. Ex. 33-37; Resp. Ex. 6-9. The flight on July 22 went generally as planned, as there was no severe convection forcing them to deviate from course. Tr. 679, 769-71. Because of the weakness of the storm, they were not able to determine precisely where the center of the storm was located. Tr. 769. The July 23 mission involved

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[9] At one point in the flight, the course deviations to avoid storm activity caused the plane to fly less than 50 miles from foreign territory, violating one of the guidelines of the ORM report. This caused one crew member to object, but his concerns were allayed by two other members. G.C. Ex. at 3-4.

[10] Generally, only hurricanes have defined eyewalls, although some intense tropical storms may have clouds and updrafts resembling an eyewall. Tr. 156-57, 670-71, 767-68.

a similar flight plan, and the crew only had to deviate from course once to avoid severe weather. Although the storm was too weak to have an eyewall, they were able to fly almost over the center of circulation of the storm. Tr. 773-76.

The ORM team composed of managers and bargaining unit members met until July or August of 2005. *Compare* Tr. 311-12 and 493-95. Since that time, the ORM process has continued, but the Agency changed the composition of the team to include only non-bargaining unit members. Tr. 495. The team continues to evaluate the procedures for flying CDO mapping missions for the 2006 hurricane season and the future.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel alleges that at the various stages of planning and implementing its CDO mapping missions, the Respondent committed three separate and distinct unfair labor practices. First, by involving bargaining unit employees in operational and personnel issues regarding how the missions would be conducted, who would staff the missions and when the missions would be flown, as well as safety issues concerning these flights, the Agency was "dealing with" those employees in a manner that bypassed the Union's exclusive role in such matters. Second, the G.C. asserts that the briefing conducted by Commander Poston on July 12 was a "formal discussion," within the meaning of section 7114(a)(2)(A), and that the Respondent therefore violated the Statute by failing to notify the Union in advance of the meeting. And third, the General Counsel argues that the CDO mapping missions (or as they call them, G-IV inner core missions) constituted a change in conditions of employment, triggering an obligation on the Agency's part to notify the Union in advance of the change and affording it the opportunity to negotiate over certain aspects of the change. The Respondent denies each of these allegations.

1. Bypass of the Union

On the first point, the G.C. notes that when a union becomes certified as the exclusive collective bargaining representative of a unit of employees, the agency owes a duty to "deal only with" that union concerning any matter affecting the conditions of employment of those employees. *American Federation of Government Employees, National Council of HUD Locals 222*, 54 FLRA 1267, 1276 (1998) (*HUD*). For instance, the Authority has found unlawful direct dealing with employees when a manager consulted with

employees in adjusting work schedules[11] and when a supervisor communicated directly with an employee concerning a matter on which the union had been representing him.[12] On the other hand, the Authority has permitted agencies to send questionnaires directly to employees asking them about issues relating to training and the effectiveness of their performance evaluation system. *United States Customs Service*, 19 FLRA 1032 (1985) (*Customs*); *Internal Revenue Service (District, Region National Office Units)*, 19 FLRA 353 (1985). The General Counsel submits that these cases demonstrate that while an agency can lawfully gather information from its employees without involving the union, it cannot go further and involve the employees actively in fashioning ways of addressing issues that are properly reserved for the union and negotiations. The G.C. argues that the Respondent's use of the ORM team here went far beyond mere information gathering: by allowing the bargaining unit employees to recommend rules of engagement for the G-IV in flying CDO mapping missions, the Agency was directly resolving personnel issues such as the length and time of day of CDO missions. This, it says, was comparable to the role of the employees in "quality circles" in *Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii*, 29 FLRA 1236, 1257-58 (1987) (*Pearl Harbor*).

Both the General Counsel and the Union also cite NLRB cases on direct dealing, as some Board decisions have addressed more specifically the creation of employee committees. *See, e.g., E.I. Dupont de Nemours & Co.*, 311 NLRB 893 (1993); *Allied-Signal, Inc.*, 307 NLRB 752 (1992), which in turn cite a Supreme Court decision, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). The Board held that "direct dealing" is a broader term than "bargaining," and that the use of employee committees to solicit proposals relating to safety, smoking and other negotiable issues was an unfair labor practice. The Authority cited and relied on these cases in a slightly different context in *HUD*, 54 FLRA at 1279-80. The General Counsel and the Union liken the ORM team's role here as similar to those cases.

The Respondent argues that the ORM process cited in this case was no different from the ORM teams used by the

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[11] *Air Force Accounting and Finance Center, Lowry Air Force Base*, Denver, Colorado, 42 FLRA 1226 (1991); *Department of Transporta-tion, Federal Aviation Adminis-tration, Los Angeles, California*, 15 FLRA 100 (1984).

[12] *U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 51 FLRA 1339 (1996).

Agency in the past for many other types of operations it has undertaken. *See* Tr. 438-40, 589. It notes that adherence to safety is a basic part of the jobs of all members of the G-IV and P-3 crews, and bargaining unit employees routinely work with the pilots and other managers to conduct missions in the most effective and safe manner possible. It cites the interaction of pilots and other crew members while taxiing on the runway on July 14, 2005, as they worked together in deciding to cancel the planned CDO mission in light of the intensifying hurricane. Resp. Ex. 5. Thus, the ORM team members were simply performing their regular jobs when they developed procedures for flying the CDO missions in the safest manner possible.

Citing the Authority's decision in *Customs*, 19 FLRA at 1034, the Respondent further asserts that the ORM team was simply gathering information in connection with the management function of studying its operations and was not negotiating directly with the members of the team. Instead, the Agency asserts that the team members were simply offering their recommendations to management as to how to minimize the risks of their missions; that Poston, not unit employees, determined which recommendations would be made; and the Agency never did adopt the team's recommendations, as nothing was finalized.

2. Formal Discussion

The General Counsel argues that the presentation by Commander Poston on July 12 to G-IV crew members and managers regarding the ORM team's recommendations meets the statutory elements of a formal discussion: it was a meeting, formal in nature, between one or more agency representatives and one or more unit employees, concerning personnel practices and general conditions of employment. The G.C. focuses on the traditionally-cited criteria of formality and argues that the July 12 meeting was indeed formal. *See, e.g., F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149 (1996). The meeting lasted for roughly an hour; was held in a conference room separate from the area where most employees worked; documents were distributed by Poston and the presentation followed his script; and a number of other managers were also present at the meeting. Finally, although Union steward McNamara learned of the meeting and attended, the General Counsel argues that this was not sufficient advance notice to satisfy the requirements of section 7114(a)(1)(A). As noted in *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 29 FLRA 594, 604-06 (1987) (*McClellan AFB*), advance notice to the Union is required so that it can decide who to send as its

representative at the meeting. According to the G.C., the accidental notice provided to McNamara did not allow the Union to make any conscious choice of a representative.

The Respondent, citing *Department of Veterans Affairs, Veterans Affairs Medical Center, Gainesville, Florida*, 49 FLRA 1173 (1994), argues that the July 12 meeting was informational only, and thus did not constitute a formal discussion. It notes that the meeting was not mandatory; not all crew members attended; it was announced only the day before by e-mail; there was no formal agenda and no notes were taken; and it was conducted by a NOAA Corps officer who does not supervise any bargaining unit employees. Moreover, the Agency asserts that the briefing had no effect on the employees' conditions of employment generally, since only ten of 49 bargaining unit employees fly on the G-IV. Thus, there was no statutory obligation to notify the Union of the briefing. Finally, the Respondent notes that Union steward McNamara learned of the briefing in advance, attended it, and was permitted to speak. It further notes that McNamara learned of the meeting at the same time as other employees, i.e. the day before. Thus, he had adequate time to select a representative.

3. Unilateral Change

The General Counsel asserts that the CDO mapping missions (what they call inner core missions) changed conditions of employment for those bargaining unit employees who fly on the G-IV, and that the changes had more than a *de minimis* impact on those employees. Thus, it argues that the Agency was required to notify the Union of these changes in advance and to allow the Union to negotiate over those aspects which are negotiable.

The General Counsel notes first that G-IV members were told in advance that all of them would be required to fly on mapping missions once AOC began flying them; thus, it asserts that the missions were a condition of employment for the G-IV crew members. The G.C. further argues that the mapping missions are a significant departure from the type of missions (surveillance missions) that the G-IV flew previously. Although the plane would occasionally fly within 50 miles of the center of the storm on surveillance missions, the overriding purpose of surveillance missions is to fly in the periphery of the storm, not in the CDO. In 2004, approximately 11% of the G-IV's surveillance missions had been spent within the CDO, but AOC expected that up to four hours of a five-hour mapping mission would be flown within the CDO. Most significant in the G.C.'s view is the type of flight pattern that is flown in CDO mapping

missions, compared to surveillance missions. While the flight plans for surveillance missions follow a circuitous, spiraling course that is intended to cover the entire area of a storm except for the central area, mapping missions typically utilize a figure 4 flight plan that explicitly takes the plane, several times, over or through the center of the storm.

As part of its decision to begin flying regular CDO mapping missions, the G.C. submits that the Agency implemented several new personnel policies for these missions. Because the ORM team recognized that the G-IV would be spending nearly the entire flight within the CDO, where there is usually no visibility and the crew must fly entirely on instruments, the team recommended (and the Agency approved) that mapping missions should only be flown during daylight hours, they should be limited to four hours within the CDO, and crews should not fly such missions more than three consecutive days. Moreover, the G.C. compares the staffing practice for the 2005 mapping missions to the practice employed for the only previous mission through the center of a storm, the 2003 Fabian mission. Whereas the Fabian mission used only volunteers for the flight and had a minimal crew, the 2005 mapping missions utilized larger than normal crews and all G-IV members were required to fly on them.

The General Counsel argues that the impact on bargaining unit employees of the Agency's decision to conduct CDO mapping missions is significant. Throughout the hearing, and in its brief, the General Counsel emphasized the increased severity of the weather systems that the G-IV can be expected to encounter when flying within the CDO, compared to those encountered in surveillance missions; along with the severity of the weather is an increased level of danger and risk that the crew must work under. Thus, the G.C. argues, the overall working conditions and level of stress faced in CDO missions is significantly more severe. It notes that the ORM team itself recognized these risks and sought to minimize them by making a large number of changes to the way CDO flights would be conducted, compared to surveillance missions. The breadth of the changes made by the ORM team and by AOC management was a recognition that CDO missions are qualitatively different from the missions traditionally flown by the G-IV.

The General Counsel asserts that the facts of the instant case distinguish it from those of a recent Authority decision, *United States Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, Border Patrol Tucson*

Sector, Tucson, Arizona, 60 FLRA 169 (2004)(*Border Patrol Tucson*). In that case, the Authority held that the agency's transfer of illegal aliens from one Border Patrol station to another, to alleviate the effects of an increase in the number of detainees at the first station, did not constitute a change in the conditions of employment for employees. Unlike that case, the General Counsel notes that here the Respondent has promulgated specific new policies and personnel actions, and many aspects of the work done by G-IV crew members are different during mapping missions that during surveillance missions. While in *Border Patrol Tucson* the change (an increase in the number of aliens processed) was not a result of anything the agency did, here AOC has made a conscious decision to fly a new type of mission that would explore areas of storms that the G-IV previously avoided, and as a result, G-IV crew members were required to learn and adopt new procedures and follow different operating instructions. While they were still flying the same plane, they were doing so in a very different manner. Thus, the G.C. asserts that the Respondent was obligated to give the Union notice of the proposed changes and to allow the Union to negotiate regarding them.13

The Respondent, on the other hand, argues that the CDO mapping missions differ little, if at all, from the traditional surveillance missions flown by the G-IV. While it concedes that the flight plans for mapping missions are different from surveillance mission flight plans, it submits that this difference has no effect on employees' conditions of employment. In each type of mission, the G-IV flies in a severe storm environment and may encounter convection, rainbands and turbulence. In each mission, it is the crew's responsibility to use its skills and its instruments to identify the potential hazards and to avoid them, and to deviate from the flight plan when necessary to avoid such hazards. The Agency cites the *Border Patrol Tucson* case as similar to the instant case, and its holding equally applicable here. The G-IV crews are still flying the G-IV in the same basic manner as always: in a manner that will

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The G.C. does not explicitly state whether it believes the changes were substantively negotiable or only negotiable concerning their impact and implementation, because in either case the Respondent failed to provide any opportunity for the Union to negotiate at all.

accomplish the research goals of the flight plan while also avoiding any weather hazards that might be dangerous.[14]

The Respondent further asserts that if there was any change in employee conditions of employment, it was *de minimis*. The underlying job of the employees, and their duties, has not changed, and the dangers they encounter are not new. All storm environments are hazardous, and the G-IV has often flown within the CDO in the past; thus, the crew is not being asked to do anything different than it has always done. The employees receive hazardous duty pay for most of their severe storm missions, recognizing the level of risk that is always present in such flights, whether they are surveillance or mapping missions. Finally, the Agency argues that the 2003 Fabian flight should not be used as a point of comparison with the current mapping missions. It was a single flight that was designed as a test, and it explicitly sought to fly through that hurricane's eyewall, something the Respondent asserts is not a goal of the CDO mapping missions.

Analysis

Rather than discuss the three alleged unfair labor practices in chronological order, I will address the unilateral change allegation first. The discussion and resolution of this issue, I believe, will clarify the analysis of the other issues.

Unilateral Change

The parties, both at the hearing and in their briefs, entangled themselves in a semantic dispute over what to call the new type of missions that were flown for the first time on a regular basis in 2005. While I think that ultimately this question is not material to the resolution of the case, it is indicative of an underlying ambiguity as to the basic purpose of the new missions: are the missions intended simply to explore the Central Dense Overcast of storms, or are they intended to penetrate the eyewall and explore the eye or inner core of storms? The unique meteorological characteristics of a hurricane's eyewall, along with the safety precautions that must be taken to fly through that

[14] Many of the bargaining unit employees flying the G-IV also serve on P-3 crews that fly reconnaissance missions through the center of storms. The Agency argues that the weather conditions encountered by the G-IV, even when flying CDO mapping missions, are much less severe than when they fly the P-3 through severe storms, including Category 5 hurricanes.

environment, give these missions not only a certain symbolic significance to the employees and the Union but also a considerable degree of additional risk, and the Union asserts a statutory role in negotiating with the Agency concerning these new missions.

The record is far from clear as to whether the Agency intends to fly through eyewalls during the CDO mapping missions. AOC Deputy Director DuGranrut testified that they do not want the G-IV to fly through eyewalls or any convective activity (Tr. 427-28), and a portion of the ORM team's recommendations corroborates this. Specifically, at "Step 4 - Make Control Decisions," of G.C. Ex. 25, under "Mission Planning & Procedures and Time & Duration of Flights (1 of 3)," the report stated:

> Flights will not be planned, nor will they be deliberately conducted, to penetrate convective clouds around the inner core. If the aircraft altitude places it above the tops of convection, or if the convective tops can be seen and avoided visually, the aircraft may pass over the inner core if the crew feels that no additional threat will result.

On the other hand, employee witnesses and other documents dispute such assertions. HRD meteorologist Black specifically addressed the above-cited portion of the ORM report and stated that is not possible to avoid areas of convection when flying over or through the inner core of a storm. Tr. 144-45. Flight Director Damiano emphasized that the basic design of the flight plans for mapping missions is a figure 4 pattern, which expressly directs the plane, usually three or four times, over the center of the storm, and in hurricanes and tropical storms that have formed eyes, this will generally require the plane to penetrate the eyewall. Tr. 220-23, 237-38. The General Counsel also cited several articles posted on the websites of NOAA or one of its divisions on the topic of its 2005 missions, which expressly state that the G-IV "will penetrate the inner core of hurricanes (previously the G-IV flew primarily in the environment around the hurricane . . .)" G.C. Ex. 10 at 5. *See also* similar quote at G.C. Ex. 11 at 3. While Respondent's counsel disavows those website statements as not being written by AOC, statements in other documents cannot be as easily dismissed. Thus, in his cover letter to the newly-formed ORM team in November 2004, team leader Kennedy said that one goal of the ORM process was to "produce criteria for RADAR cell avoidance in eyewalls, rainbands, etc. (safety)." G.C. Ex. 16. A December 2004 memo from AOC programs chief McFadden referred to "AOC's

plans for the summer which may, depending on the results of your ORM exercise, include CDO and eyewall penetrations by the G-IV." G.C. Ex. 24 at 1. McFadden also referred to an earlier study concerning flight plans for such missions, in which it was recommended that "at least 3 legs crossing the center 60 degrees apart" would be required to obtain the necessary data, with a repeat cycle within twelve hours. *Id.* at 1-2.

From the entire record, it is apparent that in the months and years leading up to the first CDO mapping missions in July 2005, both AOC and its sister divisions in NOAA gradually began planning G-IV missions closer and closer to the center of tropical storms, but until 2005 they never planned any regular missions that would take the plane over or through the center of a storm, or even within 50-100 miles of the center.[15] As AOC began planning for CDO mapping missions, however, the planners all understood that the new missions would fly a distinctly different flight plan, one that was expressly designed to take the plane several times over or through the eye of the storm.[16] Everyone involved, from management to flight crew to researchers, understood that one basic purpose of the CDO mapping mission was to cross the center of the storm. The center of a storm was the one area that had not previously been explored at high altitudes, and it contained important meteorological data. Tr. 425-27, 620-21. Flight Director Parrish, an Agency witness, perhaps expressed it best when he described CDO mapping missions as follows: "[I]n the process of mapping the CDO they want to map as much of it as possible, that includes the eyewall." Tr. 655. Moreover, it was understood that the eyewalls of most (i.e., more than half) hurricanes extend to an altitude above the flight level of the G-IV. Tr. 80, 626, 736.

Nevertheless, while AOC generally understood that the new mapping missions were designed to take the G-IV repeatedly in a path that would either penetrate or fly over the inner core of a storm, the ORM team sought to minimize

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15 The Fabian mission in 2003 was expressly viewed as a test flight; it was neither a regular surveillance mission nor a CDO mapping mission.

16 The contrasting flight patterns are illustrated best by comparing G.C. Ex. 13 and Resp. Ex. 2. The former shows the flight plan for the G-IV's July 16, 2005 surveillance mission into Hurricane Emily. G.C. Ex. 13 at 3; Tr. 137-39. Resp. Ex. 2 shows the flight plan for the G-IV's mapping mission into the same storm three days earlier, on July 13, 2005.

the risks of such flights by instructing the crew not to "penetrate convective clouds around the inner core." G.C. Ex. 25, Step 4, Mission Planning and Procedures (1 of 3). It is not at all clear whether this means that the crew is never permitted to penetrate a hurricane's eyewall, or whether the crew may penetrate the eye if it doesn't appear to have dangerous convection in its path, because other recommendations of the ORM team seem to address the specific possibility of penetrating the eyewall. Step 4 of G.C. Ex. 25, at "Pilot Procedures and Flight Training," instructs pilots never to enter an area without a predetermined exit strategy or with less than 25 nautical miles of space available to reverse course and recommends that pilots take training on "coffin corner" conditions and practice stalls and "unusual attitude recovery" techniques, all of which describe conditions or possible emergencies when flying inside the eye of a storm. These instructions seem to be anticipating future situations like the 2003 test flight into Hurricane Fabian, in which the crew decided to penetrate the eyewall when it identified a weak area on the south side. G.C. Ex. 14. The most reasonable explanation for these contradictions is that the ORM team understood (and the Agency agreed) that the CDO mapping flights were likely on occasion to take the G-IV into the eyes of storms, but they sought to minimize the risks by giving the crews maximum flexibility to decide whether the storm center could be crossed safely or to deviate from course to avoid dangerous convection or turbulence. Indeed, all the Respondent's witnesses emphasized the fundamental obligation of the pilots and crew on all AOC aircraft to constantly adjust the plane's course to ensure the safety of the crew.

It is, therefore, immaterial whether we call the new missions "CDO mapping missions" or "inner core" missions, and it is similarly unnecessary to determine whether the Agency expressly intended for such missions to fly through the eyewalls of storms. In either case, the new missions were consciously planned and formulated to be distinctly different from the G-IV's surveillance missions. They utilized a totally different flight plan, one that repeatedly took the plane over, through or as close as possible to the storm's center, whereas surveillance flights carefully circumvented the storm's center. Moreover, the new mission was only adopted after years of planning. The caution with which the change was enacted was an indication of the newness of the mission and its potentially severe consequences. *See, e.g.*, G.C. Ex. 14 at 1-2; G.C. Ex. 19, 20. Thus, there really is no doubt that the assignment of G-IV crew members to CDO mapping missions in 2005 represented a new type of mission for these employees; in other words, it constituted a "change" in the type of work

they were being assigned to perform. The real questions, then, are whether this new type of work assignment changed conditions of employment of bargaining unit employees, and if so, whether it had more than a *de minimis* effect on those conditions of employment. *See United States Department of Veterans Affairs Medical Center, Leavenworth, Kansas*, 60 FLRA 315, 318 (2004) (*VA, Leavenworth*).

Section 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." In *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 236-37 (1986), the Authority cited the following two basic considerations in determining whether a matter involves a condition of employment: whether the matter pertains to bargaining unit employees, and the nature and extent of the effect of the matter on working conditions of those employees. There is no dispute here that bargaining unit employees regularly fly on the G-IV and are affected by the Agency's decision to conduct CDO mapping missions. It is thus the nature and extent of the effect on their working conditions that is crucial.

One distinct aspect of the working conditions of G-IV crew members that changed in July 2005 was the environment in which the plane and its crews flew during mapping missions: in mapping missions, they flew almost the entire mission within the CDO, and they expressly flew repeatedly through the areas closest to, if not within, the storm's central area of circulation. AOC Director Kozak disputed this very fact in his reply to the Union's request to bargain: "the Agency has changed the particular flight pattern of the G-IV, but not the environment into which the flights are conducted." G.C. Ex. 41. As I have already discussed, this seems to be denying the obvious. If Captain Kozak means that "the environment" in which the G-IV flies is "the sky," or "the tropical storm environment," then he may be technically correct. But as I have already discussed, the three mapping missions in 2005 took the G-IV into an area of the storm that had previously been intentionally kept off-limits: the center of circulation and the 50-100 mile area immediately surrounding it. The Agency fully understood the safety implications of venturing into this new area, both on the aircraft and on the crews, because it spent literally years trying to find the best ways of flying into this new area. For the Agency now to argue that there is no difference between the "environment" of surveillance missions and CDO mapping missions, they

might as well admit that they spent six years debating and writing reports about nothing.

In *VA, Leavenworth,* the Authority held that the reassignment of three nurses from one unit to another unit within the same hospital was a negotiable change in their conditions of employment. In *Pension Benefit Guaranty Corporation*, 59 FLRA 48 (2003), the Authority held that the relocation of two employees from a window office on the sixth floor to a smaller, windowless office on the fifth floor was a negotiable change in their conditions of employment. It is apparent from the latter case in particular that even relatively small changes in an employee's work environment (the size of the office, the lack of a window) sufficiently affect working conditions to constitute a changed condition of employment.

The Authority has also held on many occasions that matters concerning the safety of employee working conditions is a negotiable condition of employment. *National Union of Hospital and Health Care Employees, AFL-CIO, District 1199 and Veterans Administration Medical Center, Dayton, Ohio*, 28 FLRA 435, 474 (1987); *Immigration and Naturalization Service*, 21 FLRA 359, 374-75 (1986); *Internal Revenue Service, Chicago, Illinois*, 9 FLRA 648, 651 (1982). In his July 20, 2005 letter to Director Kozak, protesting the Agency's actions, Union steward McNamara expressly asserted the Union's interest in addressing the safety issues related to the newly implemented CDO mapping missions (G.C. Ex. 42), and safety was clearly an overriding consideration in the ORM process itself. These safety concerns certainly affected the working conditions of the G-IV crew members in a direct and significant way.[17]

While the parties spent considerable time at the hearing attacking and defending the safety of CDO mapping missions, that issue is not before me; however, it is abundantly clear from the record that every employee and manager in AOC by 2005 was well aware that flying the G-IV in the region closest to the center of storms posed serious safety hazards that required considerable attention and the development of numerous special procedures to mitigate. G.C. Ex. 8 and 14, memoranda prepared by or with the direct input of AOC managers, describe most persuasively the severe

[17] Electronics technician David Brogan, who flew on the July 13 CDO mapping mission over Tropical Storm Emily, still felt uncomfortable enough about such missions to ask Kozak and Parrish that he be taken off the crew for the scheduled mapping mission into Tropical Storm Franklin on July 22. Tr. 391-93, 676.

challenges posed by flying even close to a hurricane's eyewall. Moreover, the scores of risks identified by the ORM team as "moderate," "critical," or "catastrophic" ably attest to the significant safety concerns related to CDO flights, even if they never penetrate the eyewall. G.C. Ex. 21, 22, 23 and 25. This does not mean the missions are unsafe; on the contrary, I am certain that the ORM process has enabled the G-IV crews to handle the risks of such flights prudently. But if the Agency believed that several of its managers and several bargaining unit employees should spend over half a year on an ORM team studying how to mitigate the risks of these flights, then the Union was certainly entitled to notice of the team's recommendations and the opportunity to bargain before those recommendations were implemented.

The Agency argues, however, that the safety concerns faced by G-IV crew members on mapping missions are no different from the safety concerns they face on surveillance missions, or from those faced by P-3 crews, which routinely penetrate the eyewalls of the most severe hurricanes. (Indeed, most of the G-IV crew members except pilots also fly on P-3 missions.) This simply is not true, however, and AOC understood this when they undertook an extensive ORM process before allowing the G-IV to begin flying CDO missions. While the G-IV flies routinely through the outer portions of the CDO for about 11% of the time in its surveillance missions, and it encounters convection, turbulence and rainbands during those missions, the likelihood of encountering these hazards is significantly higher, the closer it flies to the center of the storm, and the hazards increase exponentially if the crew chooses to penetrate the eyewall. On its mapping missions, it is expected that the G-IV will be flying inside the CDO for 75% or more of the flight, which also means that the crew will have no outside visibility and will be entirely dependent on their instruments during that time to avoid hazards. Flight Director Parrish, a strong supporter of CDO mapping missions, described at length the differences for the crew members when flying within the CDO. Tr. 631-34. Their concentration is much more intensely focused, because they must rely on so many different instruments and have no outside visibility, and because the frequency of rain bands and convection is greater as they get closer to the eyewall. Tr. 632. Moreover, this "heightened state of awareness" must be maintained for nearly the entire mission. Tr. 707-08. These factors were recognized by the ORM team as likely to cause crew fatigue, prompting the team to make recommendations to address the fatigue as well as the safety issues. It is also extremely inaccurate to compare the safety issues faced on P-3 missions to those faced on G-IV

mapping missions. While the P-3 encounters even higher horizontal winds and rain and turbulence on its flights, it doesn't fly in the CDO, and it is a much larger, slower aircraft, much better equipped to handle such conditions than the G-IV. Moreover, the potential dangers to a high-speed aircraft such as the G-IV in handling warm-air anomalies (Union Ex. 1), the likelihood of encountering vertical convection, and the risks of stalling at the G-IV's altitude, are much greater than those faced by the P-3.

Looking at all these factors cumulatively, I conclude that the safety hazards likely to be encountered on CDO mapping missions are not simply the same problems that the crews have been working with for many years. Given the high speed and altitude of the G-IV, the increased likelihood of convection, rain bands, warm air anomalies and other hazards, in the area closest to a storm's inner core, the lack of visibility in the CDO and the inability of instruments to detect all hazards, and the high percentage of time that the crew will be flying within the CDO, the safety issues posed by CDO mapping missions are both quantitatively and qualitatively different than those the employees were accustomed to. Thus, the CDO mapping missions of 2005 represented a significant change in the working environment for the G-IV crew members and required them to face new and more complex safety hazards.

Additionally, several rules were established for CDO missions that do not apply to other AOC flights, which directly implicate personnel issues and working conditions. CDO missions are to be conducted entirely during daylight hours, whereas there is no specific limit on the duration of other missions. G.C. Ex. 25, "Step 4." CDO missions are limited to four hours flying within the CDO, compared to surveillance flights that generally last eight to nine hours. *Id;* Tr. 227, 467. While the Agency requires that all flight crews receive a day off after six consecutive flight days, the crew is limited to three consecutive days of CDO flights; additionally, if the planning and execution of a CDO flight causes the crew to work longer than a twelve-hour day, the crew members will be alternated to avoid consecutive flight days. G.C. Ex. 25, "Step 4." And while surveillance missions normally use one flight director, two will be assigned to each CDO mission. *Id*. Special training recommendations were also made by the ORM team for CDO missions: pilots are to review safety articles and Gulfstream publications concerning emergency procedures and to practice such procedures on flight simulators; all crew members are to become acquainted with Agency literature concerning earlier inner-core flights; special training on use of radar will be explored for flight directors;

standardized flight director training will be developed; and an annual workshop for pilots and flight directors will be held. *Id.* These new rules and procedures make it clear that the basic work day and work week for employees will be fundamentally different for CDO missions, compared to other missions, and that bargaining unit employees will be undertaking specialized training on the special nature of CDO missions. These factors reinforce the conclusion that the decision to add CDO missions to the work assignments of bargaining unit employees significantly changed their conditions of employment. Not only did their conditions of employment change, but they changed in a way that was much more than *de minimis.*

Nothing in the Authority's decision in *Border Patrol Tucson* warrants a different conclusion. In that case, the border patrol agents at one station were required to process more illegal aliens due to the agency's decision to transfer some aliens there from another station. The alleged change in conditions of employment was simply an increase in the amount of work, the same "type" of work they had always done (emphasis in decision, 60 FLRA at 174). The Authority found that the agency had not promulgated any policy or taken any action changing the working conditions of the agents. *Id.* at 173. As I have already noted, the situation is quite different in our case. The change here occurred as a result of a conscious decision on the Respondent's part to fly CDO mapping missions in addition to its other type of tropical storm missions, and a further decision to change personnel procedures in order to fly those missions safely. The characteristics of tropical storms did not change in 2005; rather, AOC decided to fly the G-IV in a different part of those storms than in the past, and as result it instructed its crews to staff those missions differently, to engage in specialized training, and to modify the length of their work day and work week to accommodate the extra strain of those flights.

The Respondent finally argues that it never actually adopted the ORM team's recommendations, as they were never voted on or finalized.[18] For purposes of the allegation that it implemented a change in conditions of employment, it is irrelevant whether the change occurred as a result of management's action or the ORM team's recommendations, but it is apparent from the record that AOC Director Kozak approved the team's recommendations in July 2005, at least

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The Respondent asserted this in relation to the bypass charge (Post-hearing brief at 29), but it is relevant to the unilateral change allegation as well.

for the duration of the 2005 hurricane season. While Deputy Director DuGranrut was somewhat evasive in his testimony as to whether the Agency had accepted any or all of the ORM team's recommendations (Tr. 456-57, 493-95), team leader Poston directly testified that Director Kozak stood up at the end of Poston's July 12 presentation and agreed to use the recommendations for the upcoming CDO missions. Tr. 552. Moreover, it is altogether obvious that the first CDO mission was undertaken within hours after the July 12 public presentation, and that the ORM team had been initially directed to come up with recommendations in anticipation of flying CDO missions in the summer of 2005. Nobody at the hearing suggested that any of the recommendations of the ORM team, as reflected in Step 4 of G.C. Ex. 25, were rejected by AOC management for the 2005 season. While it is true that the ORM process is ongoing (indeed it is never-ending, as long as the Agency flies such missions), it is quite clear that AOC management accepted the ORM team's July 2005 recommendations and implemented them for conducting CDO missions, at least for the 2005 season.

Accordingly, I conclude that, having made a conscious decision to require G-IV crew members to fly a new type of mission (the CDO mapping mission) in addition to the traditional surveillance mission, the Agency implemented in July 2005 a series of changes in personnel policies that significantly changed the conditions of employment of those employees. The reasonable and foreseeable impact of these changes on their working conditions was more than *de minimis*. Therefore, the Respondent was required to notify the Union of these proposed changes prior to implementing them, and to afford the Union the opportunity to negotiate concerning them.[19] The Respondent admittedly did not do so, and thus it committed an unfair labor practice in violation of section 7116(a)(1) and (5) of the Statute.

Bypass of the Union

Sections 7111 and 7114 of the Statute recognize the principle of a union's exclusive representation of employees in a bargaining unit, and that principle requires an agency to "deal only with" that representative. *HUD, supra*, 54 FLRA at 1276. An agency violates that rule if it deals directly with unit employees "on matters that are within the

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19 The parties did not litigate, and I do not resolve, the question of which subjects are substantively negotiable, and which subjects are negotiable only regarding impact and implementation. *But see infra* at 41.

sole authority of that exclusive representative." *Id.* at 1276-77.

In my analysis of the unilateral change allegation above, I concluded that the Agency adopted the recommendations of the ORM team, several of which directly concerned personnel procedures for conducting CDO missions or significantly affected the working conditions of bargaining unit employees. I therefore concluded that the Agency should have negotiated with the Union concerning these matters. Accordingly, this answers part of the question posed by the quoted language from the *HUD* case: several of the recommendations of the ORM team addressed matters that are within the sole authority of the Union. Moreover, it is undisputed that several bargaining unit employees served on the ORM team. The remaining issue, then, is whether the Agency "dealt directly" with those employees in the course of the ORM process.

When Union steward McNamara approached Captain Kozak on July 12, protested the Agency's failure to include the Union on the ORM team, and demanded negotiations over the changes being implemented, Kozak likely felt a sense of frustration, because the Agency had just finished consulting at length with a number of bargaining unit employees about these very issues. Indeed, that is the crux of the problem. For the past eight months, he had authorized several bargaining unit employees to identify all the potential problems and risks involved in flying CDO mapping missions and to recommend ways of minimizing those risks; at the end of those eight months, Kozak had adopted their recommendations wholesale, without any apparent exceptions. In doing so, he was "dealing directly" with employees on matters that he should have been discussing with the Union.

The Authority has not often had the opportunity to define in concrete terms the meaning of "dealing directly with" employees, particularly in situations such as this, where an agency utilizes teams of employees (acting with or without supervisors) to study work-related issues that overlap with issues reserved for union negotiations. One such case was the *HUD* decision, although the factual context of that case was quite different, as it involved committees having members of two different unions mixed together, and the Authority was merely reviewing an arbitrator's decision. Nonetheless, it is significant that the Authority in *HUD* looked to precedent under the National Labor Relations Act (NLRA) and found that NLRB cases prohibiting "direct dealing" under section 8(a)(1) and (5) of the NLRA were relevant to the Statute's similar prohibition in section 7116(a)(1) and (5). 54 FLRA at 1279-80. Citing, among

other cases, *E.I. DuPont & Co.*, 311 NLRB 893 (1993), and *Allied-Signal, Inc.*, 307 NLRB 752 (1992), the Authority summarized the case law as prohibiting those dealings that are "likely to erode 'the [u]nion's position as exclusive representative'." *HUD*, 54 FLRA at 1280, *citing Allied-Signal* at 307. It further explained that:

> where an agency's contacts . . . do not involve matters within the scope of the statutory authority of the exclusive representative, the agency also is not engaged in direct dealing contrary to the Statute.

54 FLRA at 1280.

The *DuPont* decision of the NLRB is a particularly interesting case to compare, because many of its facts bear a close resemblance to those of our own. The employees at DuPont were represented by a union, but the company created several safety committees and fitness committees containing employees and supervisors, against the union's objections. The committees governed by consensus, meaning that no proposals were advanced without the entire group's approval. 311 NLRB at 895. In addition to merely discussing issues like safety problems and recreational facilities, the committees made proposals for changes such as incentive awards for safe work practices and the building of picnic tables and a jogging track. 311 NLRB at 897. In some instances managers on the committees responded to the proposals, and in others, managers outside the committee responded. The Board held that these committees were company dominated, and further that by interacting with the committees on matters that were mandatory subjects of bargaining, the company had unlawfully dealt with them and bypassed the union.

Beyond finding the DuPont committees unlawful, the NLRB explained how the committees could have existed lawfully. For instance, it stated that an employer may establish an employee-management committee for the purpose of "brain-storming" or "develop[ing] a whole host of ideas" without violating the law, and it may even adopt some of the ideas, as long as the committee is not actually making proposals to management. 311 NLRB at 894. Or, if the committee simply gathers information and presents it to the employer, the employer may receive the information and do whatever it wishes with it, but there is no element of "dealing" in such a process. *Id.* Indeed, the Board held that DuPont had lawfully conducted some safety conferences, in which employees and managers were split up into discussion groups to talk about safety issues. In these conferences, the

company forbade the participants from discussing "union issues." 311 NLRB at 896-97. Participants were free to express their ideas, which were recorded and forwarded to the company. In this manner, the conferences successfully steered clear of "dealing with" the employees, in contrast to the ongoing committees that made direct proposals and managers responded.

In *Pearl Harbor*, a case that predated *DuPont* but relied on the same Supreme Court decision[20] that was cited in *DuPont*, the agency violated section 7116(a)(1) and (5) by unilaterally changing the structure of its Quality Circle program and thereby dealing directly with employees. In *Pearl Harbor*, the agency had initially formed the quality circles with the union's consent, but it acted on its own when it changed the program. While some of the guidelines for the program specified that the quality circles would not address personnel-related issues, in practice the program consistently discussed and made recommendations to managers on problems involving conditions of employment. 29 FLRA at 1257. Thus the program exceeded the sort of "information gathering" that had been permitted by the Authority in cases such as *Customs*, 19 FLRA at 1033-34.

The Respondent is correct in asserting, however, that agencies have the right under section 7106(a)(2)(B) to assign employees to teams and committees. In negotiability decisions, the Authority has upheld the right of an agency to require employees to serve on "total quality management" (TQM) teams composed of employees and supervisors. *See, e.g., U.S. Department of Defense, Defense Contract Audit Agency, Central Region and American Federation of Government Employees, Local 3529,* 47 FLRA 512 (1993) (*DCAA*). Not long after the *DCAA* decision, an ALJ was aksed to find that the establishment of such a TQM team constituted a unilateral change in conditions of employment, but the judge refused. *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, D.C.*, 54 FLRA 987, 1040-41 (1998) (*Commerce*).[21] After discussing the *Pearl Harbor* and *DuPont* decisions involving employee-management committees that bypass the union, the ALJ found there was no evidence at that time that NOAA had "dealt with" the TQM team, received any proposals from them, or proposed any changes in

[20] *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

[21] Because no exceptions were filed to this part of the ALJ's decision, the Authority adopted it without precedential significance. 54 FLRA at 988 n.2.

conditions of employment; thus, he held that no unfair labor practice had been committed. *Id.* But he also cautioned that "[i]f and when such changes are contemplated, bargaining may be required consistent with the Statute." *Commerce*, 54 FLRA at 1041, citing *DCAA* at 522.

It is worth noting that the *Commerce* case, *supra*, involved a sister division within NOAA of the Respondent in the instant case. The Respondent should have heeded the (admittedly non-precedential) advice of the ALJ in *Commerce*, because its ORM team did precisely what the ALJ said might require bargaining. In our case, we are not dealing with a committee that neither made, nor even contemplated, recommendations affecting conditions of employment. As I have already discussed, the ORM team made a wide range of recommendations, several of which involved changes in conditions of employment; moreover, AOC accepted those recommendations and put them into effect for the CDO missions that were about to begin in July 2005.

The Respondent makes a series of assertions in defense of its actions. It notes, for instance, that the bargaining unit members of the ORM team were assigned to the team "by virtue of their position with the Agency." Respondent's Brief at 30. This is true, but it simply means that the Agency was exercising its statutory right to assign work to employees; as noted in the *Commerce* decision, 54 FLRA at 1040-41, the lawfulness of the initial ORM team assignment does not give the Agency *carte blanche* to deal with employees on negotiable issues, nor does it freeze the Union out of its proper role. The Agency was free to ask the ORM team to study the feasibility of CDO missions and to "brainstorm" ideas for conducting them, but the activities of the ORM team went far beyond brainstorming and offering ideas. Rather, Poston engaged in an ongoing dialogue with the bargaining unit members that certainly constituted "dealing with" them. It should be noted here that as in the *DuPont* case, the team's decision-making was by consensus. Thus, any ideas offered by employees could be vetoed by Poston. While the record suggests that Poston generally incorporated all team members' ideas into the risk identification process, it is also clear that Poston winnowed the long list of risks down to 40, and it was he who ultimately drafted the final team report. Thus he was far more than simply one member of the team among equals; he accepted some, or perhaps even most, ideas from employees, but he also eliminated others, and in this manner he engaged in the sort of ongoing exchange that constitutes "dealing." The Respondent argues that neither Poston nor Kozak bargained with the employees on the team, but "bargaining"

is not necessary to constitute unlawful "dealing." *See DuPont*, 311 NLRB at 894; *cf. HUD*, 54 FLRA at 1280.

Poston's status as a management representative is somewhat problematical, since he is a commissioned NOAA Corps officer, but I conclude that he was a manager and was acting on management's behalf in leading the ORM team. He was the Deputy Chief of Operations at AOC and supervised at least one bargaining unit employee, as did at least two other pilots on the team. Tr. 484-86. Moreover, his recommendations as leader of the ORM team were effectively adopted without exception by Captain Kozak when they were presented. Furthermore, even if Poston himself were not considered a representative of management for purposes of his "dealing with" bargaining unit employees, Kozak's adoption of the team's recommendations constituted the sort of acceptance that violates the same prohibition.

The Respondent further argues that the ORM team's recommendations did not constitute unlawful "dealing" because they were more "conservative" than AOC's existing procedures. Respondent's Brief at 30. As a legal matter, however, this is simply wrong. Whether the team was recommending that more demanding or less demanding flight guidelines be followed on mapping missions than on the traditional surveillance missions, they represented changes from the existing guidelines and flight procedures, and thus they should have been negotiated with the Union. As noted by the NLRB in *DuPont*, the company's agreement to build new fitness facilities for employees and to give incentive bonuses for safe practices constituted unlawful dealing, whether they favored the employees or not. 311 NLRB at 895; *see also Pearl Harbor*, 29 FLRA at 1258.

Finally, the Respondent argues that the ORM process used for CDO mapping missions was no different from ORMs utilized in the past regarding matters such as salt accumulation on the P-3 and evacuation procedures. Tr. 439-40, 787. But those situations are not in issue here. The fact that no unfair labor practice charge was filed in those situations does not mean that AOC acted lawfully, and the failure of the Union to protest in those situations did not constitute a waiver of their statutory role concerning CDO missions.

The Authority stated in *HUD* that in order to identify those types of contacts with employees which constitute direct dealing, it will examine "whether the agency's actions undermine the rights of the exclusive representative." 54 FLRA at 1280. For instance, if the agency's contacts "do not involve matters within the scope

of the statutory authority of the exclusive representative," the union's rights are not undermined. *Id.* But as I have already noted, many of the issues addressed by the ORM team in this case did involve matters within the scope of the Union's statutory role, and thus the Union's role was undermined. The very fact that the Agency refused to negotiate with the Union after McNamara protested on July 12 and demanded bargaining highlights the irrelevance of the Union in the Agency's perspective. As far as the Agency was concerned, the in-depth participation of employees in the ORM process made the Union redundant. That is precisely what the Statute seeks to prevent.

I do not mean to suggest that an agency is wrong to seek out the expertise and involvement of employees in ensuring that agency activities are performed effectively and safely. But an agency cannot involve employees at the expense of the employees' exclusive representative. This can be a fine line to walk at times, but the activities of the ORM team in this case far exceeded that line. The employees on the team were not simply asked to brainstorm or to offer ideas, but they were allowed to make recommendations concerning personnel matters and other negotiable issues, and those recommendations were then adopted essentially verbatim. The Agency therefore bypassed the Union unlawfully, in violation of section 7116(a)(1) and (5).

Formal Discussion

Section 7114(a)(2)(A) of the Statute provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at–
>
> > (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

A union is entitled to representation under section 7114(a)(2)(A) only if all elements of that section exist. There must be (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *McClellan AFB*, 29 FLRA at 597-98.

I find that the July 12, 2005 presentation by Poston to G-IV crew members met the four statutory elements of a formal discussion, and therefore the Union should have been notified of it and given the opportunity to be represented. But because the Union steward did learn (albeit inadvertently) of the meeting shortly after other employees were notified, I find that the Union had an adequate opportunity to select a representative to attend. Indeed McNamara did attend and participate, and the Union was not prejudiced in its ability to choose who to designate.

There can be no doubt that the July 12 presentation was a "meeting." Poston spoke at length, and employees asked questions and made comments. Moreover, it concerned personnel policies and practices and general conditions of employment. As I already indicated in relation to the unilateral change, Poston was outlining the findings and recommendations of the ORM team for conducting CDO mapping missions, and some of these recommendations changed conditions of employment. While the changes did not affect every employee in AOC, they affected all employees flying on the G-IV, which was a significant portion of the bargaining unit.

I also concluded earlier that Poston, as Deputy Chief of Operations, was a manager and that as ORM team leader, he represented management. Several other management officials also attended the July 12 meeting: Director Kozak, Deputy Director DuGranrut as well as Roles, Goldstein and Barr, who were either branch or division chiefs. Tr. 231, 458. Kozak stood up at the end of Poston's presentation of the team's recommendations and essentially adopted them, thus adding his own managerial imprimatur to the presentation.

I further find that the meeting was formal. The strongest evidence of this is the way in which Poston conducted the meeting. He had a formidable set of prepared documents available for the employees, and he gave a power-point presentation that took the employees through the ORM team's process, step by step. This was <u>more</u> formal than simply having a prepared agenda, not less as the Respondent argues. While Poston may not have been the direct supervisor of any of the bargaining unit members in attendance, he was a deputy division chief, and other division or branch chiefs were there as well, in addition to AOC Director Kozak. This was a fairly imposing lineup of management officials, adding to the formality of the meeting. The meeting was held in a location apart from the crew members' workplace, and the meeting lasted for a considerable period of time. These factors far outweigh the

fact that attendance was not mandatory and the relatively informal manner of notifying employees of the meeting. In the latter regard, Poston simply sent an e-mail on July 11 to employees who flew on the G-IV, notifying them that there would be a presentation the next day concerning the new CDO missions they would be flying. Tr. 230-31. Thus, while the meeting was called rather hastily, it was nonetheless a lengthy and well-prepared report that addressed a subject that was of considerable importance to all G-IV crew members. The idea of flying the G-IV into or near the inner core of tropical storms and hurricanes was something that had been debated within the Agency for years, and the safety and research implications of the new missions were understood by all employees. The meeting was, therefore, formal within the meaning of section 7114(a)(2)(A).

In *McClellan AFB*, the Authority reviewed its case law on the question of "formal" as opposed to "actual" notice to a union. Reaffirming some of its earlier decisions[22] while disavowing others,[23] the Authority said the mere fact that someone from a union attends a formal discussion is not sufficient to show compliance with the statutory requirement. It emphasized that one essential component of a union's rights under 7114(a)(2)(A) is its ability to select representatives of its own choosing to be present at formal discussions, and that prior notice to the union is necessary in this regard. 29 FLRA at 604, 606. But in that same case, the Authority recognized that formal prior notice may not be necessary. It stated:

> [W]here the record does not establish that a union was given formal prior notice of a formal discussion, we will examine the record to determine if a union representative received actual notice and if so, whether that receipt was sufficient to establish that the union had an opportunity to be represented at the formal discussion within the meaning of section 7114(a)(2)(A), including the opportunity to designate a representative of its own choosing.

29 FLRA at 606.

The record here shows that Union steward McNamara was told on July 11 about the meeting to be held the next day.

[22] *Norfolk Naval Shipyard, Portsmouth, Virginia*, 6 FLRA 74 (1981).

[23] *Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma*, 19 FLRA 1054 (1985).

Tr. 330. Another employee, Barry Damiano, who was a member of the ORM team, testified that the e-mail notice to employees was sent on July 11. Tr. 230. Thus McNamara found out about the meeting the same day as everyone else. The vice steward, Daniel Lino, was on the premises the day of the meeting but did not attend, but McNamara spoke to Lino immediately after the meeting. It is therefore apparent that McNamara could have had Lino attend if he had wanted to. There is no evidence that there were any other Union representatives at AOC, or that McNamara would have sought to have someone from out of town act as the Union's representative for this particular meeting, if he had received earlier notice. Therefore, although the Union did not receive formal notice in advance of the meeting, it did receive actual notice, and this actual notice was sufficient to allow it to designate a representative of its own choosing.

Accordingly, I conclude that the Respondent did not violate 7116(a)(1) and (8) as alleged, and I will recommend that this portion of the complaint be dismissed.

Remedy

I have determined that the Respondent violated section 7116(a)(1) and (5) by dealing directly with employees on the ORM team and by unilaterally implementing changes in conditions of employment.

In light of these unfair labor practices, it is appropriate that the Respondent be ordered, first of all, to cease and desist from its unlawful activity and to post a notice to employees to that effect. Deciding the proper remedy for the Respondent's unilateral changes is somewhat more problematical, in that the Agency began flying CDO mapping missions in 2005 and stated at the hearing that it intended to resume those missions in the 2006 hurricane season, which began on June 1. The General Counsel seeks a *status quo ante* remedy, pursuant to which AOC would be required to suspend CDO mapping missions until it has completed negotiations over its proposed changes, to the extent required under the Statute. I agree with the General Counsel.

The Authority applies a different analysis in determining the remedy for an unlawful change in working conditions, depending on whether the change was substantively negotiable[24] or whether it was an exercise of

[24] *Federal Deposit Insurance Corporation*, 41 FLRA 272, 279 (1991).

management's reserved rights under section 7106(a).[25] As I noted earlier, the parties did not expressly litigate whether the changes imposed here were substantively negotiable or not. It would appear that the decision to add a new type of mission would be encompassed under the Agency's rights to determine its mission, assign work, and to determine the methods and means of performing work; however, issues such as employee safety and hours of work are generally substantively negotiable. Thus this case may likely involve a combination of both types of negotiations. Even applying the more restrictive guidelines of *FCI*, however, I believe that a *status quo ante* remedy is warranted here, and that the Respondent should not conduct any further CDO mapping missions until it has completed bargaining.

The first factor to examine under *FCI* is whether and when the Union was given notice of the changes. The Respondent has admitted that it gave no advance notice to the Union, that the Union only learned of what was being implemented on July 12 or 13, when employees as a whole were notified. Further, it is clear that the Agency's failure to bargain was willful. The Union immediately demanded bargaining, and at that point, on the afternoon of July 12, Captain Kozak was still insisting that CDO mapping missions were not imminent, even though just such a mission was flown the next day. There was, nonetheless, time to delay any CDO missions and to bargain with the Union at that point, an action that would have mitigated considerably the difficulties for all parties. The effect of these actions is magnified, as I see it, by the fact that they were preceded by months of direct dealing between the Agency and the bargaining unit employees on the ORM team. The Agency obviously gave considerable and serious thought to the safety and other problems involved in CDO missions, and it clearly valued the professional expertise of the meteorologists, engineers, and technicians who were named to the ORM team. By virtue of this direct dealing, the role of the Union has been undermined, and in a real sense the Union is being asked to negotiate against its own members. That will make bargaining at this stage more difficult, but it is necessary nonetheless. I believe that this must be considered as part of the adverse impact on employees.

On the other hand, I recognize that the Agency believes that its CDO missions are important in providing data for research and storm forecasting. Nonetheless, I see little evidence that a cessation of those flights will be

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25 *Federal Correctional Institution*, 8 FLRA 604, 606 (1982)(*FCI*).

disruptive to the Agency. Up until 2005, the G-IV flew only surveillance missions, and even now the mapping missions are considered secondary to the surveillance missions. Halting the mapping missions temporarily, therefore, will not interfere in any way with the Agency performing the surveillance missions that make up the bulk of its tropical storm work. There is still plenty of time in the 2006 hurricane season for the parties to negotiate in good faith and resume CDO flights. Moreover, the longer AOC continues its CDO flights without conducting the necessary bargaining, the more difficult, and the more irrelevant, those negotiations will be. I should note as well that the Agency introduced no testimony or other direct evidence that its mission would be disrupted or interfered with by a suspension of the CDO flights. *See U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 906-07 (1999).

Based on the above findings and conclusions, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Aircraft Operations Center, Tampa, Florida (the Respondent) shall:

1. Cease and desist from:

(a) Bypassing the National Weather Service Employees Organization (the Union), the exclusive representative of certain of its employees, and dealing directly with bargaining unit employees regarding changes to their conditions of employment;

(b) Implementing changes to the conditions of employment of employees in the bargaining unit represented by the Union with regard to the conduct of Central Dense Overcast (CDO) mapping missions, until it has given notice to the Union of any such proposed changes and negotiated over the proposed changes to the extent required by the Statute; and

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

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

(a) Suspend flying any CDO mapping missions until bargaining with the Union concerning those missions has been completed; and

(b) Post at its Tampa facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Respondent's Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, June 30, 2006.

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RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Aircraft Operations Center, Tampa, Florida (the Respondent) violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT bypass the National Weather Service Employees Organization (the Union), the exclusive representative of certain of our employees, or deal directly with bargaining unit employees regarding changes to their conditions of employment.

WE WILL NOT implement changes to the conditions of employment of employees in the bargaining unit represented by the Union with regard to the conduct of Central Dense Overcast (CDO) mapping missions, until we have given notice to the Union of any such proposed changes and, upon demand by the Union, negotiated over the proposed changes to the extent required by the Statute.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL suspend flying any CDO mapping missions until bargaining with the Union concerning those missions has been completed.

_____
National Oceanic and Atmospheric
Administration
Aircraft Operations Center

Date:_____ By: _____
(Signature) (Director)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is: 404-331-5300.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. AT-CA-05-0402, were sent to the following parties:

_____

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CERTIFIED MAIL:	**CERTIFIED NUMBERS:**
Paige A. Sanderson, Esquire Federal Labor Relations Authority Marquis Two Tower, Suite 701 285 Peachtree Center Avenue Atlanta, GA 30303-1270	**7004 2510 0004 2351 0316**
Michelle I. Englar, Esquire and Elise B. Steinberg, Esquire U.S. Department of Commerce Office of General Counsel/E&LLD 1315 East West Highway, Room 5123 Silver Spring, MD 20910	**7004 2510 0004 2351 0323**
Richard J. Hirn, Esquire National Weather Service Employees Organization 5335 Wisconsin Ave., NW, Suite 440 Washington, DC 20015	**7004 2510 0004 2351 0330**

Dated: June 30, 2006
Washington, DC