OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

UNITED STATES ARMY SIGNAL CENTER
AND FORT GORDON,

FORT GORDON, GEORGIA
Respondent

and Case No. AT-CA-40997

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 2017
Charging Party

James R. Baugh, Esq. For the Respondent
Sherrod G. Patterson, Esq. For the General Counsel of the FLRA
Kay Raney, President of AFGE, Local 2017 For the Charging Party
Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (Statute), and the Rules and Regulations of the Federal labor Relations Authority (FLRA), 5 C.F.R. § 2411, *et seq.* (FLRA Regulations).

Based upon an unfair labor practice charge filed by the Charging Party, American Federation of Government Employees (AFGE), Local 2017 (Union and AFGE Local 2017), a Complaint and Notice of Hearing was issued by the General Counsel (GC) of the FLRA by the Regional Director for the Atlanta Region of the FLRA. The Complaint alleges that United States Army Signal Center and Fort Gordon, Fort Gordon, Georgia (Fort Gordon and Respondent), violated § 7116(a)(1) and (5) of the Statute when it implemented an alleged change in the working conditions of Training Instructors (Instructors) by requiring them to pass examinations prior to the completion of negotiations with the Union over the impact and implementation of the change. Respondent filed an Answer denying it had violated the Statute.

A hearing was held in Atlanta, Georgia. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The parties entered into an extensive stipulation of facts. The GC of the FLRA and the Respondent filed briefs, which have been fully considered.

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

Findings of Fact

A. Background.

AFGE Local 2017 is the collective bargaining representative for a unit of employees at Fort Gordon. Included in the unit are Instructors in the Area Communications Department.

The Labor-Management Agreement

In 1984 the Union and Fort Gordon negotiated a Labor-Management Agreement (LMA) which was executed on January 25, 1985 and became effective on August 15, 1985. At least some of the members of the Union's negotiating team were Instructors. During all times material the LMA was in effect. Article 27 of the LMA, entitled "Training and Employee Development", provides:

SECTION 1. It is the policy of the Department of Defense, the Department of the Army and this installation to provide all training necessary to assure the maximum efficiency of civilian employees in the performance of their official duties and to encourage employees in their efforts for self- improvement. The Local may make written recommendations to an activity chief relative to training employees in the unit which will be considered by the Employer.

SECTION 2. Training and development of employees within the unit is a matter of primary importance to the parties. The Employer has the right to determine the type and amount of training employees will receive, and when they will receive the training. Through the procedures established for Employer-Local cooperation, the parties shall seek training and development of employees and, consistent with the needs of the Employer, develop and maintain forward-looking and effective policies and programs designed to achieve this purpose. The Local will be consulted prior to the implementation of proposed formalized training programs, i.e., upward mobility, Fort Gordon interns, and Fort Gordon apprentices, applicable to employees in the unit, and employee development policies and procedures to be established or implemented within the Authority of the Employer. Approved Employer policies and programs

will be furnished to the Local within 10 work days after approval.

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SECTION 5. The Employer will, to the extent practicable, provide employees on-the-job cross training, employing such techniques as interchanging employees when they share mutual desires and aptitudes to receive training in each of their respective positions when such does not adversely affect the mission of the Employer. Training required by the employee in connection with officially assigned duties will be accomplished at the Employer's expense.

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The LMA, Article 36, "Consultation and Negotiation", provides in Section 3 a:

a. It is recognized that consultation between the parties and conscientious consideration of each party's views and suggestions fosters good labor-management relations. In this light, the parties will endeavor to resolve all issues by consultation. Consultation is the consideration of the Union's views and suggestions in the formulation and implementation of the proposed change but results in a decision by the Employer.

Training Instructors

Instructors were employed in various Divisions of the Area Communications Department and their job consisted of teaching military students the knowledge, skills and techniques necessary for the installation, operation, adjustment, alignment and maintenance an/or repair of communications-electronic equipment at the vocational level.

Prior to 1984, and apparently continuing thereafter, when a person was hired as an Instructor that person had to participate in a Instructor training program. Employees who had been hired as Instructors were given instruction in the proper way to teach. Upon completion of this program the employees had to pass a test to actually begin working as an Instructor.

Prior to April of 1994 Fort Gordon did not require Instructors in the Circuit Control Division of the Area Communications Department to take and pass examinations before it allowed them to teach subject matter the Instructor had not previously taught. When an Instructor was to teach a new course, called an annex, he would sit in the classroom of another Instructor, a lead Instructor, who was already qualified and teaching the new annex and act as an assistant Instructor. The Instructor who was learning the new material would be observed by his supervisor, who would critique the learning Instructor and the supervisor would decide if this Instructor had mastered the new material and if he was to be certified to teach the new annex or course. The learning Instructor did not have to take a formal examination to ascertain whether he had mastered the new material. The job descriptions of the Instructors, prior to June of 1994, did not contain any requirement that Instructors take and pass examinations as a condition of teaching new course materials.

Other Programs

The Fort Gordon Trainee's Program and the upward mobility program were and are programs designed to move employees in lower graded positions into career paths that opened up higher graded opportunities. Employees in each of these programs were and are required to take courses and to receive training and then to pass examinations that permit them to move along in the program.

B. Change requiring examinations of Instructors.

The Training Plan

During October 1992, the Military Occupation Specialties (MOS) of 29V (Microwave Systems Operator/Repairer) and 31N (Communication Systems/Circuit Controller) were merged into MOS of 31P (Microwave Systems Operator/Maintainer). On or around January 11, 1993, the training divisions for the 29V and 31N courses were merged into the 31P course in the Circuit Control Division, Area Communications Department. At that time Mr. Russell M. Bury was the Chief of the Circuit Control Division, a position which he has continued to hold to the present. In November 1993, Mr. James R. Waid became the Chief of Branch 1, Circuit Control Division, Area Communications Department.

By memorandum dated 9 Feb 94, Waid informed the Instructors in his branch that it was his intent to have all of the Instructors in his branch cross-trained and qualified to teach in all annexes of his branch. By letter dated February 18, 1994, the Union notified the Agency that it was filing an informal Unfair Labor Practice (ULP) in accordance with Article 37 of the LMA concerning Waid's memo dated

9 Feb 94.

On April 5, 1994, the parties met to discuss the ULP charge. The parties discussed cross-training in detail, and it was agreed that the holding of this meeting resolved the informal ULP charge. On April 12, 1994, Bury wrote to Mr. William Otto, who had been one of the Union's representatives at the April 5, meeting, giving him feedback on one of the issues discussed at the April 5 meeting. In closing the letter Bury stated he would provide Certificates of Training to any civilian or military Instructor for training accomplished, provided that they satisfactorily completed the annex instruction and the annex examination. Bury sent a copy of this letter to Union President Kay Raney.

On April 20, 1994, the Circuit Control Division finalized the Instructor Training Plan for the Microwave Systems Operator/Maintainer, MOS 31P course (Training Plan). The Training Plan provides that when an Instructor is assigned to a new training annex, one he had not taught before, the Instructor will take the new course as a student, including the taking of the examination, and the Instructor will remain in this phase of training until achieving passing examination scores. The Training Plan provides further that this training could be repeated as often as required to qualify the Instructor to teach the new annex.

Communications between the Union and Fort Gordon

On May 26,1994, Fort Gordon furnished AFGE Local 2017 with a copy of the Training Plan. By letter dated June 7, 1994, the Union demanded to bargain over the Training Plan and submitted four counter proposals.

By letter dated June 10, 1994, Fort Gordon explained to AFGE Local 2017 the consideration Fort Gordon had given to each of the Union's counter proposals. Fort Gordon concluded that its responsibilities Article 27 of the LMA had been fulfilled and that the Training Plan was therefore in full force and effect.

By letter dated June 21, 1994, AFGE Local 2017 again demanded to bargain on three counter proposals concerning the Training Plan. Only one of these counter proposals had been included on the original list of the four counter proposals contained in the June 7, 1994, letter. By letter dated July 5, 1994, Fort Gordon repeated that it had met its obligations under Article 27, Section 2 of the LMA.

By letter dated July 11, 1994, AFGE Local 2017 requested or demanded to bargain on the Training Plan. The Union added that it would file an unfair labor practice charge if Fort Gordon failed to bargain. By letter dated July 13, 1994, Labor Counselor James R. Baugh, explained that Fort Gordon believed it had already met its obligations on the Training Plan and offered to discuss the matter with Union President Raney to help resolve the dispute.

The result of instituting the Training Plan

Instructors, before they could teach a new annex, took the new annex as a student and took the examination at the conclusion of the course. An Instructor who failed the examination, David Thackery, was given a written counseling that was incorporated into his mid-point review and this was a performance related document. Thackery apparently subsequently passed the examination and was certified for the new annex.

DISCUSSION AND CONCLUSIONS OF LAW

The GC of the FLRA contends that Fort Gordon violated Section 7116(a)(1) and (5) of the Statute by unilaterally instituting the Training Plan requiring Instructors to pass examinations on new annexes they were to teach and refusing to negotiate with AFGE Local 2017 concerning this change in conditions of employment.

Fort Gordon contends that the LMA permitted the institution of the Training Program without bargaining with the Union so long as Fort Gordon consulted with the Union, as provided in the LMA.

A. The Statute.

Section 7116(a)(1) and (5) of the Statute provides:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-
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> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
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> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

B. An established condition of employment.

A matter is a condition of employment depending on whether it pertains to bargaining unit employees and on the nature and extent of the effect of the matter on working conditions of unit employees. *See, Antilles Consolidated Education Association and Antilles Consolidated School System,* 22 FLRA 235, 236-237 (1986).

The training of Instructors, whether they are required to take examinations to teach new annexes, and their career development, affects their duties and how they are performed by the Instructors, and how Instructors are appraised and their careers development. Thus I conclude, and there seems to be no dispute, that the training of Instructors and whether they are required to take examinations before they can teach new annexes are conditions of employment.

Where the evidence establishes that a past practice involving a condition of employment has been consistently exercised over a significant period of time and followed by both parties, the FLRA holds that

management is obligated to provide the union with notice and an opportunity to request bargaining, and upon request to bargain, before it changes the practice. *See, Defense Distribution Region West, Tracy, California,* 43 FLRA 1539 (1992); and *U.S. Department of Labor, Washington, D.C.,* 38 FLRA 899, 908 (1990).

Prior to 1994 institution of the Training Plan, Instructors who were to teach a new course were not required to take that course as a student and to pass the examination, like every other student. Prior to April of 1994, for a number of years, an Instructor who was to teach a new annex observed and assisted a lead Instructor in teaching the new annex and was then observed and assessed by his supervisor in order to be certified to teach the new annex. Instructors were not required to pass examinations in order to teach a new annex. This latter practice was an established condition of employment and could not be changed by Fort Gordon without adequate notice to and negotiating with the Union, absent some privilege or contractual right. *Id.* In this regard I conclude further that the change accomplished by the implementation of the Training Plan was more than *de minimis* because the failing of an examination could result in counseling and have a substantial impact on an Instructor's career development.

C. LMA covers the implementation of the Training Plan.

Fort Gordon contends that Article 27 of the LMA permitted them to implement the Training Plan for the Instructors, including the requirement that they pass examinations, with out having to bargain with the Union. Respondent contends that, under the LMA, it was required to notify the Union of the change and to consider any suggestions the Union made. Fort Gordon was then free, under the LMA, to implement the Training Plan.

Article 27 of the LMA is entitled "Training and Employee Development" and Section 2 provides, *inter alia,* "the local will be consulted prior to the implementation of proposed formalized training programs . . . applicable to employees in the unit, and employee development policies and procedures to be established or implemented within the authority of the Employer."

The express language of the LMA addresses employee training and development policies and procedures. The Training Plan, by its express terms, was clearly a program designed to train Instructors in new annexes and to provide them with career and professional development. Article 27 of the LMA would thus apply to the implementation of the Training Plan for Instructors, in general. The LMA, however, does not specifically mention or refer to examinations and changes that would require Instructors to pass examinations before they could teach a new annex. Fort Gordon contends that the implementation of the Training Plan, including the examination requirement, is "covered by" Article 27 of the LMA.

The FLRA has set out standards to be applied in determining whether matters in dispute are "covered by" or "contained in" an agreement so as to preclude further bargaining on the subject. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland,* 47 FLRA 1004 (1993)(*SSA)*; *U.S. Department of The Navy, Marine Corps Logistics Base, Barstow, California,*

48 FLRA 102 (1993)*(Marine Corps)*; and *Social Security Administration, Douglas Branch Office, Douglas, Arizona,* 48 FLRA 383 (1993).

The FLRA dealt with an alleged unilateral change that was argued to have been "covered by" an agreement and, in referring to *SSA*, the FLRA stated:

> . . . we held that to determine whether an agreement covers a matter in dispute, we will initially determine whether the matter is expressly contained in the collective bargaining agreement. We also noted that we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. If the collective bargaining agreement does not expressly encompass the matter, we will next determine whether the subject matter is so commonly considered to be an aspect of the matter set forth in the agreement that the subject is inseparably bound up with and plainly of a subject expressly covered by the contract. If so, we conclude that the subject matter is covered by the agreement provision.

Marine Corps at 106-107.

In applying this standard, the FLRA was dealing with a clause in the parties collective bargaining agreement which provided when employee details would be implemented, to what kinds of positions an employee may be detailed, how long a detail may last and what effect a detail will have on an employee's salary and liability for union dues covered the union's request. The FLRA concluded that the subject matter of the union's request to bargain--the impact and implementation of the Respondent's decision to detail employees and transfer work-- was an aspect of and was inseparably bound up with, the clause in the collective bargaining agreement and, thus, the Respondent was not obligated further on these matters. *Id* at 107.

In the subject case in Article 27 of the LMA the Union and Fort Gordon agreed how "Training and Employee Development" was to accomplished, that Fort Gordon had the right to determine the types and amount of training employees would receive, and that the Union would be "consulted" prior to the implementation of proposed formalized training programs. Thus, in the LMA, the Union and Fort Gordon not only agreed that Fort Gordon was responsible for and was free to institute training and employee development programs, but specifically set out a procedure for notifying and dealing with the Union.

I conclude that testing employees in the unit to determine whether they have mastered the subject matter upon which they are being trained is an aspect of, and inseparably bound up with, the clause in the LMA. This is so even though the clause does not specifically mention the word "examination". In this regard I note that examinations were part of training and career development programs, although not involving Instructors training to teach new courses, at the time the LMA was negotiated. Further, the record establishes that Fort Gordon did "consult" with the Union concerning the implementation of the Training Plan, as required by the LMA.

In light of the foregoing, consistent with *SSA* and *Marine Corps*, I conclude the Respondent was not obligated to bargain with the Union over whether Instructors had to take examinations to teach new courses and did not violate the Statute by refusing to do so. Accordingly I recommend the FLRA issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. AT-CA-40997 be, and hereby is, dismissed**.**

Issued, Washington, DC, October 31, 1995.

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SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge