70 FLRA No. 24

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145, AFL-CIO
(Charging Party/Union)

and

DENISE O'BRIEN
(Charging Party/Individual)

WA-CA-15-0116
WA-CA-15-0117
WA-CA-15-0157
WA-CA-15-0224

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DECISION AND ORDER

December 22, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (Judge) found that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by, as relevant here, unilaterally applying a policy to non-employee Union representatives (representatives) before providing the Union with notice and an opportunity to bargain. The Judge found that a status quo ante (SQA) remedy was appropriate and directed the Respondent to stop applying the policy to representatives until impact-and-implementation bargaining is complete. There are two questions before us.

The first question is whether the Judge erred in his factual findings or legal conclusions when he found that the Respondent's implementation of the policy was a change in bargaining-unit employees' conditions of employment. For the reasons discussed further below, the answer is no.

The second question is whether the SQA remedy is contrary to law. Specifically, the Respondent alleges that the remedy: (1) would cause the Respondent to violate a regulation[2] implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[3] and (2) does not satisfy the criteria set forth by the Authority in *Federal Correctional Institution* (*FCI*).[4] Because the Respondent has not demonstrated that the remedy is contrary to the cited regulation (the HIPAA regulation), and the Judge's direction of an SQA remedy is consistent with *FCI*, the answer to the second question is no.

II. Background and Judge's Decision

We summarize the relevant facts only briefly here, as they are set out in more detail in the Judge's decision.

A. Background

The Respondent is a medical center, and requires its employees to complete security procedures that include a background check, fingerprinting, and privacy training. The Respondent also allows volunteers to work at the medical center, but has a policy (the volunteer policy) that requires those volunteers to register with the medical center. As part of this registration, the volunteer policy requires volunteers to complete the same privacy training and security procedures as employees.

The Union notified the Respondent that it had appointed a retired medical-center employee as a vice president and steward (the steward) to represent certain bargaining-unit employees (unit employees). Shortly thereafter, the Respondent determined that it would not allow the steward access to the medical center until she registered under the volunteer policy. Meanwhile, the steward had arranged to represent some unit employees in a meeting with management (the nurses' meeting). The Respondent did not notify the Union or the steward of its decision to apply the volunteer policy to the steward prior to the nurses' meeting. Instead, when the steward arrived for the nurses' meeting, a Respondent supervisor called the

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] Exceptions at 10 & n.30 (citing 45 C.F.R. § 164.502).
[3] Pub. L. 104-191, 110 Stat. 1936 (1996).
[4] 8 FLRA 604, 606 (1982).

Respondent's security officers, removed the steward from the nurses' meeting without explanation, and conducted the nurses' meeting without a Union representative present.

Two days after the nurses' meeting, the Respondent notified the Union by letter (the notification letter) that it was applying the volunteer policy to representatives. Specifically, the notification letter stated that the steward was "not a current . . . employee or a veteran and, therefore, [she was] not allowed to be on the [m]edical [c]enter premise[s] in the role of a volunteer unless [she was] a registered volunteer."[5] Therefore, the notification letter stated, the Respondent would not permit the steward to "return to [the medical center] . . . until [she] . . . completed the registration process."[6]

After receiving the notification letter, the Union informed the Respondent that the steward would not register under the volunteer policy because she was not a volunteer. Subsequently, the Respondent barred the steward from representing two unit employees at scheduled disciplinary meetings.

The Union filed several unfair-labor-practice (ULP) charges based on the Respondent's actions and, following an investigation, the FLRA's General Counsel (GC) issued a consolidated complaint for hearing before the Judge. As relevant here, the GC alleged that the Respondent violated § 7116(a)(1) and (5) of the Statute by "unilaterally implementing a policy requiring the [steward] to register as a volunteer in order to represent [unit] employees at the [m]edical [c]enter, thereby changing a condition of employment without providing the [U]nion advance notice of, and an opportunity to bargain over, the change."[7]

B. Judge's Decision

First, the Judge addressed whether the Respondent's application of the volunteer policy to representatives changed a condition of employment. Citing Authority precedent, the Judge stated that a union's "access to agency facilities used by the union to carry out its representational duties is a condition of employment under the Statute" even if the union representatives are not employees of the agency.[8]

Regarding whether there was a change, the GC argued that the Respondent had not previously required Union representatives to register as volunteers, whereas the Respondent argued that the volunteer policy was a longstanding policy.

The Judge found that the volunteer policy itself was not "new," but that – by applying it to representatives – the Respondent "most certainly applied the existing volunteer policy in a way that had never been done previously."[9] In this regard, the Judge found that nothing in the volunteer policy expressly applied to Union representatives, and that the Respondent had "never previously told the Union that its non-employee representatives needed to register as volunteers."[10] In particular, the Judge cited testimony by the Respondent's director (the director) that he had never sent a letter like the notification letter before.

In response to the parties' arguments about the requirements that the Respondent had imposed upon representatives in the past, the Judge found that "inconsistenc[ies]" in the evidence demonstrated that the Respondent had no established practice of applying the volunteer policy to representatives.[11] Specifically, the Judge found that the Respondent had applied varying security procedures to other representatives by requiring, for example: one to obtain only a medical-center identification badge, another to complete only privacy training, and a third to register under the volunteer policy. As to the representative who had registered under the volunteer policy, the Judge found that she was the only representative who was required to do so, and that her employment with a veterans' service group might have been the reason that she was subject to the volunteer policy. The Judge also noted the steward's testimony that she had represented unit employees at the medical center between her retirement and the nurses' meeting without registering under the volunteer policy.

Based on the foregoing, the Judge concluded that, by applying the volunteer policy in a new way and restricting the steward's access to the medical center, the Respondent had changed a condition of employment.

Next, the Judge addressed whether the Respondent had made this change without notifying the Union and providing an opportunity to bargain. The Judge found that the Respondent gave the Union "no advance notice" before applying the volunteer policy to the steward during the nurses' meeting and gave the Union no opportunity to bargain over the impact and implementation of the change.[12] In particular, the Judge noted that the notification letter did not include an offer to bargain. The Respondent argued that the Union "never

[5] Judge's Decision at 7 (quoting the notification letter).
[6] *Id.* (quoting the notification letter).
[7] *Id.* at 3.
[8] *Id.* at 18 (citing *NFFE, Local 1655*, 36 FLRA 75, 77 (1990); *AFGE, AFL-CIO, Nat'l Council of SSA Field Operations Locals*, 25 FLRA 622, 625 (1987)).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 19.

requested bargaining" over the change, and that the Union "demonstrated that it had no intention of bargaining."[13] But the Judge found that "the change was announced as a fait accompli"[14] – rendering any request to bargain futile – and so it was irrelevant whether the Union thereafter requested bargaining.

As to the remedy, the Judge applied the criteria set forth by the Authority in *FCI* for determining whether an SQA remedy is appropriate.[15] In *FCI*, the Authority found that determining whether an SQA remedy is appropriate requires consideration of the following factors: (1) whether, and when, the agency gave notice concerning the action or change; (2) whether, and when, the union requested impact-and-implementation bargaining regarding the action or change; (3) the willfulness of the agency's conduct in failing to properly bargain under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, an SQA remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.[16]

As to the first factor, the Judge found that the Respondent did not give the Union advance notice of its decision to apply the volunteer policy. Specifically, the Judge found that the Respondent sent the notification letter *after* the Respondent had already applied the volunteer policy to the steward during the nurses' meeting. This sequence of events also led the Judge to conclude, as to the second and third factors, that the Respondent "acted willfully, . . . rendering a Union demand for bargaining futile."[17]

As to the fourth factor, the Judge found that the Respondent caused a "significant" impact on adversely affected employees that was "exacerbated" by the steward's removal from the nurses' meeting.[18] Regarding that meeting, the Judge found that "the sight of watching their Union representative escorted out of the [m]edical [c]enter without warning or any real explanation would shake most employees' confidence that their statutory rights are protected."[19] Moreover, the Judge found that the Respondent's actions left a group of employees "without a chance to find another representative"[20] and impacted, by extension, "the entire bargaining unit."[21]

And as to the fifth factor, the Judge found that the Respondent did not demonstrate that the remedy would disrupt its operations. In this connection, the Judge stated that: (1) "the record indicates that [the steward] had represented employees for a period of time prior to [the month of the nurse's meeting], as had [another retired representative] and possibly other non-employee Union officials, and there is no evidence that these activities had caused any problems at the [m]edical [c]enter"; and (2) "[n]othing in [the steward's] representation . . . suggests that her representational work would impair the [Respondent's] operations."[22]

The Judge concluded that the *FCI* factors weighed in favor of an SQA remedy and directed the Respondent to stop applying the volunteer policy to representatives "until impact[-]and[-]implementation bargaining is complete."[23]

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to those exceptions.

III. Analysis and Conclusions

A. The Judge did not err in finding that the Respondent changed a condition of employment.

The Respondent argues that, for two reasons, the Judge erred "legally and factually" when he found that the Respondent changed a condition of employment.[24]

First, the Respondent argues that this finding is inconsistent with the Judge's findings that the volunteer policy was a long-established security policy.[25] But while the Judge found that the volunteer policy itself was not new, he also found that the Respondent had no established practice of applying the volunteer policy to representatives.[26] Moreover, the Judge found that nothing in the volunteer policy expressly applied to Union representatives, and that the Respondent had "never previously told the Union that its non-employee representatives needed to register as volunteers."[27] Contrary to the Respondent's argument, these findings are consistent with the Judge's conclusion that the Respondent's new application of the volunteer policy changed conditions of employment.[28]

[13] *Id.* at 14.
[14] *Id.* at 19.
[15] *Id.* at 23 (citing *FCI*, 8 FLRA at 606).
[16] 8 FLRA at 606.
[17] Judge's Decision at 23.
[18] *Id.* at 23-24.
[19] *Id.* at 24.
[20] *Id.*
[21] *Id.* at 19.
[22] *Id.* at 24.
[23] *Id.* at 23.
[24] Exceptions at 4; *see also id.* at 5-8.
[25] *Id.* at 6.
[26] Judge's Decision at 18.
[27] *Id.*
[28] *Id.* at 18-19.

Second, the Respondent argues that the Judge based his finding on "a factual determination that [the steward] had been performing Union representational duties for years as a non-employee."[29] And, according to the Respondent, the Judge based that factual determination on the steward's "self-serving testimony that she represented employees 'in various capacities' at the [m]edical [c]enter after she retired."[30] According to the Respondent, the preponderance of evidence does not support the steward's statement, citing Union rosters that did not list the steward as a representative[31] and management witnesses' testimony that they did not remember or have knowledge of the steward coming to the medical center to perform representational duties.[32]

In concluding that the Respondent had not applied the volunteer policy to other representatives the way it did to the steward, the Judge relied on the director's undisputed testimony that the Respondent had never previously sent a letter like the notification letter.[33] Additionally, the Judge relied on inconsistencies in the testimony regarding the varying registration requirements – or lack thereof – that the Respondent imposed on Union representatives.[34] Thus, the Respondent has not established that the Judge relied solely on the steward's testimony. And the Respondent has not demonstrated that the Judge otherwise erred in making, or relying upon, these other findings.

Further (albeit in the context of addressing the requested SQA remedy), the Judge found that "the record indicates that [the steward] had represented employees for a period of time prior to [the month of the nurse's meeting], as had [another retired representative] and possibly other non-employee Union officials."[35] There is record evidence to support this finding. As the Respondent acknowledges,[36] the steward testified that she had been representing employees at the medical center before the month of the nurse's meeting.[37] Additionally, the Judge noted that the Union president "testified that prior to [the month of the nurse's meeting], the [Respondent] . . . 'had no objection' to [the steward] representing employees at the [m]edical [c]enter."[38] Although the Respondent cites rosters that do not list the steward as a representative, and management witnesses' testimony that they did not remember or have knowledge of the steward coming to the medical center to perform representational duties, there is contrary testimony from the Union steward herself – who (unlike the managers) had first-hand knowledge of what she, herself, was doing. In addition, the testimony of the Union president, noted above, implies that the steward represented employees at the medical center before the month of the nurse's meeting, thereby corroborating the steward's testimony. The steward's and the Union president's testimony is no more "self-serving" than that of the management witnesses.[39] In these circumstances, we find that a preponderance of the record evidence supports the Judge's finding that the steward represented employees at the medical center before the month of the nurse's meeting.[40] And that finding further supports the Judge's conclusion that the Respondent made a change here.

In response to the dissent's statement that "[n]ot every variance or act that hasn't previously occurred constitutes a change over which a federal agency must bargain,"[41] we note the following. Here, as discussed above, the record supports a finding that representation by the steward *has* "previously occurred."[42] The notification letter reflected a change in that situation, stating that the steward was "not a current . . . employee or a veteran and, *therefore*," needed to become a registered volunteer before she would be given access to the medical center as a "volunteer" again.[43]

In addition, the dissent states that: the Respondent was only requiring the steward "to comply with a protective registration and vetting process, which is required by a federal statute, 38 U.S.C. § 901, by a federal regulation, 38 [C.F.R.] § 1.218 (*Security* and *law enforcement* at VA facilities), and by local policies such as Handbook 1620.01, which implements the aforementioned statute and regulation"; and the Respondent's policies "establish a registration and vetting process [that] applies . . . 'to *all persons* entering in or on [the Respondent's] property,'[44] including employees, contractors, and volunteers."[45]

[29] Exceptions at 7.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 8.
[33] Judge's Decision at 10 (citing Tr. at 376); *see also id.* at 18.
[34] *See id.* at 10-11 (citing Tr. at 67-68, 204, 221-22, 226-27, 229-30, 250-51, 267-68).
[35] Judge's Decision at 24.
[36] Exceptions at 7.
[37] Judge's Decision at 10 (noting the steward's testimony that "I had been representing people in various capacities at this medical center since I retired in 2009, and it [registering as a volunteer] has never been required.") (Quoting Tr. 169)).
[38] *Id.* (quoting Tr. at 29-30).
[39] Exceptions at 7.
[40] *See U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 171-72 (2009) (Member Beck concurring in part) (Authority applies preponderance-of-the-evidence standard to review judges' factual findings).
[41] Dissent at 16.
[42] *Id.*
[43] Judge's Decision at 7 (quoting the notification letter) (emphasis added).
[44] 38 C.F.R. § 1.218(a).
[45] Dissent at 16 (quoting Judge's Decision at 4).

However, the particular procedure at issue in this case is a procedure *for registering volunteers* – not a policy that applies "'to *all persons* entering in or on [the Respondent's] property,' including employees, contractors, and volunteers," as the dissent claims.[46] In this regard, as the Judge noted, Veterans Health Administration Handbook 1620.01 states, among other things, that the Voluntary Service program manager is responsible for "[d]etermining the appropriateness of a volunteer working in the current assignment if positive results are found in the background check," and "[d]irecting . . . training . . . of volunteers."[47] And MCM-135-4 states, in part, that volunteers are "oriented the same as medical center employees in matters of . . . patient confidentiality."[48]

As for the dissent's reliance on 38 U.S.C. § 901, that statutory section provides, in pertinent part, that the Secretary "shall prescribe regulations to provide for the maintenance of law and order and the protection of persons and property on Department property."[49] It does not mandate the content of the prescribed regulations, does not *require* the Respondent to take any particular actions regarding registration of volunteers, and certainly does not require the Respondent to apply the volunteer policy to require registration of stewards. Therefore, the dissent's reliance on that statutory section is misplaced.

With regard to 38 C.F.R. § 1.218, the cited portion of that regulation provides:

> (a) Authority and rules of conduct. Pursuant to 38 U.S.C. 901, the following rules and regulations apply at all property under the charge and control of [the Veterans Administration (VA)] (and not under the charge and control of the General Services Administration) and to all persons entering in or on such property. The head of the facility is charged with the responsibility for the enforcement of these rules and regulations and shall cause these rules and regulations to be posted in a conspicuous place on the property.
>
> . . . .
>
> (2) Recording presence. Admission to property during periods when such property is closed to the public will be limited to persons authorized by the head of the facility or designee. Such persons may be required to sign a register and/or display identification documents when requested to do so by VA police, or other authorized individual. No person, without authorization, shall enter upon or remain on such property while the property is closed. Failure to leave such premises by unauthorized persons shall constitute an offense under this paragraph.[50]

That regulation – a very general regulation, focused on admission to property when that property is closed to the public – similarly does not require the Respondent to take any particular actions regarding registration of volunteers, and certainly does not require the Respondent to apply the volunteer policy to require registration of stewards. Therefore, the dissent's reliance on that regulation is also misplaced.

Moreover, the decisions that the dissent cites do not support a conclusion that the Judge erred in finding a change here. In *U.S. DHS, Border and Transportation Security Directorate, U.S. CBP Border Patrol, Tucson Sector, Tucson, Arizona* (*CBP Tucson*),[51] the Authority found that a respondent did not change conditions of employment when it did not change the type of work that employees were performing, but only increased the amount of work that employees were performing.[52] In *U.S. Department of VA, Medical Center, Sheridan, Wyoming* (*VAMC Sheridan*),[53] the Authority found that a respondent did not change conditions of employment when the GC's complaint specifically alleged a change in policy, but there was no evidence of a change in policy – only an increase in the admissions of the same types of patients that the respondent (a medical center) had historically admitted.[54] By contrast, here, the Respondent changed a situation where at least some non-employee representatives – including the steward – were not required to register as volunteers, to a situation where the Respondent stated that they were required to register. Thus, this case is

[46] *Id.* (quoting Judge's Decision at 4).
[47] Judge's Decision at 12 n.7 (quoting Respondent's Ex. 12 at 8-9).
[48] *Id.* (quoting Respondent's Ex. 13 at 1).
[49] 38 U.S.C. § 901(a)(1).
[50] 38 C.F.R. § 1.218(a)(2).
[51] 60 FLRA 169 (2004) (Chairman Cabaniss concurring & then-Member Pope dissenting).
[52] *Id.* at 173-75.
[53] 59 FLRA 93 (2003) (Chairman Cabaniss concurring).
[54] *Id.* at 94-95.

distinguishable from *CBP Tucson* and *VAMC Sheridan*.[55] As for *Central United Life Insurance Co. v. Burwell*,[56] that decision – which held that an administrative agency acted improperly by issuing a rule that was inconsistent with a statute[57] – is inapposite to whether a change occurred here. Finally, as for the dissent's reliance on *Morales-Izquierdo v. DHS*,[58] the cited portion of that decision – which involved interpretation of an immigration statute – discusses the standards governing when a court's prior judicial interpretation of a statute controls despite an administrative agency's later interpretation of the same statute.[59] That decision has nothing whatsoever to do with this case – and, in fact, the court's application of the cited principles in that case was later overruled.[60]

Based on the foregoing, neither the Respondent's nor the dissent's arguments establish that the Judge erred in finding that the Respondent's new application of the volunteer policy changed a condition of employment. Accordingly, we deny the Respondent's exception.

B. The SQA remedy is not contrary to law.

The Respondent argues that the SQA remedy is contrary to law in two respects,[61] discussed separately below.

1. The SQA remedy is not contrary to the HIPAA regulation.

The Respondent contends that the Judge's SQA remedy requires the Respondent to give representatives unfettered access to the medical center without any training, vetting, or registration, in violation of the HIPAA regulation.[62] Specifically, the HIPAA regulation concerns "[u]ses and disclosures of protected health information."[63] And the Respondent claims that the privacy-training requirements in the volunteer policy are derived from the HIPAA regulation's requirement that medical facilities secure patient information.[64] The Respondent alleges that it would violate the HIPAA regulation if the representatives did not register under the volunteer policy, because medical records would be "readily available" in areas where representational activities may occur.[65]

However, the Respondent does not specify which part of the HIPAA regulation the SQA remedy violates. Instead, the Respondent cites instances where the Union president – an employee who was subject to a training-and-security process that is "identical" to the volunteer policy[66] – allegedly improperly removed patient information from the medical center.[67] But the Respondent's argument about the Union president's past actions does not: (1) demonstrate that the training-and-security process keeps patient information secure; or (2) explain how the SQA remedy will result in compromised patient information. Moreover, the HIPAA regulation does not impose any privacy-training requirements. Consequently, the Respondent's arguments do not show that the SQA remedy violates the HIPAA regulation, and we deny this exception.

2. The SQA remedy is not contrary to *FCI*.

The Respondent asserts that the SQA remedy does not satisfy the *FCI* criteria.[68] Where, as here, a judge has granted an SQA remedy based on a finding that an agency committed a ULP by violating its duty to engage in impact-and-implementation bargaining, and a party challenges that remedy, the Authority applies the factors established in *FCI*[69] to determine whether the SQA remedy is deficient.[70] The *FCI* factors are set forth in Section II.B., above. The appropriateness of an SQA remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that such a remedy would cause.[71] And when an agency argues that an SQA remedy would disrupt the efficiency and effectiveness of the agency's

[55] Chairman Pope notes that she continues to believe that *CBP Tucson* was wrongly decided for the reasons stated in her dissent in that case. *See* 60 FLRA at 177-79 (Dissenting Opinion of then-Member Pope). However, she agrees that the majority opinion in *CBP Tucson* is distinguishable for the reasons stated here.
[56] 827 F.3d 70 (D.C. Cir. 2016).
[57] *Id.* at 73-75.
[58] 600 F.3d 1076 (9th Cir. 2010).
[59] *Id.* at 1086.
[60] *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012) ("To the extent our precedent suggests the contrary, it is overruled in favor of the analysis we adopt today." (citing, inter alia, *Morales-Izquierdo*, 600 F.3d 1076, 1087-91)).
[61] Exceptions at 8-14.
[62] *Id.* at 8-10.
[63] 45 C.F.R. § 164.502.
[64] Exceptions at 10 & n.30 (citing 45 C.F.R. § 164.502).
[65] *Id.* at 10 (quoting Judge's Decision at 7).
[66] *Id.* at 4.
[67] *Id.* at 11.
[68] *Id.* at 8, 12.
[69] 8 FLRA at 606.
[70] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1032 (2015) (*IRS*) (citing *U.S. DHS, CBP*, 64 FLRA 989, 996 (2010)).
[71] *IRS*, 68 FLRA at 1033 (citing *U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 694 (2006) (*Peterson*)).

operations, the Authority requires that the agency's argument be "based on record evidence."[72]

With regard to the first *FCI* factor, concerning the notice given by the Respondent, the Respondent argues that it gave the Union and the steward notice that she had to register under the volunteer policy, but that the steward refused to do so.[73] However, the Respondent does not dispute the Judge's finding that it notified the Union of its decision to apply the volunteer policy to representatives *after* the Respondent had already applied the volunteer policy by removing the steward from the nurses' meeting.[74] Therefore, this factor supports the SQA remedy.

As to the second and third *FCI* factors, regarding the Union's request to bargain and the Respondent's willfulness, the Respondent asserts that the Union "unequivocally" expressed no interest in bargaining and there is "no evidence" that the Respondent implemented a new registration requirement "despite and over a Union request to bargain."[75] However, the obligation to bargain arose prior to implementation of the change,[76] and, as discussed above, we have rejected the Respondent's argument that its new application of the volunteer policy was not a change in conditions of employment. The Judge found that, by notifying the Union after it had already implemented the change, the Respondent had "announc[ed] its policy as a fait accompli and render[ed] a Union demand for bargaining futile."[77] It is well established that when, as here, an agency gives the impression that it is futile for the union to attempt bargaining, the agency has failed to engage in good-faith bargaining, in violation of the Statute.[78] Thus, the second and third *FCI* factors support the SQA remedy.

As to the fourth factor, concerning the impact on adversely affected employees, the Respondent argues that any impact on unit employees was minimal and was due "solely to the Union's spitefulness in refusing to follow the [volunteer policy]."[79] But the Judge found that the impact occurred *before* the Union knew of the change and could refuse to follow the volunteer policy.[80] In this regard, two days *before* the Respondent notified the Union that it was applying the volunteer policy to the steward, the Respondent removed the steward from the nurses' meeting without explanation.[81] And the Judge found that "the sight of watching their Union representative escorted out of the [m]edical [c]enter without warning or any real explanation would shake most employees' confidence that their statutory rights are protected."[82] Moreover, the Judge found that the Respondent's actions left a group of employees "without a chance to find another representative"[83] and that the impact extended to "the entire bargaining unit."[84] Accordingly, the fourth *FCI* factor supports the SQA remedy.

As to the fifth factor, regarding the disruption to the Respondent's operations, the Respondent reiterates its argument that the SQA remedy violates the HIPAA regulation,[85] and argues that, under the remedy, it "has no right, whatsoever, to control when, how, or why . . . representatives access the [m]edical [c]enter."[86] As discussed above, we have rejected the Respondent's argument that the SQA remedy is contrary to the HIPAA regulation. And the Authority has found that an agency's argument that an SQA remedy would disrupt the efficiency and effectiveness of the agency's operations must be "based on record evidence."[87] But the Respondent offers no evidence that the SQA remedy would disrupt its operations.[88] Thus, this factor supports the SQA remedy. We note, in this regard, that the SQA remedy requires only that the Respondent return to the status quo until it completes impact-and-implementation bargaining; it does not completely remove the Respondent's ability to control representatives' access to the medical center.

For the above reasons, and weighing the *FCI* factors, we find that the Respondent has not shown that the SQA remedy is contrary to law. Accordingly, we deny the Respondent's exception.

Finally, we note that the dissent states that the steward caused a "disrupti[on]" at the nurse's meeting,[89] as if that were established fact. It is not. In the section of the Judge's decision that the dissent cites, the Judge states that a supervisor "had called [a particular]

[72] *Id.* (quoting *Peterson*, 61 FLRA at 695).
[73] Exceptions at 12.
[74] *See* Judge's Decision at 23.
[75] Exceptions at 12.
[76] *See, e.g., Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 855-56 (1999) (*Bastrop*).
[77] Judge's Decision at 23.
[78] *Bastrop*, 55 FLRA at 855 (1999) (citations omitted); *see also U.S. DHS, U.S. CBP*, 64 FLRA 916, 921 (2010) (citing *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.*, 36 FLRA 567, 572 (1990) (finding union did not waive right to bargain over a change announced as a fait accompli)).
[79] Exceptions at 12-13 (emphasis omitted).
[80] *See* Judge's Decision at 23-24.
[81] *Id.* at 5-7.
[82] *Id.* at 24.
[83] *Id.*
[84] *Id.* at 19.
[85] Exceptions at 13-14.
[86] *Id.* at 13.
[87] *IRS*, 68 FLRA at 1033 (citing *Peterson*, 61 FLRA at 695).
[88] *See* Judge's Decision at 24.
[89] Dissent at 17.

labor[-]relations specialist . . . , *told him that [the steward] was being 'disruptive,'* and asked for his assistance."[90] While the labor-relations specialist who received the call testified,[91] the supervisor who called him – and alleged that the steward was being disruptive – did not. Accordingly, the labor-relations specialist whose testimony that the Judge noted – and that the dissent relies on – is hearsay.[92] Further, no other witness testified that the steward was being disruptive. Therefore, there is no creditable evidence in the record to support the dissent's characterization of events.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[93] and § 7118 of the Statute,[94] the Respondent shall:

1. Cease and desist from:

(a) Failing and refusing to grant the steward access to the medical center, and failing and refusing to allow her to conduct representational activities on behalf of the Union there.

(b) Failing and refusing to bargain with the Union, to the extent required by the Statute, regarding the impact and implementation of any requirements that non-employee Union representatives must follow certain procedures before being allowed to conduct representational activities at the medical center.

(c) In any like or related manner, interfering with, restraining, or coercing 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 any requirements that the steward or other non-employees must follow certain procedures before being allowed to conduct Union representational activities at the medical center, and grant the steward access to the medical center.

(b) If the Respondent decides to require the steward or other non-employees to follow certain procedures before being allowed to conduct Union representational activities at the medical center, notify the Union and bargain to the extent required by the Statute.

(c) Post at its facilities where 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 of the medical center, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous 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) In addition to the physical posting of the notice, the Respondent shall distribute the notice electronically, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(e) Pursuant to § 2423.41(e) of the Authority's Regulations,[95] notify the Regional Director, Washington Region, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

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[90] Judge's Decision at 5 (emphasis added); *see also* Tr. at 320 (labor-relations specialist testified that the supervisor "called me . . . [and] said, I have a person that's disrupting a meeting and she should not be there, and I need [Human Resources] representation, or something very similar to that.").

[91] *See* Tr. at 305-345.

[92] 28 U.S.C. § 801(c) (defining hearsay as "a statement that[] . . . the declarant does not make while testifying at the current trial or hearing[] and [that] . . . a party offers in evidence to prove the truth of the matter asserted in the statement").

[93] 5 C.F.R. § 2423.41(c).

[94] 5 U.S.C. § 7118.

[95] 5 C.F.R. § 2423.41(e).

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (FLRA) has found that the Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL rescind any requirements that Deneen Harris or other non-employees must follow certain procedures before being allowed to conduct representational activities at the Medical Center on behalf of American Federation of Government Employees, Local 2145, AFL-CIO (the Union).

WE WILL grant Harris access to the Medical Center to conduct Union representational activities.

WE WILL notify the Union and bargain, to the extent required by the Statute, if we decide to require Harris or other non-employees to follow certain procedures before being allowed to conduct Union representational activities at the Medical Center.

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.

_____
(Agency/Respondent)

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, Washington Regional Office, FLRA, whose address is: 1400 K Street, NW, 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.

Member Pizzella, dissenting:

The late Apple CEO Steve Jobs once observed that there is a clear distinction between things that are "important" and things that constitute "change."[1] So it is in the federal workplace – not every variance or act that has not occurred previously constitutes a change over which a federal agency must bargain with a federal union.

Therefore, I do not agree with the majority that the Department of Veterans Affairs (Agency) and Veteran Affairs Medical Center Richmond (the medical center) *changed anything* when they required a non-employee representative of AFGE, Local 2145 (Local 2145) to comply with a protective registration and vetting process, which is required by a federal statute, 38 U.S.C. § 901, by a federal regulation, 38 CFR § 1.218 (*Security* and *law enforcement* at VA facilities), and by local policies such as Handbook 1620.01, which implements the aforementioned statute and regulation. These policies ("procedure[s]" as vernacularly narrowed and paraphrased by the majority[2]) establish a registration and vetting process which applies to "*all property* under the charge and control of [the Veterans Administration]," "to *all persons* entering in or on such property,"[3] including employees, contractors, and volunteers.[4] These important protective measures specifically require that *before anyone* may be granted "*access*" to any part of the medical center's facilities,[5] including its computer system and patient records, they must first "be fingerprinted, undergo [a] background check[], and take privacy training" (including HIPAA and privacy safeguards).[6] The

[1] http://www.brainyquote.com/search_results.html?q=change+steve+Jobs.

[2] Majority at 8.

[3] 38 C.F.R. § 1.218(a) (emphasis added).

[4] Judge's Decision at 4.

[5] *Id.*

[6] *Id.* at 4. It is also worthy of note that Local 2145 president Jennifer Marshall was fired from her federal position at the medical center because she improperly removed, from the medical center and without permission or need, a "Patient Health Report" which "contained confidential information to which she was not entitled." *Marshall v. Seekins*, No. 3:08-CV-461, 2008 WL 4463626 (E.D. Va. Sept 30, 2008) (*Marshall*). As a result she was barred from the premises of the medical center by its acting director under his authority from 38 C.F.R. § 1.218 (the same regulation at issue here). *Id.* This public record, available for all to see and as it becomes readily apparent in reviewing the record of this case, is directly pertinent to this case in that Local 2145 argues that the Agency had never applied its regulations and policies concerning access to the medical center to Union representatives who were no longer employed by the Agency. The events in *Marshall* occurred just one year before Deneen Harris retired from the Agency. Judge's Decision at 4.

process, though important, is by no means onerous because it can be "satisfied in a few hours."[7]

Inexplicably, the majority accepts the implausible proposition that − even though the regulation (pursuant to the authority granted the medical center by 38 U.S.C. § 901) gives the "head of the facility" full responsibility to "enforce[] these rules and regulations"[8] – the registration and vetting process applies to *all employees, contractors, volunteers, and even Union representatives who* ***are currently employed*** *by the Agency*, but *does not apply to Union representatives who* ***are not employed*** *by the Agency*.

But the notion that these policies apply to everyone *but* Deneen Harris, a *non-employee* (who had been retired from the Agency for more than five years) and that the medical center cannot require (only) her to comply with this policy unless the medical center first bargains with Local 2145 is as legally implausible as it defies commonsense.

Local 2145 president Jennifer Marshall asked Harris[9] to join its extensive cadre of thirty-seven (37) Union representatives[10] in late November 2014.[11] Knowing full well that Harris had not complied with any part of the registration process, Marshall nonetheless asked Harris (rather than any one of the other 37 representatives) to represent the Union at a meeting on December 9, 2014.[12] Harris went to the meeting, where she caused a "disrupti[on]"[13] and when the VA police were called, it was discovered that Harris had not registered as required by the security and access regulation and policies.[14] The next day, the Agency reminded Harris that she would have to comply with those procedures ***before*** she could access the medical center's facilities to perform representational duties.[15]

Somehow, the majority concludes that the medical center *changed* a condition of employment. According to the majority, even when circumstances − which are covered by an existing policy, regulation, or statute − have never occurred, the agency must bargain with its union ***before*** it applies the policy, regulation, or statute (no matter how longstanding) to those circumstances.

Applying the majority's fractured reasoning, if an agency disciplined ten bargaining-unit employees over the course of five years for *insubordination - refusing to perform work* – the agency would be unable to charge an eleventh employee some time later for *insubordination - failing to carry out instructions in a timely manner* unless it *first bargained* with the union, even though prior circumstances would not have warranted that charge. Similarly, if the eleventh employee (unlike the first ten employees) just happened to be a union representative, the majority would require the agency to *first bargain* with the union before it could take disciplinary action under its disciplinary policy. According to the majority's rationale, both of these circumstances would constitute a *change* to a condition of employment.

[7] Judge's Decision at 2.

[8] Exceptions at 9 (quoting 38 C.F.R. § 1.218(a)).

[9] Harris was a retired employee of the Agency, having retired in 2009. Judge's Decision at 4.

[10] At the time, Local 2145 already had 37 officers (including 3 vice-presidents) and stewards. https://www.unionfacts.com/lu/502203/AFGE/2145#basic-tab.

[11] Judge's Decision at 5.

[12] *Id.* It is notable that by the date of the Judge's decision herein, Harris had made no effort whatsoever to comply with the procedures. *Id.* at 17. In fact, Marshall, Local 2145's president, took it as a badge of discontent to disregard the Agency's request, and figuratively counter-punched the Agency with the challenge that she "***thrive[s] on fighting so bring it on!!![!]***" *Id.* at 8 (emphasis added).

[13] *Id.* at 5.

[14] It is unclear from the record whether Harris was removed from that meeting because of the "disrupti[on]" and "confrontation" or because she had not registered in compliance with the regulation and policy.

[15] Judge's Decision at 6-7.

I do not agree. Federal courts,[16] as well as the Authority itself, has long held, as I noted at the outset, that not every variance or act that has not previously occurred constitutes a change over which a federal agency must bargain.

The Authority has already held that a sudden increase in workload occasioned by circumstances which an agency "had [not] previously faced"[17] (i.e. sudden increase in number of inspections[18] or increase in numbers and acuity of patients[19]) constitutes a change to a condition of employment.

Here, *nothing changed*. The regulation and policy which apply to *all employees* (including Union representatives), *contractors, and visitors* and require specific vetting before access to the medical center is authorized, naturally to the same extent to *non-employees*, including Harris, a newly-appointed-union representative.

In other words, *nothing changed*. Because the medical center *always had* the authority, under 38 U.S.C. § 901, 38 CFR § 1.218(a)(2), to require *any person* to comply with the vetting and registration process *before* being given unfettered access, it was not a *change* when the medical center required Harris to comply with that process.

Therefore, the majority's reliance on comparisons − to four other non-employee representatives to establish that the medical center changed a condition of employment in the manner it applied its regulations and policy − is as baseless as the comparisons themselves. Two of those non-employee representatives were Union representatives while they were fully employed by the medical center and then continued on as representatives for Local 2145 *immediately upon retirement* with no lapse.[20] A third representative, as with the first two, continued as a union representative after her retirement with no lapse in time but, unlike the first two, she continued to work at the medical center as a volunteer for the Military Order of the Purple Heart, a volunteer organization which "assists veterans with benefit claims."[21] The fourth retiree worked as a paid office assistant for Local 2145 but, unlike the other three representatives, "worked behind the scenes" and performed none of her representational duties on the premises of the medical center.[22]

But, by embracing the Judge's findings, the majority now requires a federal agency to bargain with a union ***before*** it applies any statute, regulation, or policy to circumstances which have never occurred.

To the contrary, I would conclude that *nothing changed* least of all a condition of employment. The Judge's decision is contrary to law.

I would be remiss if I failed to point out one important aspect of this case which the Judge deemed to be inconsequential and the majority ignores altogether. Local 2145 and its president, Jennifer Marshall, did not come to this case as innocent victims of an overbearing agency. Rather, it appears that Marshall took this matter on as a continuation of her own fight with the Agency

[16] *See Central United Life Insurance Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016) (*Central Life*) (agency afforded "flexibility to flesh out a particular policy . . . 'as long as the agency stay within that delegate[ed]'" intent); *Morales-Izquierdo v. DHS*, 600 F.3d 1076, 1086 (9th Cir. 2010) (when statute or regulation is "silent or ambiguous" the court will "defer to an agency's 'permissible construction'" of its authority) (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).
I strongly disagree with the majority's assertion that these cases are "inapposite." *See* Majority at 9 & 10 n.58. The fact that my colleagues state this, does not make it so. *Central Life* and *Morales-Izquierdo* clearly intonate that agencies do not have to predict every conceivable variable or circumstance to which a policy will apply. The majority, on the other hand, would require the agency to have near-divine omniscience at the time a policy is implemented and initially applied or will otherwise be precluded from doing unless it receives absolution from the union for any variance. The majority thoroughly obfuscates the important take away from these cases when they erroneously assert that the issue for which *Morales-Izquierdo* is cited "was later overturned." First, the analysis from *Morales-Izquierdo*, upon which I rely, addresses an agency's "*later-in-time*" interpretation of a statute or regulation which is "silent or ambiguous," as found *by the Supreme Court* in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*National Cable*). Contrary to the majority's assertion, *Garfias-Rodriquez* ***did not, and could not, overturn*** the Supreme Court's "later-in-time" analysis cited by the *Morales-Izquierdo* court. *Morales-Izquierdo*, 600 F.3d at 1086. Instead, the *Garfias-Rodriquez* court challenged the *Morales-Izquierdo* court's analysis of Chevron deference. *Id.* at 1087-91. To any relevant extent, the *pertinent* take-away from *Morales-Izquierdo* (and the Supreme Court in *National Cable*) was later reaffirmed by the United States Court of Appeals for the District of Columbia Circuit in *Central Life*.

[17] *U.S. DHS, Border and Transp. Sec. Directorate, U.S. CBP Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 174 (2004) (*CBP Tucson*) (Chairman Cabaniss concurring) (then-Member Pope dissenting). Chairman Pope notes that she "*continues*" to disagree with that decision, *see* Majority at 9 n.55 (emphasis added). I would note, however, that the holding in *CBP Tucson* is Authority precedent.

[18] *Id.*

[19] *U.S. Dep't of VA, Medical Ctr, Sheridan, Wyo.*, 59 FLRA 93, 95 (2003) (Chairman Cabaniss concurring).

[20] Judge's Decision at 11.

[21] *Id.*

[22] *Id.* at 18-19.

(which began with her firing in 2008).[23] After the medical center asked Harris to comply with the registration policy, Marshall challenged the medical center to a "fight"[24] because she "thrive[s] on fighting"[25] and Local 2145's representatives were not "subject[] to any rules."[26] I guess that some things *never change*.

Thank you.

[23] *Marshall v. Seekins*, No. 3:08-DV-461, 2008 WL 4463626, slip op at 2 (E.D. Va. September 30, 2008).
[24] Judge's Decision at 8.
[25] *Id.* at 8.
[26] *Id.* at 2.

Office of Administration Law Judges

DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
RICHMOND, VIRGINIA
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2145, AFL-CIO
CHARGING PARTY

AND

DENISE O'BRIEN
CHARGING PARTY/INDIVIDUAL

Case Nos. WA-CA-15-0116
WA-CA-15-0117
WA-CA-15-0157
WA-CA-15-0224

Douglas J. Guerrin
For the General Counsel

Timothy M. O'Boyle
For the Respondent

Jennifer Marshall
For the Charging Party, AFGE, Local 2145

Denise O'Brien
Charging Party, Individual

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Philosophers and theologians have long grappled with the Irresistible Force Paradox: what happens when an irresistible force is met by an immovable object? Our case, fortunately, does not require us to resolve that paradox, but instead it poses a variation on that theme: what happens when neither the irresistible force nor the immovable object is as strong as they think they are? Specifically, what happens when a union believes its right to designate its own representatives is absolute, and an agency believes its right to determine its own internal security policies need not be compromised? And more pertinently, what happens when neither party is interested in discussing the matter?

This case revolves around the Union's appointment of retired nurse Deneen Harris as a vice president and steward, and the Agency's insistence that Harris undergo the registration process and orientation required of all volunteers before she could represent employees on the grounds of the VA Medical Center in Richmond, Virginia. The Union insisted that Harris was not a "volunteer," and that the Agency could not limit the Union's exclusive discretion as to who would serve as Union representatives. Harris began setting up meetings with employees and supervisors, but the Agency refused to meet with her and evicted her from a meeting between a manager and several employees. Agency management insists that it will be happy to meet with her and allow her to perform her Union duties once she meets the minimal procedural requirements that it has long had in place. The Union insists that it had never before been required to follow these procedures, and that management must allow Harris to perform her representational duties unconditionally. Neither side offered to step back and discuss the matter, and so the dispute has reached a standoff.

Federal law has long recognized that unions certified as the exclusive representative of employees have the right to designate their own representatives, but that right is not unlimited. Federal agencies also have the right to determine their internal security practices, safeguard their physical property, and determine when and how employees and visitors may gain access to their facilities. In other words, the respective rights of the union and agency must be accommodated – but in this case, neither party sought any accommodation.

Primary blame for the current standoff rests with the Agency, because it unilaterally and prematurely imposed a change in conditions of employment without notifying the Union or offering to negotiate. Employees who had arranged for Ms. Harris to represent them watched as she was escorted out of meetings and off the Medical Center. But the Union also needs to share the blame: once Harris and the Union were notified of the Agency's new application of its "volunteer" policy, the Union refused to entertain any notion that its stewards could be subjected to any rules, and it is clear that it was more interested in fighting than negotiating. The procedural requirements for Harris to register and undergo an orientation and training were indeed minimal and could have been easily satisfied in a few hours. By refusing to understand and accept the limits on its rights, the Union chose a needless fight and allowed at least two employees to become unsuspecting victims of this labor-management power struggle.

The substance of the Agency's policy regulating when and how people may access the Medical Center is not negotiable, but the Union does have the right to bargain over the impact and implementation of that policy on employees and union officials. Management's

mistake here was not in telling Harris that she had to comply with its rules, but in failing to give the Union an opportunity to bargain before implementation. If, after receiving proper notice and a chance to bargain, the Union had chosen to fight rather than negotiate, it would have waived its right to bargain, and the Agency would have been free to apply its policy to Harris. But since the Agency did not give proper notice or offer to negotiate, its unilateral implementation of this policy violated § 7116(a)(1) and (5) of the Statute, and its eviction of Harris from a meeting with employees independently violated § 7116(a)(1) of the Statute.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On December 16, 2014, Denise O'Brien filed a ULP charge and an amended charge (Case No. WA-CA-15-0116) against the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia (the Agency, Respondent, or Medical Center), alleging that the Agency violated the Statute by removing Union representative Deneen Harris from a meeting between employees and their manager. GC Exs. 1(a) & 1(e). Also on December 16, 2014, the American Federation of Government Employees, Local 2145, AFL-CIO (the Union) filed a ULP charge (Case No. WA-CA-15-0117), alleging that the Agency violated the Statute by barring Harris from the Medical Center until she registered as a volunteer. GC Ex. 1(c). On January 23 and March 9, 2015, the Union filed two additional ULP charges against the Agency (Case Nos. WA-CA-15-0157 and WA-CA-15-0224), alleging that the Agency unlawfully prevented Harris from representing an employee at a disciplinary meeting and another employee at a Professional Standards Board (PSB) hearing.[1] GC Exs. 1(f) & 1(h).

After investigating the charges, the Regional Director of the FLRA's Washington Region issued a Consolidated Complaint and Notice of Hearing on June 26, 2015, on behalf of the FLRA's General Counsel (GC). With regard to Case Nos. WA-CA-15-0116 and WA-CA-15-0117, the GC alleged that on December 9, 2014, the Agency violated § 7116(a)(1) of the Statute by preventing a Union official from representing employees in a meeting with management and by interfering with the Union's right to designate its representative. The GC also alleged that the Agency violated § 7116(a)(1) and (5) of the Statute by unilaterally implementing a policy requiring the Union representative to register as a volunteer in order to represent employees at the Medical Center, thereby changing a condition of employment without providing the union advance notice of, and an opportunity to bargain over, the change. With regard to Case No. WA-CA-15-0157, the GC alleged that on December 22, 2014, the Agency violated § 7116(a)(1) of the Statute by preventing Harris from representing an employee at a disciplinary meeting and thus interfering with the Union's right to designate its representative. The Complaint further alleged that the Agency bypassed the Union by meeting directly with the employee at that meeting, in violation of § 7116(a)(1) and (5) of the Statute. With regard to Case No. WA-CA-15-0224, the GC alleged that the Agency violated § 7116(a)(1) of the Statute on February 18, 2015, by preventing Harris from representing an employee at a PSB hearing until she registered as a volunteer with the Agency. GC Ex. 1(j).

The Respondent filed its Answer on July 15, 2015, denying that it violated the Statute. GC Ex. 1(*l*).

A hearing was held in this matter on September 17 and 18, 2015, in Richmond, Virginia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit of employees of the Department of Veterans Affairs (VA). The Union is an agent of AFGE for the purpose of representing employees at the Medical Center. GC Exs. 1(j), 1(*l*).

The Medical Center is a 1A facility, the highest level facility in the VA. Tr. 353. Approximately 3500 people work at the Medical Center, some of whom are employed under Title 5 of the United States Code and others under Title 38. About 1000 people visit the

[1] The Union filed other, additional, ULP charges against the Agency concerning related incidents, but it subsequently withdrew those charges. Tr. 138-39, 179.

Medical Center on any given day. Tr. 391. Nurses work throughout the Medical Center, from ambulatory clinics to intensive care units (ICUs). Many of the areas where nurses work are not open to the public. Tr. 357. The Voluntary Service (also referred to as "Voluntary Services") is the department responsible for recruiting, training, and placing volunteers at the Medical Center. Tr. 233-34. People wishing to volunteer at the Medical Center must first register as volunteers with the Voluntary Service. Tr. 242. This also includes people affiliated with veteran service organizations, many of which have kiosks in the lobby of the Medical Center and offer social and informational services to patients. Tr. 250, 261-63. Registration involves a "vetting" process that includes fingerprinting, a background check, and privacy training. Tr. 235, 354-55. The Medical Center similarly requires employees and contractors to be fingerprinted, undergo background checks, and take privacy training. Tr. 354, 393. The VA and the Medical Center have both issued written policies regarding these issues. Resp. Exs. 12 & 13.

Deneen Harris worked as a registered nurse for nineteen years at the Medical Center and retired in 2009, after which she had no affiliation with the Union or the Medical Center for at least two years. Tr. 36. Subsequently, she was appointed by the Union President to a variety of positions, helping employees with issues such as workers compensation claims. Tr. 36-37, 44, 105-06. On November 25, 2014,[2] the Union gave the Agency a revised list of its stewards and officers, which identified Harris as a vice president and steward for Title 38 employees. GC Ex. 2.

The Meeting between the Surgical ICU Nurses and Skelton

In late November, several nurses on the night shift in the Surgical ICU met with Union President Jennifer Marshall about a variety of complaints they had, many of which related to their nurse manager. Tr. 106-07, 182-84. Marshall asked Harris to handle the matter, and Harris met with the nurses to learn more about their problems. Tr. 198-99. Denise O'Brien, a Surgical ICU nurse who had recently been appointed as a Title 38 steward, spoke to Jon Skelton, their second-line supervisor, and arranged for him to meet with the nurses to discuss the complaints. The meeting was initially scheduled for December 1, but Skelton postponed it to the morning of December 9 and arranged for it to be held in a community room located near his office. Tr. 108-09, 184, 198-99.

Around this same time period in late November or early December, Human Resources Director Valencia Moore learned that Harris had been contacting bargaining unit employees and scheduling meetings as their Union representative. Moore concluded that Harris should not be in the Medical Center, meeting with employees and supervisors, until she had registered as a volunteer. Medical Center Director John Brandecker agreed with Moore, and the HR department prepared a letter to be sent to Harris, under Brandecker's signature, directing her to comply with the volunteer registration procedure. Tr. 341-43, 356, 376-77. The letter was dated December 10; it was delivered to the Union office on December 11 and to Harris's home a few days later. Tr. 113-16; GC Ex. 3.

On the morning of December 9, Harris arrived at the room where the Surgical ICU nurses' meeting with Skelton was to be held. Tr. 108-09, 151, 185. Harris greeted the nurses and waited for Skelton to arrive. Meanwhile, Skelton had called labor relations specialist James Kielhack, told him that Harris was being "disruptive," and asked for his assistance. Kielhack called the VA police to come to the scene, because he "did not want a confrontation." Tr. 319-21. Kielhack arrived at the meeting room, spoke with Skelton, and then told Harris that she could not attend the meeting. Tr. 109-10, 322. After considerable discussion between Harris, Kielhack, and the security officers, Harris left the area and went to the Union office. Tr. 111-12.

At the hearing, Harris testified that Kielhack "told me that I had to stop the meeting and I had to leave the premises by order of the director. And I said, excuse me?" Tr. 110. Kielhack explained to her, "[B]ecause you are . . . no longer an employee, and you're not a volunteer, you're not a veteran, and Mr. Brandecker wants you to leave the property." Tr. 111. She further testified, "When I asked him about the order, for me to leave the property, he kept telling me, well, a letter will be coming. You'll be getting a letter from the director, but never gave me any real answer as to why I needed to stop the meeting." Tr. 112. Harris apologized to the nurses, asked O'Brien to take notes, and left. Tr. 112-13, 186.

O'Brien testified that "there was no way we could . . . reschedule the meeting with that many nurses and [Skelton]." Therefore, O'Brien asked Skelton "if I could excuse myself as a nurse and take notes for the Union." Tr. 186-87. She testified that she did not have any formal representational training and was not authorized by the Union to do more than take notes at the meeting. Tr. 190. The meeting went on without Harris and lasted about an hour. Tr. 199; GC Ex. 8. The night shift nurses complained of ineffective communication with their nurse manager, of being overworked in

[2] All dates hereafter are in 2014, unless otherwise noted.

comparison to the other shifts, and of having insufficient and outdated supplies. Skelton addressed each of these issues with the nurses, and he also answered questions about the criteria for promotion. Tr. 188; GC Ex. 8.

On the evening of December 9, Union President Marshall sent an email to Brandecker and other management officials, reminding them that the Union had previously notified the Agency of Harris's status as a Union official, and protesting Harris's exclusion from the nurses' meeting that morning. She advised the Agency that Harris needed to be at the Medical Center on December 11 and 12 to represent an employee in a proposed adverse action, and she warned the Agency that it would commit an unfair labor practice if it prohibited Harris from performing her Union duties or restricted her access to the Medical Center. Resp. Ex. 11 at 8-12.

The Director's Letter to Harris

On December 11, Brandecker's letter to Harris was delivered to the Union. The letter stated:

> As Director of the Hunter Holmes McGuire VA Medical Center I am charged by federal regulation (38 C.F.R. § 1.218) with the responsibility for enforcing the rules of conduct and order on Medical Center grounds.[3] I am also responsible for ensuring that all employees and volunteers at the Medical Center comply with VA privacy laws and regulations, and other rules of conduct. I was recently advised that you are volunteering at the Medical Center, including patient care areas.
>
> You are not a current VA employee or a veteran and, therefore, you are not allowed to be on the Medical Center premise[s] in the role of a volunteer unless you are a registered volunteer. All volunteers must register with the Voluntary Service, including scheduling an appointment for fingerprints and the appropriate background investigation, obtaining an identification card, and completing an orientation program, including privacy training. The Voluntary Service advised that you have not completed this registration process.
>
> In accordance with the authority granted to me under 38 C.F.R.§ 1.218, by this letter I am instructing you to not return to this facility as a volunteer until you have completed the registration process with Voluntary Service. . . .
>
> It is imperative that you adhere to the instructions stated in this letter if you wish to volunteer in this facility. If you attempt to perform volunteer duties at the Medical Center without first registering with the Voluntary Service, your violation of these instructions may result in escort off Medical Center grounds and issuance of a trespassing citation.

[3] 38 C.F.R. § 1.218, entitled "Security and law enforcement at VA facilities," states, in part:
(a) Authority and rules of conduct. Pursuant to 38 U.S.C. 901, the following rules and regulations apply at all property under the charge and control of VA . . . and to all persons entering in or on such property. The head of the facility is charged with the responsibility for the enforcement of these rules and regulations . . . .
(1) Closing property to the public. The head of the facility . . . shall establish visiting hours for the convenience of the public . . . . The property shall be closed to the public during other than the hours so established. In emergency situations, the property shall be closed to the public when reasonably necessary to ensure the orderly conduct of Government business. The decision to close a property during an emergency shall be made by the head of the facility or designee. The head of the facility or designee shall have authority to designate areas within a facility as closed to the public.
(2) Recording presence. Admission to property during periods when such property is closed to the public will be limited to persons authorized by the head of the facility or designee. Such persons may be required to sign a register and/or display identification documents when requested to do so by VA police, or other authorized individual. No person, without authorization, shall enter upon or remain on such property while the property is closed. Failure to leave such premises by unauthorized persons shall constitute an offense under this paragraph.

GC Ex. 3.

Although Brandecker asserted that Harris was "volunteering" at the Medical Center and that she could not volunteer there until she registered with the Voluntary Service, the record shows that Brandecker meant (and the parties understood Brandecker to mean) that Harris could not perform representational work on behalf of the Union at the Medical Center until she registered as a volunteer. For example, when Brandecker was asked at the hearing why he wrote this letter, he explained:

> It was my understanding that Ms. Harris was up on the floors, in units where she would have access to information, talking to union employees, which is not a crime, but it does require her to undergo training. It is my responsibility to make sure that [Harris] undergoes that training, so she knows what the regulations are, what the rules are, where the boundaries are, relating to her access to health information or any information related to veterans. That's always readily available when you're up on the unit.

Tr. 356.

The Oral Reply Meeting

On October 30, the Agency proposed suspending Alice Tart, an LPN, for fifteen days for pushing a coworker. GC Ex. 4. Ms. Tart signed a letter of representation designating Harris as her Union representative;[4] Harris obtained Tart's evidence file and interviewed Tart and other potential witnesses. Tr. 119. A meeting was initially scheduled for December 12, for Tart to make an oral reply to the proposed suspension to Brandecker, the deciding official. Tr. 119, 121, 175.

On December 11, the day the Union received Brandecker's letter to Harris requiring her to register as a volunteer, both Harris and Marshall responded with separate emails to Brandecker and other management officials. First Harris wrote, asserting that she was entitled to represent bargaining unit employees at the Medical Center, and that she was in fact a veteran.[5] Resp. Ex. 11 at 6-7. That evening, Marshall wrote to the same officials, asserting that Harris "does NOT serve as a volunteer[,]" and that Union officers "do not and are not volunteers." *Id*. at 3-4. Marshall continued, "You cannot deny [her] access and I will take you on full steam on this matter." She reminded Brandecker that Harris would be attending the December 12 meeting regarding the proposed suspension of Ms. Tart, who is also an officer of the local chapter of the NAACP. "Harm Ms. Tart by denying her duly designated representative, . . . and the full wrath of the NAACP will fall on you as well." *Id*. at 4.

Marshall continued the offensive the next morning, December 12, when she sent the following email to Agency management:

> Do not call down to the Union Office to try and get another Union official to represent Ms. Alice Tart with regards to her agency Proposed 15 day Suspension.
>
> You are the most incompetent HRM Service Chief that I have ever encountered. This place once [sic] to fight and I thrive on fighting so bring it on!!! . . . YOU DISHONOR ONE OF OUR NATIONS HEROES WHO IS A VETERAN OF THE UNITED STATES ARMY!!!
>
> . . . .
>
> This is not difficult!! You have been placed on several notices that Deneen Hurtt Harris, Vice President, Title 38 for . . . Local 2145 is the designated Union representative to provide this 3 pm response and SHE WILL BE THERE TO PROVIDE THE RESPONSE.
>
> [T]his agency . . . issued a barr [sic] letter to Deneen Hurtt Harris for not being a veteran or a registered-volunteer. Ms. Harris is a Union Officer for Local 2145.
>
> . . .
>
> Mrs. Harris is the only representative that has solely worked with Ms. Tart to provide a meaningful response to this proposed adverse action for the deciding official to consider as to

[4] The letter was not offered into evidence, and there is no indication as to when it was sent to the Agency.

[5] Harris served in the Virginia Army National Guard and the United States Army Reserve, and was activated for Operation Desert Storm. Tr. 103-04. Brandecker testified that as a technical matter, and for certain VA purposes, Harris's service did not qualify her as a veteran. Tr. 379-83. While this issue clearly upset Ms. Harris, it is not material to any of the issues in our case.

> whether to sustain the proposed action or issue any action at all.

Id. at 1-2.

Later that day, Harris and Tart went to the conference room outside the director's suite, where the oral response meeting was to be held. Angela Kimel-Hampton, a labor relations specialist, told Harris that she could not represent Tart, but that the Union could send another representative instead. Tr. 123. When Tart insisted on having Harris represent her, the meeting was rescheduled for December 22. Tr. 124.

On December 22, Harris approached the director's suite to attend the rescheduled oral response meeting and saw two VA police officers. One of them told her, "I'm sorry, we can't allow you to go any further." Tr. 124-25. Minutes later, Harris saw Tart, and then Kimel-Hampton. Kimel-Hampton told her, "[Y]ou know you can't represent Ms. Tart. We notified the union office that they needed to send someone else up there. You haven't done what you're supposed to, what the director directed you to do in the letter." Harris countered that she was Tart's representative and that Kimel-Hampton was "denying [Tart] her due process." Tr. 125. Then, Harris recalled, Kimel-Hampton "proceeded to try to walk off with Ms. Tart and talk to her, and told Ms. Tart, it'll be okay. You can come with me, it'll be okay." Tr. 126.

At the hearing, Brandecker testified that he directed Kimel-Hampton to advise Tart that she could have another Union representative, but Tart declined the offer and agreed to meet with Brandecker on her own. Tr. 365-66. The disciplinary meeting took place with Brandecker and Tart and without a Union representative. Tr. 364. Brandecker also testified that he did not allow Harris to serve as Tart's representative because Harris "had not undergone the training, as she was asked." Tr. 363. Asked why there was a need to bar Harris from the meeting, Brandecker stated:

> This was not going to be a one-time thing with her. So if we establish a precedent that she could do this, that's in effect, allowing her to go up onto units, allowing her not to go through the background check. And that is just not . . . according to our policy.

Tr. 377. When Harris was asked at the hearing why another steward could not have represented Tart, she said that the Union was short several stewards, and the few Title 38 stewards were new and untrained. Tr. 154-57.

The PSB Hearing

On February 5, 2015, Skelton informed Alma Johnson, a registered nurse, by memorandum that a Professional Standards Board would be held on February 19, to review Johnson's performance during her probationary period, including an allegation that Johnson had failed to scan the wristband of a patient before administering medications. The letter advised her, among other things, that she had the right to be represented by a person of her choosing. GC Ex. 5. Subsequently, Johnson signed a letter designating Harris as her representative, and the two met in the Union office to discuss the case. Tr. 128, 131-32.

On February 17, Harris sent Skelton an email asking to postpone the PSB hearing so that the Human Resources Department would have time to produce the evidence file and additional information Harris had requested. GC Ex. 6 at 2. Skelton forwarded Harris's request to HR, and on February 18, Kimel-Hampton informed Skelton and Harris that the hearing would not be postponed. GC Ex. 7. In addition, Kimel-Hampton told Harris, "If you have been properly vetted, you may represent Ms. Johnson. If not, please provide an alternate union representative to represent Ms. Johnson at tomorrow's hearing." *Id.* Harris saw the email in the evening and did not try to find a replacement, since "nobody had prepped her case or done anything for her, and knew nothing about her case, and could not represent her[.]" Tr. 162.

According to Harris, Johnson was out sick on February 19 and did not attend the PSB hearing. Although the General Counsel did not introduce any direct evidence concerning the hearing, Harris testified that she understood that the PSB proceeded without either Johnson or a representative present. Tr. 135-36.

Issues Elaborated on at the Hearing

Among the issues addressed by witnesses at the hearing was whether the Agency had changed a condition of employment. Marshall testified that prior to December 2014, the Agency had "had no objection" to Harris representing employees at the Medical Center. Tr. 29-30. Similarly, Harris testified, "I had been representing people in various capacities at this medical center since I retired in 2009, and it [registering as a volunteer] had never been required." Tr. 169. For his part, Brandecker stated that he had never sent anyone else a letter similar to the one he sent Harris on December 10, 2014. Tr. 376.

Marshall acknowledged that the Union did not ask to bargain over the change, but asserted that it was because the Agency "had already implemented" the policy. Tr. 60, 80.

Several people were identified who have performed work on behalf of the Union, and who are not employees of the Medical Center. None of these individuals, except for one, has been required to undergo the volunteer registration process. Most of them, like Harris, had previously worked for the Agency and retired, including Betty Taylor, Charles Jackson, and Joyce Smith. Ms. Taylor retired from the Medical Center as a details clerk in 2001, but then started working full-time for the Union in 2011 as a paid office assistant, which requires her to deliver grievances and other documents to supervisors throughout the Medical Center, including patient care areas. Tr. 33, 223-26. The Agency required Taylor to get a Medical Center ID badge in 2011, but did not require her to be fingerprinted, undergo a background check, take privacy training, or register as a volunteer. Tr. 226-27, 229-30. While Mr. Jackson was working at the Medical Center as a registered nurse, he was also a Union officer, most recently its executive vice president. He retired from the VA in 2012, but continued in his Union position as executive vice president and to represent bargaining unit employees until approximately April of 2013. Tr. 32, 202-03, 212. Jackson was never asked to register as a volunteer, though he did take privacy training after he retired. Tr. 204, 221-22. Ms. Smith retired as a radiologist from the Medical Center in 2003, and she has continued since then to serve as a Union steward and as chairman of the Union's legislative committee. Tr. 32, 88-90.

One Union representative, Deborah Brooks, has been required to register as a volunteer. Ms. Brooks was a long-time steward and chief steward for Title 5 employees (see Resp. Exs. 2-5), who retired from the VA and went to work for the Military Order of the Purple Heart, a private service organization that has a kiosk at the Medical Center and assists veterans with benefit claims. Tr. 67-68, 250. She also continues to serve as a Title 5 steward for the Union. GC Ex. 2. Jason Gray, the Agency's Chief of Voluntary Services, testified that because Ms. Brooks is not a VA employee, she is subject to the Agency's volunteer rules and was required to be interviewed, vetted, and fingerprinted. Tr. 250-51, 267-68.[6]

Agency witnesses emphasized the importance of vetting individuals who regularly perform activities on the grounds of the Medical Center, including making sure that they understand the laws and rules concerning patient privacy and the confidentiality of records. Tr. 236, 240-41, 243, 283, 353-54. All employees are required to undergo privacy and confidentiality training upon hire and then annually, and volunteers receive similar training when they register. Tr. 283, 354-55. Brandecker asserted that a Union representative working in nursing areas could have access to many types of information that are sensitive to veterans and their families; accordingly, "we need to make sure that folks have training before they – so they understand that they're not allowed to reveal any of that." Tr. 357-58.

Brandecker explained why Harris needed to register and undergo vetting and training, even though she had previously worked at the Medical Center for many years:

> This is somebody who had not been here for 10 [sic] years. That's quite a long break. A lot can happen in 10 years, including laws and regulations that change. And, you know, certainly all of the HIPAA laws are not 40 years old. Some of them are fairly current. Of course, other additional regulations that the VA has related to privacy and so on, all of those – and information security, all of those things she would need to get caught up on. So I don't see that as being unreasonable, or a different treatment at all[.]

Tr. 393. Brandecker contrasted Harris's situation with Jackson's, even though Jackson had ceased performing any Union duties before Brandecker came to the Medical Center. In Jackson's case:

> There was no break from the time he was an employee. He was a union officer at the time. . . . And then, the only thing that changed was his status as an employee to retired. So he had already gone through a background check, fingerprinting, training – because training is annual. It's mandatory. . . . So I can see how folks at the time may not have asked him to go through another fingerprint check because his status changed.

[6] Although Marshall testified she didn't think Brooks was registered under the Agency's volunteer procedures, she had no actual knowledge of the fact. Tr. 69. I consider Mr. Gray's testimony more direct and authoritative, and I credit it over Marshall's.

Tr. 392-93. Brandecker suggested that other non-employee Union representatives had not been required to register as volunteers because they, like Jackson, continued working for the Union immediately upon ceasing their employment with the VA. Tr. 375-76.

The Union asserted that it was improper to treat Harris as a volunteer. Marshall testified that the Voluntary Service bore no relation to the work performed by Union representatives. "The . . . policies related to Voluntary Service only serves patients. We [Union representatives] don't serve patients in any capacity." Tr. 30. The Union also contrasted the treatment of Harris as a volunteer to the treatment of private attorneys coming to the Medical Center.

Brandecker testified that regardless of whether Harris interacted with patients, she needed to be vetted and to receive privacy training. He denied that she was being singled out for different treatment in any way. Employees are vetted and trained through Human Resources, contractors through the contracting department, and "all others go through Voluntary Services, no matter who they are." Tr. 358. He insisted that he had no intention of barring Harris from the Medical Center or preventing her from representing the Union, but only of ensuring that she go through a background check and complete her privacy training. Tr. 359. Those registration procedures for volunteers are specifically described in VHA Handbook 1620.01, "Voluntary Service Procedures," issued by the Veterans Health Administration; and MCM-135-4, "Voluntary Program," issued by the Medical Center. Tr. 238-39, 245-46; Resp. Exs. 12 & 13.[7] Agency officials further explained that private attorneys are not required to register as volunteers, because such individuals enter the Medical Center as "a one-time thing," whereas Union representatives would be doing so on a recurring basis. Tr. 265, 378. They also noted that private attorneys would not have access to patient care areas or the Agency's computer system. Tr. 293.

A procedural dispute also arose at the hearing with regard to the Respondent's right to review pretrial statements Harris made to the General Counsel prior to cross-examining her. At the Respondent's request, Counsel for the GC furnished Respondent's Counsel with those affidavits Harris made in support of the four ULP charges at issue here, but not the affidavits Harris made in support of other charges that were filed and withdrawn. Tr. 138-40, 179-81. Counsel for the GC indicated that he did not bring those affidavits to the hearing, and thus the affidavits were not available; he also argued that Respondent was not entitled to those affidavits. Tr. 139. Respondent's Counsel argued that the withdrawn charges are "related to this case. They also involve issues of Ms. Harris's access to this medical center." Tr. 138.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that by preventing Harris from accessing the Medical Center, the Agency interfered with the Union's right to designate its representative, in violation of § 7116(a)(1) of the Statute. GC Br. at 16-17 (citing *Bureau of Indian Affairs, Isleta Elementary Sch., Pueblo of Isleta, N.M.*, 54 FLRA 1428, 1438 (1998) (*BIA*); *Phila. Naval Shipyard*, 4 FLRA 255, 266-68 (1980) (*Shipyard*)). The GC argues that there was no "legitimate justification" for barring Harris from the Surgical ICU nurses' meeting, Tart's disciplinary meeting, and Johnson's PSB hearing, as Harris had not engaged in "flagrant misconduct" or a "serious abridgement of . . . rules or regulations." GC Br. at 17 (citing *BIA*, 54 FLRA at 1440; *Shipyard*, 4 FLRA at 266). The GC also alleges that the Respondent "has not provided any evidence of any security concerns posed by Ms. Harris." GC Br. at 19.

In addition, the General Counsel argues that the Agency had not previously required Union representatives to register as volunteers, and that it therefore changed conditions of employment when it required Harris to register as a volunteer. Since the Agency imposed the change without giving the Union advance notice or an opportunity to bargain, it violated § 7116(a)(1) and (5) of the Statute. While the GC acknowledges that an agency has the right to determine its internal security practices, a union is entitled to negotiate over the impact and implementation of changes in such practices. *Id.* at 20-21. By applying its policy to Ms. Harris before giving the Union notice and an opportunity to bargain, the GC asserts that the Union was not required to demand bargaining, because such a request would have been useless. *See Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 855 (1999).

[7] VHA Handbook 1620.01 states, among other things, that the Voluntary Service program manager is responsible for "[d]etermining the appropriateness of a volunteer working in the current assignment if positive results are found in the background check," and "[d]irecting . . . training . . . of volunteers." Resp. Ex. 12 at 8-9. MCM -135-4 states, in part, that volunteers are "oriented the same as medical center employees in matters of . . . patient confidentiality[.]" Resp. Ex. 13 at 1.

The General Counsel further contends that Brandecker unlawfully bypassed the Union when he met with Ms. Tart regarding her proposed discipline without Harris or any other Union representative present, in violation of § 7116(a)(1) and (5) of the Statute. GC Br. at 22 (citing *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1346 (1996)).

Finally, the General Counsel asserts that it was not obligated (under the "Jencks Rule," first articulated by the Supreme Court in *Jencks v. United States*, 353 U.S. 657 (1957), and later codified into law at 18 U.S.C. § 3500) to provide the Respondent with the additional affidavits it requested at the hearing, because the requested affidavits pertained to charges that were not part of the Consolidated Complaint. GC Br. at 23. Since Harris's testimony at the hearing related only to the four charges included in the Complaint, her other affidavits were not "related to the subject matter" of this case, as required by 18 U.S.C. § 3500(b).

Respondent

The Respondent argues that it did not violate the Statute by barring Harris from the Medical Center. In this regard, the Respondent cites 38 C.F.R. § 1.218(a)(1)-(2), which provides, "The head of the facility or designee shall have authority to designate areas within a facility as closed to the public[,]" and, "Admission to property during periods when such property is closed to the public will be limited to persons authorized by the head of the facility or designee." Resp. Br. at 6. Further, barring Harris from the Medical Center until she registered as a volunteer involved the exercise of management's right to determine its internal security practices. *Id.* at 5-6 (citing *U.S. Dep't of Def., Fort Bragg Dependents Sch., Fort Bragg, N.C.*, 49 FLRA 333, 342-43 (1994)). In addition, the Respondent contends that people seeking to work as volunteers in the Medical Center must register as volunteers and undergo vetting, a requirement set forth in VHA Handbook 1620.01. Resp. Br. at 7. Respondent suggests that it needed to bar Harris from the Medical Center until she registered as a volunteer because Harris "would need access to private and confidential areas of the Medical Center[]" when working as a Union representative. *Id.* at 9.

Respondent insists that at no time has it refused to recognize Harris as a Union representative; rather, it simply demands that she complete the simple vetting process, and then she will be free to roam the Medical Center and represent employees. Despite the Agency's simple demands on Harris, she has refused to comply, and neither she nor the Union has explained why she cannot complete the vetting process. *Id.* at 8.

With regard to the claim that the Respondent unilaterally changed conditions of employment, the Respondent asserts that it treated Harris "in a manner consistent with the treatment given to non-employees who regularly perform work at the Medical Center." *Id.* at 11. The fact that other non-employee Union officials had not been required to register with the Voluntary Service did not create a past practice establishing a condition of employment, as those other officials were not comparable to Harris. *Id.* at 13-17. Moreover, the Union never requested bargaining over the registration requirements; indeed, the Respondent argues that the Union's actions throughout the dispute demonstrated that it had no intention of bargaining. *Id.* at 21, 24. In the Respondent's view, the basic requirements that Harris be vetted and trained through the volunteer registration process involve "management rights not subject to negotiations." *Id.* at 25.

Finally, the Respondent argues that the General Counsel "did not meet its obligations under *Jencks* of providing all [of Harris's] prior statements regarding this matter," because the GC did not produce statements Harris made "in other withdrawn charges." *Id.* at 25-26 (emphasis omitted). Respondent, like the GC, cites the Authority's decision in *Dep't of the Treasury, IRS, Memphis Serv. Ctr.*, 16 FLRA 687 n.1 (1984) (*IRS Memphis*), applying the Jencks Rule to ULP hearings. Although the Respondent acknowledges that the GC produced statements Harris made in the charges at issue in this matter, it asserts that the withdrawn charges "dealt with the same operative facts as the charges in this matter, specifically, the Medical Center's notification to Ms. Harris that she had to be vetted before performing representational duties at the Medical Center." Resp. Br. at 25. Conceding that the Authority's case law is "not clear regarding what remedy there may be in addressing a *Jencks* violation," Respondent asks that I strike Harris's testimony or, in the alternative, credit Agency witnesses over Harris. *Id.* at 26.

ANALYSIS AND CONCLUSIONS

A. Witness Affidavits

Although the Authority has adopted the Jencks Rule for ULP hearings, and it is routinely followed by the administrative law judges of this agency, neither counsel has identified any precedent that would apply to the specific facts of this case. The General Counsel gave the Respondent Harris's affidavits in connection to the four pending charges in this consolidated case, and all evidence suggests that Counsel for the GC acted in good faith to comply with the rule. The question is whether, in the words of the statute codifying *Jencks*, the withdrawn charges "relate[]

to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

Neither the *IRS Memphis* decision nor cases following it, such as *U.S. Small Bus. Admin., Wash., D.C.*, 54 FLRA 837, 848-49 (1998), shed any light on this question. Assuming, as the Respondent's counsel asserts, that the withdrawn charges involved other incidents in which the Agency refused to deal with Harris until she registered as a volunteer, these additional affidavits might indeed be considered "related" to the subject matter of the case at bar. Seeing how Harris described other, similar incidents might have provided counsel with some new insight into the current charges that might have been useful in cross-examination. An equally reasonable argument can also be made, however, that the withdrawn charges do not truly "relate" to the incidents at issue today: that is, they do not relate to the Agency's exclusion of Harris from the meetings of December 9 and 22, 2014, or from the PSB hearing of February 19, 2015.

If Respondent's counsel had raised this issue at the prehearing conference, held a week before the hearing, I would have required the General Counsel to bring all of Harris's affidavits to the hearing, in an abundance of caution. When the affidavits were first requested, they were a hundred miles away, in Washington, D.C. In light of the ambiguity as to the scope of the rule, I believe it would be unreasonable to expect counsel for the GC to have come to the hearing with statements Harris made in support of withdrawn charges, absent advance warning. Finally, it is highly unlikely that the Respondent's counsel was prejudiced in his cross-examination of Ms. Harris by his inability to review the affidavits from withdrawn cases. Accordingly, I deny the Respondent's request that I sanction the GC by striking Harris's testimony.

B. The Alleged Unfair Labor Practices

In its narrowest sense, this is a rather simple, straightforward case: the fundamental question, whose answer resolves most of the remaining issues in the case, is whether the Agency changed conditions of employment when it required Harris to register as a volunteer before recognizing her as a Union representative. And as I indicated in the opening paragraphs of this decision, I conclude that the answer to that question is yes. Once it is recognized that the Agency initiated such a change, it follows that the Agency was required to notify the Union and offer to negotiate the impact and implementation of the change; that the Agency failed to provide such notice before implementing the change; and that the Agency's premature attempts to enforce the new policy by refusing to meet with Harris were unlawful.

But as I also suggested at the start, there is an underlying power struggle ongoing between this union and this agency, which will not be resolved by deciding the case narrowly. While the Respondent must understand that it cannot impose its internal security rules on the Union peremptorily, the Union must also understand that the Agency has the right to set policies regarding how and when employees and non-employees may gain access to the Medical Center. In other words, the Agency's management rights are not an immovable object, and the Union's right to designate its representatives is not an irresistible force. Rather, an accommodation between the two must be established, preferably by negotiations.

Section 7102 of the Statute provides that employees have the right to form, join, or assist any labor organization. This right encompasses a union's right to designate its representatives, including a non-employee representative who will have access to an agency's premises to conduct representational activities. *BIA*, 54 FLRA at 1438; *see also U.S. Dep't of Veterans Affairs, N. Ariz. VA Health Care Sys., Prescott, Ariz.*, 66 FLRA 963, 965 (2012) (section 7114 of the Statute also entitles a union to designate its own representative). Absent a "legitimate justification," an agency's interference with this right violates § 7116(a)(1) of the Statute. *BIA*, 54 FLRA at 1440. Examples of a legitimate justification include a "serious abridgment of . . . rules or regulations," *Shipyard*, 4 FLRA at 266, and flagrant misconduct, *BIA*, 54 FLRA at 1440; *see also U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 713-14 (1999) ("special circumstances" may justify agency's refusal to recognize a representative).

The Union would like the preceding paragraph to be the end of my decision, but it is only the beginning. As the General Counsel (but not the Union) concedes, an agency's right under § 7106(a)(1) to determine its internal security practices includes the right to control access to its premises and the right to protect confidential information. GC Br. at 20. *AFGE, Local 3937*, 66 FLRA 393, 395 (2011); *Fort Bragg*, 49 FLRA at 342-43 (internal security includes policies for when and how employees and non-employee union representatives may gain access to agency facilities). Similarly, it entitles an agency to establish policies to prevent improper disclosure of confidential or privileged information. *NFFE, Local 1482*, 44 FLRA 637, 655 (1992).

In our case, both the VA and the Medical Center had long-established policies in effect, giving the Medical Center Director authority to control as to who may access Medical Center property and the circumstances in which employees and non-employees may gain access to the Agency's computer system and to

employee and patient records. The policies for employees are overseen by Human Resources, and the policies for non-employees are overseen by the Voluntary Service. The policies described by Gray and Brandecker to require all non-employees regularly accessing the Medical Center facilities to register with the Voluntary Service fit squarely within its 7106(a)(1) right to determine internal security, and as such, the substance of those policies is not negotiable.

The Agency would like the preceding sentence to be the end of my decision, but it is not. For even when (as here) an agency exercises a management right, and the substance of the policy is not negotiable, the agency has an obligation to bargain over the impact and implementation of that policy, if the resulting change has more than a de minimis effect on conditions of employment. *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015). Moreover, the agency is generally required to maintain the status quo during the pendency of such bargaining. *Id.*; *U.S. Dep't of Justice, INS*, 55 FLRA 892, 902-03 (1999).

In the next section of this decision, I will explain my reasoning as to why the Agency unilaterally, and unlawfully, changed conditions of employment, but it is important to emphasize first that implementation of that decision will require both the Agency and the Union to come together to accommodate each other's legitimate statutory rights. The Agency's error here was not in advising a non-employee Union representative that she needed to register and undergo a vetting and training process in order to access the Medical Center, but rather in applying its policy to a Union official for the first time without affording the Union an opportunity to negotiate procedures for implementing the policy and appropriate arrangements for individuals (like Harris) affected by the policy.[8]

[8] While it is clear that the Agency has the right to determine when and how Ms. Harris and other non-employees may access the Medical Center and its facilities, the Agency's classification of Harris as a "volunteer" certainly contributed to some understandable confusion on the Union's part. Resp. Ex. 11 at 4. Calling such Union representatives "volunteers" seems to be an awkward attempt to fit a square peg in a round hole. But regardless of how Harris and other non-employee Union representatives are categorized, the Medical Center's internal security is dependent on its ability to regulate who uses its facilities, when, and how. This is a good example of how the parties could benefit from negotiations over how the policy will affect individuals like Harris.

1. The Respondent violated § 7116(a)(1) and (5) of the Statute by unilaterally applying its volunteer policy to Union representatives.

As I noted earlier, the crucial question regarding this portion of the complaint is whether the policy announced in Brandecker's letter involved a change in conditions of employment. The determination of whether a change in conditions of employment has occurred involves an inquiry into the facts and circumstances regarding the agency's conduct and the employees' conditions of employment. *Soc. Sec. Admin.*, 68 FLRA 693, 694 (2015); *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995).

A union's access to agency facilities used by the union to carry out its representational duties is a condition of employment under the Statute. *NFFE, Local 1655*, 36 FLRA 75, 77 (1990). As the Authority stated in *AFGE, AFL-CIO, Nat'l Council of SSA Field Operations Locals*, 25 FLRA 622, 625 (1987), a union's request that its representatives have access to agency facilities (even when those representatives are not employees of the agency) "directly affects the Union's ability to carry out its representational responsibilities and therefore is inextricably tied to the conditions of employment of unit employees." But did the Agency change its policy or practice concerning the ability of Union representatives to access the Medical Center in December of 2014?

The Agency did not promulgate a new volunteer policy, or explicitly revise that policy, in December 2014, but it most certainly applied the existing volunteer policy in a way that had never been done previously. Agency officials acknowledged that they had never previously sent a letter like the December 10 letter to a Union official. The policies that were already in existence at that time, and on which the Agency relied for requiring Harris to register as a volunteer – VHA Handbook 1620.01 and Memorandum MCM-135-4 – describe a wide variety of individuals who come under their registration procedures, but they do not expressly address the situation of Union representatives. While the Agency may have been within its management rights to determine that non-employee Union officials must be vetted in the same way as volunteers, an outsider reading MCM-135-4 would be unlikely to understand it as applying to Union representatives.

The General Counsel went to some lengths to offer evidence that in the past, the Agency had allowed several non-employee Union representatives to perform their Union duties without requiring them to register as volunteers. While I view the evidence as too inconsistent to establish any conscious practice on the part of Agency

management,[9] that same inconsistency suggests that the Agency never previously told the Union that its non-employee representatives needed to register as volunteers. Several retired employees served the Union at the Medical Center in a variety of roles, but many of these individuals worked behind the scenes, and it is not at all clear that responsible management would have been aware of what they were doing or would have connected their activity to the Agency's volunteer policies. Thus, the failure of management to require them to register as volunteers does not constitute an acknowledgement by the Agency that Union officials didn't have to register. Ms. Brooks was required to register as a volunteer, but it is unclear whether she was required to do so because of her Union work or because she was employed by Purple Heart and was regularly assisting veterans on the premises. I suspect the latter, but this cannot be assumed.

What is clear from this varying testimony is that prior to December 2014, the Agency had never told the Union that a non-employee Union representative was required to register as a volunteer before doing representational work at the Medical Center. While the volunteer policy itself may not have been new, its application to Union representatives was new, and it was this new application that affected bargaining unit employees, the Union, and working conditions at the Medical Center. Accordingly, I conclude that the requirements set forth in the December 10 letter to Harris represented a change in conditions of employment.

The next question is whether this change had more than a de minimis effect on working conditions. In assessing whether the effect of a change is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *Nat'l Treasury Employees Union*, 64 FLRA 462, 464 (2010) (citing *U.S. Dep't of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998)). The most immediate effect of the newly enforced policy was to prevent Harris from attending the December 9 meeting between the Surgical ICU nurses and Skelton. Before either Harris or the Union was aware of the Agency's policy, Skelton and Kielhack called security officers and had Harris removed from the meeting and from the premises, depriving those nurses of any effective representation at a meeting that had already been postponed once. By itself, this denial of representation significantly affected the Surgical ICU nurses, and by extension, the entire bargaining unit. Continued enforcement of the policy prevented Harris from representing Tart and Johnson at their meetings with management in the ensuing two months, and the mutual refusal of the Agency and Union to budge from their respective positions concerning Harris's registration makes it reasonably foreseeable that the change would continue to impede the Union's ability to utilize Harris to represent employees. It is difficult to foresee whether compliance with the actual registration and vetting requirements would themselves hinder the Union significantly, but the Union might certainly want to negotiate provisions that would alleviate possible difficulties in compliance. For all these reasons, I conclude that the change had more than a de minimis impact on conditions of employment.

Finally, the evidence demonstrates that the Agency gave the Union no advance notice of its new policy before implementing it, at which time it interrupted Harris's meeting with Skelton and the Surgical ICU nurses. Although the Union was sent a courtesy copy of Brandecker's December 10 letter announcing the new application of the Agency's volunteer rules to Union officials, the letter was addressed to Harris, not the Union, and nowhere in the letter does the Agency offer the Union an opportunity to bargain over the impact and implementation of the change. GC Ex. 3. Rather, the change was announced as a *fait accompli*. When a change is announced in this manner, the Authority has consistently held that the change is unlawful, regardless of whether the affected union subsequently requests to bargain, as a request to bargain would be futile. *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.*, 36 FLRA 567, 572 (1990); *U.S. Dep't of Interior, Bureau of Reclamation*, 20 FLRA 587, 599 (1985). As the Authority stated in *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 64 FLRA 916, 921 (2010), Brandecker's letter "made clear that it was implementing its plan, not inviting the Union to discuss it."[10]

Accordingly, I conclude that by requiring Harris to register as a volunteer before she could represent employees at the Medical Center, the Respondent implemented a greater than de minimis change in conditions of employment; and as the Respondent implemented the change unilaterally, it violated § 7116(a)(1) and (5) of the Statute.

[9] In order for a condition of employment to be established through a past practice, the practice must have 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. *U.S. Dep't of the Air Force, U.S. Air Force Academy, Colo.*, 65 FLRA 756, 758 (2011); *Soc. Sec. Admin., Office of Hearings & Appeals, Montgomery, Ala.*, 60 FLRA 549, 554 (2005).

[10] Although the Union seems to have had no interest in actually negotiating on this subject (*see* Tr. 60), the Agency absolved the Union of having to make a decision on whether to negotiate, by implementing the registration rule unilaterally.

2. The Respondent violated § 7116(a)(1) by interfering with the Union's right to name its representatives.

With regard to each of the incidents, identified in the Complaint, in which the Agency prevented Harris from representing employees (i.e., December 9, December 22, and February 18-19), the General Counsel alleges that the Respondent independently violated § 7116(a)(1) by interfering with the Union's right to designate its representative. I agree that the Agency's conduct in those incidents violated § 7116(a)(1), but only because the Agency acted unilaterally in imposing registration requirements on Ms. Harris, not because the requirements inherently interfere with the Union's right to name its representatives.

In the introduction to Part B of this decision, I noted that both §§ 7102 and 7114 of the Statute give unions the right to designate their own representatives, and that interference with that right is an unfair labor practice, absent "legitimate justification . . . ." *BIA*, 54 FLRA at 1440. In the same way that the Agency's unilateral implementation of its registration requirements preempted the Union from requesting to bargain over the change, the Agency's exclusion of Harris from the December 9, December 22, and February 19 meetings was premature and unlawful. The Agency may well have had a legitimate justification for requiring Harris to register and undergo vetting before representing employees at the Medical Center, but it could not put those requirements into effect before notifying the Union and giving it the opportunity to bargain. With regard to the incidents specified in the Complaint, the Respondent improperly prevented Harris from representing employees and improperly interfered with the Union's right to designate her as its representative.

The December 9 incident was the most egregious example of the Agency's interference with the rights of the Union and employees, but the Agency violated § 7116(a)(1) with regard to the Tart meeting and the Johnson PSB as well. The Surgical ICU nurses had spent considerable time trying to arrange a meeting with Skelton to discuss their complaints, and just as the meeting was to begin, management officials told Harris she could not stay on the premises, and they escorted her out, leaving the nurses with no effective representation. Based on Kielhack's comments to Harris that she would be receiving a letter explaining the Agency's action in more detail, it appears that the Agency had been preparing its letter to her prior to the December 9 meeting. But neither the Union nor the nurses had any idea or advance warning that Harris would be required to register as a volunteer before she could represent them. Therefore, the Agency's unilateral implementation of its new policy had the effect of frustrating the nurses' efforts to have Harris mediate their dispute concerning their supervisor.

While the Agency must shoulder the full blame for the events of December 9, the Union must share some of the responsibility for the denial of representation to Ms. Tart on December 22 and to Ms. Johnson on February 19. Although the Union had no warning before the December 9 meeting that the Agency was requiring Harris to register as a volunteer, it had two weeks' notice of the Agency's policy in advance of the December 22 meeting, and it had two months' notice prior to the February 19 PSB hearing. The Agency was wrong to have unilaterally implemented its policy, but the Union chose to continue its grudge match with management, at the expense of Ms. Tart and Ms. Johnson. Harris and Marshall were well aware, long before the Tart and Johnson meetings, that the Agency would not allow Harris to represent those employees, but it appears that Tart and Johnson were left clueless that they would be left without a representative on the dates of their respective meetings with management. Regardless of the merits of the Union's ULP charges, I find it inexcusable for the Union to abandon its members in this fashion, for the purpose of a seemingly never-ending war with management. For its conduct, the Respondent is guilty of an unfair labor practice; for its own conduct, the Union owes an apology to its members.

My analysis of this portion of the Complaint should end here. But because both the Union and the GC further argue that the registration and vetting requirements on Harris are not legitimate, and because the Union has thus far demonstrated no willingness to comply with any registration requirements, I believe it is necessary to caution the Union – again – that its right to designate Harris as a steward must be accommodated with the Agency's right to regulate access to the Medical Center. There was no evidence introduced at the hearing to suggest that the Agency was seeking to discriminate against Harris or the Union in requiring her to register. The Union concedes that other Union officials, even non-employee officials, have previously represented employees at the Medical Center, and there was no evidence that management officials bore any animus against Harris in particular. Moreover, the evidence suggests that Harris could comply with most, if not all, of the registration and training requirements in a matter of a few hours. Accordingly, those requirements cannot objectively be viewed as a pretext for preventing her entirely from serving as a Union official, or as a significant impediment to the Union's right to name her as its representative.

If the Agency determines that its internal security requires that non-employee Union representatives comply with certain procedures, it

must first notify the Union in advance and provide it with an opportunity to negotiate the impact and implementation of those requirements. Such negotiations will enable the Union to discuss any concerns it may have over who is covered by the requirements and how the requirements will be implemented, but the Union cannot prevent the Agency from determining what is necessary for internal security. [11]

3. The Respondent violated § 7116(a)(1) and (5) by bypassing the Union with regard to Tart's oral reply meeting.

An agency unlawfully bypasses an exclusive representative when it communicates directly with bargaining unit employees concerning grievances, disciplinary actions, and other matters relating to the collective bargaining relationship. Such conduct constitutes direct dealing with an employee and violates § 7116(a)(1) and (5) of the Statute because the conduct interferes with the union's right under § 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit. *AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1276-77 (1998). The Authority has indicated, however, that if a union consents to an agency dealing directly with a bargaining unit employee, the agency may lawfully do so. *Air Force Logistics Command, Ogden Air Logistics Ctr., Hill AFB, Utah*, 43 FLRA 736, 737 (1991). In a recent case involving these same parties, I found, and the Authority agreed, that the Respondent improperly bypassed the Union when it tried to settle a complaint directly with an employee. *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Richmond, Va.*, 68 FLRA 882 (2015).

Here, Brandecker acknowledged that he held the oral reply meeting directly with Tart on December 22, without Harris or any other Union representative present. Tr. 364. The evidence is clear that the Union objected strongly to Brandecker meeting alone with Tart and insisted that he allow Harris to represent Tart. Both on December 12, when the meeting was first scheduled, and on December 22, when it was actually held, the Agency offered to meet with a Union official other than Harris, but the Union insisted that Harris be allowed to represent Tart. Tr. 123-26; Resp. Ex. 11 at 1-4.

As I have already noted, it is unfortunate that Ms. Tart was caught in the crossfire of a battle of wills between management and the Union. The Agency chose to apply its new registration requirements to Harris without giving the Union a chance to bargain, and the Union chose not to comply with those requirements over the eleven days between receiving Brandecker's letter and Tart's oral reply meeting. The Agency's unilateral implementation of its rule was as invalid on December 22 as it was when Harris was escorted out of the Medical Center on December 9. It is immaterial that Tart was apparently willing (under severe duress) to meet without a Union representative, since only the Union could consent to Brandecker conducting the meeting without a Union official. *See U.S. Dep't of the Air Force, Space & Missile Sys. Ctr., L.A. AFB, El Segundo, Cal.*, 67 FLRA 566, 569 (2014) (disagreeing with dissent's suggestion that a bypass complaint against an agency should be dismissed because the grievant settled his own complaint with the agency). Accordingly, I find that the Agency violated § 7116(a)(1) and (5) of the Statute by bypassing the Union.

REMEDY

Where an agency has exercised a management right and changed a condition of employment without fulfilling its obligation to bargain over the impact and implementation of that decision, the Authority applies the criteria set forth in *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (*FCI*), to determine whether a status quo ante remedy is appropriate. The purpose of a status quo ante remedy is to place the parties, including employees, in the positions they would have been in had there been no unlawful conduct. *Dep't of Veterans Affairs Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1580 (1996). Determining the appropriateness of status quo ante relief requires, "on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." *FCI*, 8 FLRA at 606. In determining whether a status quo ante remedy

[11] If the Union still insists that all or some of these requirements violate § 7116(a)(1), the appropriate standard is whether, under the circumstances, the requirement would tend to coerce or intimidate an employee. *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009); *U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1034 (1994). I believe that this general standard is more appropriate in this situation than the "flagrant misconduct" standard propounded by the GC. In this context, the Agency demonstrated a reasonable connection between the registration, vetting, and training of non-employee Union representatives and the Agency's internal security; thus I would find that the Agency had a legitimate justification for applying those rules to Harris. The Agency is not seeking to discipline Harris for her Union activity or to prevent her from representing employees on behalf of the Union, as was true in cases where the "flagrant misconduct" standard was utilized. *See, e.g., BIA*, 54 FLRA at 1440-42; *Dep't of the Air Force, Grissom AFB, Ind.*, 51 FLRA 7, 11 (1995). The Authority has in some contexts (primarily for Weingarten interviews) applied a "special circumstances" test, but it is unclear whether that test would be appropriate here. *See U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customs & Border Prot., El Paso, Tex.*, 62 FLRA 241, 244-46 (2007); *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 713-14 (1999).

would be appropriate in a case involving the failure to bargain over impact and implementation, the Authority considers, among other things: (1) whether, and when, notice was given 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 properly bargain 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. *Id.* As the court explained in *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992), ordering that unilaterally implemented changes be rescinded "ensure[s] that agencies will have the incentive to bargain with their unions."

Here, all of the *FCI* factors favor awarding a status quo ante remedy - specifically, rescinding the rules restricting Harris's Union activities until impact and implementation bargaining is complete. With regard to the first factor, the Agency did not give the Union advance notice of its decision to bar Harris from accessing the Medical Center until she registered as a volunteer. With regard to the second and third factors, the Agency acted willfully, announcing its policy as a *fait accompli* and rendering a Union demand for bargaining futile. The impact experienced by adversely affected employees was significant, as the Agency interfered with the Union's right to designate its representative in at least three separate matters – the ICU nurses meeting, Tart's oral reply meeting, and Johnson's PSB hearing. With regard to the nurses meeting, the sight of watching their Union representative escorted out of the Medical Center without warning or any real explanation would shake most employees' confidence that their statutory rights are protected; the impact was exacerbated by the fact that it occurred just before these employees were to meet with a high-level manager, leaving the nurses without a chance to find another representative. Similarly, Tart and Johnson were left without representation, although I recognize that this was also a conscious choice made by the Union. The standoff between the Agency and the Union on Harris's status was still ongoing as of the date of the hearing, so in all likelihood, further incidents of this sort have continued. With respect to the fifth factor, there is no evidence that the remedy would burden the Agency's operations. Indeed, the record indicates that Harris had represented employees for a period of time prior to December of 2014, as had Jackson and possibly other non-employee Union officials, and there is no evidence that these activities had caused any problems at the Medical Center. Nothing in Harris's representation of the ICU nurses, Tart, or Johnson suggests that her representational work would impair the Agency's operations. For these reasons, I find that it is appropriate to order the Agency to rescind the restrictions on Harris's Union activities until it has given the Union proper notice of any change to the rules applicable to non-employee Union representatives and further until it has given the Union the opportunity to bargain over the procedures that management will observe in applying those rules and appropriate arrangements for anyone adversely affected by those rules.

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 (the Statute), the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia, shall:

1. Cease and desist from:

(a) Failing and refusing to grant Deneen Harris access to the Medical Center, and failing and refusing to allow her to conduct representational activities on behalf of the American Federation of Government Employees, Local 2145, AFL-CIO (the Union) there.

(b) Failing and refusing to bargain with the Union, to the extent required by the Statute, regarding the impact and implementation of any requirements that non-employee Union representatives must follow certain procedures before being allowed to conduct representational activities at the Medical Center.

(c) 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 any requirements that Harris or other non-employees must follow certain procedures before being allowed to conduct Union representational activities at the Medical Center, and grant Harris access to the Medical Center.

(b) If the Respondent decides to require Harris or other non-employees to follow certain procedures before being allowed to conduct Union representational activities at the Medical Center,

notify the Union and bargain to the extent required by the Statute.

(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 of the Medical Center, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous 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) In addition to the physical posting of the Notice, Respondent shall distribute electronically, such as by e-mail, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(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., May 12, 2016

_____
RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL rescind any requirements that Deneen Harris or other non-employees must follow certain procedures before being allowed to conduct representational activities at the Medical Center on behalf of American Federation of Government Employees, Local 2145, AFL-CIO (the Union).

WE WILL grant Harris access to the Medical Center to conduct Union representational activities.

WE WILL notify the Union and bargain, to the extent required by the Statute, if we decide to require Harris or other non-employees to follow certain procedures before being allowed to conduct Union representational activities at the Medical Center.

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.

_____
(Agency/Respondent)

Date: _____ 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 any of its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street, NW, 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.