

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-00307

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 (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (8), when the Inmate Systems Manager held a formal meeting on February 1, 2000, without affording the

American Federation of Government Employees, Local 3955, AFL-CIO (Union/Local 3955), an opportunity to be represented, and notified employees that effective immediately employees could no longer store their personal effects, such as food and beverage containers, hats, coats, bags, etc., on top of filing cabinets. The complaint further alleged that the Respondent committed an unfair labor practice in violation of section 7116(a)(1) and (5) of the Statute when the Inmate Systems Manager implemented the announced change in the storage space for employees' personal effects without providing the Union 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 the alleged formal discussion and bargaining violations

For the reasons explained below, I conclude that a preponderance of the evidence supports the alleged violations.

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. The Respondent and the General Counsel filed helpful briefs.

The General Counsel presented the testimony of the Union President and two Inmate Systems Officers. The Respondent presented the testimony of the Inmate Systems Manager. In making the foregoing findings concerning the practices and procedures regarding the storing of bargaining unit employees personal effects in the Inmate Systems office, I have credited the testimony of Officers Montoya and Rodriquez. They were long-time employees of the office compared to Ms. Serrato who has served as Inmate Systems Manager for two years. The testimony of the two officers was mutually corroborative, consistent with the surrounding circumstances, and their recollections were forthright and convincing. 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).

Among the facilities at FCI Tucson is a department known as Inmate Systems Management (ISM). For two years, Barbara Serrato has served as the Manager of ISM. At all times material to this case, Mark Colangelo was the Assistant Manager, ISM. ISM employees and Inmate Systems Officers (ISOs), worked on two shifts: the first, from 6:00 a.m. to 2:30p.m.; the second, from 2:00 p.m. to 10:00 p.m. Among the ISOs were Alfred Montoya on the afternoon shift and David Rodriguez on the morning shift. When the events material to this charge occurred, in addition to Montoya and Rodriguez, there were three other ISOs: Frank Rubalcava, Maria Ortega, and Robert Langman.

ISM provides no break room for employees, nor does it provide any shelving, cabinets, or closets for employees to store their personal gear and valuables. There is a microwave, but it is not in a storage area. It is in an intake interviewing room which is also used by inmate orderlies.

There is a refrigerator; however, employees are reluctant to use it to store their lunches, because it is located in the property room, which holds about 300 bags of generally smelly clothing worn by inmates before their incarceration.

Prior to approximately January 2000, a coat rack was placed along the south wall of the computer room, near the photo area. It was not generally used by employees because the hanging coats, etc. interfered with taking mug shots of inmates, and the articles had to be removed before pictures could be taken. Instead, for many years employees stored their personal belongings, including coats, bottled water, lunches, and Agency-issued green bags containing wallets, extra pens, paperwork, and other gear such as umbrellas, on the top of the filing cabinets located in the computer room near the north wall. Employees liked using the top of the filing cabinets to store their belongings because the articles were in plain view and they could see that no inmates or other staff were interfering with their property.

Since Barbara Serrato became manager of ISM about two years ago, if she saw coats and other personal items on the file cabinets, she would place them on the coat rack on the south wall. She was aware that employees did not like using the rack on the south wall because it was in the photo imaging area. Other than Serrato removing the material from the cabinets to the coat rack by herself, there is no evidence that she ever insisted that employees use the rack on the south wall or gave written counseling to employees for their failure to do so.

In approximately January 2000, Serrato moved the coat rack from the south wall to the space between the filing cabinets and the north wall. Some time after the coat rack was moved, two more hooks were placed on it, making a total of six hooks. There remained about one and one half feet of space between the end of the filing cabinets and the coat rack on the wall. On the floor of this space between the wall and the filing cabinets is a photo imaging stand, sometimes described as a small box, about 1' x 2', which can be used for office memos and some personal items.

### **The Staff Meeting**

When Serrato conducted meetings with her staff, she chose to do so during the half hour overlap of the morning and afternoon shifts, from 2:00 to 2:30 p.m. She had issued a memorandum to inform employees that when they were alerted to attend a meeting, they were to report to her office immediately. All such meetings were mandatory. Before such meetings, Serrato sent her then-Assistant, Colangelo, to inform the employees to report to her office for a meeting.

Around 2:00 p.m. on February 1, 2000, Colangelo told employees at their work site in the front end of the building to report to Serrato's office in the rear of the building. The February 1 meeting was attended by Serrato, Colangelo, Montoya, Anthony Martinez, Anthony Buccini, Frank

Rubalcava, Maria Ortega, and Robert Langman. Among the matters discussed was that "ISM staff need to place their personal items in the new designated area utilizing the coat hooks located near the filing cabinet in the computer room." Seven other topics were discussed over the course of the 20-25 minute meeting. Colangelo took notes, and on March 1, 2000, Serrato circulated to the staff a memorandum of the items discussed at the meeting, including the need for staff to place their personal items in the "new designated area" for storage of personal items.

Gary Hungerford, President, Local 3955, was the Union official whom managers were to notify of formal discussions. Serrato did not notify Hungerford of the February 1 meeting.

### **Impact of the Change**

In February there were four or five ISO employees. The coat rack had too few hooks to accommodate all of their coats and belongings. Sometimes an employee brought a heavy coat and a light windbreaker to accommodate the changes in temperature. Employees used string to hang their lunches, coffee cups, water jugs, and other items from the hooks. Montoya's Agency-issued bag was about 2½ ' x 1½ ', and he used it for his large lunch box, hanging it at an angle from the hook. Rodriguez initially needed three hooks to hang his jacket, green bag, and water jug. Repeated hanging from a hook caused the weight of the water to break the handle of Rodriguez' water jug, and he had to put the jug in his green bag, and then hang the bag on a hook. Employees would inadvertently jostle each others' belongings as they tried to hang their own gear on the hooks. Someone spilled coffee into Montoya's bag. Rodriguez' lunch once tipped over in the bag hanging from a hook, spilling spaghetti and making a mess of his bag, including spoiling his paperwork. Employees could no longer keep their personal belongings in view.

After the February 1 meeting, both Montoya and Rodriguez continued to use the top of the filing cabinets for storage, especially if all the hooks were full until the other shift left. On March 6, 2000, Serrato issued Montoya and Rodriguez each a memorandum containing a direct order to use "the designated area" for personal items.<sup>(1)</sup> Serrato's memorandum to Montoya specifically noted that she had previously addressed the issue "at our departmental meeting" and "on March 1" [the date the minutes of that meeting were distributed.]

On approximately March 8, the Union's President Hungerford was requested by then-Associate Warden Bailey to attend a meeting in his office. Bailey called Montoya and Rodriguez into his office one at a time, and in the presence of Hungerford, Bailey asked each whether "they were going to comply with the new procedure in R&D." Hungerford told Bailey that he should bargain a new procedure before bringing employees in for disciplining. Bailey responded, "I am not here to negotiate anything with you. I am here to discover if this officer will follow the procedure

established for him in R&D, or if I'm going to have to take a disciplinary action against him." Bailey then turned to the officer and asked each: "Are you going to follow this procedure; yes or no?" Both agreed to comply.

Hungerford first learned of the February 1 meeting during his conversations with Montoya and Rodriguez at this time. After the meetings with Bailey, Hungerford asked Montoya and Rodriguez to give him copies of the direct orders they had been given and the minutes from the February 1 meeting.

## Discussion and Conclusions

### Formal Discussion

Section 7114(a)(2)(A) states as follows:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --

(A) Any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

In order for a union to have a right to representation under the Statute, all the elements of section 7114(a)(2)(A) must exist. There must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; and (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *General Services Administration, Region 9 and American Federation of Government Employees, Council 236*, 48 FLRA 1348, 1354 (1994). In determining whether the elements of section 7114(a)(2)(A) exist in a particular case, the Authority is guided by the intent and purpose of the section to provide the union with an opportunity to safeguard its interests and the interests of unit employees viewed in the context of the union's full range of responsibilities under the Statute. *Id.* at 1355.

There is no dispute that the staff meeting constituted a "discussion" between "one or more representatives of the agency and one or more employees in the unit." *See, e.g., Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region*, 15 FLRA 70, 73 (1984). The change in storage of employees' personal effects constituted a general condition of employment.

All the facts and circumstances of the February 1, 2000 meeting require the conclusion that it was "formal" within section 7114(a)(2)(A) of the Statute and the Authority's precedent in case law. First, the discussion was conducted by the ISO employee's third-line supervisor, Serrato, the ISM manager; (2) her then-Assistant Manager, Colangelo also attended; (3) the meeting was conducted in the back of the building, in Serrato's office, away from the R&D section in the front end of the building where the ISOs work; (4) the meeting was conducted over a 20 to 25 minute period, although the announcement of the new designated storage area only took a few seconds; (5) Colangelo, the employees' second-line supervisor, formally announced the meeting in advance; (6) Serrato ran the meeting according to an agenda, as she required a set of minutes to be drawn up, which reflected each topic of discussion, including the new

designated storage area; (7) the meeting was mandatory for all employees, and it was held during the 2:00 to 2:30 p.m. overlap of the morning and afternoon shifts, when most employees were likely to be present; in addition, all attendees' presence was noted and recorded in the minutes; and (8) as Serrato conducted the meeting, Colangelo took notes of those present and the subjects discussed, from which he later drafted minutes for Serrato's signature to verify them as true and accurate. She then distributed the minutes to all employees on March 1, 2000.

The Respondent contends that the ISM Manager was simply reminding employees of a past practice that had been in place for years. A routine reminder of a past practice and requirement was held not to constitute a formal discussion in *Department of Veterans Affairs, Veterans Affairs Medical Center, Gainesville, Florida*, 49 FLRA 1173, 1175-76 (1994). This was not the situation here. As found above, employees did not routinely use the old storage area, they used the top of the cabinets for storage instead, and there was no strict requirement to use the old area since it was recognized that using it interfered with taking inmate pictures. The February 1 announcement of the new storage requirement was also considered so important that it and the date that the minutes of that meeting were distributed were cited in the memorandum that Montoya received after his non-compliance. Further, then-Associate Warden Bailey thereafter extracted promises from Montoya and Rodriguez that they would "comply with the new procedure."

As the Respondent did not give the Union prior notice and the opportunity to be represented at the February 1, 2000 formal discussion, the Respondent failed to comply with section 7114(a)(2)(A) in violation of section 7116(a)(1) and (8) of the Statute, as alleged.

### **Duty to Bargain**

The General Counsel contends that the Respondent violated section 7116(a)(1) and (5) of the Statute by changing the storage area of ISM unit employees without providing the union with adequate prior notice and the opportunity to bargain. Counsel claims that the Respondent was obligated to bargain over the substance of the change in conditions of employment or, in the alternative, the impact and implementation of the change since the foreseeable adverse impact on employees was more than *de minimis*.

Before implementing a change in conditions of employment affecting bargaining unit employees, an agency is required to provide the exclusive representative with notice of, and an opportunity to bargain over, those aspects of the change that are within the duty to bargain. See *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*,

55 FLRA 848, 852 (1999) (*FCI, Bastrop*); *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 81 (1997). Absent a waiver of bargaining rights, the mutual obligation to bargain must be

satisfied before changes in conditions of employment are implemented. *Id.*; *National Weather Service Employees Organization and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service*, 37 FLRA 392, 395 (1990).

The nature of the change in conditions of employment that management proposes to make dictates the extent of its duty to bargain. If the change is substantively negotiable, a union may bargain over the actual decision whether the change should be made. *See, e.g., Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 35 FLRA 153, 155 (1990). If the decision to change a condition of employment constitutes the exercise of a management right under section 7106 of the Statute, the substance of the decision to make the change is not negotiable, but the agency is nonetheless obligated to bargain over the impact and implementation of that decision if the resulting change will have more than a *de minimis* effect on conditions of employment. *See Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-08 (1986). In such circumstances, an agency which fails to provide adequate prior notice of the change to the affected employees' exclusive representative or rejects the union's timely request for negotiations pursuant to section 7106(b)(2) and (3) of the Statute will be found to have violated section 7116(a)(1) and (5) of the Statute. *See FCI, Bastrop*, 55 FLRA at 852, and cases cited.

The Respondent defends on the basis that there was no change in the working conditions of unit employees by requiring them to place their personal effects on the coat rack and, if a minor change did occur, it was *de minimis*.

As found above, I conclude that the change in the storage space for employees' personal effects constituted a change in the conditions of employment of bargaining unit employees. It is also concluded that the Respondent was required to provide the Union with adequate prior notice and the opportunity to bargain over the substance of the change in storage space for personal effects, such as food and beverage containers, hats, coats, bags, etc., for bargaining unit employees. *Cf. American Federation of Government Employees, Social Security Local 3231, AFL-CIO and Department of Health and Human Services, Social Security Administration*, 16 FLRA 47, 47-48 (1984) (agency required to bargain concerning a proposal for storage space for lunches, etc.); *Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg*, 17 FLRA 752, 756 (1985) (agency required to bargain concerning a proposal for secure areas for storage of personal items during working hours).

As the Respondent implemented the change in storage space for personal effects without providing the Union with adequate prior notice and the opportunity to bargain concerning the substance of its decision, it violated section 7116(a)(1) and (5) of the Statute, as alleged.<sup>(2)</sup>

## **Remedy**



Concerning the Respondent's failure to comply with section 7114(a)(2)(A), the formal discussion violation, the General Counsel requests a usual cease and desist order, a prospective order to notify the Union of formal discussions as well as a standard notice to employees. With respect to the violation of section 7116(a)(1) and (5) through the implementation of a new storage area and procedures, the General Counsel requests a *status quo ante* remedy, including a make-whole remedy for Montoya and Rodriguez who, but for the unlawful implementation, would not have received the written direct orders on March 6, 2000.

The proposed remedy would effectuate the purposes and policies of the Statute. Consistent with established precedent and in the absence of any specific evidence that a *status quo ante* remedy would be disruptive to the efficiency and effectiveness of the Respondent's operations, a *status quo ante* remedy is deemed appropriate. *U.S. Department of Justice, Immigration and Naturalization Service, Washington, DC*, 56 FLRA 351, 358-60 (2000); *Department of Veterans Affairs, Veterans Administration Medical Center, Veterans Canteen Service, Lexington, Kentucky*, 44 FLRA 179, 191 (1992).

The Authority will remedy even "disciplinary actions taken against employee conduct that, absent unilateral changes, would not have been proscribed conduct." *United States Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 34 FLRA 1035 (1990), order denying in part, and granting in part, motion for reconsideration and modifying decision, 39 FLRA 1431 (1991). All the more, the direct orders in the March 6, 2000 memoranda, that only exist due to Serrato's unlawful change, should be expunged.

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) Conducting formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general condition of employment without affording the American Federation of Government Employees, Local 3955, AFL-CIO, the exclusive representative of its employees, with prior notice and the opportunity to be represented at any formal discussions to the extent required by the Federal Service Labor-Management Relations Statute.

(b) Changing storage areas for its employees personal effects without providing the American Federation of Government Employees, Local 3955, AFL-CIO, with notice and an opportunity to bargain to the extent required by the Federal Service Labor-Management Relations Statute.



(c) 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) Rescind the changes in the Inmate Systems Management storage areas for employees personal effects implemented on February 1, 2000.

(b) Make Alfred Montoya and David Rodriguez whole to the extent that any and all copies of the March 6, 2000 memoranda issued to them, be removed permanently from any and all records and files the Institution retains on these employees.

(c) Notify the American Federation of Government Employees, Local 3955, AFL-CIO, prior to making any changes in the storage areas for its employees personal effects and, upon request, bargain to the extent required by the Federal Service Labor-Management Relations Statute.

(d) 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.

(e) 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.

Issued, Washington, DC, June 29, 2001.

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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 conduct any formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general condition of employment without providing the American Federation of Government Employees, Local 3955, AFL-CIO, the exclusive representative of our employees, with prior notice and an opportunity to be represented at the formal discussions.

WE WILL NOT change storage areas for employees personal effects without providing the American Federation of Government Employees, Local 3955, AFL-CIO, with notice and an opportunity to bargain 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 rescind the changes in the Inmate Systems Management storage areas for employees personal effects implemented on February 1, 2000.

WE WILL make Alfred Montoya and David Rodriguez whole to the extent that any and all copies of the March 6, 2000 memoranda will be removed permanently from any and all records and files the Institution retains on these employees.

WE WILL notify, the American Federation of Government Employees, Local 3955, AFL-CIO, prior to making any changes in the storage areas for employees personal effects and, upon request, bargain to the extent required by the Federal Service Labor-Management Relations Statute.

\_\_\_\_\_

(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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2.