UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-000

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 911 Charging Party	Case No. CH-CA-90466

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 undersigned 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 19, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: May 16, 2000
Washington, DC

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

MEMORANDUM DATE: May 16, 2000

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

Respondent

and Case No. CH-CA-90466

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 911

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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 00-33

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 911 Charging Party	Case No. CH-CA-90466

Ofelia C. Franco
Counsel for the Respondent

Yvonne Hannah
Representative of the Charging Party

Kenneth Woodberry
John F. Gallagher
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 Housing and Urban Development (HUD or 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 implementing new critical elements and performance standards for the bargaining unit employees assigned to Respondent's Illinois State Office, Income Verification Center, Chicago, Illinois, without providing the American Federation of Government Employees (AFGE), Local 911 notice and an opportunity to negotiate over the change to the extent required by the Statute.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, and that it assigned new performance standards to the unit employees, but denied any violation of the Statute.

For the reasons explained below, I conclude that the Respondent violated the Statute, as alleged.

A hearing was held in Chicago, Illinois. The parties were represented 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, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

AFGE is the certified exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the Respondent, which includes the employees of the HUD Illinois State Office. AFGE, Local 911 is the agent of AFGE for the purposes of representing the bargaining unit employees assigned to the HUD Illinois State Office.

The HUD Illinois State Office, Chicago Income Verification Center, started in November of 1997, as a pilot project to verify that public housing residents were appropriately entitled to public housing based on their income. Prior to the inception of the Income Verification Center, HUD did not verify the income of households receiving rental assistance. This was a new initiative to root out fraud in Respondent's public housing assistance programs.

The initial structure of the newly established Center was as follows: Mr. Jim Zale was the Director, Mr. Turhan Brown was a supervisor and there were fifteen (15) bargaining unit employees. All of the fifteen employees were reassigned from the HUD Illinois State Office Title I unit to the Income Verification unit.

The Income Verification Center became an official fixture in August of 1998. At that time the unit employees were placed under new position descriptions as Income Verification Analysts.

During the Center's transition period from a pilot project to an official office, Respondent retained Price Waterhouse to assist in the development of the Center. One of the projects for Price Waterhouse was to design the critical elements and performance standards plan for the Center, which they completed in approximately February of

1998. The February 1998 standards for the Income Verification Analysts had five critical elements. Shortly after the February 1998 standards were implemented, Respondent's Headquarters asked that those standards be pulled because they wanted to universalize the elements. The February 1998 standards were discontinued in April of 1998.

In June 1998, Mr. Brown assumed the position of Acting Director of the Center. At that time, the Center unit employees had no critical elements and performance standards. Respondent's Headquarters advised Mr. Brown to issue a new performance plan with one critical element. The new performance plan with the one critical element was issued in July 1998. The single performance element was "Special Projects: Perform special projects mandated or assigned by HUD Senior Officials, the Director or Branch Chiefs". (G.C. Exh. 2). The actual rating using that one element took place in February of 1999. The unit employees' rating cycle runs from February 1 to January 31 of each year.

In April of 1999, Mr. Brown, in collaboration with the Seattle HUD office, developed five new critical elements and performance standards for the Center employees consisting of five elements. (G.C. Exh. 3). Both the Union, nationally and locally, and headquarters management staff had expressed the view that there should be more than one element in order to rate everything that the employees were doing. The elements were prepared from and based on the position descriptions. The job duties and responsibilities remained the same. The new elements and standards were issued to the unit employees in late April 1999.

On April 29, 1999, Union Chief Steward and Center employee Donald Boyd found a copy of the new critical elements and performance standards placed on his desk when he arrived for work. At that time he also discovered an e-mail message dated April 28, 1999 from Mr. Brown to the employees concerning the new standards. The e-mail message explained that all employees should have received a copy of the new standards with the five new critical elements. The e-mail message further stated that employee comments were encouraged pursuant to the Union contract and that any comments should be sent to him by April 29, 1999; otherwise a final set would be issued Monday, May 3, 1999. (G.C. Exh. 4).

The new elements and standards contained 5 critical elements: 1) Customer Service and Communication Skills, 2) Analysis Skills, Policy and Procedures, 3) Tax

Information Security, 4) Special Projects and Collateral Duties, and 5) Quality Assurance. Each new critical element contained several detailed performance standards. Critical element # 4 was similar to the prior single element which the Center employees had been working under prior to May 3. Furthermore, the new standards contained 5 possible performance ratings: 1) Outstanding, 2) Highly Successful, 3) Fully Successful, 4) Marginally Successful, and 5) Unacceptable. (G.C. Exh. 3). The previous performance plan included only: 1) Outstanding, 2) Fully Successful, and 3) Unacceptable.

The copy of the new standards left on Mr. Boyd's desk was the first time that Mr. Boyd, who is also a Union official, learned of the new standards. Yvonne Hannah, Local 911 President, is the appropriate Union official to receive notice of changes, and Ms. Hannah was never notified by management of the new standards.

Upon discovery of the change, Mr. Boyd notified Mr. Brown via e-mail on April 29 that Local 911 had not been given prior notice and an opportunity to bargain over the new standards. Respondent's Human Relations Specialist, Mark Zaltman, responded and advised that Respondent viewed the impact of the new standards as being de minimis and that Respondent would not negotiate concerning the new standards. The new standards went into effect on May 3, 1999.

During the hearing, Respondent indicated that the unit employees would not be rated under new critical standard #5. This information had not been previously communicated to the employees. In addition, the new standards were implemented in the fourth month of the twelve month rating cycle and it was not clear what standards (old or new) would govern performance during the February to April 1999 time period.

Respondent conceded it did not give Local 911 prior notice of the new standards and an opportunity to bargain concerning section 7106(b)(2) procedures and section 7106(b)(3) appropriate arrangements.

Employees receive annual performance ratings based on their performance standards. Ratings affect a host of significant working conditions with dramatic consequences for employees. In this regard, ratings have a direct influence on promotion, retention, demotion, reduction-in-force (RIF) standing, awards, and within grade increases.

Discussion and Conclusions

Under section 7116(a)(1) and (5) of the Statute, prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice of the change and the opportunity to bargain over those aspects of the change that are within the duty to bargain. *U.S. Army Corps of Engineers, Memphis District,* 53 FLRA 79, 81 (1997).

In this case, the establishment of new critical elements and performance standards involves the exercise of management rights under section 7106(a) of the Statute and is not substantively negotiable. *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA 769 (1980), aff'd sub nom. *NTEU v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982); *American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York*, 5 FLRA 70 (1981) (Proposals 1-2), *aff'd sub nom. AFGE, Local 1968 v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983).

It is equally well established, on the other hand, that there is a duty to bargain consistent with section 7106(b)(2) and (3) of the Statute with respect to the procedures management will employ in exercising such right and respecting appropriate arrangements for employees who may be adversely affected by the changes where the changes have a more than *de minimis* effect on conditions of employment. *56th Combat Support Group (TAC), MacDill Air Force Base, Florida,* 43 FLRA 434, 447-448 (1991)(*MacDill AFB*); D*epartment 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 Respondent contends that there was no adverse impact because the nature of the work performed by the unit employees did not change and no additional training was required. However, it is not the impact on the job duties or the nature of the work that is of sole concern here, but the impact on employees' conditions of employment of the measurement of the performance of that work by the additional critical elements and standards. Here, the employees went from performing under a performance plan consisting of one critical element with three possible ratings to a performance plan consisting of five critical

elements with numerous performance standards for each element and five possible ratings. The record readily demonstrates that the impact of this change was more than *de minimis*. In this regard, success or failure in meeting the new standards affects the very heart of an employee's working conditions. Promotions, demotions, terminations, RIF standings, awards and within grade increases are all tied to an employee's performance. In addition, Respondent's application of the new standards has created additional impact concerns in view of its disclosure at the hearing that it had decided not to enforce the new critical element # 5. There was also confusion as to which standards govern the February to April 1999 time period.

Accordingly, the change herein was more than de minimis. *MacDill AFB,* 43 FLRA at 447-448; *Department of Health and Human Services, Social Security Administration, Dallas Region*, 32 FLRA 521, 527 (1988). 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, TX,* 55 FLRA 848, 852 (1999).

The Respondent's "Covered By" Defense

The Respondent contends in its post-hearing brief that its "only obligations concerning the new performance standards were covered by the governing collective bargaining agreement." The General Counsel has moved to strike that defense on the basis that the Respondent failed to properly raise this affirmative defense at any time prior to the filing of the post-hearing brief. Counsel for the General Counsel claims that he was thereby deprived of any opportunity to prepare for and present evidence at the hearing to rebut such a defense, such as by showing bargaining history, past practice, and the relationship between other articles of the collective bargaining agreement.

"Covered by" is an affirmative defense. *Social Security Administration*, 55 FLRA 374, 377 (1999). It must be raised timely by a respondent or it will be deemed waived.

Section 2423.23(c) of the Regulations requires a party to give a brief statement in the prehearing disclosure and exchange of "any and all defenses to the allegations in the complaint." The Respondent's prehearing disclosure did not

set out a "covered by" defense. Both in its prehearing disclosure of "Defenses" and in its opening statement at the hearing, the Respondent defended its action on the basis that the new performance standards did not change the duties or job requirements of employees and that the employees experienced no adverse impact.[1] The Respondent never clearly and explicitly raised a "covered by" defense; that is, that it had no obligation to bargain based on the terms of a negotiated agreement.[2] The Respondent did list the collective bargaining agreement as a proposed exhibit and stated as a theory of the case that it issued the standards "in accordance with Section 37.03(2)." These statements were consistent with the specific defenses the Respondent had listed and were insufficient to also put the General Counsel on notice that it was asserting a "covered by" defense.

The Respondent did elicit from a witness at the hearing that the witness reviewed the agreement when preparing the elements and standards, found that it said nothing about "having to consult the Union, but specifically that we should encourage employee participation, which I did." (Tr. 103). This testimony was also consistent with the Respondent's listed defenses and, without more, is not adequate support for a conclusion that the General Counsel thereby had notice that a "covered by" defense was in issue and that such an issue was fully and fairly litigated. *Cf. Department of Veterans Affairs, Veterans Affairs Medical*

[1] The Respondent also submitted into evidence at the hearing a position paper submitted to the FLRA Regional Director during the investigation of the charge. In this paper the Respondent made the same defenses as in the prehearing disclosure and opening statement, also stating, in part:

> Of course, Management recognizes that changes in performance standards may result in adverse impact on employees which would create an obligation to negotiate appropriate arrangements for those employees. But no adverse impact resulted from the change in the performance standards. As stated above, the employees continue to perform the same work in the same way. (Respondent's Exh. 2, page 2).

[2] The Authority in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) established a three prong approach for determining whether to sustain a respondent's defense that it has no duty to bargain based on the terms of an existing negotiated agreement.

Center, Washington, D.C., 51 FLRA 896, 900 (1996) (circumstances under which a *violation* not alleged in a complaint may be deemed fully and fairly litigated).

It is concluded that the Respondent's "covered by" defense was not timely raised and was waived. In the alternative, the motion to strike is granted, as a sanction against the Respondent, pursuant to section 2423.24(e), for not raising the defense in its prehearing disclosure, and the Respondent may not rely on this particular defense.

Remedial Order

The General Counsel seeks a remedial order which includes a *status quo ante* bargaining order in accordance with the *Federal Correctional Institution,* 8 FLRA 604, 606 (1982) criteria. I agree that a *status quo ante* order is appropriate. Here, no notice of the new standards was provided, and when Local 911 discovered the change it promptly requested bargaining only to be rebuffed by the Respondent. Thus, Respondent's conduct herein was willful. *FCI Bastrop,* 55 FLRA at 855-856. The change had more than *de minimis* impact and concerns a significant working condition. There was also no showing by Respondent that such relief would be disruptive. Finally, one critical purpose of the *status quo ante* remedy is to deter the Respondent and future parties from failing to satisfy their duty to bargain, and reduce any incentive that may exist to unilaterally implement changes in conditions of employment and then refuse to negotiate over all pertinent aspects of the impact and implementation of the changes. *FCI Bastrop*, 55 FLRA at 857.

Based on the above findings and conclusions, it is concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged, and 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 Statute, it is hereby ordered that the U.S. Department of Housing and Urban Development shall:

1. Cease and desist from:

(a) Unilaterally implementing new critical elements and performance standards for bargaining unit employees of the Chicago Income Verification Center without

giving prior notice to the American Federation of Government Employees, Local 911, the exclusive representative of certain of its employees, and affording it an opportunity to bargain over the impact and implementation of the new performance standards.

(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) Rescind the critical elements and performance standards for Income Verification Analysts which were effective May 3, 1999, reappraise employees who were evaluated under the new elements and standards by applying the previous elements and standards, and make whole any employee adversely affected by application of the new critical elements and performance standards.

(b) Notify and, upon request, negotiate with the American Federation of Government Employees, Local 911, the exclusive representative of its employees, over the impact and implementation of new critical elements and performance standards.

(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 chief executive officer of the HUD Illinois State Office 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, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 16, 2000

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 Housing and Urban Development 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 unilaterally implement new critical elements and performance standards for Income Verification Analysts at the Chicago Income Verification Center without giving prior notice to the American Federation of Government Employees, Local 911, the exclusive representative of our employees, and affording it an opportunity to bargain over the impact and implementation of the new critical elements and performance standards.

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 critical elements and performance standards for Income Verification Analysts which were effective May 3, 1999, reappraise employees who were evaluated under the new critical elements and performance standards by applying the old critical elements and performance standards, and make whole any employee adversely affected by application of the new critical elements and performance standards.

WE WILL notify and, upon request, negotiate with the American Federation of Government Employees, Local 911, the exclusive representative of our employees, over the impact and implementation of new critical elements and performance standards.

(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, Chicago Regional Office, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. CH-CA-90466, were sent to the following parties in the manner indicated:

CERTIFIED MAIL & RETURN RECEIPT NUMBER	**CERTIFIED**
Kenneth Woodberry John F. Gallagher Chicago Region Federal Labor Relations Authority 55 West Monroe, Suite 1150 Chicago, IL 60603-9729	P 726 680 958
Ofelia C. Franco, Attorney U.S. Department of Housing and Urban Development Office of the General Counsel 77 West Jackson Boulevard, Room 2622 Chicago, IL 60604-3507	P 726 680 959
Yvonne Hannah Representative of the Charging Party American Federation of Government Employees, Local 911 77 West Jackson Boulevard Chicago, IL 60604-3507	P 726 680 960

Dated: May 16, 2000
Washington, DC