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

MEMORANDUM DATE: December 17, 2004

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEFENSE COMMISSARY AGENCY
PETERSON AIR FORCE BASE
COLORADO SPRINGS, COLORADO

Respondent

and Case No. DE-CA-03-0099

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1867

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
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DEFENSE COMMISSARY AGENCY PETERSON AIR FORCE BASE COLORADO SPRINGS, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1867 Charging Party	Case No. DE-CA-03-0099

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 18, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: December 17, 2004
Washington, DC

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

DEFENSE COMMISSARY AGENCY PETERSON AIR FORCE BASE COLORADO SPRINGS, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1867 Charging Party	Case No. DE-C-03-0099

Matthew Jarvinen, Esq.
Ayodele Labode, Esq.
For the General Counsel

Helen White, Esq.
Phyllis Jenkins
For the Respondent

Darrel Banks
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq*. (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA or Authority).

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 1867, AFL-CIO (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Denver Region. The complaint alleges that the Department of Defense, Defense Commissary Agency, Peterson Air Force Base, Colorado Springs, Colorado (Respondent) violated section 7116(a)(1) and (5) of the Statute by issuing Reduction in

Force (RIF) notices to bargaining unit employees on October 10, 2002; by issuing amended RIF notices to bargaining unit employees on December 12, 2002, and by implementing a Reduction in Force on January 11, 2003, without providing the Charging Party with prior notice and an opportunity to negotiate to the extent required by law.[1] Respondent filed an Answer admitting in part and denying in part the allegations set forth in the Complaint.

A hearing was held on October 8, 2003, in Fountain, Colorado, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent each filed a timely, helpful brief.

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

STATEMENT OF FACTS

The Defense Commissary Agency (DeCA), Peterson AFB, Colorado Springs, Colorado is an agency under 5 U.S.C. §7103 (a)(3). (G.C. Ex. 1(c) and 1(d)) DeCA is headquartered in Alexandria, Virginia. (Tr. 156) The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at DeCA. (G.C. Ex. 1(c) and 1(d)). AFGE Local 1867 is an agent of the AFGE for the purpose of representing DeCA employees at Peterson Air Force Base, Fort Carson and the Air Force Academy. Darrell W. Banks is the President of AFGE Local 1867 during this time frame. (Tr. 50, 76)

The Master Labor Agreement (MLA) between the parties has been effective since October 26, 1997. Although expired, the parties continued to follow the MLA during the time period involved in this matter. (Jt. Ex. 1; Tr. 51) Article 45 of the MLA is titled REDUCTION IN FORCE/TRANSFER OF FUNCTION/REORGANIZATION and states, in part:

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[1] In its brief, Counsel for the General Counsel stated that it no longer wished to pursue its allegation that the Respondent failed to provide the Union prior notice or an opportunity to bargain concerning issuance of the Amended RIF notices on December 12, 2002. Therefore, this allegation will no longer be considered in this decision.

Section 2. RIF, TOF and Reorganization will be conducted in accordance with applicable laws, government-wide regulations and this agreement.

Section 3. The **EMPLOYER** shall notify the **UNION**, with as much advance notice as possible, prior to notifying any bargaining unit employee, when a RIF, TOF or Reorganization may be necessary. The notice will include the reason(s) for the RIF/TOF/Reorganization, approximate number of positions or employees impacted and the approximate date the actions are expected to take place. The **UNION** agrees to assist the **EMPLOYER** in keeping employees informed.

Section 4. The **EMPLOYER** will provide all other pertinent information to the **UNION** if and when available regarding RIF/TOF/Reorganization. The **EMPLOYER** will endeavor to provide this information at least 120 days prior to the effective date of a RIF/TOF/Reorganization. Additional information, as it becomes available, will be provided.

Section 5. When the **EMPLOYER** issues a specific written notice to an effected employee, the **EMPLOYER** will give written notice to the employee, it will include another copy of the notice with the heading 'THIS COPY MAY BE FURNISHED TO YOUR UNION REPRESENTATIVE.' Upon request and in accordance with applicable laws, and prior to employees receiving specific written notice, the **UNION** will be provided a list of affected unit employees to include their offers, if applicable, and a copy of the retention register and any revised registers.

. . .

Section 9. The **UNION** has the right to bargain, to the extent allowed by law, concerning actions to carry out the RIF/TOF/Reorganization.

(Jt. Ex. 1, pages 87-89, emphasis in original)

In 2001 DeCA, at the headquarters level, determined there would be a reorganization and reduction in force (RIF). Various facilities throughout the country, including the Commissary at Peterson Air Force Base, were identified as affected locations. On July 11, 2001, the Respondent notified the Union of the impending RIF. The attachment to the letter stated that nine full time equivalent (FTE) from the commissary at Peterson AFB were expected to be effected, with an effective date of the fourth quarter of FY 2001. (Jt. Ex. 2; Tr. 52, 89) The Union, by President Banks, replied on July 11, 2001, stating that the Union demanded to negotiate. (Jt. Ex. 3; Tr. 53, 90)[2]

Banks had a telephone conversation with Arla Bruch, Personnel Management Specialist, regarding the notice that he had been sent and indicating his interest in being involved in the entire process. (Tr. 53). The Respondent, by Bruch, replied to Banks on July 30, 2001, clarifying a conversation with Banks regarding the facilities involved (Peterson AFB and the Air Force Academy as opposed to Peterson AFB and Fort Carson). The Respondent also asked if there was going to be an information request and when the proposals would be received. (Jt. Ex. 4; Tr. 54, 90-91)

The Union replied on July 31, 2001, stating that it would like to send proposals about the procedures, but the issues were not entirely clear. Banks suggested that Bruch attend a scheduled conference regarding RIF procedures (mentioned in Jt. Ex. 4) and then meet with him upon her return to discuss the issues. The Union could then provide proposals. (Jt. Ex. 5; Tr. 54, 55) Banks testified that at this time he did not have specific information with respect to which employees were to be affected, the areas that were going to be affected, when the RIF notices were going to be sent out, and things of that nature. (Tr. 55)

There was no response from the Respondent and no further action was taken on the proposed RIF in FY 2001. The Union did not submit any proposals in response to the July 11, 2001 notice. (Tr. 91)

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[2] Article 4, Section 6b of the MLA provides that the Union should submit any requests to bargain within 15 days of receipt of notice of a proposed change. It further states that "[s]hould a timely request to bargain be made concerning a proposed change, the change will not be implemented until all phases of bargaining are concluded, consistent with applicable law." There is no requirement with regard to when bargaining proposals must be submitted. (Jt. Ex. 1; Tr. 92)

In April and May 2002, however, the reorganization and RIF issue again surfaced. Briefings were held throughout the country in which personnel from Virginia met with groups of employees and discussed RIF procedures and rights in general terms. Such meetings were held in Colorado Springs, apparently for unit employees of Peterson AFB and the Air Force Academy. Michelle Reynolds, a Union steward at the Air Force Academy and possibly an officer of the Union, was present at these meetings. (Tr. 94, 95, 162-165)[3]

On June 21, 2002, Respondent sent Banks notice regarding the RIF for FY 2003 at Peterson AFB. This letter informed the Union that after the RIF there would be 71 FTE, with 44 full time and 45 part time employees at the Peterson Commissary. It also broke down the full time and part time employees by department, *i.e.*, Produce, Meat, Front End, Office of the CO, and Grocery. The letter also stated "As you aware, when President Bush rescinded E.O. 12871, the permissive subjects of bargaining were also rescinded. Management no longer has a duty to bargain on numbers and types of positions or the termination of mission, budget, number of employees, or organization. Therefore, the new authorization levels are non-negotiable." (Jt. Ex. 6; Tr. 96, 98)

The Union did not respond in writing to the June 21, 2002 letter, but Banks did speak with Bruch. According to Banks, he requested to bargain. He said that Bruch indicated to him that the issue was non-negotiable so there was really no reason for him to request to bargain or to try to be a part of the situation. (Tr. 55-56) Banks testified that the June 21 notice did not give him specific information about who was going to be affected, when the RIF was going to take place and what areas were going to be affected. (Tr. 56)

On September 30, 2002, apparently in response to a conversation with Banks, Bruch faxed the Union a copy of the RIF Summary Report and the RIF Retention Register. Both documents contained similar information but in different formats. They list the full time employees at Respondent [full time employees being the only type of employee selected for the RIF procedure], whether they would be

[3] Although President Banks denied knowledge of these meetings (Tr. 64), I credit the testimony of Bruch and Verla Martin, Supervisory Human Resources Specialist, Human Resources Operations Division; Chief of the Midwest Staffing Branch, and Chief of the Reduction in Force Team, regarding the subject matter and presence of the Union at these meetings. (Tr. 94, 95, 162)

impacted, their job classification, service computation date, etc., and how impacted.[4]

On October 10, 2002, the notices of RIF action for affected employees were generated in the Virginia office, using the RIF Register and RIF Summary Report. These notices were sent to the Commissary by federal express on October 11. Employees began receiving their Notices between October 15 and 17, 2002.

The notices explained the RIF action and the impact on the individual employee. Five employees, Diane Coleman, Donna Cruz, Tonya Y. Gibson, Sun O. Merritt and Barbara K. Martinez, had their full time position abolished and they were offered a part time position. (Jt. Exs. 14, 15, 16, 18 and 20). Three employees, Kathryn L. McCarthy, Christa K. Allen and Julie T. Cox, had their Materials Handler position abolished and they were offered Meatcutting Worker positions. (Jt. Exs. 19, 22 and 24) One employee, Maria I. Camacho, a Meatcutting Worker, was displaced by an employee with a higher retention standing and she was offered a part time position, with save pay for two years. Three other employees, Tae S. Luther, Antonio Briggs and Tammy M. Longland, were separated after their positions were abolished or they were displaced by employees with a higher retention standing. (Jt. Exs. 17, 23 and 25)

Following a phone call from Banks, Bruch faxed him a second set of the RIF Retention Register and RIF Summary Report on October 17, 2002. Not included in the original September 30 transmission of the RIF Summary Report are two pages dated September 18, 2004, which show that unit

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[4] While Banks denied that he received the two faxes and asserted that he had informed anyone who called him that the fax machine was not working (Tr. 59, 60, 66, 67), I credit Bruch's testimony that she did send such faxes in response to a conversation with Banks. I find her testimony more complete and logical than Banks. The attached fax remittal notices also indicated that both copies had been sent without difficulty. Banks' testimony that the fax probably wasn't working at this time and even that he may have been out of town during this time was self-serving and unconvincing. Knowing the Respondent was asserting that they had sent the faxed documents on September 30, Banks' inability to express a specific time frame for when the fax machine was allegedly broken or when he was out of town support my rejection of his testimony. Therefore I find that the RIF Summary Report and RIF Register were faxed to the Union on September 30, 2002.

employee Tammy Longland was to be separated since her position was abolished. (Jt. Exs. 11 and 12)

On October 17, 2002, Banks sent a demand to bargain to the Respondent. (Jt. Ex. 9) Banks also sent a memorandum to Bruch concerning alleged violations of the RIF regulations. The Union requested ". . . that the agency re-conduct the RIF proceedings or negotiate *with the local to correct the violations aforementioned in this memorandum."* (Jt. Ex. 10, italics in original; Tr. 109, 110).5

There is no evidence that the Respondent replied in writing to Jt. Ex. 7. There is evidence that there were conversations between the parties but no bargaining. The Union did not submit bargaining proposals at any time.

In November 2002, the Union filed the unfair labor practice charge in this case, alleging the refusal to bargain. (G.C. Ex. 1(a))

Sometime in November and/or December 2002, new management came into the commissary at Peterson AFB, which, after reviewing the proposed RIF, was not satisfied. A second RIF action was run after management furnished additional information to Headquarters in Virginia. A meeting had been scheduled with Banks, Bruch and the new commissary manager on December 10, 2002. However, Banks did not attend. (R. Ex. 3; Tr. 60, 113-115) In December 2002, Bruch called Banks to tell him that a new RIF had been run and it was much better for the employees. Banks told Respondent to go ahead and issue the amended notices to the employees. (R. Ex. 2; Tr. 60-61)

The new RIF Retention Register was faxed to the Union on December 23, 2002. The positions for Martinez, Coleman, Cruz, Gibson, Luther and Merritt were abolished and they were offered part time positions. McCarthy, Cox and Allen

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The memo is actually dated September 23, 2002, but Banks explained that he sent it on October 17 and forgot to change the date. This is consistent with the content of the memo which was clearly written after the employees received their notices (between October 15-17). I therefore find the letter was sent sometime after October 17. The Respondent claims they did not actually receive the letter until October 23, according to a log maintained in the office. I have serious concerns about the accuracy of the dates on the log, but I do not find the issue of whether the memo was sent October 17 or received on October 23 to be of particular significance to the overall issue.

were offered Meatcutting positions. Briggs and Camacho were offered part time positions after they were displaced by employees with higher retention standings. Tammy Longland was separated, although her position was not listed on the RIF Register. (Jt. Ex. 26)

The RIF was effective January 12, 2003. Employees who were separated are, of course, no longer employed by Respondent. Several employees accepted part time positions, which reduced their working hours from 40 hours a week to 24 hours a week.[6] Most are now working 6 hour shifts, 4 days a week. Their work shift hours have not changed, *i.e.*, 10:00 am to 5:30 pm, but their days off vary every 2 weeks. The Commissary is closed on Monday, so that is a standard day off. Health costs have increased due to part time status; employees also earn less sick and annual leave per pay period (6-8 hours annual leave at full time; 4 hours annual leave at part time; 4 hours sick leave at full time; 2 hours sick leave at part time). While the hourly wage has not changed (except for cost of living increases), the total pay has been lessened by the reduced hours.[7] (Tr. 22, 25-27, 29-30, 32-33, 35-40, 42-43, 46-47, 62-63)

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent failed to provide the Union with adequate and specific prior notice describing its plan to issue RIF notices to bargaining unit employees in October 2002 or concerning its implementation of the RIF effective January 12, 2003. The Authority has indicated that an agency's notice to the union of a proposed change in conditions of employment must be "sufficiently specific and definitive" to provide the exclusive representative with a reasonable opportunity to request

[6] There was questioning whether a choice between no job and a part time job was actually a fair choice, but I find this line of testimony irrelevant. While the General Counsel appears to be trying to assert that the RIF was somehow improper due to the elimination of full time positions and the subsequent offer of part time positions, this issue is not before me.

[7] The employees who testified were all working 24 hours a week, or 48 hours a pay period. They were offered 39 hours a week when the RIF first went into effect, but all declined the additional hours for various personal reasons. There is no evidence how long the 39 hours offer was available, or whether it continues to be available.

bargaining. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee,* 53 FLRA 79 (1997) *(COE Memphis).* Nothing in the Respondent's July 10, 2001 letter or in its subsequent letter of June 21, 2002 reviving the RIF described which employees would be affected by the RIF, how they would be affected, when RIF notices would be issued, or precisely when the RIF would be effected. While the June 21, 2002 letter indicated an intent to implement the RIF sometime during fiscal year 2003, it did not specify even an approximate date for issuance of RIF notices or for completion of the RIF. Without such details concerning management's plan for the RIF, the General Counsel argues that it was impossible for Banks to engage in meaningful discussions with employees concerning how best to ameliorate the adverse impact of the upcoming RIF, much less prepare bargaining proposals.

The General Counsel further asserts that Banks credibly testified regarding his failure to receive the facsimile transmission of the Respondent's Summary Report and Retention Register on September 30, 2002. It was not until after the affected employees received their RIF notices that Banks received the documents from the Respondent, on October 17, 2002. Even if it could be established that the Union received these documents on September 30, 2002, the General Counsel asserts that these documents failed to satisfy the Authority's adequate and specific notice requirement, noting unexplained discrepancies in the documents, that these documents did not specify when employees would be issued their RIF notices, when the RIF would be implemented, and did not completely describe the Respondent's plan for the impending RIF. Under these circumstances, the General Counsel asserts that the Respondent failed to fulfill its obligation to furnish adequate and specific notice to the Union concerning the RIF.

The General Counsel asserts that the Union submitted a timely request to bargain over the Respondent's issuance of RIF notices and implementation of the RIF. Banks submitted the Union's initial request to bargain on July 11, 2001. After receiving the June 21, 2002 letter of its plan to proceed with the RIF, Banks promptly telephoned Bruch to ensure that she was aware that the Union continued to expect bargaining. Therefore the Union satisfied its obligation to submit a timely request to bargain over the RIF. The General Counsel rejects the Respondent's apparent theory that the Union missed its 15 day contractual deadline by failing to request bargaining any time between the Respondent's alleged FAX of the September 30, 2002 RIF documents and the issuance 15 days later of the first of the

RIF notices. This argument completely overlooks the fact that the Union had already submitted a request to bargain earlier. The General Counsel argues that the Respondent was fully aware of the Union's July 11, 2001 request to bargain over the RIF and that the Union verbally renewed its request to bargain by Banks' telephone calls to Bruch in June 2002. There is no basis to conclude that the Union failed to preserve its bargaining rights following the Respondent's alleged fax of the September 30, 2002 reports to the Union office. These documents did not specify a date for the issuance of the proposed RIF notices, and in the absence of any proposed implementation date, the Union should not be expected to speculate as to the date by which it was expected to request bargaining to preserve its rights.

The General Counsel further asserts that the Union was not required to submit bargaining proposals prior to engaging in face-to-face bargaining with the Respondent concerning the RIF. While the language of Article 4, section 6.b. of the parties' MLA requires the Union to submit a request to bargain within 15 days of receiving notice of a proposed change (assuming that a proposed implementation date is provided), there is nothing in the applicable agreement to suggest when the Union must submit bargaining proposals. Authority decisions support the proposition that in the absence of agreement to the contrary, there is no requirement for proposals to be submitted prior to face-to-face bargaining. *United States Department of Veterans Affairs, Regional Office, San Diego, California*, 44 FLRA 312, 338 (1992).

In conclusion, the General Counsel asserts that the evidence establishes that no bargaining ever took place prior to the Respondent's issuance of RIF notices in mid-October 2002. The Union was not provided any opportunity to bargain prior to implementation of the RIF effective January 12, 2003. Therefore, it should be found that the Respondent violated the Statute by failing to fulfill its bargaining obligation prior to implementing changes in conditions of employment of bargaining unit employees. *See, United States Department of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania,* 57 FLRA 852 (2002) (*Willow Grove*) (increase in staffing); *COE Memphis* (elimination of position without providing adequate notice and an opportunity to bargain); *Scott AFB* (issuance of RIF notices).

As a remedy for the violation, the General Counsel seeks an Order, to include status quo ante (SQA) relief together with full make-whole relief and a requirement to post a Notice To All Employees. SQA relief would require

the Respondent to rescind the RIF implemented January 12, 2003, to return all affected employees to the positions and schedules they had worked prior to implementation of the RIF (including an offer of reinstatement to Tammy Longland), and to make all affected employees whole for the loss of pay and benefits suffered as a result of the RIF. *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*). The General Counsel asserts that the Respondent failed to provide the Union with advance and specific notice of its intent to issue RIF notices and to implement the RIF and it also ignored the Union's repeated requests to bargain. It is the General Counsel's contention that the Respondent's failure to fulfill its bargaining obligation was willful. Further the adverse effects of the RIF on bargaining unit employees were immediate and severe. Longland lost her job, Camacho and Briggs were moved from their Meatcutting Worker positions to Store Worker positions, suffering reductions in grade (albeit with save pay); McCarthy, Allen and Cox were reassigned from their Materials Handler positions to Meatcutting Worker positions; and six Front End Cashiers were reduced from full-time to part-time positions with corresponding reductions in their pay and benefits. Finally, the record is devoid of any evidence to suggest that a SQA remedy would disrupt the Respondent's operations. *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky*, 38 FLRA 647, 649 (1990). The Respondent did not offer any evidence to suggest that there would be any difficulty in restoring employees to their previous positions and work schedules. *COE, Memphis*. Further, there is no suggestion in the record that employees return to their former positions and work schedules would not perform meaningful work at the Respondent's facility. *Compare U.S. Immigration and Naturalization Service, U.S. Border Patrol, Del Rio, Texas*, 47 FLRA 225, 233-34 (1993) (SQA relief that would require an agency to re-establish a work unit found to be inappropriate where there was little or no work to be done by such a unit if reinstated) with *U.S. Department of Health and Human Services, Social Security Administration, Hartford District, Hartford, Connecticut*, 37 FLRA 278, 287 (1990) (*SSA Hartford*) (SQA relief requiring restoration of employee to former position in the field warranted, even in the face of agency's contention, that there was no work remaining for the employee to perform in his field position).

Finally the General Counsel asserts that make-whole relief is warranted since any loss of pay and benefits by Longland and by the six Front End Cashiers who were reduced to a part-time schedule resulted directly from the Respondent's unwarranted personnel action, *i.e.*, its refusal to bargain. *U.S. Department of the Interior, Bureau of*

Indian Affairs, Gallup, New Mexico, 52 FLRA 1442 (1997); *Pueblo Depot Activity, Pueblo, Colorado*, 50 FLRA 310 (1995) and *SSA Hartford*.

Respondent

Respondent asserts that it did not violate the Statute as alleged. It argues that it did everything possible to keep the Union advised of the status of the RIF, and that the Union had adequate notice of the impending RIF. The Respondent asserts that the Union received adequate notice of the pending RIF in July 2001. *United States Department of the Army, Letterkenny Army Depot, Chambersburg, Pennsylvania*, 58 FLRA 685 (2003) (Letterkenny)[8] Following the RIF briefings in May 2002, the Union was notified by letter dated June 21, 2002, that (1) a RIF would still be conducted at the Peterson AFB Commissary during FY 03; (2) which would affect full time employees and (3) established the new staffing authorizations for the facility. The Respondent asserts that this letter satisfies the notice criteria required by the Authority. *Department of the Treasury, Customs Service, Region 1 (Boston, Massachusetts)*, 16 FLRA 654 (1984). Respondent also argues that the Union was provided adequate notice, even if the July 2001 and June 2002 letters failed to specify an implementation date. *See*, *Letterkenny* and *General Services Administration*, 15 FLRA 22 (1984).

Respondent notes that Banks, the Union President, admitted that he chose not to respond to the official notification that a RIF would be conducted. This is further reinforced by Banks' inaction upon receipt of the September 30, 2002 faxed transmission of the Retention Register and Summary Sheets. This information provided a definitive list of positions that would be affected by the RIF. Banks did not respond to this information, but rather waited until the RIF notices were issued to employees and they came to him for assistance.

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8 After the brief was filed in this matter, this case was remanded to the Authority from the D.C. Circuit in *National Federation of Federal Employees v. Federal Labor Relations Authority*, 369 F.3d 548, 174 L.R.R.M. (BNA) 3256, 361 U.S. App. D.C. 348 (May 28, 2004). On November 30, 2004, the Authority issued its Decision and Order on Remand, setting aside its earlier decision and finding that the Respondent violated the Statute as alleged. *United States Department of the Army, Letterkenny Army Depot, Chambersburg, Pennsylvania,* 60 FLRA No. 90 (2004) (Letterkenny #2).

Assuming that the Union was entitled to a second opportunity to submit a request to bargain, the Union should have submitted such a request within 15 days of receipt of the proposed change, either the July 2002 letter or September 30 receipt of the RIF Retention Register and Summary Report. Banks chose not to respond to the former letter and his response to the September 30 transmission was untimely and without proposals. Since the MLA requires that a request to bargain be received in 15 days and the Union failed to make such a request, the Respondent began issuing the RIF notices on the 15th day.

The Respondent asserts that Banks had adequate knowledge of the impending RIF but never submitted any proposals during this 18 month period. While his initial request to bargain in July 2001 was timely, he never submitted proposals, and his October 17, 2002 request was untimely and also without proposals. Respondent asserts that it provided the Union with reasonable and adequate notice of its decision to conduct a RIF and therefore fulfilled its statutory obligation.

Respondent further argues that, if a violation of the Statute is found, none of the *FCI* factors indicate that a *status quo ante* remedy is appropriate in this matter. With respect to the first factor, the evidence clearly establishes that the Union had notice of the RIF and was provided regular updates of the status of the RIF through correspondence, emails and telephone calls. The Union never submitted any proposals with regard to its timely request to bargain (July 2001) and the subsequent untimely request to bargain (October 2002). The Respondent was ready and willing to negotiate as evidenced by the continual updates provided to the Union. With regard to the fourth factor, several full-time bargaining unit positions were abolished and the employees occupying these positions were slated for removal from Federal service. However, to lessen the adverse impact of the RIF, the Respondent offered these employees assignments to vacant part-time positions. The affected sales store checkers were also offered opportunities to work additional hours, but all declined. With regard to the fifth *FCI* factor, the Department of Defense mandated budget cuts, which affected the Defense Commissary Agency (Jt. Ex. 6) A *status quo ante* remedy would seriously disrupt the accomplishment of the agency's mission and the efficiency of its operations inasmuch as the reorganization was part of a long-range plan which included realignment of its Regions. The reorganization resulted in the abolishment of full-time positions in order for the agency to achieve unit cost reductions and efficiencies to operate more effectively and efficiently. Impact and

implementation bargaining could not have changed the resultant staffing levels. Furthermore the abolishment occurred Agency-wide because of the need to significantly reduce manpower full-time equivalents. (Tr. 164, 167). A return to *status quo* would cause an undue hardship upon the Respondent and result in a benefit that impact and implementation bargaining itself could not have provided.

Discussion and Conclusion

Prior to implementing a change in conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the changes that are within the duty to bargain. *United States Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999); *Willow Grove*. Adequate notice of a change triggers the exclusive representative's responsibility to request bargaining. An agency is not obligated to bargain over the impact and implementation of a change if it has only a *de minimis* effect on bargaining unit employees' conditions of employment. *Air Force Logistics Command, Warner Robins Air Logistics Center, Robins AFB, Georgia*, 53 FLRA 1664, 1668 (1998); *Willow Grove*. 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, on unit employees' conditions of employment. *United States Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 913 (2000). In this matter, the Respondent does not argue that the reduction in force did not have a substantial impact on certain bargaining unit employees. The evidence shows that at least one employee was separated from government service; other employees accepted part time employment, with reduced pay and benefits; and other employees were transferred to different departments with different work. Therefore, the evidence clearly shows that the effect of the reduction in force was more than *de minimis* in nature, thus obligating the Respondent to bargain over the impact and implementation of the change. *See, Willow Grove; COE Memphis,* and *Scott AFB*.

The first issue to be determined is whether the Respondent furnished to the Union adequate notice of the proposed change. The evidence reflects that the Respondent first notified the Union in July 2001 that there would be a reduction in force involving bargaining unit employees at the Peterson AFB Commissary. This RIF was postponed and resurfaced in May 2002, when meetings were held with bargaining unit employees to discuss RIF procedures and employee rights. The Union was present at these meetings. In June 2002, the Respondent sent the Union notification of the impending RIF for FY 2003. And finally on September 30, 2002, the Respondent faxed to the Union the RIF Summary Report and RIF Retention Register, which included which individual employees were to be affected by the RIF. One employee, Tammy Longland, who was in fact separated from employment by the RIF, was not included on either the RIF Summary Report or the RIF Retention Register, and whose

exclusion was not explained by the Respondent. As stated previously, I find that the record evidence does establish that the Union was faxed the September 30, 2002, documents.

The Respondent argues that it kept the Union informed of the RIF process and that it gave the Union adequate notice to trigger its bargaining obligation. The General Counsel argues that the Respondent's attempts at notice were not adequate, noting that the July 2001 and June 2002 letters did not give information regarding specific employees and how they would be affected or even give a specific date for the RIF.

In examining the record as a whole, I find that the Respondent did meet its obligation to the Union with regard to furnishing adequate notice of the impending RIF. *Cf. Letterkenny #2 and Ogden Air Logistics Center, Hill Air Force Base, Utah, and Air Logistics Command, Wright-Patterson Air Force Base, Ohio,* 41 FLRA 690 (1991) *(Hill AFB).* The original notices were sufficient to inform the Union of the impending RIF, as seen by the fact that the Union did demand to bargain upon receipt of the initial notice and restated its interest in bargaining with the June 2002 notice. Further the RIF documents furnished in September 2002 identified specific employees, with the exception of Longland. Although a specific RIF date was not given, the Union was clearly on notice that the RIF was moving forward and that RIF notices were imminent. While a more specific time frame would have been helpful, I do not find that the Respondent failed in its statutory duty to furnish notice in this matter.

The Union, as noted above, did request to bargain in July 2001 and restated its interest in bargaining in June 2002. The Union did not respond to the September 30 faxed documents until employees starting receiving their RIF notices, 15 days later. The Union then reiterated its request to bargain, although it never submitted any proposals to the Respondent at any time during this process.

The Respondent argues that the Union had a 15 day time frame after the September 30 fax in order to renew its request to bargain and to submit proposals. However, this argument ignores the fact that the parties' MLA does not set forth any specific time frames in which the Union must submit proposals. It also ignores the fact that the Union had an outstanding request to bargain on this matter, of which the Respondent was aware. There is no evidence that the Respondent ever replied to the Union's demand to bargain. Further, there is evidence that the Respondent, by Bruch, informed the Union that there was nothing to bargain

about since the President had rescinded the Executive Order regarding permissive topics of bargaining. While the Respondent's July 22, 2002 letter relates this issue to bargaining about the subject matter of the RIF itself, the implication of the discussions between Bruch and Banks are that there would be no bargaining on the issue at all.

In viewing the evidence as a whole, it is clear that the Respondent took no action with regard to the Union's outstanding request to bargain. While the Respondent did keep the Union informed of the RIF, it did not make an effort to negotiate with the Union as requested. *Letterkenny #2; Scott AFB,* and *Hill AFB*.

Therefore, based on the record as a whole, I find that the Respondent failed to negotiate with the Union prior to implementing the RIF notices to bargaining unit employees and failed to negotiate regarding the implementation of the RIF in January 2003.

Remedy

Where an agency has failed to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a *status quo ante* remedy using the factors set forth in *FCI*, 8 FLRA 604. *United States Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 84 & n.4 (1997) (*Army Corps, Memphis*) and *Willow Grove*. The *FCI* factors are: (1) whether and when notice was given to the union by the agency concerning the change; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a *status quo ante* remedy would disrupt or impact the efficiency and effectiveness of the agency's operations. *United States Immigration & Naturalization Service, Washington*, D.C., 55 FLRA 69, 70 n.3. (1999); Willow Grove.

The appropriateness of a *status quo ante* 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 would be caused by such a remedy. *FCI*, 8 FLRA at 606. The Authority requires that a conclusion that a *status quo ante* remedy would be disruptive to the operations of an agency be "based on record evidence." *Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas*, 53 FLRA 749, 763 (1997).

With regard to the first factor, I have found that the Respondent furnished the Union with adequate and timely notice regarding the RIF. With regard to the second factor, the Union timely made a demand to negotiate. As to the wilfulness of the Respondent's conduct in failing to discharge its bargaining obligation, I cannot find that the Respondent's efforts in keeping the Union informed overcome its consistent failure to bargain. Therefore, I find that the Respondent's conduct in this matter to be wilful. With regard to the nature and extent of the adverse impact on bargaining unit employees, there is evidence that the Respondent made efforts to reduce the impact on bargaining unit employees with the changes to the RIF in December 2002. Further, the Union was aware of these changes and acquiesced without further bargaining. The final effect on certain bargaining unit employees was substantial, including both separation and reduction in pay and benefits in moving from full time employee to part time employee positions. Therefore, the second, third and fourth factors weigh in favor of a *status quo ante* remedy. The fifth factor concerns whether and to what degree a *status quo ante* remedy would disrupt or impact the efficiency and effectiveness of the agency's operations. The Respondent argues that such a remedy would have a substantial impact, while the General Counsel asserts that the Respondent offered no evidence in support of this allegation. In agreement with the General Counsel, I find that the record evidence does not support that a *status quo ante* remedy would be disruptive to the operations of the Respondent. Respondent furnished little, if any, evidence regarding disruption of its operation. Thus, weighing the factors set forth in *FCI*, I find that a *status quo ante* remedy is appropriate in this matter. *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky,* 38 FLRA 647 (1990).

Based on the record, I conclude that the Respondent, by its conduct in issuing Reduction in Force (RIF) notices to bargaining unit employees on October 10, 2002 and by implementing a Reduction in Force on January 11, 2003, failed to provide the Union with an opportunity to negotiate to the extent required by law. Accordingly, I conclude that Respondent violated section 7116(a)(1) and (5) of the Statute.

It is therefore recommended that the Authority adopt the following order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service

Labor-Management Relations Statute, the Defense Commissary Agency, Peterson Air Force Base, Colorado Springs, Colorado, shall:

1. Cease and desist from:

(a) Issuing reduction in force (RIF) notices to bargaining unit employees and implementing RIFs without first affording the American Federation of Government Employees, AFL-CIO, Local 1867 (the Union), the exclusive collective bargaining representative of its employees, an opportunity to bargain regarding the procedures to be observed in implementing such changes and appropriate arrangements for employees who have been adversely affected by the issuance of such RIF notices and by the implementation of such RIFs.

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

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

(a) Rescind the RIF implemented January 12, 2003.

(b) Offer to reinstate Tammy M. Longland to the GS-3 Identification Card Checker position she occupied prior to January 12, 2003.

(c) Offer to return Antonio Briggs and Maria I. Camacho to the GS-5 Meatcutting Worker positions they occupied prior to January 12, 2003.

(d) Offer to return Kathryn L. McCarthy, Christa K. Allen and Julie T. Cox to the GS-5 Meatcutting Worker positions they occupied prior to January 12, 2003.

(e) Offer to return Sales Store Checkers Diane Coleman, Donna Cruz, Tonya Y. Gibson, Tae S. Luther, Sun O. Merritt and Barbara K. Martinez to the full time positions they occupied prior to January 12, 2003.

(f) Make Longland, Coleman, Cruz, Gibson, Luther, Merritt and Martinez whole to the extent they have suffered any reduction of pay and/or benefits as a result of implementation of the RIF on January 12, 2003.

(g) Notify the Union of any intent to issue RIF notices or to implement a RIF affecting bargaining unit employees and, upon request, negotiate over the procedures

to be observed in implementing such changes and appropriate arrangements for employees who have been adversely affected by the issuance of RIF notices and by the implementation of the RIF.

(h) Post at its facilities at the Defense Commissary Agency, Peterson Air Force Base, Colorado Springs, Colorado, where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1867, 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 Store Manager, and shall be posted and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, DC, December 17, 2004.

_____

SUSAN E. JELEN
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 Defense Commissary Agency, Peterson Air Force Base, Colorado Springs, Colorado, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally issue reduction-in-force (RIF) notices to bargaining unit employees and implement RIFs without first affording the American Federation of Government Employees, AFL-CIO, Local 1867 (the Union), the exclusive collective bargaining representative of our employees, an opportunity to bargain regarding the procedures to be observed in implementing such changes and appropriate arrangements for employees who have been adversely affected by the issuance of such RIF notices and by the implementation of such RIF.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the RIF implemented January 12, 2003 and return employees to the positions and work schedules they occupied prior to January 12, 2003.

WE WILL provide the Union with adequate and specific notice of any intent to implement a RIF and, upon request, bargain with the Union to the extent required by law regarding procedures for implementing the RIF and over appropriate arrangements for employees adversely affected by the RIF.

WE WILL make whole employees to the extent they have suffered any reduction of pay and/or benefits as a result of implementation of the RIF on January 12, 2003.

_____
_
(Respondent/Activity)

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

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado, 80204-3581 and whose telephone number is: 303-844-5226.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-04-0099, were sent to the following parties:

_____

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CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Matthew Jarvinen **7000 1670 0000 1175 4755**
Ayodele Labode
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Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
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Helen White **7000 1670 0000 1175 4731**
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Darrell Banks, President **7000 1670 0000 1175 4748**
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REGULAR MAIL:

President
American Federal of Government Employees
80 F Street, NW
Washington, DC 20001

DATED: December 17, 2004
Washington, DC