

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL
CORRECTIONAL INSTITUTION TUCSON, ARIZONA
Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3955, AFL-CIO Charging Party

Case No.

DE-CA-00392

Scot L. Gulick Counsel for the Respondent Gary Hungerford Representative
for the Charging Party Hazel E. Hanley Counsel for the General Counsel,
FLRA Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Tucson, Arizona (Respondent), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5), by changing inmates designations/

assignments to the Mesquite, Saguaro, and Yucca housing units, and requiring laundry color uniform conversions for all inmates transferred among the units, without providing the American Federation of Government Employees, Local 3955, AFL-CIO (Union/Local 3955), with adequate prior notice and an opportunity to bargain to the extent required by the Statute.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute. The Respondent contended that it notified the Union of management's intention to convert the housing unit; that the actions taken did not change bargaining unit employees working conditions and that any change was *de minimis*; that there is a constant change in the numbers of inmates and the change during the period in question did not amount to a change in working conditions. The Respondent also contended that the inmate uniform conversion was performed by a management employee.

For the reasons explained below, I conclude that a preponderance of the evidence supports the alleged violations except for the alleged change concerning the uniform conversion.

A hearing was held in Tucson, Arizona. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Respondent and the General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE), Council of Prison Locals (Council) is the exclusive representative of a unit of employees appropriate for collective bargaining at the U.S. Department of Justice, Federal Bureau of Prisons (FBOP). AFGE, Local 3955 is an agent of the Council for purposes of representing bargaining unit employees at the FBOP, Federal Correctional Institution, Tucson, Arizona (FCI Tucson).

FCI Tucson is a minimum security Federal prison housing some 675 inmates with a staff of approximately 230 employees. The inmate population can fluctuate to a high degree, sometimes a large increase is the result of law enforcement making "sweeps" or large arrests involving drug offenses.

FCI Tucson houses three kinds of inmates: pretrial, holdover, and designated. Pre-trial inmates have been charged with a crime and are involved in the trial process, holdovers have been convicted but are awaiting assignment to a facility to serve their sentences, and designated inmates have been assigned to FCI Tucson to serve their sentences. Among the housing units at FCI are Yucca Unit South, for pretrial inmates; Yucca Unit North, for holdover inmates and overflow pretrial inmates; Saguaro Unit for some holdover inmates as well as designated inmates; and Mesquite North and South for designated inmates.

In April 2000, Warden John Pendleton decided to convert Yucca North housing to a holdover unit due to a large influx of designated inmates.

Notice

The Union normally receives notice of changes in conditions of employment at labor-management meetings, in writing, or a department head discusses a minor change with the Union's President, Gary Hungerford.

Warden Pendleton testified that he received permission to attend a Union meeting on April 4, 2000. He had not attended a Union meeting in 23 years, but felt that the change in housing assignments converting Yucca North to a holdover unit was important enough to do so and to give the

Union an opportunity to ask any questions. He explained the rationale for the change; that it was a bed space issue; that bed space was available in the Yucca unit and with a large influx of population he did not want to continue triple bunking the designated population; and it was better to shift the holdover population to that area as they were at the prison for a shorter time. The Warden stated that he hoped it would be a temporary measure and then discussed other issues. No questions were asked about the housing changes and no request to bargain was made. The Union's President Hungerford and the Union's Chief Negotiator were present, among others.

Union President Hungerford and Robert Wright Union member acknowledged that Warden Pendleton attended the meeting but

they did not recall the Warden discussing the inmate housing change. The change was not discussed at a labor-management meeting on April 13. A memorandum dated April 11, from Ruth Weller, Unit Manager "To All Concerned," was sent through the Group-Wise e-mail system on April 14 announcing the Yucca North conversion to a holdover unit effective April 14, 2000. A copy was not directed to the Union although Mr. Hungerford read it on his e-mail sometime prior to April 16. He filed the unfair labor practice charge in this case on that date.

Impact of the Change

FCI Tucson implemented the announced change on April 14, 2000, including a laundry color uniform conversion that was to be completed for all inmates transferred among the units.

Holdover inmates living in Saquaro East were moved to Yucca North. Pretrial inmates in Yucca North were moved to Yucca South, with overflow to Yucca North. Designated inmates remained, and new ones were added, in Saquaro and Mesquite units.

Workload

When Union President Hungerford reported for work on April 17, he received complaints from counselors concerning large increases in workloads and requests that the Union take some action. Counselor Sheehey of Yucca South reported that his caseload had increased by 50 inmates overnight because he was now doing the work of Counselor Ramirez, at Saquaro East.

Counselor Ramirez was assigned to inmates in Saquaro East housing. When these inmates were transferred to the Yucca unit he remained responsible for them, according to Warden Pendleton, but Ramirez did not follow them to take care of his responsibilities from April 14 to June 1, 2000.⁽¹⁾

From April 14 until a large number of inmates were transferred to a new prison in California in early July 2000, there was a buildup in the number of inmates and, consequently, more inmates were placed in the

housing units. As a result, the workload of some counselors, case workers, and secretaries increased. The case load of Counselor Sheehey, as noted, increased at once by 50 as did that of the Yucca unit secretary. The case load of Counselors Wright, Fuzzell, and Henry, and the three case workers working with them, increased by about 40 each. The case load of the unit secretary in Mesquite North increased by 80 cases. Counselors perform many time-sensitive duties for the inmates. Counselor Henry, at Mesquite South, complained that he was unable to keep up with the deadlines on his inmates' financial responsibility programs and had been counseled about it.

Tension

After April 14, some of the changes in housing had the possibility of creating security concerns for the staff. Some of the holdover inmates in Saquaro East resisted moving to Yucca North as Yucca North is considered less desirable housing. There were differences in the number of inmates assigned to a cell or in the freedom allowed the inmates to move about. After April 14, Yucca South held pretrial inmates, who were confined to the building, while Yucca North held holdover inmates, who had the same privileges to move about, go outside the building, as designated inmates. The inmates would have knowledge of, or could observe, these differences and that they operated under different rules. The differences created foreseeable animosity toward the correctional officers and other staff.

On April 20, 2000, a correctional officer was assaulted while working on Yucca South. An inmate swung out his cell door, striking the officer in the face. Warden Pendleton testified that the moving of holdovers went smoothly; that there could be assaults at any time; that the prison has a number of assaults, but he did not think the May 2 assault was a result of moving holdovers to the Yucca unit.

The minutes of a department head meeting on May 2, 2000 reflect that the Yucca unit manager advised the group that "tensions are slightly high due to the overcrowded conditions in Yucca South."

Clothing

Union President Hungerford testified that Virginia Gorrer, laundry foreman, a bargaining unit employee, had to convert the 90 holdover inmates from green elastic suits to fitted khaki clothing in two days. Mr. Hungerford did not observe Ms. Gorrer performing this work, and Ms. Gorrer did not testify. Mr. Hungerford identified a copy of the "Arizona Rattler," a prison publication, which included an item by the FCI, Arizona financial manager thanking Ms. Gorrer "for her assistance in dressing out [in two days] the approximately 90 inmates that moved from Saquaro to Yucca."

Mr. Robert Lopez, Trust Fund Supervisor of the laundry, warehouse, and commissary, testified that he did most of the work regarding the exchange of uniforms. He developed and posted a time schedule for all inmates to

give him their sizes. He then collected the sizes from the inmates and provided the list to Ms. Gorrer. Ms. Gorrer, who normally supervises inmates working in the laundry, supervised the inmates who altered the clothing and filled bags with clothing for issuing to the inmates. Mr. Lopez then picked up the bags, took them to the units, and issued the bags to the inmates over a two day period. Ms. Gorrer issued only about 15 bags to inmates in the laundry during the noon hour on the second day.

I credit the direct testimony of Mr. Lopez and conclude that Ms. Gorrer was only minimally involved in the uniform conversion associated with the housing move. She would have been supervising the inmates working in the laundry regardless of whether or not the uniforms were being changed.

Discussion and Conclusions

There is no dispute that FCI Tucson had a management right under section 7106(a) of the Statute to make a change in the assignment of inmates to housing units and a change in the type of inmate uniforms. However, pursuant to section 7106(b) (2) and (3) of the Statute, the Union had a right to be notified and an opportunity to negotiate over the procedures which management would use and appropriate arrangements for employees adversely affected by the exercise of such authority where the changes have a more than a *de minimis* effect on conditions of employment. *56th Combat Support Group (TAC), MacDill Air Force Base, Florida*, 43 FLRA 434, 447-48 (1991); *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-08 (1986) (SSA).

In assessing whether the effect of a management decision on conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *SSA*, 24 FLRA 408.

The record reflects that the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment concerning the inmate uniform conversion was *de minimis*. A non-bargaining unit employee performed most of the work connected with the change. The conditions of employment of the bargaining unit employee who assisted slightly with the uniform conversion did not change.

It was reasonably foreseeable that the housing adjustments due to a large influx in population would result in more than a *de minimis* change on some bargaining unit employees' conditions of employment. An increased workload, and possible disparity in workload, among counselors, case workers, and unit secretaries, and increased security concerns on the part of correctional officers and other staff was reasonably foreseeable. It was therefore incumbent on FCI Tucson to give the Union appropriate notice and the opportunity to bargain over the impact and implementation of the housing changes.

Notice

As the Authority stated in *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999):

Notice of a proposed change in conditions of employment must be sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining. *See, e.g., Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 41 FLRA 690, 698 (1991). Where an agency asserts waiver of bargaining rights as a defense to an allegation that it failed to bargain over a change in conditions of employment, it bears the burden of establishing that the exclusive representative received adequate notice of the change. *See Corps of Engineers*, 53 FLRA at 82-83.

I credit Warden Pendleton's testimony that he advised the Union of the housing change at the April 4 meeting; that it was a very rare occasion for him to attend such a meeting; and that he considered this issue important enough to do so.

However, his testimony reflects that he provided the rationale for the change, but not specific and definitive information as to the scope and nature of the proposed change in conditions of employment, such as the workloads and security concerns as discussed above, and the planned timing of the change. *See Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 41 FLRA 690, 699 (1991). The notice must be sufficient to inform the exclusive representative of what will be lost if it does not request bargaining. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997).

In circumstances where the effect of the change is more than *de minimis*, and the agency fails to provide the exclusive representative with prior notice and an opportunity to bargain over section 7106(b)(2) and (3) matters, the agency will be found to have violated section 7116(a)(1) and (5) of the Statute. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999). It is concluded that FCI Tucson violated section 7116(a)(1) and (5) of the Statute by failing to give the Union prior notice and an opportunity to bargain over the impact and implementation of the foreseeable adverse impact of the change in housing units.

Remedy

In addition to a proposed order and posting, the General Counsel requests that a *status quo ante* remedy be afforded which would require FCI Tucson, to restore, to the extent possible, the housing units to the same distribution of inmate populations the institution served before April 14, and restore the same distribution of workload among counselors case managers, and unit secretaries that existed before April 14, 2000.

The record reflects that the inmate population was restored to its normal level in late June or early July 2000, and FCI Tucson contends in its brief, without further elaboration, that it "returned to the status quo on June 26, 2000." (Resp. brief at 9). Considering FCI Tucson's mission as a penal institution and its necessity to maintain security and order within the institution, and the fact that the inmate population fluctuates to a high degree, depending on law enforcement action, I conclude that a further order restoring the same distribution of inmates to housing units and the same workload to bargaining unit employees is not necessary and could disrupt or impair the efficiency and effectiveness of the agency's operations. A prospective bargaining order and a requirement that FCI Tucson bargain over the impact of the change on adversely affected employees will adequately remedy the violation. *See Federal Correctional Institution*, 8 FLRA 604 (1982).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Changing operations in housing units at its Tucson Arizona facilities without providing the American Federation of Government Employees, Local 3955, AFL-CIO, the exclusive representative of its employees, with adequate prior notice and the opportunity to bargain over changes affecting the working conditions of bargaining unit employees to the extent required by the Federal Service Labor-Management Relations Statute.

(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) Upon request, bargain with the American Federation of Government Employees, Local 3955, AFL-CIO, concerning the impact on adversely affected employees of management's decision on or about April 14, 2000, to change operations in its housing units.

(b) Provide the American Federation of Government Employees, Local 3955, AFL-CIO, with adequate prior notice and the opportunity to bargain over changes affecting working conditions of bargaining unit employees in the operations of housing units.

(c) Post at the Tucson, Arizona Prison, where bargaining unit employees represented by the American Federation of Government Employees, Local 3955, AFL-CIO, are located, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

3. The allegation that the Respondent violated the Statute by unilaterally implementing a uniform conversion for inmates transferred among the housing units, is dismissed.

Issued, Washington, DC, June 29, 2001.

GARVIN LEE OLIVER

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, Tucson, Arizona, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change operations in inmate housing units without providing the American Federation of Government Employees, Local 3955, AFL-CIO, the agent of the exclusive representative of our employees, with adequate prior notice and an opportunity to bargain over changes affecting the working conditions of bargaining unit employees to the extent required by the Federal Service Labor-Management Relations 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 Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees, Local 3955, AFL-CIO, concerning the impact on adversely affected employees of management's decision on or about April 14, 2000, to change operations in inmate housing units.

WE WILL provide the American Federation of Government Employees, Local 3955, AFL-CIO, with adequate prior notice and an opportunity to bargain over any changes affecting working conditions of bargaining unit employees in the operations of inmate housing units.

(Respondent/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, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303) 844-5224.

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