**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**WASHINGTON, D.C. 20424-0001**

BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION

BASTROP, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3828

Charging Party

Case No. DA-CA-20907

Steven R. Simon

Counsel for the Respondent

Christopher J. Ivits

Charlotte A. Dye

Counsel for the General Counsel

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute , 5 U.S.C. §§ 7116(a)(l) and (5), by unilaterally cancelling (1) the requirement for a simultaneous count of controlled substances by unit employees in the Pharmacy and (2) the mandatory overtime that resulted as a part of the simultaneous count. The complaint alleges that Respondent also refused to engage in post-implementation bargaining on the change.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Austin, Texas. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record,[(1)] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

## Findings of Fact

Prior to October 8, 1991, Respondent's practice in its Pharmacy regarding inventory of controlled substances substock was for the off-going physician's assistant to count the controlled substances substock immediately prior to the end of the shift. The on-coming physician's assistant would count the controlled substances substock as soon as possible after beginning the shift. Sometimes, because of different emergencies at the Respondent, the on-coming physician's assistant was not able to conduct the count until some time had passed from the beginning of the shift. The off-going and on-coming physicians' assistants did not conduct a simultaneous count. There is no evidence of disciplinary action being taken against any employee for a discrepancy in the count. Taking the count and completing the inventory sheet required from 5-7 minutes of uninterrupted time.

On October 8, 1991, a memorandum was issued by F.J. Chevalier, Health Services Administrator at the Bastrop facility, to "comply with the requirements of [Federal Prisons System] Operations Memorandum 151-91."

The memorandum assigned mandatory overtime and required a simultaneous count by the pharmacist and the physicians' assistants. The simultaneous count required two employees from different shifts to be at work at the same time, resulting in overtime of about fifteen minutes per shift.

The mandatory overtime affected all daily shifts and from six to eight of the physicians' assistants. The physicians' assistants who were working those shifts were required to come in fifteen minutes early to conduct the count and were given fifteen minutes of overtime pay for that work. As a result of the October 8, 1991 memorandum, the assigned physicians' assistants were earning approximately 75 minutes of overtime each per week.

Although the October 8, 1991 memorandum changed the Respondent's procedures for counting controlled substances and was issued without notice to the Union and without affording the Union an opportunity to bargain over the impact and implementation of the change, the Union conferred with the affected employees, accepted the change, and elected not to request bargaining over the change.

On February 26, 1992, a memorandum was issued by Michael H. Grizzle, Acting Health Services Administrator, which informed all medical staff that a simultaneous count of controlled substances and mandatory overtime would no longer be required. The memorandum was implemented on that day by distributing the memorandum to bargaining unit employees' mail boxes. The Union was not given prior notice

or an opportunity to bargain the impact and implementation of the change. A copy of the memorandum was distributed to employee Clark Jones, the health services steward, at the same time as other employees.

Warden Billy R. Hedrick had the memorandum issued as one way to reduce overtime at Bastrop. He had received a mandate from the Central Office that there would be an Agency wide reduction of 10 percent in overtime costs.

After checking with other Agency officials, he and Mr. Grizzle decided that it was not necessary to have the substock counted simultaneously, and that this action was one way to meet the goal of a 10 percent reduction in overtime. Warden Hedrick testified that his Fiscal Year 1993 funding level for staff was at the level of 92.5 percent while his staffing level at that time was at approximately 96 percent. Associate Warden J. Larry Craven testified that the more overtime is paid, the less salary is available for full-time positions.

On March 13, 1992, Pam Clampit, Union President, having learned about the change in early March, met with Warden Hedrick, concerning the matter. During the meeting, Clampit informed Hedrick that the Union wanted to negotiate on the impact and implementation of the change. Clampit expressed the Union's concern that the change could result in an adverse action against a physician's assistant because of an incorrect count. The Union believed that without the simultaneous count, there would be no way to identify the employee responsible for the incorrect count, and this could raise the specter of theft of a controlled substance. The Union was also concerned about the loss of the approximately 75 minutes of weekly overtime for each of the physicians' assistants. Hedrick's position was that the change was not negotiable as to impact and implementation and that he, as Warden, had the responsibility to contain overtime costs.[2]

After March 13, 1992, and prior to the filing of the instant unfair labor practice on June 3, 1992, Clampit met again with Hedrick. During the meeting, Clampit raised the concerns that the Union had about the elimination of the simultaneous count. Clampit complained that the Respondent was requiring the physicians' assistants to use a form which made it appear that a simultaneous count was taking place, when in fact it was not. After Hedrick told Clampit that the form could be modified, she stated that the change of the count procedure should have been negotiated with the Union. Hedrick replied in the negative.

The change implemented by the Respondent on February 26, 1992 was not negotiated with the Union. The unfair labor practice charge was filed on June 3, 1992.

Federal Bureau of Prisons Change Notice CN-13 to Directive 6000-3 of June 30, 1992 provides, in part, as follows:

The only person with access to a substock of controlled substances is the person who has

completed a proper change of shift count and signed the "substock inventory certification sheet"

as the "on-coming" person who has assumed responsibility for that substock. This procedure

requires the simultaneous participation of both the "off-going" and the "on-coming" staff member.

The record does not reflect whether this Change Notice has been implemented by the Respondent.

Discussion and Conclusions

The complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by cancelling the requirement for a simultaneous count of controlled substances on each Pharmacy shift, and the mandatory over-time that resulted, without providing the Union notice and an opportunity to bargain on the impact and implementation of the change.

Respondent defends on the basis that the action merely returned it to the historic practice. Respondent claims that the change from a brief deviation from that historic practice did not require bargaining as the brief deviation was not the subject of bargaining or agreement between the Agency and the Union. Respondent also asserted that the change did not require bargaining as it was de minimis and involved the assignment of work and a mandated reduction in overtime.

The General Counsel does not dispute that Respondent was not required to bargain on its decision to change the assignment of work and overtime. However, even if the subject matter of the change is outside the duty to bargain, an agency must bargain about the impact and implementation of a change in conditions of employment that has more than a de minimis impact on unit employees. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut, 41 FLRA 1309, 1317 (1991). An agency is not released from its duty to bargain whenever it suffers economic hardship. See American Federation of Government Employees v. Federal Labor Relations Authority, 785 F.2d 333 (D.C. Cir., 1986.)

I agree with Counsel for the General Counsel that the requirement for a simultaneous count of controlled substances on each Pharmacy shift, and the mandatory overtime that resulted, constituted a condition of employment and was a past practice which could not be changed by Respondent without fulfilling its bargaining obligations. See Norfolk Naval Shipyard, 25 FLRA 277, 286-87 (1987). Respondent expressly established the procedure by memorandum on October 8, 1991 and it continued for almost five months, a significant period of time. There was no indication at the time it was implemented that the procedure was "a temporary hiatus from a historic agency practice" as contended by Respondent. Indeed, the memorandum placing the simultaneous count in effect stated that the action was necessary to comply with a Federal Bureau of Prisons Operations Memorandum issued in July 1991. The Union's failure to request bargaining in connection with this earlier change, because it agreed with it, did not constitute a clear and unmistakable waiver by past practice of its right to request bargaining in connection with the later February 26, 1992 change. See Scott Air Force Base, Illinois, Department of the Air Force, 5 FLRA 9, 22-23 (1981).

The change on February 26, 1992 to eliminate the simultaneous count and the mandatory overtime and return to the "historic practice" had more than a de minimis impact on unit employees. The change resulted in a loss of approximately 75 minutes of overtime a week for six to eight employees and increased the likelihood of a mistaken disciplinary action. Without a simultaneous count it would be more difficult to determine which shift personnel were responsible for the loss of a controlled substance.

It is concluded that Respondent violated section 7116(a) (1) and (5) of the Statute by cancelling the requirement for a simultaneous count of controlled substances on each Pharmacy shift, and the mandatory overtime that resulted, without providing the Union notice and an opportunity to bargain on the impact and implementation of the change, as alleged.

The General Counsel seeks a status quo ante remedy and backpay for the lost overtime. The evidence shows that Respondent acted willfully, provided no notice to the Union in advance of the changes which had a more than de minimis impact on the unit employees involved, and rebuffed the Union's request for post-implementation bargaining. The record does not establish that a status quo ante remedy would unduly disrupt or impair the efficiency and effectiveness of the Respondent's operations. Federal Bureau of Prisons Change Notice CN-13 of June 30, 1992 "requires the simultaneous participation of both the 'off-going' and the 'on-coming' staff member." Accordingly, after balancing these factors pursuant to Federal Correctional Institution, 8 FLRA 604, 606 (1982), I conclude that a status quo ante remedy is appropriate and warranted to best effectuate the purposes and policies of the Statute. Backpay is appropriate where, as here, the Agency's unlawful implementation resulted in a reduction of pay. The amount of backpay owed will be a matter for compliance. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 37 FLRA 278, 288-93 (1990); United States Customs Service, Southwest Region, El Paso, Texas, 44 FLRA 1128, 1129-30 (1992). There is no basis on which to conclude that the Anti-Deficiency Act applies to this situation so as to limit the Respondent's liability. Cf. U.S. Air Force, Loring Air Force Base, Limestone, Maine, 43 FLRA 1087, 1102.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following order:

## ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas shall:

1. Cease and desist from:

(a) Changing the requirement that unit employees conduct a simultaneous count of controlled substances in the Pharmacy and the mandatory overtime that results as a part of the simultaneous count without providing the American Federation of Government Employees, AFL-CIO, Local 3828, prior notice and an opportunity to bargain on the impact and implementation of the change.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reinstate the requirement that unit employees conduct a simultaneous count of controlled substances in the Pharmacy and the mandatory overtime that results as a part of the simultaneous count.

(b) Consistent with law and regulation, make whole all bargaining unit employees for any loss of pay or benefits suffered as a result of the unilateral cancellation, on February 26, 1992, of the simultaneous count and mandatory overtime in the Pharmacy, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials.

(c) Post at its facilities 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 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, Federal Office Building, 525 Griffin Street, Suite 926, LB 107, Dallas, TX 75202-1906, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, March 18, 1994

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GARVIN LEE OLIVER

Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY**

**AND TO EFFECTUATE THE POLICIES OF THE**

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT change the requirement that unit employees conduct a simultaneous count of controlled substances in the Pharmacy and the mandatory overtime that results as a part of the simultaneous count without providing the American Federation of Government Employees, AFL-CIO, Local 3828, prior notice and an opportunity to bargain on the impact and implementation of the change.

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 Federal Service Labor-Management Relations Statute.

WE WILL reinstate the requirement that unit employees conduct a simultaneous count of controlled substances in the Pharmacy and the mandatory overtime that results as a part of the simultaneous count.

WE WILL, consistent with law and regulation, make whole all bargaining unit employees for any loss of pay or benefits suffered as a result of the unilateral cancellation, on February 26, 1992, of the simultaneous count and mandatory overtime in the Pharmacy, including backpay with interest for any withdrawal or reduction in pay, allowances, or differentials.

________________________________________

(Activity)

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 of the Federal Labor Relations Authority, Dallas Region, Federal Office Building, 525 Griffin Street, Suite 926 LB 107, Dallas, TX 75202-1906, and whose telephone number is: (214) 767-4996.

1. By agreement of the parties, the record was left open

to receive, at the time briefs were filed, Respondent's Exhibits 2 and 3 respectively, the collective bargaining agreement effective October 1, 1992 as well as the previous agreement. (Tr. 55-56.) The agreements were not provided and, consequently, have not been considered herein.

2. Warden Hedrick acknowledged that the meeting took place and recollected that there was some discussion about the change, but was unable to recall the specifics about the meeting. He testified that he never received any "formal" requests or demands to negotiate, although "there indeed may have been inference on her part

that the Union was thinking about negotiating the issue." (Tr. 52.) Associate Warden J. Craven testified that he did not recall any "formal" requests and did not recall any informal requests dealing directly with the issue. I credit Ms. Clampit's testimony.