

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

MEMORANDUM

DATE: May 8, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FAIRTON, NEW JERSEY

Respondent

and Case No. BN-
CA-05-0123

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF PRISON LOCALS
AFL-CIO, LOCAL 3975

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, and any briefs filed by the parties.

Enclosures

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FAIRTON, NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS AFL-CIO, LOCAL 3975 Charging Party	Case No. BN-CA-05-0123

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 under-signed 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 **JUNE 12, 2006**, and addressed to:

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

PAUL B. LANG
Administrative Law Judge

Dated: May 8, 2006
Washington, DC

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FAIRTON, NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS AFL-CIO, LOCAL 3975 Charging Party	Case No. BN-CA-05-0123

Laurie R. Houle
For the General Counsel

Paul M. Schneider
For the Respondent

David F. Gonzalez
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

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

completing negotiations, thereby depriving the Union of the opportunity to negotiate to the extent required by the Statute.

A hearing was held in Philadelphia, Pennsylvania on March 22, 2006.¹ All parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

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

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

Findings of Fact

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

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

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

Bargaining Between the Parties

By memorandum dated February 26, 2004², from Jonathan C. Miner, Warden, to David F. Gonzalez, the Union President (GC Ex. 4) the Respondent requested that the Union:

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

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

On December 8 representatives of the parties met to negotiate the impact and implementation of the new procedure.³ Gonzalez and Belfonti were, respectively, the heads of the Union's and Respondent's negotiating teams. At the meeting the Union presented the Respondent with a

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

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

memorandum from Gonzalez to Miner (GC Ex. 9) which contained 15 proposals including the following:

- I. All non-custody staff will receive a clothing allowance.⁴
- K. Union Officials will have access upon request to the relief roster to ensure and verify fair and equitable distribution of assignments.

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

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

The Implementation of the New Procedure

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

Consequently, starting December 26, 2004, I will
require non-custody staff to fill in for custody

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

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

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

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

The Master Agreement and Local Supplement

At all times pertinent to this case the Union and the Respondent were parties to a Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals of the AFGE (GC Ex. 2)⁵. There is also a Supplemental Agreement between the parties which is applicable only to FCI Fairton and which is subordinate to the Master Agreement (GC Ex. 3).

The Effect of the New Procedure

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

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

alleging that the new procedure caused a change in any employee's hours of work (Tr. 65, 66).

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

Discussion and Analysis

The Duty to Bargain

The General Counsel has acknowledged that the assignment of non-custody staff to custody duties is an

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

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

The Respondent's duty to negotiate did not preclude it from challenging the negotiability of any or all of the Union's proposals.⁷ The Union would then have had the option of either amending its proposals or seeking the aid of the Authority, either by initiating negotiability proceedings pursuant to Part 2424 of the Rules and Regulations of the Authority or by filing an unfair labor practice charge as it did in this case. However, the Respondent acted at its peril when it refused to bargain altogether because of a belief that none of the Union's proposals were negotiable. As stated in *United States Department of Housing and Urban Development*, 58 FLRA 33 (2002) (*HUD*):

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

The Union's Proposals

In view of the holding in *HUD* it is not necessary to assess the negotiability of each of the Union's proposals, but only to determine if any are negotiable. Belfonti testified that when, on December 8, he asked the Union to submit proposals regarding impact and implementation, he anticipated proposals on such subjects as a clothing

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

allowance (Tr. 114).⁸ Contrary to the Respondent's assertion (Resp. Brief, p.20), the tabling of proposal I did not justify its repeated calls for additional proposals as a condition for resuming bargaining prior to the implementation of the new assignment procedure. The Respondent is partially correct in its assertion that it did negotiate over proposal I. However, it did not complete such negotiations as is required by the Statute.

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

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

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

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

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

proposals was sufficient to trigger the Respondent's duty to bargain.¹¹

The Effect of the Master Agreement

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

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

Article 16 of the Master Agreement (GC Ex. 2), entitled "Position Description and Review", states, in pertinent part:

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

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

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

and the decisions of the Federal Labor Relations Authority.

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

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

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

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

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

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

contractual violation; the General Counsel has not alleged such a violation.

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

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

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

In concluding that the terms of the Master Agreement did not relieve the Respondent of the duty to bargain, I am mindful of the letter of November 24, 2003, from the Regional Director of the Boston Region of the Authority to Tim Mindock, President of the American Federation of Government Employees, Local 1325 (Resp. Ex. 5). In that letter the Regional Director stated that the issuance of a complaint was not warranted in Case No. BN-CA-03-0550. That case arose out of an unfair labor practice charge filed by

Local 1325 against the Federal Bureau of Prisons, FDC Philadelphia, Pennsylvania. The Regional Director partially based his conclusion on a determination that the agency was not obligated to bargain over a management decision to assign certain non-custody employees to fill in for custody employees during off-site training exercises which were to be conducted over two days. According to the Regional Director, management's action was covered by Article 16, Section c and Article 18, Section o of the Master Agreement, the same portions of the agreement upon which the Respondent relies in this case.¹³

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

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

The Remedy

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

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

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

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

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

3. The willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute. Although the Respondent apparently came to believe that it was under no obligation to negotiate over the Union's proposals, it terminated negotiations on all of the proposals in spite of the fact that its chief negotiator, Belfonti, admitted that at least one of the proposals (proposal I concerning uniforms) was negotiable. The

Respondent's unjustified reliance on the letter from the Regional Director in another case does not detract from the willful nature of its failure to complete bargaining. This factor supports the imposition of a SQA remedy.

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

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

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

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

ORDER

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

1. Cease and desist from:

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

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

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

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

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

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

(c) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Region of the Authority, in writing, within

10 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 8, 2006.

Paul B. Lang
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 Justice, Federal Bureau of Prisons, Federal Correctional Institution, Fairton, New Jersey, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the conditions of employment of our bargaining unit employees without fulfilling our obligation to bargain with the American Federation of Government Employees, Council of Prison Locals, AFL-CIO, Local 3975 (Union).

WE WILL NOT refuse to bargain upon request with the Union, to the extent required by the Statute, over the impact and implementation of the policy of assigning non-custody staff to custody positions which was implemented on or about December 26, 2004.

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

(Agency)

Date: _____ By: _____
(Signature) (Title)

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, Boston Region, Federal

Labor Relations Authority, whose address is Thomas P. O'Neill, Jr., Federal Building, 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is 617-565-5100.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-05-0123 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

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Dated: May 8, 2006
Washington, DC