68 FLRA No. 118

UNITED STATES
DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
GREAT LAKES SCIENCE CENTER
ANN ARBOR, MICHIGAN
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 723, AFL-CIO
(Charging Party/Union)

CH-CA-13-0115

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DECISION AND ORDER

June 30, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

In the attached decision, Federal Labor Relations Authority (FLRA) Chief Administrative Law Judge Charles R. Center (the Judge) found that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when it unilaterally reduced the meal-and-incidental-expenses per diem (M&IE) rates for employees temporarily assigned to research vessels on the lower four Great Lakes. This case presents three substantive questions.

The first question is whether the Judge erred in determining that the ULP charge was timely filed. Because the Union filed the charge within six months of the date on which the Agency implemented the reduction in M&IE rates, we find that the answer to the first question is no.

The second question is whether the Judge erred when he concluded that the Agency violated § 7116(a)(1) and (5) when it unilaterally reduced the M&IE rates. We find that the Judge correctly applied Authority precedent to conclude that the reduction in M&IE rates constituted a change in conditions of employment and that the Agency was obligated to bargain with the Union before implementing the change. Accordingly, the answer to the second question is no.

The third question is whether the Judge erred when he rejected the FLRA General Counsel's (GC's) request to the Agency to make the employees whole by reimbursing them for the underpayment in their M&IE rates. Because the GC requests M&IE reimbursements pursuant to the Back Pay Act (the Act),[2] which does not cover travel-expense reimbursements, we find that the answer to the third question is no.

II. Background and Judge's Decision

A. Background

The Agency operates five survey vessels, one on each of the five Great Lakes. Each year, these vessels conduct up to ten surveys, which last from one to three weeks. While conducting these surveys, employees live and work aboard the survey vessels. The Agency provides meals to employees while they are temporarily assigned to the Lake Superior vessel (the *Kiyi*), but not to employees who work aboard vessels on the lower four Great Lakes.

The latter group of employees, who are at issue here, receive M&IE reimbursements. Before 2012,[3] the Agency generally paid employees the maximum M&IE rates authorized by the General Services Administration's (GSA's) regulations – currently $46 for most of the contiguous United States, but up to $71 in some urban areas,[4] and up to $108 in Canada.[5] Employees typically used their M&IE reimbursements to dine at restaurants near the ports where their vessels docked. The only exception was that, between 2008 and 2010, the Agency paid a reduced rate of $64 for Canadian travel. The $64 reimbursement was equivalent to the maximum domestic rate at the time, and the parties did not have a collective-bargaining agreement in place when the Agency implemented the reduced Canadian rate.

On April 26, the Agency emailed its employees to announce that it was changing the M&IE rates for employees assigned to vessels with a kitchen. The new

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] *Id.* § 5596.

[3] All dates are in 2012 unless otherwise noted.

[4] *See generally Per Diem Rates Look-Up*, GSA, http://www.gsa.gov/portal/category/100120 (last updated Dec. 2, 2014).

[5] *See* Canadian Per Diem Rates, Dep't of State, http://aoprals.state.gov/web920/per_diem_action.asp?MenuHide=1&CountryCode=1079 (May 1, 2015).

rate, called the "camp rate,"[6] would be either $20 or $30 (plus incidentals) depending on the amount of food storage available on the vessel. The email also stated that "[s]tarting immediately, [the Agency] expect[ed] all surveys on the large vessels to institute the camp rate this fiscal year."[7] The purpose of the camp rate was to cover the cost of groceries.

The Agency stated that it was reducing M&IE rates for budgetary reasons, citing Executive Order No. 13,589.[8] That executive order required each agency to establish a plan for reducing costs related to travel, technology, printing, and the federal vehicle fleet "by not less than [twenty] percent below Fiscal Year 2010 levels, in Fiscal Year 2013."[9] The Agency also cited the GSA regulation concerning reduced per diem rates, 41 C.F.R. § 301-11.200. That regulation authorizes an agency to pay an employee less than the maximum rate "[w]hen [the] agency can determine in advance that lodging and/or meal costs will be lower than the per diem rate," and the agency includes the lower rate in the employee's travel authorization before the employee goes on travel.[10]

By letter, on April 30, the Union responded to the Agency's email. The Union claimed that reducing the rates was a change in conditions of employment that required notice and bargaining. The Union requested that the Agency refrain from implementing the change until the Agency complied with their agreement's notification requirements. Specifically, the Union requested a description of the change, the scope, an explanation of the Agency's implementation plans, and the proposed date of implementation.

The Agency replied to the Union's letter on May 8; however, the response did not contain the information requested by the Union in its April 30 letter. Rather, the Agency stated that it was not required to negotiate over the change because the reduction in M&IE rates was consistent with the Federal Travel Regulation (FTR)[11] and the parties' agreement, which covered per diem reimbursements. Article 26.a.1. of the parties' agreement provides, in relevant part, "[a]ll [u]nit [e]mployees may be required to travel from their official duty station on official government business and will be compensated for such travel expenses in accordance with the [FTR]."[12]

On May 14, the Union sent the Agency a request to bargain over the reduced M&IE rates. That same day, the Agency sent an email to employees informing them that an additional document had to be included in official travel documents when the camp rate applied. That email stated, "[s]ince this form wasn't included in the original guidance [sent] below, implementation of the camp rate for the [Agency] will take effect on May 15 . . . and apply to all subsequent travel."[13]

On May 17, the Union sent the Agency a proposal to maintain the pre-reduction M&IE rates. The Agency replied to the Union's May 14 and 17 letters on May 24. The Agency stated that it could not restore the status quo because doing so would violate the FTR. The Agency also "invite[d] the Union to provide its specific suggestions/recommendation for mitigating the adverse impact of th[e per diem] policy correction on bargaining[-]unit personnel."[14] The parties continued to discuss the M&IE rates for the next several months. The Union proposed an M&IE rate of $42.50, which the Agency rejected; however, the Agency increased the per diem rate to $30 (plus incidentals) for all vessels, effective October 1.

The Union filed a charge with the FLRA's Chicago Regional Office on November 15, alleging that the Agency failed to bargain with the Union before implementing the reduced M&IE rates. The GC subsequently issued a complaint alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by reducing M&IE rates without first providing the Union with notice and an opportunity to bargain.

B. Judge's Decision

The Agency argued that it did not violate the Statute and that the Union's ULP charge was not timely filed. Regarding the timeliness of the charge, the Agency argued that the alleged ULP occurred with the April 26 announcement, or alternatively, the Union had constructive knowledge that the Agency had reduced the M&IE rates before May 15. Regarding the merits, the Agency made the following arguments: (1) there was no past practice of full M&IE reimbursements because established practice was simply to follow the FTR; (2) the Agency's right to determine its budget under § 7106(a)(1) of the Statute permitted it to reduce the M&IE rates; (3) the reduction in M&IE rates was covered by Article 26.a.1. of the parties' agreement; (4) the FTR gave the Agency unfettered discretion to implement reduced M&IE rates; and (5) paying full M&IE rates was illegal, so the Agency was required to immediately

[6] Judge's Decision at 3.
[7] *Id.* (quoting GC Ex. 3 at 2).
[8] 3 C.F.R. 282 (2012).
[9] *Id.* at 283.
[10] 41 C.F.R. § 301-11.200.
[11] *Id.* §§ 300-1.1-304-9.7.
[12] GC Ex. 2 at 4.
[13] Judge's Decision at 4 (quoting GC Ex. 6 at 1) (first alteration in original).
[14] GC Ex. 9 at 1.

reduce the M&IE rates. The Agency also argued that an order to restore the status quo ante and a make-whole remedy were not appropriate.

Conversely, the GC argued that: (1) the reduction in M&IE rates had a more than de minimis effect on employees' conditions of employment; (2) the parties' agreement merely acknowledges the applicability of the FTR to travel reimbursements, and therefore, did not cover the M&IE rate reduction; (3) the FTR did not require the Agency to cut M&IE rates; and (4) M&IE rates are substantively negotiable. With respect to the timeliness of the charge, the GC argued that the change took effect on May 15. The GC claimed the Agency's evidence was insufficient to prove implementation before May 15, and that even assuming that there were isolated instances of employees receiving reduced M&IE rates before May 15, the Union was not aware of them. With respect to the remedy, the GC argued that a status quo ante remedy was appropriate. The GC also relied on a Comptroller General decision to argue that the Act authorized a make-whole remedy.[15]

The Judge found that the Agency violated the Statute. With respect to the timeliness of the charge, the Judge found that the Agency implemented the reduced M&IE rates on May 15, making the charge timely.

With respect to the merits, the Judge found that paying the full M&IE rates was a condition of employment that had been established through a past practice. The Judge rejected the Agency's allegations that per diem reimbursements were nonnegotiable, holding that "an agency's ability to determine the amount of per diem [that] bargaining[-]unit employees will receive is subject to negotiation."[16] The Judge further rejected the Agency's argument that the FTR required the Agency to reduce the M&IE rates. Moreover, he found that the Agency did not comply with the FTR when it set the reduced M&IE rates because it failed to analyze the cost of food or consider all of the costs to the Agency. But the Judge did not address the Agency's covered-by argument.

As a remedy, the Judge ordered the Agency restore the status quo ante, and to post and electronically distribute a notice. However, the Judge denied the GC's requested make-whole remedy because he found that per diem reimbursements were not pay within the meaning of the Act.

[15] *See* GC's Post-Hr'g Br. at 25-26 (citing *In re Wilson*, 66 Comp. Gen. 185 (1987)).
[16] Judge's Decision at 10 (citing *NTEU*, 42 FLRA 964, 972 (1991)).

III. Analysis and Conclusions

A. The charge is timely.

The Agency argues that the ULP charge was untimely.[17] Section 7118(a)(4) of the Statute provides that "no complaint shall be issued based on any alleged [ULP] which occurred more than [six] months before the filing of the charge with the Authority," unless a "failure of [the charged party] to perform a duty owed to the [charging party]" or "concealment . . . prevented discovery of the alleged [ULP] during the [six]-month period."[18] In cases involving a unilateral change in conditions of employment, the six-month statute of limitations runs from the date on which the charging party has "clear and unequivocal notice of unilateral implementation" of a change in working conditions.[19]

The Agency first argues that the charge was untimely because the six-month statute of limitations began to run when it provided notice of the planned reduction in M&IE rates on April 26.[20] The Agency does not claim that it actually implemented the change in M&IE rates on April 26.[21] Rather, it argues that announcement of a proposed change in working conditions should be the triggering event in failure-to-bargain cases.[22] However, Authority precedent, as well as that of the National Labor Relations Board,[23] holds that the six-month time limit commences when the alleged ULP occurs, not when notice of a proposed change is given to the union.[24] Here, the Union alleged that the Agency implemented a change in working conditions without first providing the Union with an opportunity to bargain. Thus, the six-month limitation period commenced when the Agency implemented the change in M&IE rates.

The Agency also argues that the Union had "constructive notice" that it implemented the change before May 15.[25] Constructive notice applies where a

[17] Agency Exceptions at 14-23 (Exceptions).
[18] 5 U.S.C. § 7118(a)(4).
[19] *U.S. DOJ, INS, Wash. D.C.*, 55 FLRA 93, 96 (1999) (*INS*).
[20] Exceptions at 15-19.
[21] *See* Exceptions at 15 ("[The Judge] . . . found no illegal action . . . when [the Agency] implemented the policy by authorizing travel pursuant to the new rates beginning on May 11, 12, 14 and 15.").
[22] *Id.* at 16.
[23] *Howard Elec. & Mech.*, 293 NLRB 472, 475 (1989) (citing *Am. Distrib. Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983)) ("Notice of an intent to commit an unlawful unilateral implementation, however, does not trigger the [limitations] period with respect to the unlawful act itself.")
[24] *See INS*, 55 FLRA at 96; *U.S. DHS, U.S. CBP, El Paso, Tex.*, 65 FLRA 422, 424 (2011).
[25] Exceptions at 20.

party could have learned of an alleged ULP through "the exercise of reasonable diligence."[26] But "reasonable diligence" does not "require the [u]nion to maintain or exercise . . . [an] extreme level of suspicious imagination or hypervigilance."[27] Here, the Agency's email stated that "implementation of the camp rate for the [Agency] will take effect on May 15."[28] In light of this unequivocal statement, investigating whether the Agency had actually implemented the reduced M&IE rates a few days before May 15 would require an "extreme level of suspicious imagination or hypervigilance,"[29] rather than the exercise of reasonable diligence.

Moreover, even assuming that the Agency has established that it implemented the reduced M&IE rates for bargaining-unit employees on May 11, as it claims in its exceptions,[30] the exceptions to the six-month rule would apply. In this regard, the Agency failed to perform a duty owed to the Union by not providing the contractually required notice setting forth the planned implementation date, and its statement that "implementation . . . will take effect on May 15,"[31] would have had the effect of concealing its earlier implementation of the reduced M&IE rates.

Thus, we find that the ULP charge was timely filed and, therefore, deny the Agency's exception.

B. The Agency violated § 7116(a)(1) and (5) of the Statute by unilaterally reducing the M&IE reimbursements.

It is well established that before changing bargaining-unit employees' conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain.[32] The Authority has recognized that parties may establish conditions of employment through a past practice where the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other.[33] Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time.[34] The Authority has found that a period of several years suffices for purposes of establishing a past practice.[35]

When an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency nonetheless has an obligation to bargain over the impact and implementation of that decision, if the resulting change has a more than a de minimis effect on a condition of employment.[36] Even where the substance of a proposed change is nonnegotiable, an agency is generally required to maintain the status quo pending the completion of impact-and-implementation bargaining.[37] But an agency is not required to maintain the status quo during bargaining if doing so would require the agency to continue an unlawful practice.[38] Further, an agency may unilaterally implement a change in conditions of employment without violating the Statute where all of a union's proposals, submitted in response to that change, are nonnegotiable.[39]

1. There was an established past practice of paying full M&IE rates to employees assigned to vessels on the lower Great Lakes.

The Agency argues that the Judge erred in concluding that there was a past practice of paying full M&IE rates to employees serving aboard vessels on the lower Great Lakes.[40] The Agency does not claim that the Judge misapplied the Authority's long-standing precedent[41] concerning the establishment of a past practice.[42] Rather, the Agency argues that "[t]he policy was to reimburse travel expenses pursuant to the FTR"[43] and that the Judge erred by "parsing the past practice of the Agency to a select group of employees."[44] Instead, it claims that the Judge should have "define[d] the past

[26] *NTEU v. FLRA*, 798 F.2d 113, 116 (5th Cir. 1986).
[27] *Miramar Hotel Corp.*, 336 NLRB 1203, 1234 (2001) (*Miramar*) (ALJ decision adopted by NLRB).
[28] Judge's Decision at 4 (quoting GC Ex. 6).
[29] *Miramar*, 336 NLRB at 1234.
[30] Exceptions at 15.
[31] Judge's Decision at 4 (quoting GC Ex. 6).
[32] *E.g., U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997) (citing *U.S. Dep't of VA, Veterans Admin. Med. Ctr., Memphis, Tenn.*, 42 FLRA 712, 713 (1991)).
[33] *E.g., U.S. Dep't of the Air Force, U.S. Air Force Acad. Colo.*, 65 FLRA 756, 758 (2011) (citing *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987)).
[34] *Id.* (citing *SSA, Office of Hearings & Appeals, Montgomery, Ala.*, 60 FLRA 549, 554 (2005); *U.S. DHS, Border & Transp. Directorate, Bureau of CBP*, 59 FLRA 910, 914 (2004) (*CBP*)).
[35] *Id.* (citing *SSA*, 64 FLRA 199, 203 (2009)).
[36] *E.g., U.S. DHS, CBP*, 64 FLRA 989, 994 (2010) (citing *U.S. Dep't of the Treasury, IRS*, 62 FLRA 411, 414 (2008)).
[37] *U.S. DOJ, INS*, 55 FLRA 892, 902-03 (1999) (*INS*).
[38] *NAGE, Local R1–109*, 37 FLRA 448, 456–57 (1990).
[39] *INS*, 55 FLRA at 902-03.
[40] Exceptions at 23-26.
[41] *E.g., IRS & Brookhaven Serv. Ctr.*, 6 FLRA 713, 725 (1981)
[42] Exceptions at 23-26.
[43] *Id.* at 25.
[44] *Id.* at 24.

practice . . . in a manner that applies generally to all similarly situated employees."[45]

In support of this proposition,[46] the Agency cites *U.S. Postal Service*[47]and *Department of the Navy v. FLRA* (*Navy*).[48] But the holding of *U.S. Postal Service* was that "a partial breach of [the agency's] otherwise uniform enforcement" of its break policy did not establish a past practice, [49] and *Navy* concerned the application of the covered-by doctrine.[50] Thus, neither case supports the proposition that past practices must be defined so as to be generally applicable.

Moreover, proving the existence of a past practice requires showing, at a minimum, that the practice was consistently exercised for an extended period of time with the opposing party's knowledge and express or implied consent.[51] Thus, in *U.S. DOL, Office of the Assistant Secretary for Administration & Management, Dallas, Texas* (*DOL*),[52] the Authority held that an agency could not prove the existence of a past practice of following a department-wide policy manual with respect to parking merely by showing that the agency followed the manual and that the union had submitted a proposal that was consistent with the manual.[53]

Here, although the record reflects the existence of practices that are consistent with the FTR – such as the provision of meals, rather than per diem, aboard the *Kiyi*, or the payment of a reduced M&IE rate of $64 for employees in Canadian waters from 2008 to 2010[54] – this does not establish that the parties had expressly or implicitly agreed to an overarching practice whereby the Agency was permitted to take any actions that the FTR authorized. And the Agency has not introduced any evidence showing, for example, a history of resolving travel-expense disputes by determining whether the FTR authorized the Agency's actions.[55] Further, the fact that the Agency temporarily paid a reduced M&IE rate for employees in Canadian waters does not establish that the Union acquiesced in a practice of allowing unilateral changes in M&IE rates.[56]

Accordingly, we find that the Judge did not err in concluding that there was a past practice of reimbursing employees at the full M&IE rates. We, therefore, deny the Agency's exception.

2. The Agency's practice of paying full M&IE rates was not illegal.

The Agency argues that reducing the M&IE rates was mandated by law, and that the Agency was, therefore, required to immediately correct the "unlawful past practice[]."[57] Specifically, the Agency argues that the FTR provides that agencies "[m]ust limit the authorization and payment of travel expenses to travel that is necessary to accomplish [their] mission[s] in the most economical and effective manner, under rules stated throughout th[e FTR]."[58] Thus, the Agency appears to argue that an agency is required to pay a reduced per diem rate whenever it "determine[s] in advance that lodging and/or meal costs will be lower than the per diem rate."[59]

But it is a basic rule of statutory (or in this case regulatory) construction that a general command should not be interpreted to override a specific one.[60] Here, although the FTR contains a general command to use travel funds prudently, with regard to the specific issue of reduced per diems, the FTR expressly provides that an agency "*may* . . . prescribe a reduced per diem rate lower than the prescribed maximum" when it determines that subsistence expenses will be less than the maximum authorized rate.[61] Further, the GSA's Board of Contract Appeals (GSBCA) has observed that "[t]he FTR gives an agency the *discretion* to pay a reduced per diem rate when it determines in advance of the temporary duty that lodging and/or meal costs will be lower than the maximum per diem rate."[62] And, as the issuing agency, the GSA is entitled to deference in interpreting the FTR.[63]

[45] *Id.*
[46] *Id.* at 24-25.
[47] 275 NLRB 360 (1985).
[48] 962 F.2d 48 (D.C. Cir. 1992).
[49] *Hyatt Corp. v. NLRB*, 939 F.2d 361, 373 (6th Cir. 1991); *accord Treanor Moving & Storage Co.*, 311 NLRB 371, 385 n.12 (1993) (ALJ decision adopted by NLRB) ("[In *U.S. Postal Service*] the employer repeatedly enforced its time limits on 'rest breaks'—a lawful rule—in a 'uniform, manner.'")
[50] 962 F.2d at 61-62.
[51] *U.S. DOL, Office of the Assistant Sec'y for Admin. & Mgmt., Dall., Tex.*, 65 FLRA 677, 679 (2011) (*DOL*).
[52] *Id.*
[53] *Id.* at 679-80.
[54] *See* Exceptions at 6 & n.2 (citations omitted).
[55] *See DOL*, 65 FLRA at 679-80 (citing *CBP*, 59 FLRA at 914-15).
[56] *See Marine Corps Logistics Base, Barstow, Cal.*, 46 FLRA 782, 799 (1992).
[57] Exceptions at 37 (quoting *Region III, SSA, Dep't of HHS*, 17 FLRA 959, 962 (1985)).
[58] *Id.* at 38 (quoting 41 C.F.R. § 301-70.1(a)).
[59] 41 C.F.R. § 301-11.200(a).
[60] *E.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012).
[61] 41 C.F.R. § 301-11.200(a) (emphasis added).
[62] *In re Henzie*, GSBCA No. 15820-TRAV, 02-2 B.C.A. (CCH) ¶ 31,900 (2002) (emphasis added).
[63] *Auer v. Robbins*, 519 U.S. 452 (1997).

Thus, the Agency has not established that the FTR required it to immediately and unilaterally implement the reduced M&IE rates. Accordingly, we deny this exception.

3. The reduction in M&IE rates is not "covered by" the parties' agreement.

The Agency argues that it had no duty to bargain over the change because it was "covered by" the parties' agreement.[64] The covered-by doctrine has two prongs.[65] Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in the agreement.[66] The Authority does not require an exact congruence of language.[67] Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.[68]

If the agreement does not expressly contain the matter, then, under the second prong of the doctrine, the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement.[69] In evaluating the second prong of the test, the Authority will "examine all record evidence to determine whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances."[70]

Although the Agency advanced its covered-by argument at hearing before the Judge,[71] he did not resolve that claim. We find, however, that the record is sufficient for us to resolve the issue.

The Agency claims that the reduction in M&IE rates is covered by a sentence in Article 21.2.a. of the parties' agreement that provides, in relevant part, that "[e]mployees . . . will be compensated for . . . travel expenses in accordance with the [FTR]."[72] Specifically, the Agency argues:

> [T]he agreement expressly provides that travel[-]expense[] reimbursement shall be pursuant to the FTR. The FTR, in turn, expressly provides that "[w]hen [an] agency can determine in advance that lodging and/or meal costs will be lower than the per diem rate," the agency may prescribe a reduced per diem rate.[73]

The Agency goes on to say that:

> [A] reasonable person would read an agreement that expressly states a government-wide regulation controls a matter, and which regulation expressly provides an agency the authority to reduce per diem rates in appropriate circumstances, [and] would conclude that the matter of reduced per diem rates was covered by the agreement and not subject to further bargaining.[74]

Thus, the Agency appears to argue that Article 21.2.a. incorporates the FTR by reference. Conversely, the GC argues that Article 21.2.a. is merely a "routine acknowledgment . . . that the FTR applies to travel reimbursement."[75] It is unclear whether the Agency is arguing (1) that the FTR required it to reduce the M&IE rates, and, thus, that the parties' agreement permitted it to do so without bargaining; or (2) that the parties' agreement permits the Agency to exercise any discretion that the FTR grants it without further bargaining with the Union. To the extent that the Agency is arguing the former, as explained above,[76] this argument lacks merit because the authority to prescribe reduced M&IE rates is discretionary. And as to the latter argument, as discussed below, we reject the claim that Article 21.2.a. covers any exercise of discretion permitted by the FTR.

Applying the first prong of the covered-by analysis, we find that Article 21.2.a. does not expressly cover reduced M&IE rates. Clearly, the text of Article 21.2.a. itself does not refer to setting M&IE rates. Furthermore, Article 21.2.a. does not "use clear and express language of incorporation, [that] unambiguously communicates that the purpose is to incorporate" the Agency's discretion, under the FTR, to reduce M&IE

[64] Exceptions at 29-32.
[65] *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1017-18 (1993) (*SSA, Balt.*).
[66] *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000) (*Customs*).
[67] *Fed. BOP v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011).
[68] *SSA, Balt.*, 47 FLRA at 1018.
[69] *Id.*
[70] *Customs*, 56 FLRA at 813-14.
[71] *See* Judge's Decision at 7.
[72] Exceptions at 30 (first bracket in original).
[73] *Id.* (alteration in original) (quoting 41 C.F.R. § 301-11.200(a)).
[74] *Id.*
[75] GC Opp'n & Cross-Exception at 17 (GC Opp'n).
[76] *See supra*, section III.B.2.

rates.[77] Thus, we reject the Agency's argument that Article 21.2.a. expressly provides for reduced M&IE rates, and we, therefore, consider the second prong of the covered-by doctrine.

In support of its claims regarding the second prong, the Agency largely repeats its arguments that the parties' past practice was simply to follow the FTR (with Agency discretion to take any actions that were consistent with the FTR).[78] Because we have already rejected the Agency's past-practice argument, we need not consider those claims again here.[79] The Agency also argues that there is "[t]estimonial evidence" supporting the Agency's position; however, it does not include a citation to the transcript, identify the proponent of the testimony, or explain what the testimony is or how it relates to the application of the covered-by doctrine.[80] Thus, the Agency has failed to support this claim, and as a result, we will not consider it.[81] Finally, the only (and thus undisputed) evidence concerning the parties' bargaining history reflects that there was no "detailed discussion of the FTR" and "no specific mention of reducing per diem" when the contract was negotiated.[82] Accordingly, we find that the Agency has not established that it was the intent of the parties to foreclose bargaining over the determination of reduced M&IE rates.

We, therefore, deny the Agency's covered-by exception.[83]

4. Per diem reimbursements are negotiable.

The Agency next argues that it did not commit a ULP because the proposals related to per diem reimbursements are nonnegotiable.[84] Although the Agency acknowledges Authority case law holding that an agency must complete impact-and-implementation bargaining before changing conditions of employment, it claims that because the Union never submitted proposals addressing the impact and implementation of the reduced M&IE rates, "it can be inferred that any procedural issues were de minimis and, thus, there was no obligation to bargain."[85] This statement reflects a misunderstanding of the de minimis doctrine. In determining whether a change is de minimis, the Authority looks at the effects of the change as a whole, rather than analyzing the effects of the negotiable aspects of the change.[86] Further, the Authority has found changes to be greater than de minimis where the change affected employees financially.[87]

Thus, the Agency's claim that per diem reimbursements are nonnegotiable does not provide a defense to its failure to bargain prior to reducing the M&IE rates. Moreover, as discussed below, its assertion that its reduction in M&IE rates was nonnegotiable is incorrect.

i. The Agency has not established that its right to determine budget permitted it to unilaterally reduce M&IE rates.

The Agency argues that its right to determine budget under § 7106(a)(1) of the Statute permitted it to unilaterally reduce M&IE rates.[88] The Authority has held that if a proposal prescribes either the particular programs to be included in an agency's budget, or the amount to be allocated in the budget, then the proposal affects the agency's right to determine its budget.[89] Alternatively, if

[77] *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 826 (Fed. Cir. 2010); *see also St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008) ("This court has been reluctant to find that statutory or regulatory provisions are incorporated into a [commercial] contract with the government unless the contract explicitly provides for their incorporation.").

[78] Exceptions at 32.

[79] *See DOL*, 65 FLRA at 680-81.

[80] Exceptions at 32.

[81] *See* 5 C.F.R. § 2423.40(a)(2) (requiring exceptions to include "[s]upporting arguments, which shall set forth . . . all relevant facts with specific citations to the record").

[82] Tr. at 102.

[83] Member DuBester notes the following: I agree with the decision to find that the reduction in M&IE rates is not "covered by" the parties' agreement, and that the Respondent's reliance on the "covered-by" doctrine is misplaced. In doing so, I note again my reservations concerning the "covered-by" standard, and that "the Authority's use of the covered-by standard warrants a fresh look." *SSA, Balt., Md.*, 66 FLRA 569, 575-76 (2012) (Dissenting Opinion of Member DuBester); *accord U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Williamsburg, Salters, S.C.*, 68 FLRA 580, 583 n.38 (2015); *NTEU, Chapter 160*, 67 FLRA 482, 487-88 (2014) (Dissenting Opinion of Member DuBester).

[84] Exceptions 26-28, 33-36.

[85] *Id.* at 28 (italicization omitted).

[86] *E.g.*, *U.S. Dep't of Treasury, IRS*, 66 FLRA 528, 530 (2012) (citing *POPA*, 66 FLRA 247, 253 (2011)) ("[A]n agency is required to bargain over the impact and implementation of changes that have greater than de minimis effects on conditions of employment.")

[87] *E.g.*, *id.* (citing *U.S. Dep't of VA, Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004) (*Leavenworth*) (Member Armendariz dissenting in part)) (affecting award pools); *Leavenworth*, 60 FLRA at 318 (overtime opportunities).

[88] Exceptions at 26-28.

[89] *E.g.*, *AFGE, Local 1441*, 61 FLRA 201, 205 (2005) (Chairman Cabaniss concurring).

the agency makes a substantial demonstration that a proposal would result in an increase in costs that is significant and unavoidable and which is not offset by compensating benefits, then the Authority will find that the proposal affects the agency's right to determine its budget.[90] But an assertion that a proposal would increase an agency's costs does not, by itself, establish that the proposal affects management's right to determine its budget.[91]

The Agency argues that the second test applies[92] – in other words, that at the time the Agency implemented the reduction in M&IE rates, all of the Union's proposals were nonnegotiable because they would result in a significant increase in costs. Such a claim lacks merit, however, as the Union had not yet submitted proposals when the Agency implemented the reduced M&IE rates.

Further, the Agency has not made a substantial demonstration that the Union's post-implementation proposal to restore the status quo ante would result in a significant and unavoidable increase in costs. The Agency claims that its annual budget has been between $8.5 million and $9.2 million and that its travel budget is approximately five percent of its total budget.[93] Based on "extrapolat[ions]" from the cost savings associated with providing meals, rather than per diem reimbursements, onboard the *Kiyi*, the Agency claims that it could save "up to twenty percent of the office's travel budget" – or one percent of the Agency's total budget – by reducing M&IE rates for employees aboard the other four vessels.[94]

But the Agency does not provide us with any information that would enable us to conclude that it is appropriate to extrapolate based on the *Kiyi*. For example, we do not know whether the other four vessels' crews are the same size as the *Kiyi's* crew, whether the length and frequency of their surveys are the same, or whether their average M&IE rates are comparable. Moreover, even though the change had been in effect for over a year by the time of the hearing, the Agency did not introduce any evidence regarding its *actual* savings under the new policy. Finally, even if we were to accept the Agency's claimed potential savings of up to one percent of its budget, the Authority has held that an increase of 2.34% of a $7 million budget was not "significant,"[95] and the claimed increase here is smaller in both relative and absolute terms.

Accordingly, we deny this exception.

ii. The Agency does not have "sole and exclusive" discretion to determine reduced per diem rates.

The Agency next argues that the FTR gives it unfettered discretion to prescribe reduced per diem rates.[96] The Authority has consistently held that matters concerning conditions of employment are subject to collective bargaining when they are within the discretion of an agency and not otherwise inconsistent with law or applicable rule or regulation.[97] But an agency is not required to bargain where law or applicable regulation vests an agency with "sole and exclusive" discretion over a matter.[98]

Here, the Agency argues that the FTR gives the Agency unfettered discretion to determine reduced M&IE rates.[99] Noting that the FTR provides that "an agency may '*prescribe* a reduced per diem rate,'"[100] the Agency claims that "the authority to '*prescribe*' the matter signifies unfettered discretion."[101] The only case that the Agency cites in support of this claim, however, concerned a statute that gave an agency head the authority to "prescribe hours of duty . . . *notwithstanding any other provision of law*."[102] Thus, the Agency has not provided any authority for the proposition that the word "prescribe" signifies sole and exclusive discretion.

Moreover, the Authority has held that per diem reimbursements are a negotiable subject of bargaining.[103] Likewise, we note that, in cases involving negotiated agreements concerning travel-expense reimbursements, neither the GSBCA[104] nor the U.S. Court of Appeals for

[90] *Id.*
[91] *See AFGE, Locals 3807 & 3824*, 55 FLRA 1, 3-4 (1998).
[92] Exceptions at 26.
[93] *Id.* at 6.
[94] *Id.* at 27.
[95] *NAGE, Local R4-26*, 40 FLRA 118, 134 (1991).
[96] Exceptions at 33-36.
[97] *U.S. DHS, U.S. ICE*, 67 FLRA 501, 502 (2014) (*ICE*) (Member Pizzella dissenting); *POPA*, 53 FLRA 625, 648 (1997), *overruled in part by POPA*, 59 FLRA 331 (2003).
[98] *E.g., AFGE, SSA Gen. Comm.*, 68 FLRA 407, 409 (2015) (citing *AFGE, Locals 3807 & 3824*, 55 FLRA 1, 4-5 (1998); *AFGE, Nat'l Border Patrol Council*, 51 FLRA 1308, 1335 (1996)).
[99] Exceptions at 33-36.
[100] *Id.* at 34-35 (quoting 41 C.F.R. § 301-11.200).
[101] *Id.* at 35 (citing *Ill. Nat'l Guard v. FLRA*, 854 F.2d. 1396, 1402 (D.C. Cir. 1988)).
[102] *Ill. Nat'l Guard*, 854 F.2d. at 1402 (emphasis added) (internal citation omitted); *see also ICE*, 67 FLRA at 502-03 (collecting examples of phases indicating intent to convey sole and exclusive discretion).
[103] *NTEU*, 42 FLRA 964, 972 (1991)
[104] *In re Henzie*, GSBCA No. 15820-TRAV, 02-2 B.C.A. (CCH) ¶ 31,900 (2002).

the Federal Circuit[105] has given any indication that it believes that per diem reimbursements are outside the duty to bargain because their determination is within an agency's sole and exclusive discretion.

Accordingly, the Agency has not established that the FTR grants it sole and exclusive discretion to determine reduced M&IE rates. We, therefore, deny this exception.

C. Per diem reimbursements are not "pay" within the meaning of the Act.

The GC cross-excepts to the Judge's determination that the Act does not permit backpay for M&IE underpayments.[106] The Act provides for backpay for an employee affected by an unjustified or unwarranted personnel action.[107] Under the Act, backpay includes "the pay, allowances, or differentials . . . which the employee normally would have earned or received . . . if the personnel action had not occurred."[108] And the Act's implementing regulations define "[p]ay, allowances, and differentials" as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of [f]ederal employment."[109] However, "the Authority has determined that an award of 'pay' . . . does not extend to reimbursement payments such as per diem."[110]

The GC acknowledges this precedent, but it argues that in *DOD Dependents Schools*:[111]

> [T]he Authority took time to analyze a Comptroller General decision, *In [re] Wilson*,[112] which set forth two categories of travel expenses: (1) incidental expenses which would not have existed absent the unjust personnel action and would therefore not be authorized by the . . . Act; and (2) travel expenses that would have been received but for the unjust personnel action and thus reimbursable under the . . . Act.[113]

The GC's reliance on *In re Wilson* is misplaced. In 1996, Congress transferred the Comptroller General's authority to settle travel-expense claims to the GSA.[114] And, as relevant here, in *In re Revels*, the GSBCA held that the Act did not apply to relocation expenses.[115] In so doing, the GSBCA cited, with approval, judicial decisions holding that "travel costs . . . are not encompassed within the . . . Act,"[116] and observed that the legislative history of the Travel Expenses Act reflected Congress's belief that travel expenses were not encompassed by the Act.[117]

Accordingly, the Judge did not err when he determined that per diem reimbursements are not recoverable under the Act. We deny the GC's exception.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[118] and § 7118 of the Statute,[119] we order the Agency to:

1. Cease and desist from:

(a) Changing the conditions of employment for bargaining-unit employees without first providing the Union an opportunity to bargain over the M&IE rates of bargaining-unit employees.

(b) In any like or related manner interfering with, restraining, or coercing bargaining-unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

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[105] *Filipczyk v. United States*, 386 Fed. App'x 973, 979 (2010) (per curiam).
[106] GC Opp'n at 19-22.
[107] 5 U.S.C. § 5596(b); *U.S. SEC*, 62 FLRA 432, 438 (2008).
[108] 5 U.S.C. § 5996(b)(1)(A)(i).
[109] 5 C.F.R. § 550.803.
[110] *USDA Rural Dev., Wash., D.C.*, 60 FLRA 527, 529 (2004) (citing *DOD Dependents Schs.*, 54 FLRA 259, 265 (1998)).
[111] 54 FLRA 259.
[112] 66 Comp. Gen. 185 (1987).
[113] GC Opp'n at 20-21.
[114] *See* General Accounting Office Act of 1996, Pub. L. No. 104–316, § 202(n), 110 Stat. 3826, 3843-44 (1996) (codified as amended at 31 U.S.C. § 3702); *U.S. Dep't of the Treasury, IRS, Plantation, Fla.*, 64 FLRA 777, 781 & n.12 (2010).
[115] GSBCA No. 14935-RELO, 00-1 BCA ¶ 30,716 (1999) *reconsideration denied* 00-1 BCA ¶ 30,896 (2000).
[116] *Id.* (citing *Hurley v. United States*, 624 F.2d 93 (10th Cir. 1980); *Morris v. United States*, 595 F.2d 591 (Ct. Cl. 1979)).
[117] *Id.* at n.7 (discussing Travel & Transportation Reform Act 1998, Pub. L. No. 105- 264, § 2(g), 112 Stat. 2350, 2352 (1998) and S. Rep. No. 105-295, at 4 (1998)).
[118] 5 C.F.R. § 2423.41(c).
[119] 5 U.S.C. § 7118.

(a) Rescind the May 15, 2012, reduction in M&IE rates.

(b) Upon request, bargain with the Union over any proposed decision to reduce M&IE rates of bargaining-unit employees in the future.

(c) Post at its facilities where bargaining-unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Director, Great Lakes Science Center, Ann Arbor, Michigan, and shall be posted and maintained for sixty 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) Send, by electronic mail, the notice to all bargaining-unit employees at the Agency. This notice will be sent on the same day that the notice is physically posted.

(e) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

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 the Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Michigan, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT change bargaining-unit employees' conditions of employment without first providing the American Federation of Government Employees, Local 723, AFL-CIO (the Union) an opportunity to bargain over a proposed decision to reduce the Meals and Incidental Expenses (M&IE) per diem rate.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of their rights assured by the Statute.

WE WILL rescind the May 15, 2012, reduction in bargaining-unit employees' M&IE per diem rates.

WE WILL, to the extent required by the Statute, provide the Union with notice and an opportunity to bargain over any future proposed decision to change bargaining-unit employees' M&IE per diem rates.

_____
Agency/Activity

Dated: _____ By: _____
(Signature) (Title)

This notice must remain posted for sixty 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, Chicago Regional Office, Federal Labor Relations Authority, and whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.

Office of Administrative Law Judges

UNITED STATES
DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY
GREAT LAKES SCIENCE CENTER
ANN ARBOR, MICHIGAN
Respondent

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 723, AFL-CIO
Charging Party

CH-CA-13-0115

Gary W. Stokes
For the General Counsel

Wayne A. Babcock
For the Respondent

Charles Madenjian
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor−Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the rules and regulations of the Federal Labor Relations Authority (Authority), Part 2423.

On May 10, 2013, the Regional Director of the Chicago Regional Office of the Federal Labor Relations Authority issued a complaint and notice of hearing in the above case alleging that the U.S. Department of the Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Michigan (Respondent) violated § 7116(a)(1) and (5) of the Statute by committing an unfair labor practice (ULP) when it unilaterally reduced the Meal and Incidental Expenses (M&IE) per diem rate for members of the American Federation of Government Employees, Local 723, AFL-CIO (Charging Party/Union) who perform temporary duty on research vessels on the lower four Great Lakes. The Respondent filed its Answer to the Complaint on June 4, 2013, denying that it was obligated to give notice and an opportunity to bargain over its decision to reduce per diems.

A hearing in the matter was conducted on July 30, 2013, in Ann Arbor, Michigan. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent committed an unfair labor practice when it unilaterally reduced the M&IE per diem rate for bargaining unit members who perform temporary duty on research vessels on the lower four Great Lakes. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDING OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. Employees of Respondent's Great Lakes Science Center (GLSC) are represented by the American Federation of Government Employees, Local 723, AFL-CIO (Union), which is a labor organization within the meaning of § 7103(a)(4) of the Statute. GC Ex. 1(b), 1(c). Approximately ninety-four employees at the GLSC work among seven field stations and a regional office. Tr. 161. Seventy-four of these employees are bargaining unit members. Tr. 16, 101. Between twenty and thirty bargaining unit members travel on vessels on the Great Lakes. Tr. 112.

The Respondent's mission is to restore, protect, and enhance the natural resources and habitat of the Great Lakes' basin ecosystem. Tr. 17. The GLSC uses five vessels, one for each of the Great Lakes, to conduct research surveys or cruises. Tr. 17-18. During surveys, each vessel has four to seven people on board, including biologists, biological technicians, and the vessel's crew. Tr. 19-20, 120, 135. Research surveys last between one and three weeks, with each vessel conducting up to ten surveys per year. GC Ex. 19; Tr. 16, 120-21, 142-43, 153.

Prior to 2012, employees conducting surveys on vessels on the lower four Great Lakes were given full Government Services Administration (GSA) authorized per diems to cover meals and incidental expenses. Tr. 122, 130, 145, 147, 154, 211. Employees usually used their per diems at restaurants located near the ports at which they docked each evening. Tr. 121, 144, 212. This was common practice since at least the 1980s. Tr. 103. The amount of per diem provided to employees depended on the specific locality of travel, but was generally about $46 for assignments within the continental United States (CONUS). GC Ex. 10; Tr. 36, 122, 147. The exception to this practice was Lake

Superior. Tr. 93, 106-07, 171. There, the government prepared and provided meals free of charge to employees on surveys. *Id.*

On April 26, 2012, the Respondent emailed all GLSC employees and announced that per diems would be reduced to a fixed $20 "camp rate" for future travel on vessels that had a kitchen. GC Ex. 3 at 1-2; Tr. 22. The email stated that "[s]tarting immediately, we expect all surveys on the large vessels to institute the camp rate this fiscal year. In addition, any studies in which all staff are on government-approved travel and are stationed in a government-funded lodging with a kitchen will also be using this camp rate." GC Ex. 3.

The camp rate per diem was intended to cover the cost of buying groceries. GC Ex. 3. Employees were expected to purchase their own groceries and cook their own meals onboard their vessel. i*d.* A $30 camp rate per diem was also announced for instances where there was only enough storage space to accommodate breakfast and lunch items but not dinner items. GC Ex. 3; Tr. 173, 183, 191. Both rates included an additional $5.00 for incidental expenses. Tr. 9, 148, 209-10.

As justification for this change, the Respondent cited budgetary concerns, the Federal Travel Regulation (FTR), and Executive Order (EO) 13589 — Promoting Efficient Spending, as its reasons for reducing per diems. GC Ex. 3; Tr. 65, 198, 208, 231. The Respondent explained that it selected the $20 camp rate after examining the average cost of groceries purchased by the GLSC survey crew who worked on Lake Superior. GC Ex. 3; Tr. 199.

When a government employee is eligible for an allowance, either as a per diem or an actual expense, the agency must pay it. 41 C.F.R. § 301–11.3. The FTR states that government employees are eligible for a per diem allowance when they perform official travel away from their official duty station and incur per diem expenses. 41 C.F.R. § 301–11.1(a)-(b). Government employees that travel the whole day are allowed 100 percent of the applicable M&IE rate. 41 C.F.R. § 301–11.101(a). Seventy-five percent of the M&IE rate is given to qualifying employees on their departure day and/or last day of travel. *Id.*

For travel by vessel, the "agency will determine an appropriate M&IE rate within the applicable maximum rate allowed." 41 C.F.R. § 301–11.101(b). The agency may prescribe a reduced per diem rate that is lower than the maximum prescribed when: "(a) [the] agency can determine in advance that lodging and/or meal costs will be lower than the per diem rate; and (b) the lowest authorized per diem rate must be stated in your travel authorization in advance of your travel." 41 C.F.R. § 301–11.200.

The Executive Order cited by the Respondent in its announcement directed agency heads to "take even more aggressive steps to ensure the Government is a good steward of taxpayer money." R. Ex. A; EO 13589. It specifically required that each agency establish a plan for reducing costs related to travel, technology, printing, and the federal vehicle fleet "by not less than 20 percent below Fiscal Year 2010 levels, in Fiscal Year 2013." i*d.* Agencies had to submit their plans to the Office of Management and Budget by December 24, 2011. i*d.* The Order encouraged agencies to use alternatives to government travel, such as teleconferencing, and ordered a review of policies related to personnel relocations. i*d.* The order did not direct agencies to implement their plan. *See id.* However, the Respondent interpreted the order as directing it to implement its plan. Tr. 163-64, 196-97, 207-08.

On April 30, 2012, the Union sent the Respondent a response to the April 26 email, alleging that Respondent violated the Collective Bargaining Agreement (CBA) it had signed when it contacted all employees before notifying the Union of the change. GC Ex. 4; Tr. 181. The Union asserted that the M&IE per diem reduction was a change in conditions of employment that required notice and bargaining. GC Ex. 4. It requested that the Respondent "cease and desist any implementation of this proposed change in policy and practice until you have met the notification requirements of the Negotiated Agreement." GC Ex. 4; Tr. 183. The letter went on to request that any forthcoming notice include a description of the change, the scope, an explanation of the Respondent's implementation plans, and the proposed date of the change's implementation. GC Ex. 4; Tr. 25.

The Respondent replied to the Union's April 30 letter on May 8, 2012. GC Ex. 5. The Respondent wrote that it did not have to negotiate with the Union over the change because management had already completed negotiations on per diems and because the change was consistent with the FTR. i*d.*; Tr. 182. The Respondent further wrote that management did not have to negotiate because the "covered by doctrine clause excuses parties from negotiating over a change in conditions of employment on the ground they already bargained and reach[ed] agreement on the matter." GC Ex. 5. The Respondent wrote that the April 26 email "continues to provide consistent and fair guidance in regards to travel across the GLSC for all projects." GC Ex. 5. Respondent then invited the Union to discuss "[s]everal good ideas" that were in the email exchange and that the two parties could "discuss items of mutual concern." GC Ex. 5 at 2.

On May 14, 2012, the Union wrote to the Respondent and requested to "negotiate the proposed reduction in Meals and Incidental Per Diem Expenses." GC Ex. 7. That same day, the Respondent, by Curtis Hoesing, sent an email to all GLSC employees informing them that an additional document had to be included in official travel documents when the camp rate applied. GC Ex. 6. Respondent ended the email writing that "[s]ince this form wasn't included in the original guidance send below, implementation of the camp rate for the Great Lakes Science Center will take effect on May 15, 2012, and apply to all subsequent travel where camp rates can be utilized." GC Ex. 6.

The Union sent the Respondent three counterproposals on May 17, 2012, and requested that the Respondent maintain the pre-reduction status quo per diem and that it reimburse unit employees for the reduced M&IE per diem. GC Ex. 8; Tr. 30-32, 185. The Respondent replied on May 24, 2012, informing the Union that "management is available to discuss the reduced M&IE policy with the Union at the Union's convenience." GC Ex. 9; Tr. 33-34, 62-63, 83-84, 185-86. However, the Respondent explained that it reduced the M&IE so that the Agency would be compliant with the FTR and Negotiated Agreement. GC Ex. 9; Tr. 33, 62. Respondent claimed that a return to the status quo was not possible because it would violate the FTR and management could not act contrary to the law. GC Ex. 9; Tr. 62, 84, 185-86. The Respondent ended its letter by inviting the Union to "provide its specific suggestions/recommendations for mitigating the adverse impact of this policy correction on bargaining unit personnel." GC Ex. 9.

On June 5, 2012, the Union repeated its request to negotiate over the change and asked the Respondent to cease and desist implementing the per diem reduction until bargaining obligations were met. GC Ex. 11. In a letter dated June 22, 2012, the Respondent invited the Union again to a meeting and reasserted its previous position.

During a Labor-Management Relations Council meeting on July 10, 2012, the parties met for the first time to discuss the M&IE per diem reduction. Tr. 38-39. The Respondent maintained that the reduced per diem was appropriate because management could determine that the camp rate was "the least expensive reimbursement[ ]" and because it was legally required. MSJ App. Ex. Q; Tr. 38-39. The Union told the Respondent that storage space on the Great Lakes vessels was not adequate for the group of employees that participated in each survey. MSJ App. Ex. Q. There was also confusion as to whether or not the camp rate was a $25 or $35 per diem. Tr. 39. At the end of the meeting, both parties agreed to reconvene. Tr. 40. The Respondent was assigned to compute the cost of getting breakfast and lunch on the vessels while the Union was assigned to determine if its members would accept any lowered M&IE per diem rate. *Id.*

Both parties reconvened on September 4, 2012, but neither party altered their previous position. Tr. 40-41. The next day, on September 5, 2012, the Union sent a letter to the Respondent proposing a $42.50 per diem rate. GC Ex. 13; Tr. 42. The Respondent rejected the proposal on September 21, 2012. GC Ex. 14. In its rejection letter, Respondent explained its position again. *Id.* Respondent ended by announcing a modification to the April 26, 2012, M&IE reduction announcement, writing:

> GLSC is hereby establishing a modification to the April 26, 2012 Meal Reimbursement Policy, where a flat "Camp Rate" of $30/day will be provided for field work situations where kitchen facilities are available. This amount more than adequately covers groceries for camp situations, and allows for restaurant dinners, and for flexibility among stations/operations. Additional Incidental Rates will remain at $5/day US, and $23/day Canada. This modified Policy will be effective October 1, 2012. We will be sharing this with staff via subsequent memo.

GC Ex. 14 at 2.

In response M&IE per diem rate reduction, the Union filed a ULP charge on November 15, 2012.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) contends that the Respondent violated § 7116(a)(1) and (5) of the Statute when it unilaterally reduced the M&IE per diem rate of bargaining unit members from the full rate of $46 per day ($51 on Lake Ontario) to the $35 per day camp rate. The GC argues that the Respondent is not required by the FTR to reduce per diem rates. Rather, the GC argues that the FTR permits the Respondent to use its discretion in determining a M&IE per diem and that once established for bargaining unit employees, any change resulting from the exercise of such discretion requires notice and an opportunity to bargain over the discretionary change.

The GC asserts that based on past practice, the full per diem rate was a condition of employment and any

change to the rate requires notice and an opportunity to bargain. The GC notes the testimony of multiple employees that full per diems were paid for years. Furthermore, the GC argues that the change in the per diem rate was more than de minimis, citing *Nat'l Treasury Employees Union*, 66 FLRA 528, 530 (2012). In that case, the Authority found that changes to conditions of employment that affected an employee's earning potential were more than de minimis. The GC notes that in this case unit employees' per diems were reduced by 24% from the previously established and utilized rate of $46.

The GC also contends that the Respondent's April 26, 2012, email did not clearly announce a reduction to the M&IE rate. The GC asserts that the April 26, 2012, email was unclear on the timing, scope, amount, and nature of the proposed change in rates. According to the GC, the camp rate went into effect on May 15, 2012. The GC cites Respondent's May 14, 2012, email as evidence of that start date. "[I]mplementation of the camp rate for the Great Lakes Science Center will take effect on May 15, 2012, and apply to all subsequent travel where camp rates can be utilized." GC Ex. 6.

Finally, the GC submits that the Union's proposals were negotiable and did not involve a management right under § 7106 of the Statute. The GC argues that there is little evidence to support the conclusion that the full M&IE per diem rate was a significant cost to the Respondent. Therefore, the GC argues that determining per diems was not an exclusive managerial right. The GC cites *Nat'l Fed'n of Fed. Employees, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 125 (2011) to show that a proposal which increases an agency's costs does not necessarily affect management's right to determine its budget.

As a remedy, the GC seeks status quo ante relief. The GC argues that under the factors set forth in *Fed. Corr. Inst.*, 8 FLRA 604 (1982) (*FCI*), status quo ante is appropriate. According to the GC, no notice was given of the plan to reduce per diems, the Union requested bargaining, the Respondent willingly failed to bargain, unit employees were adversely affected, and it would not be difficult to reinstall full per diems. The GC also seeks back pay, with interest, for the amounts by which per diems were reduced for unit employees affected by the reduction. The GC also requests that a cease-and-desist order be issued, as well as a notice to employees, signed by the Director of the GLSC. The GC specifically requests that the notice be both physically posted and sent electronically to all bargaining unit members through the Respondent's email system.

Respondent

As a preliminary matter, the Respondent claims that the allegations in the complaint are barred by § 7118(a)(4)(A) of the Statute. The Statute states that "no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority." The Respondent asserts that because it implemented the M&IE per diem rate deduction on April 26, 2012, and the Union did not file its ULP charges until November 15, 2012, the filing was beyond the six month threshold, making it untimely.

The Respondent asserts that the Union received actual notice of the alleged unfair labor practice on April 26, 2012. Contrary to the Union's claims, the Respondent holds that the April 26 announcement described the scope of the per diem reduction, specified the new reduced per diem rates, and identified the timing of the change when it wrote: "[s]tarting immediately, we expect all surveys on the large vessels to institute the camp rate this fiscal year." GC Ex. 3 at 2. The Respondent goes on to argue that even if the Union did not understand when the changes would be implemented, it was properly notified that per diems were going to be reduced. Furthermore, the change was implemented immediately, and information on it was available to the Union.

The Respondent also argues that it acted in compliance with the provision of the CBA requiring that per diems be determined pursuant to the FTR. Consequently, the Respondent asserts that there was no requirement to bargain because there was no material change to any condition of employment. The Respondent contends that there was no past practice of paying full per diem. Rather, the past practice was to issue per diems in conformity with the FTR, which the Respondent claims it maintained.

The Respondent argues that it had no obligation to bargain because it acted within its discretion to determine its budget and because the change was covered by the CBA provision that per diem determinations would be made pursuant to the FTR. The Respondent explains that because of budgetary concerns and target reduction requirements, it believed that a reduced per diem rate was required by the FTR to control budget costs. The Respondent asserts that it indicated willingness to discuss impact and implementation, but the Union never raised impact and implementation issues over which the Respondent was willing to bargain.

The Respondent also argues that the FTR gives the agency complete discretion over per diem rates. Therefore, the Respondent argues it did not have to

bargain with the Union over those rates. The Respondent claims that the previous per diem rate system was illegal because it did not minimize expenses. As such, the Respondent claims that the FTR required that the agency reduce its per diem rates in order for it to be compliant with the law.

As for a remedy, the Respondent argues that status quo ante is inappropriate. The Respondent asserts that a status quo ante remedy is not appropriate under the *FCI* factors. According to the Respondent, a status quo ante remedy would disrupt agency operations because it would "undermine the efforts to control the travel budget" which would lead to reduced travel and could result in furloughs or a reduction in the number of employees. R. Br. at 32. The Respondent also asserts that unit employees did not suffer losses and cited the GLSC Director's testimony that no employee incurred actual travel expenses that were not reimbursed. The Respondent warns that a status quo ante remedy would be illegal, arguing that it would violate the FTR by having the Agency issue reimbursements that would be greater than actual expenses. Finally, the Respondent argues that per diems are not compensation under the Back Pay Act, and contending that back pay would be to unduly enrich unit employees.

ANALYSIS AND CONCLUSIONS

The Charge Was Filed Within Six Months

The Respondent argues that the Union filed its ULP charge more than six months after the action upon which the charge is based occurred. Accordingly, the Respondent argues that the Authority is jurisdictionally barred from deciding this case under the Statute. As evidence, the Respondent cites its April 26, 2012, letter to employees as the point in time that per diem rates were reduced to the camp rate. However, I find that argument without merit and conclude that the Union's charge was timely.

The Statute mandates that "no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority." 5 U.S.C. § 7118(a)(4)(A). On April 26, when the Respondent first announced a proposed reduction in per diem, it did not clearly state when the reduction would occur. GC Ex. 3. The Respondent wrote: "[s]tarting immediately, we expect all surveys on the large vessels to institute the camp rate this fiscal year." i*d.* at 2. The Union responded to the announcement, specifically requesting that any response from management contain "[t]he proposed implementation date." GC Ex. 4. When the Respondent replied, it did not include an implementation date. GC Ex. 5. Instead, the Respondent suggested that it meet with the Union to discuss "items of mutual concern[,]" implying that there was flexibility on when the change would be implemented. GC Ex. 5 at 2.

On May 14, 2012, the Respondent, via Curtis Hoesing wrote: "implementation of the camp rate for the Great Lakes Science Center will take effect on May 15, 2012, and apply to all subsequent travel where camp rates can be utilized." GC Ex. 6. This letter marked the first time that the Respondent stated a date certain when the reduction in per diem would occur. Thus, the actual date of the change's implementation was May 15, 2012, and the Union filed the ULP charge over the unilateral change on November 15, 2012, thus, it was not more than 6 months later. GC Ex. 1(a). Because the Union filed its charge within 6 months of the date the Respondent effectuated the change, I find that the charge was filed within the time period required by the Statute and the complaint was properly issued.

Paying Full Per Diem Was a Condition of Employment Established by Past Practice

The Authority has recognized that employment practices can establish conditions of employment. *See U.S. Dep't of the Air Force, U.S. Air Force Academy Colo.*, 65 FLRA 756, 758 (2011) (*Air Force Academy*) (finding that the respondent had violated the Statute when it unilaterally ended the past practice of providing taxis for employees to travel to the union representative). The Authority has established a two part rule to find the existence of a past practice: (1) there must be a showing that the practice has been consistently exercised over a significant period of time; and (2) the practice was followed by both parties or the practice was followed by one party and not challenged by the other. *See U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001) (*Patent*). "Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time." *U.S. DHS, Border & Transp. Directorate, Bureau of Customs & Border Prot.*, 59 FLRA 910, 914 (2004). A period of "several years" suffices for a significant period of time. *Air Force Academy*, 65 FLRA at 758.

"The Authority has consistently held that insofar as an agency has discretion regarding a matter affecting conditions of employment it is obligated under the Statute to exercise that discretion through negotiation unless precluded by regulatory or statutory provisions." *Nat'l Treasury Employees Union*, 21 FLRA 6, 10-11 (1986) (*NTEU*). Per diem payments and proposals related thereto concern conditions of employment. *id.* at 10. In *NTEU*, the Authority determined that a proposal to pay per diem to unit employees on official time concerned

conditions of employment and was within the duty to bargain. *id.* at 8-10.

Union proposals that do not directly interfere with management's rights are negotiable. *See AFGE, Local 1923*, 44 FLRA 1405, 1405-10 (1992) (reviewing the negotiability of union proposals for an affirmative employment program). Management rights include the right to determine the budget of the agency. 5 U.S.C. § 7106(a)(1). For an agency to successfully argue that a union bargaining proposal interferes with the agency's authority to determine its own budget, it must show that the proposal would "prescribe an amount to be allocated in the Agency's budget for programs or operations." *NTEU*, 21 FLRA at 12. This is consistent with the Authority's prior holding that a union proposal or provision impermissibly interferes with management's right to determine its budget when it proscribes a certain amount of funds for a program, or the agency makes a substantial showing that it would significantly increase costs that are not offset by compensating benefits. *AFGE, AFL-CIO*, 2 FLRA 604, 607-08 (1980).

If a union proposal prescribes an amount to be allocated, the agency is not obligated to negotiate. *NTEU*, 21 FLRA at 12. In *NTEU*, the agency argued that the union's proposal to pay per diem while on official time interfered with its right to determine its budget. *id.* at 7. However, the Authority noted that the union proposal neither added a specific line item to the agency budget, nor prescribed a specific amount of money to programs or operations. *id.* at 13. The Authority then found that the proposal did not interfere with management's budget authority given that "[n]o specific information or estimates of the financial impact of the proposal have been presented. Based on this record, the Agency's poorly supported assertion cannot provide a ground for concluding that there is a substantial demonstration that the proposal would result in a significant and unavoidable increase in costs." *id.* Because the proposal did not violate management's budget authority, it did not violate law or government-wide regulation and was thus within the duty to bargain. *id.*

When employees travel by ship, agencies have discretion over the appropriate M&IE rate provided to them so long as it is within the applicable maximum allowable rate. 41 C.F.R. § 301–11.101. However, an agency may provide a reduced per diem only when the agency can determine in advance that lodging and/or meal costs will be lower than the established per diem rate and the lower per diem rate is disclosed in the travel authorization in advance of the travel. 41 C.F.R. § 301–11.200.

The FTR explicitly recognizes that employees traveling by ship will receive a per diem. *See* 41 C.F.R. § 301–11.101, and it establishes the maximum allowable per diem, but does not establish what amount of per diem an agency must pay. 41 C.F.R. § 301–11.6. Where meals are provided to employees by the government without charge, an appropriate deduction may be made from the authorized per diem rate. 41 C.F.R. § 301–11.18(a). However, agencies have the discretion, in accordance with administrative procedures prescribed by the agency, to allow employees to claim the full M&IE allowance if they are "unable to take part in a government-furnished meal due to the conduct of official business." 41 C.F.R. § 301–11.18(c).

Furthermore, an agency's ability to determine the amount of per diem bargaining unit employees will receive is subject to negotiation. *See Nat'l Treasury Employees* Union, 42 FLRA 964, 972 (1991). "[N]othing in the authorities that govern the payment of such expenses, i.e., the Travel Expense Act and the Federal Travel Regulations, requires that this determination be made only by management and only on a case-by-case basis." *id*. Per diem proposals are negotiable. *See also U.S. Dep't of Agric. Food & Nutrition Serv., Midwest Region*, 30 FLRA 477, 480 (1987) (rejecting the agency's argument that per diem bargaining proposals were non-negotiable and contrary to the Travel Expense Act and the FTRS); *Office of the Gen. Counsel, NLRB*, 22 FLRA 259, 262 (1986).

In this case, the Respondent did not reduce per diems in accordance with the requirements set forth in the FTR. The FTR authorizes agencies to reduce the rate of per diem when the agency can determine in advance that actual costs will be lower and that lower rate is made known to the employee in the travel authorization. 41 C.F.R. § 301–11.200. However, in this case, when the Respondent reduced the per diem by implementing a camp rate, it did not consider all costs related to having employees cook their own meals. Tr. 111-12, 200. It did not do an analysis of food cost in the areas where it would be obtained. Tr. 191. Nor did it consider the cost of fuel for generating electricity to run the kitchen equipment, Tr. 200, or the cost of paying overtime to employees who cook meals, which is what it does for employees who conduct surveys on Lake Superior. Tr. 93. Therefore, I find that the Respondent did not demonstrate that the full and total cost of meals prepared under the camp rate was less than the full per diem rate, as required by the FTR to justify a reduction in per diems.

The Respondent argues that it implemented its per diem change to lower costs which it contends was required by law and the FTR. Tr. 84, 232. However, other components within the Department of the Interior, like the Fish and Wildlife Service, as well as other federal agencies like the National Oceanic and Atmospheric Administration, which is part of the Department of

Commerce, are subject to the same executive order and the FTR, and yet they provide full per diems to their employees who perform field work aboard vessels plying the waters of the Great Lakes as well as other nautical climes. Tr. 202-03. Given the dubious nature of the Respondent's justification for reducing per diem, I am far from convinced that it is the only organization within the federal government capable of properly interpreting the FTR and that the entities paying full per diems, one of whom is within the same Department of Interior, are acting illegally and in contravention of the FTR.

Furthermore, the Respondent was not mandated by the FTR to reduce per diems because contrary to its contention, it does not provide meals. *See* 41 C.F.R. § 301–11.18. In essence, the Respondent equates the existence of a small kitchen on survey vessels with providing meals to unit employees. GC Ex. 3, 6. This equation is fuzzy logic at its finest and a culinary sleight of hand worthy of Houdini. The Respondent's own history of providing meals to employees during surveys conducted on Lake Superior exposes the chicanery of the Respondent's equation. On the vessel *Kiyi*, the government provides meals to the employees and crew. Tr. 171. Employees on the *Kiyi* do not prepare or cook their own meals; their meals are prepared by two crew members who are paid overtime to prepare everyone's meals. Tr. 93, 171. The government secures and pays for all the groceries hauled aboard the Kiyi and employees do not shop or otherwise provide their own groceries. Tr. 106-07. Everything needed to provide sustenance to employees on the *Kiyi*, ranging from purchasing, transporting, storing, preparing, cooking, and final clean-up is done for them by other employees who are paid for their culinary services. Tr. 93, 106-07, 171. This is not the arrangement the Respondent provided on vessels surveying the lower four Great Lakes for which per diem was reduced to the camp rate. Unit employees on these vessels received a per diem which presumably covered the cost of groceries but nothing else. Tr. 107. There were no cooks on these vessels, so unit employees cooked their own meals with the groceries they secured, transported, stored, and prepped. Tr. 106. The Respondent did nothing, nor did it compensate the employees for the additional time spent engaging in such activities. *i*d. As I conclude that the Respondent does not provide unit employees participating in survey cruises of the lower four Great Lakes with meals, its argument that it was obligated under the FTR to reduce the per diems provided to bargaining unit employees is as unsubstantial as the sustenance it provided.

Based on its past practice, the Respondent established that providing a full M&IE per diem was a condition of employment for unit employees while conducting surveys on the lower four Great Lakes. Full per diems were provided to employees since the 1980s, Tr. 103, and the Respondent continued to provide unit employees with full M&IE per diems after it signed a CBA with the Union in February of 2009. GC Ex. 2; Tr. 20, 21. Because a full per diem was provided for several years prior to the 2012 change, I find that the practice was consistently exercised over a significant period of time. *See Patent*, 57 FLRA at 191; *Air Force Academy*, 65 FLRA at 758. Throughout this extended period, the Respondent was fully aware that full per diems were paid to bargaining unit employees as it was the entity responsible for paying them. Tr. 21, 22, 47. Because there is no evidence that the Respondent challenged the practice prior to 2012, I find that the Respondent established the payment of full per diems as a condition of employment.

The Respondent did not have the unilateral right to determine the amount of per diem bargaining unit members received and the FTR did not mandate a lower per diem or the imposition of a camp rate. 41 C.F.R. § 301–11.101. While the FTR gives agencies discretion in determining the amount of per diem that employees receive when traveling by vessel, i*d.*, that discretion does not give the agency the ability to act unilaterally. The Authority has consistently held that when an agency has discretion regarding a matter affecting conditions of employment, it is obligated under the Statute to exercise that discretion through negotiation unless so doing is precluded by regulatory or statutory provisions. *See NTEU*, 21 FLRA at 10-11. As indicated above, the payment of full per diems was a condition of employment for these bargaining unit employees established over a period of years, and the Union requested to negotiate over the reduction of per diems on multiple occasions when the Respondent indicated that practice was going to be changed. However, the Respondent failed to maintain the status quo and refused to negotiate over the planned reduction. GC Ex. 7, 8, 9, 11, 12 &14. Therefore, I find that the Respondent violated the Statute when it unilaterally reduced the Meals and Incidental Expenses per diem rate of bargaining unit employees.

Furthermore, the change from full per diem to a lesser camp rate was more than de minimis. Before the Respondent implemented the camp rate, unit employees usually ate their meals at restaurants where their vessel came to port. Tr. 131, 144. After the Respondent changed the per diem to a camp rate, unit employees were expected to purchase their own groceries and prepare their own meals on the vessel despite it being docked at a port where off ship dining establishments were available. GC Ex. 3. However, the kitchens on the vessels were not designed to accommodate an entire crew with each member cooking for himself. Tr. 144. The kitchens were cramped, with a small stove, a small microwave, a small refrigerator, and a small sink. Tr. 134. Also, there was not enough storage space for

employees to properly store enough groceries for all the meals that would be required during the course of a survey. Tr. 144, 202. When both vessel crew and science crew attempted to cook at the same time, "it's not a good situation." Tr. 144. The Respondent acknowledged this problem and eventually implemented a $30 per diem rate. Tr. 202.

This change in per diem rate and the method by which employees secured their meals was greater than de minimis under the *DHHS* standard. *See Dep't of HHS, SSA*, 24 FLRA 403, 407-08 (1986). The Respondent completely changed how unit employees secured their meals during survey cruises, every unit employee on the survey was affected by the change, and the adverse effect was certainly foreseeable. Unit employees had to spend time shopping for groceries, transporting the groceries to the vessel, storing the food, prepping and cooking their own meals, and then cleaning the kitchen. GC Ex. 3; Tr. 169, 200. While the Respondent may have a legitimate interest in reducing travel costs, that interest cannot be placed upon the backs of its bargaining unit employees without notice and an opportunity to bargain, and providing a kitchen is not the same thing as providing a meal. For these reasons, I find that the change from providing full M&IE per diem to providing a lesser camp rate and requiring employees to prepare their own meals was greater than de minimis.

REMEDY

The Authority examines requests for a status quo ante (SQA) remedy by balancing the nature and circumstances of a violation with the degree of operational disruption that the remedy would have on the agency. *FCI*, 8 FLRA at 606. The Authority examines:

> (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

Under those factors, an order that the parties return to the status quo is appropriate in this case. Although given notice, the Union was not provided an opportunity to bargain over the change and the notice advising the Union of the date the change would be implemented was issued one day prior to implementation. Furthermore, the Respondent willingly and repeatedly refused to bargain over the change and every employee assigned to work on survey ships went from getting the full per diems to purchase meals at dining establishments to getting a reduced per diem and having to provide their own meals, that were cooked in a cramped and inadequate kitchen on board the vessel. Finally, imposition of an SQA remedy would not affect the Respondent's efficiency or operational effectiveness. While there was testimony regarding tight budgets and the need to reduce travel costs, there was no evidence demonstrating that the payment of full per diems rather than the reduced camp rate would have any impact upon the Respondent's efficiency or operational effectiveness. In fact, the best evidence was that it would not do so, as there was uncontroverted testimony that other components within the Department of Interior that conduct research aboard vessels on the Great Lakes continued to pay full per diems in the same budgetary environment. Tr. 202-03. Given the Respondent's failure to establish the financial impact and to demonstrate how that amount of money would erode its efficiency and operational effectiveness given the size of its annual budget, I can only conclude that the adverse impact was not substantial enough to make it worth proving.

Although a status quo ante remedy is appropriate, back pay in the form of reimbursement for lost per diem is not. Reimbursements for lost per diem are not covered by the Back Pay Act. 5 U.S.C. § 5596(b)(1)(A). The Office of Personnel Management Regulations implementing the Back Pay Act, defines pay, allowances, and differentials as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment." 5 C.F.R. § 550.803. "[T]he Authority has determined that an award of 'pay' includes restoration of regular pay, annual leave, and pay for missed overtime opportunities, but does not extend to reimbursement payments such as per diem." (citation omitted). *U.S. Dep't of Agric., Rural Dev., Wash., D.C.*, 60 FLRA 527, 529 (2004); *Dep't of Def. Dependents Schs.*, 54 FLRA 259, 265 (1998). In the case at hand, the per diems were reimbursements and fall outside the scope of the Back Pay Act.

CONCLUSION

I find that the Respondent violated § 7116 (a)(1) and (5) of the Statute when it unilaterally reduced without an opportunity to bargain, the Meals and Incidental Expenses per diem rate of bargaining unit employees who perform temporary duty on research vessels on the lower four Great Lakes. Therefore, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor‑Management Relations Statute (Statute), the U.S. Department of the Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Michigan, shall:

1. Cease and desist from:

(a) Changing the conditions of employment for bargaining unit employees without first providing the American Federation of Government Employees, Local 723, AFL-CIO (AFGE/Union) an opportunity to bargain over the Meals and Incidental Expenses (M&IE) per diem rates of bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Rescind the May 15, 2012, reduction in M&IE per diem rate.

(b) Upon request, bargain with the Union over any proposed decision to reduce M&IE per diem rate of bargaining unit employees in the future.

(c) Post at its facilities where bargaining unit employees represented by the Union 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 Director, Great Lakes Science Center, Ann Arbor, Michigan, 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) Send, by electronic mail, the Notice to all AFGE Local 723 bargaining unit employees in the Respondent's Great Lakes Science Center. This Notice will be sent on the same day that the Notice is physically posted.

(e) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, 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.

Issued, Washington, D.C., September 8, 2014

_____

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that U.S. Department of the Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Michigan, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change bargaining unit employees' conditions of employment without first providing the American Federation of Government Employees, Local 723, AFL-CIO (Union) an opportunity to bargain over a proposed decision to reduce the Meals and Incidental Expenses (M&IE) per diem rate.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL rescind the May 15, 2012, reduction in bargaining unit employees' M&IE per diem rates.

WE WILL to the extent required by the Statute, provide the Union with notice and an opportunity to bargain over any future proposed decision to change bargaining unit employees' M&IE per diem rates.

_____

(Agency/Activity)

Dated: _____ 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 its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, and whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.