FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-59
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. RESPONDENT AND NATIONAL TREASURY EMPLOYEES UNION CHARGING PARTY	Case No. WA-CA-14-0299

Sarah Kurfis
For the General Counsel

Kurt Lauer
Simon Fisherow
For the Respondent

Jonathan S. Levine
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 September 30, 2014, the Regional Director of the Chicago Regional Office of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing alleging that the U.S. Department of Homeland Security, Customs and Border Protection, Washington, DC (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 bargaining unit employees represented by the National Treasury Employees Union (Charging Party/Union) who were lodged in apartments equipped with kitchens while

on temporary duty. On October 7, 2014, the case was transferred to the Washington Regional Office of the Federal Labor Relations Authority. The Respondent filed an Answer to the Complaint on October 27, 2014, denying that it was obligated to give notice and an opportunity to bargain over the reduction of per diem for employees whose temporary duty lodging contained a kitchen.

On February 10, 2015, the parties filed a joint motion for a decision based upon a stipulated record, attaching a Joint Stipulation of Undisputed Facts (Stip.) along with exhibits A through E. (Jt. Exs. A, B, C, D, E). In response to the motion, the scheduled hearing was indefinitely postponed. On March 10, 2015, the parties filed timely briefs that were fully considered and the case is decided on the basis of the stipulated record without a hearing. Based upon that record, I find that the Respondent committed an unfair labor practice when it unilaterally reduced the M&IE per diem rate for bargaining unit employees who were provided temporary duty lodging in apartments equipped with kitchens.

In support of this decision, 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. (Stip. 3). The National Treasury Employees Union (NTEU), is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (Stip. 4). In February 2013, bargaining unit employees from the Customs and Border Protection Office of Field Operations began volunteering for long-term temporary duty assignments of 90 to 120 days as Subject Matter Experts (SMEs) at the Respondent's ACE Business Office (ABO) in Alexandria, Virginia. (Stip. 6). The Respondent arranged for the employees who served as SMEs to be lodged in apartments with kitchens while on this temporary duty. (Stip. 9).

Under the rates set by the General Services Administration (GSA), for fiscal years 2013-2015, the Meals and Incidental Expenses (M&IE) portion of per diem for Alexandria, Virginia was $71. (Stip. 15). Article 16, Section 6(c) of the Parties' Collective Bargaining Agreement (CBA) states that per diem reimbursement will be "in accordance with existing travel regulations." (Stip. 30). The Federal Travel Regulations, 41 C.F.R. § 301 – 11.200, provide than an "agency may prescribe a per diem rate lower than the prescribed maximum if: (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 is stated in the travel authorization in advance of travel." (Stip. 28).

Section 9.A. of Article 16 provides that when the "Agency makes lodging available for an employee on official travel, the employee will have the option of remaining in the Agency provided lodging or securing other lodging." (Jt. Ex. D). Article 26, Section 3.A. states that the agency "shall provide the Union with reasonable advance notice of intended changes in operational or administrative procedures or of any new initiative." (Jt. Ex. D). In addition, Section 16, of Article 26, indicates that "when employees are surveyed by CBP

management . . . about matters relating to the conditions of employment, the Union will be provided an advance copy of the Survey, invited to comment on its appropriateness and completeness, and given the opportunity to bargain impact and implementation." (Jt. Ex. D).

Prior to February 2013, the Respondent did not have a policy or practice of providing apartments with kitchens to employees on temporary duty and reducing Meals & Incidental Expenses (M&IE) per diem. (Stip. 10). The Respondent did not provide the Union notice of its intent to implement a reduced rate for the M&IE provided bargaining unit employees on temporary duty to the ABO. (Stip. 25). Although it had not previously reduced M&IE per diem when employees were lodged in facilities where food preparation was possible, the Respondent had reduced the M&IE portion of employees' travel per diem in circumstances when the agency knew that meal expenses would be less than the maximum rates because meals were being provided as part of a conference or training. For example, while the employees (as trainees) were staying at government training facilities; trainees were provided meals and received M&IE per diem at a lower rate than the authorized maximum. (Stip. 26).

The Respondent justified its reduction of per diem for temporary duty to the ABO based upon a survey of local restaurants, grocery stores, and other shopping opportunities which determined that meal costs would be lower than the M&IE rate established by GSA. (Stip. 12). This survey was identified as the ABO Survey. (*Id.*). Prior to the first assignment of temporary duty to the ABO, the Respondent determined that an M&IE rate of 55% of the established GSA rate ($39.05) was sufficient for the SMEs lodged in apartments equipped with kitchens. (Stip. 16). Participation in the temporary duty to the ABO was voluntary, and bargaining unit employees who volunteered were notified in their travel authorization of the reduced M&IE rate. (Stip. 17). The Respondent also provided a "welcome package" to each SME assigned to temporary duty at the ABO, and that package included the results of the ABO Survey. (Stip. 14). Although some of the recipients of the welcome package were Union officials, the Union was not provided notice of the results of the ABO Survey. (*Id.*). Employees who found the reduced per diem insufficient were not required to accept an assignment to the ABO, and one employee who declined was not disciplined for declining a temporary duty assignment. (Stip. 20, 24). In response to the per diem reduction, the Union filed a ULP charge on January 31, 2014.

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 employees who perform temporary duty while lodged in apartments equipped with kitchens. The M&IE per diem rates were reduced from the full rate of $71 per day to $39.05 per day.

The GC argues that the Authority's "covered by" doctrine does not provide a defense to Respondent's unilateral reduction of M&IE per diem rates. The GC asserts that there is no direct reference to reducing M&IE per diem in the parties' CBA that would satisfy the expressly provided first prong of the "covered by" doctrine. As for the second prong, the GC contends that there is no suggestion that the matter of reducing M&IE per diem is

inseparably bound up with the "routine acknowledgement in Article 16 that the FTR applies to travel reimbursement." (GC Br. at 8). The GC submits that the Authority has previously held that when parties have negotiated a subject matter into their CBA that does not mean that any issue that may arise relating to that specific matter was covered by the provision. The subject matter must be more than "tangentially" related to the contract provision to determine that the subject matter is covered by the agreement. *USDA, Food Safety & Inspection Serv., Boaz, Ala.*, 66 FLRA 720, 731 (2012) (*FSIS*). The GC contends that just because the parties' CBA reflects that reimbursement for travel on official business is subject to the FTR does not mean that the parties had agreed to permit unilateral reductions in per diem. Therefore, the GC submits that the "covered by" doctrine does not provide a defense for the Respondent. *U.S. Dep't of the Air Force, Luke AFB, Ariz.*, 66 FLRA 159 (2011); *Soc. Sec. Admin.*, 64 FLRA 199 (2009).

In support of this conclusion, the GC notes that the Respondent is not required by the FTR to reduce M&IE per diem rates. Rather, the Respondent's implementation of the reduced M&IE per diem rates was discretionary. The GC submits the Respondent relies on 41 CFR 301-11.200 of the FTR as justification for the reduced per diem rate when the regulation provides an agency the discretion to reduce the per diem rate only when certain circumstances have been met. The GC cites to *U.S. Dep't of HHS, PHS, IHS, Quentin N. Burdick Memorial Health Care Facility, Belcourt, N.D.*, 57 FLRA 903, 907 (2002) (*HHS*), to demonstrate that when discretion is given to an agency, that matter is not excepted from the definition of conditions of employment to the extent of the agency's discretion. (*Id.*). The GC asserts that the language of the regulation provides that agencies "may . . . prescribe" a reduced M&IE per diem rate, and that language may have provided the Respondent with total discretion over whether to implement such a reduction, but the regulation does not eliminate the duty to bargain the substantive decision to reduce the M&IE per diem rate. (GC Br. at 9).

As a remedy, the GC seeks status quo ante relief. The GC contends that such relief is appropriate because the Respondent's decision to unilaterally change the M&IE per diem rate for those employees who perform temporary duty for at the ABO involved a decision that was substantively negotiable. According to the GC, the Respondent provided no notice to the Union, the Respondent willingly disregarded its bargaining obligations under the Statute, and as a result, unit employees suffered financial losses.

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 argues that that the M&IE per diem is an element of SMEs' pay, and it is not an incidental expense. The SMEs at the ABO were normally getting allowances (M&IE per diem) which were an element of their compensation, regardless of whether the improper personnel action (the unilateral reduction in their M&IE per diem rates) had not occurred.

The GC also requests that a cease-and-desist order be issued, as well as a notice to employees, signed by the Director of Customs and Border Patrol. The GC requests that the notice be both physically posted and sent electronically to all bargaining unit employees through the Respondent's email system.

Respondent

The Respondent argues that notice to the Union was not required since the agency was not obligated to bargain over a change that the subject matter of the change is "covered by" an existing agreement between the parties. According to the Respondent, the parties bargained to authorize the agency to administer travel in accord with existing FTR, citing Section 6 of Article 16 of their CBA. The Respondent contends that while its action may not be supported by the first prong of the "covered by" doctrine, it is supported by the second prong. The Respondent states that even assuming that the parties' CBA does not expressly contain the matter of per diem determinations, that matter is inseparably bound up with, and is an aspect of the subject expressly covered by Article 16.

The Respondent also argues that the agency acted in accordance with the FTR because it permits agencies to reduce M&IE per diem when it is determined in advance that meal costs will be less than the per diem rate and the agency discloses the lesser rate in the travel authorizations. The Respondent claims both criteria apply in this case. The Respondent asserts that according to the parties' CBA, any past practices would stay in place unless it conflicted with the parties' CBA or are re-negotiated in accordance with law and the parties' CBA. The Respondent argues that there is no evidence that the agency has previously provided the Union with notice and an opportunity to bargain each determination that affected the amount of travel reimbursement for its employees.

The Respondent also argues that back pay is not an appropriate remedy because the GC's request is not supported by statutory authority to impose such a remedy. The Respondent asserts that the Back Pay Act, does not support the remedy sought. The Respondent argues that per diems are not compensation under the Back Pay Act, and cites to *United States v. Testan*, 424 U.S. 392 (1976). (*Id.*). The Respondent contends that the statute's intent is "... to provide monetary remedy for wrongful reductions in grade, removals, suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignments ..." (Resp't Br. at 8). The Respondent cites two cases where the Tenth Circuit and the Court of Claims have interpreted the Back Pay Act's language "pay, allowances, and differentials" to include only amounts and benefits that the employee normally would have earned as part of his regular compensation if the unjustified or unwarranted personnel action had not occurred. *Hurley v. United States*, 624 F.2d 93, 94-95 (10th Cir. 1980); *Morris v. United States*, 595 F.2d 591, 594 (Ct. Cl. 1979). The Respondent contents that this precedent is consistent with the Authority's determination that reimbursement payments such as per diem are not "pay" under the Back Pay Act.

The Respondent further argues that the voluntary nature of these temporary duty assignments preclude the employees from receiving back pay. All of the employees on the ABO were aware that the temporary duty was subject to a reduced per diem rate before they volunteered for the assignment. (Resp't Br. at 10). The Respondent claims that given the voluntary nature of the assignments, the reduction was not an adverse action citing to *Bur v. United States*, 621 F.2d 415 (Ct. Cl. 1980) and *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

ANALYSIS AND CONCLUSIONS

The Respondent Unilaterally Reduced M&IE Per Diem

Prior to implementing a change in conditions of employment, an agency is required by § 7116(a)(5) of the Statute to 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. *See U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA, 704, 715 (1999). "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*). 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).

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. In this case, the Respondent alleges that it determined in advance the actual costs would be lower, and that employees were notified of the lower rate in their travel authorization. (Stip. 12, 16-17). However, the Union was not notified about the results of the study used to justify the per diem rate reduction, nor was it notified that the rate would be reduced for bargaining unit employees. As a result, the Union was not provided an opportunity to bargain over a change in conditions of employment that was negotiable.

The parties stipulated that the Respondent did not have a policy or practice of providing apartments with full kitchens and reducing M&IE per diem prior to February 2013. (Stip. 10). Given the Respondent did not reduce per diem prior to February 2013, it did not have the unilateral right to begin reducing the amount of per diem bargaining unit employees received just because it could satisfy the requisites set forth in the FTR. Furthermore, the Respondent was obligated to provide notice to the Union prior changing a condition of employment for bargaining unit employees. While the bargaining unit employees were made aware of the reduction in M&IE per diem before commencing the temporary duty, the Union was not notified prior to the change being implemented and the Union was not given an opportunity to demand bargaining over such a change.

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

Prior to February 2013, when the Respondent began long-term details of SMEs to the ABO, the Respondent did not have a policy or practice of reducing M&IE per diem when employees were lodged in apartments with full kitchens while on long-term temporary duty assignments. (Stip. 10). Thus, prior to the implementation of this change for SMEs detailed to the ABO, it was the past practice of the parties to pay full per diem to bargaining unit employees when assigned long-term temporary duty at another location.

Although the Respondent argues that its past practice was to reduce M&IE per diem based upon doing so in situations when the agency knew that meal expenses would be less than the maximum rates because meals were providing as part of a conference or training, this is not the same as providing full per diem when long term lodging included cooking facilities. The provision of meals is not the same thing as the provision of a kitchen and reducing per diem when meals were provided does mean the cessation of full per diem in all other situations was not a change in conditions of employment. The Respondent established the payment of full per diem as a condition of employment for bargaining unit employees while on long-term temporary duty even when lodged in apartments with kitchens and failed to provide notice prior to changing that practice. Even if such a change was authorized by the FTR, the change was at the discretion of the Respondent, and thus, the Respondent was required to given the Union notice and an opportunity to bargain over such a change.

The Per Diem Reduction Was Not "Covered By" the Parties' CBA

While the FTR permits discretionary determinations to pay less than full per diem when it is justified by legitimate research, it does not relieve the Respondent of its obligation to bargain over the reduction of per diem when it exercises such discretion. The Authority has found that even if the "substance of the subject matter . . . is nonnegotiable, the Respondent is still obligated to bargain over the impact and implementation of the change." *HHS*, 57 FLRA at 907. The Respondent argues that it was not required to bargain with the Union over something that the parties have already bargained, and is "covered by" the parties' CBA. Correctly conceding that the CBA may not expressly address per diem reductions, the Respondent contends that such reductions are inseparably bound up with, and is an aspect of the subject "covered by" the parties' CBA since it provides that "reimbursement will be in accordance with existing travel regulation." CBA Article 16, Section 6.

The "covered by" doctrine consists of two prongs. Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in the agreement. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). The Authority does not require an exact congruence of language. *Fed. BOP v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011) (*BOP*) (granting petition for review of *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 559 (2010). Instead, the Authority looks to see "if a reasonable reader would conclude that the contract provision settles the matter in dispute." *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*SSA*).

If the agreement does not expressly contain the matter, under the second prong the Authority determines whether the subject is inseparably bound up with, and thus plainly an aspect of a subject covered by the agreement. *SSA*, 47 FLRA at 1018. In doing so, the Authority determines whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining. *NTEU*, 66 FLRA at 189-90.

In this case, the language of Article 16 does not expressly permit the Respondent to unilaterally reduce per diem. Moreover, the Authority has previously held that including a subject in their CBA does not mean that any issue that arises related to that subject is covered by the provision. The subject matter must be more than "tangentially" related to the contract provision to determine that the subject matter is covered by the agreement. *FSIS*, 66 FLRA at 731. Although the CBA reflects that reimbursement for travel on official business is subject to the FTR, that is not the equivalent of negotiating a unilateral right to exercise the discretion provided by the FTR without providing notice and an opportunity to bargain over such discretionary changes. Thus, neither prong of the "covered by" doctrine provides a defense for the Respondent. *U.S. Dep't of the Air Force, Luke AFB, Ariz.*, 66 FLRA 159 (2011); *Soc. Sec. Admin.*, 64 FLRA 199 (2009). 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.

REMEDY

When an agency has an obligation to bargain over the substance of a matter, and fails to meet the obligation, the Authority orders a status quo ante remedy in the absence of special circumstances. *Air Force Logistics Command, WRALC, Robins AFB, Ga.*, 53 FLRA 1664, 1671 (1998). All employees assigned to work at the ABO were notified prior to their travel of the change in the M&IE per diem and the Agency's reasoning was based upon the findings in the Survey. While some of those employees were Union officials, the agency did not provide formal notice to the Union prior to implementing the change. As a consequence, the Union was not provided an opportunity to bargain over the change. The Respondent does not cite any special circumstances in this case that would support the denial of status quo ante relief, nor does the record otherwise reveal any special circumstances.

Although a status quo ante remedy is appropriate under the facts presented, back pay in the form of reimbursement for lost per diem, is not. 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." *USDA, 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 payment of per diem is a reimbursement that falls 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 changed the M&IE per diem for bargaining unit employees who perform temporary duty as subject matter experts at for the Respondent's ABO in Alexandria, Virginia, based upon the provision of apartments equipped with kitchens.

Accordingly, 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 Homeland Security, U.S. Customs and Border Protection, Washington, D.C., shall:

1. Cease and desist from:

(a) Changing conditions of employment for bargaining unit employees without first providing the National Treasury Employees Union (Union) an opportunity to bargain over a reduction in the M&IE per diem paid to bargaining unit employees.

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

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

(a) Rescind the reduction in M&IE per diem paid to bargaining unit employees assigned to temporary duty as SMEs when lodging includes a kitchen.

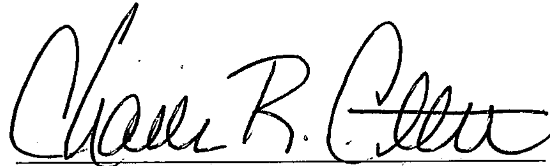
(b) Upon request, bargain with the Union over any proposed decision to reduce M&IE per diem rate of bargaining unit employees.

(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, U.S. Customs and Border Protection, Washington, D.C., and shall be posted and maintained for sixty (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 bargaining unit employees represented by the Union. 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, Washington Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 30, 2015



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 Homeland Security U.S. Customs and Border Protection, Washington, D.C., 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 National Treasury Employees (Union) an opportunity to bargain over a proposed decision to reduce the Meals and Incidental Expenses per diem rate.

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

WE WILL rescind the reduction in bargaining unit employees' M&IE per diem rate.

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 to the extent required by the Statute.

____
(Agency/Activity)

Dated: __________________ By: ________________________________
(Signature) (Title)

This Notice must remain posted for sixty (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, Washington Region, Federal Labor Relations Authority, and whose address is: 1400 K Street NW., 2nd Floor, Washington, D.C., 20424, and whose telephone number is: (202) 357-6011.