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

MEMORANDUM DATE: May 23, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION

Respondent

and Case No. WA-CA-04-0172

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

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

SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO Charging Party	Case No. WA-CA-04-0172

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 Federal Labor Relations Authority (Authority), the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Authority pursuant to 5 C.F.R. § 2423.34 (b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 26, 2006**, and addressed to:

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

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RICHARD A. PEARSON
Administrative Law Judge

Dated: May 23, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
Washington, D.C.

SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO Charging Party	Case No. WA-CA-04-0172

Susanne S. Matlin, Esquire
For the General Counsel

LaTina Burse Greene, Esquire
For the Respondent

Steve Fesler, Esquire
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

The American Federation of Government Employees, Local 1923, AFL-CIO (the Charging Party or Union) initiated this case on January 16, 2004, when it filed an unfair labor practice charge against the National Computer Center.[1] After investigating the charge, the General Counsel of the Federal Labor Relations Authority (the General Counsel) issued a complaint on June 2, 2004, against the Social Security Administration (the Respondent or Agency). The complaint alleges that the Respondent violated section 7116 (a)(1) and (5) of the Statute in November 2003 by

[1] The record shows, and it is undisputed, that the National Computer Center is an entity within the Social Security Administration.

implementing a change in the procedure for scheduling overtime without providing the Charging Party with notice and an opportunity to bargain over the changes to the extent required by the Statute. On June 28, 2004, the Respondent filed an answer, denying that it had committed an unfair labor practice.[2]

A hearing was held in Baltimore, Maryland, on August 17 and 18 and October 4 and 5, 2004, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

Background

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a nationwide bargaining unit of the Respondent's employees. The Charging Party is the agent of AFGE for the purpose of representing the bargaining unit employees at the Agency's headquarters facilities in the Baltimore, Maryland area. At all times material to the events in this case, the Respondent and AFGE were parties to collective bargaining agreements, the most recent of which became effective on April 6, 2000. Resp. Ex. 6.

The dispute in this case involves employees assigned to the Office of Facilities Management at the Respondent's National Computer Center (NCC).[3] The NCC, the central data storage center for the Agency, houses the computer systems and the data that constitute the basis of the nation's

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[2] The Respondent also filed a motion to dismiss the complaint (G.C. Ex. 1(o)), which was denied. Tr. 7-10.

[3] The organizational relationship between the Office of Facilities Management and the NCC is not clear from the record. The information provided does not reliably establish whether the two organizations are in the same chain of command or in separate chains of command with one providing services to the other. G.C. Ex. 5, p. 1, suggests the latter.

Social Security system. Tr. 475-76. The physical plant of the NCC includes two buildings: the NCC Building and the Utility Building, which house large mainframe computers as well as equipment for supplying power and for heating, ventilating and cooling the computers. *Id.* The record establishes that it is critical to the operations of the NCC (indeed, of the Agency as a whole) that an uninterrupted power supply be maintained. Tr. 475, 505. The normal source of power for the NCC is the local commercial power company, Baltimore Gas and Electric (BG&E). Tr. 98-99, 478-79, 496. NCC's physical plant includes systems for distributing the power coming from that source throughout the Agency's headquarters and generating alternate power in the event of disruptions in the commercial power supply. For this purpose, the NCC maintains three 7-million-watt jet turbine generators. Tr. 61, 477-78.

The Division of NCC Management within the Office of Facilities Management is responsible for operating and maintaining the physical plant of the NCC. Tr. 476. To this end, four crews working rotating 8-hour shifts, provide coverage 24 hours a day, 7 days a week. Tr. 29. Three crews work each day, with the fourth crew "off" that day, on a rotating basis. Four people (counting the shift supervisor) must be working on the crew at all times, and employees may not leave work until their relief arrives. The normal staffing complement of each crew is one shift supervisor, one Distribution Facilities Electrician (electrician), and two Utility Systems Repairer-Operators (USROs or engineers). Tr. 29, G.C. Ex. 5 and Resp. Ex. 3. Thus, each crew consists of employees from two "trades," electricians and engineers.

Although the two trades work jointly to maintain and operate the NCC physical plant, the record shows that each has a separate focus in pursuit of that common mission. The engineers are primarily responsible for maintaining and operating electronic and mechanical systems and equipment within the NCC physical plant. G.C. Ex. 5. The electricians are primarily responsible for operating and maintaining the electrical power supply system. Resp. Ex. 3. Consequently, the skills and knowledge required for each trade are different and reflect the specialty of the particular trade. G.C. Ex. 5 and Resp. Ex. 3. Additionally, the risks associated with the work of the two trades are different. For example, the record shows that the electricians can be called upon to do "hot work," which involves live electricity of up to 13,200 volts. Tr. 62-65, Resp. Ex. 3. As a consequence, although the risk of injury accompanies the work of both the engineers and electricians, the potential for fatality is greater, and the margin for

error is smaller, for the electricians than for the engineers. Resp. Ex.3, G.C. Ex. 5.

The record reflects that although shift supervisors may be either engineers or electricians by trade, most of them have historically been electricians. At the time of the hearing, three of the four shift supervisors had been electricians prior to being promoted. Tr. 53. Although the fourth, Wayne Snipes, was promoted to supervisor from an engineer position, the parties dispute whether he was also qualified to do the work of an electrician.[4] It is clear from the record, however, that in at least one previous instance an engineer, James Hawkins, was promoted to, and served as, a shift supervisor (and later, General Foreman), notwithstanding the fact that he admittedly lacked qualification to do high-voltage electrical work. Tr. 607-08, 649.

The evidence shows that it is relatively common for maintenance employees to "call out" on unscheduled leave. When such absences occur, the Agency maintains the staffing of crews at four persons by having members of the other crews work overtime to fill in for the absent employee. Tr. 517. Maintaining a four-person crew allows adequate

[4] Although some of the managers who testified stated that Snipes had prior experience as both an electrician and an engineer, this view was questioned by some of the bargaining unit employees who testified. Tr. 57, 249, 488-89, 678, 717. In this regard, James Greener, the former General Foreman of NCC, testified that Snipes had been trained as an electrician in previous private-sector employment and that his dual background was a factor in his selection as a supervisor. Tr. 489-90. Bargaining unit witnesses disputed those qualifications, but it is apparent that they had no direct knowledge on this point. *See, e.g.*, Tr. 29-30, 69-70, 217, 354. While I find that a determination regarding Snipes's qualifications as an electrician is not necessary to the disposition of this case, weighing the relative qualifications of employees to work in a given position is a management function, and I would defer to the Agency's supervisors on this point. The factual dispute is only relevant in evaluating documents offered by the General Counsel (G.C. Ex. 8-10, 13-16), showing that Snipes (among other employees) filled in for absent electricians on various occasions. I accept, in this regard, the testimony of the management witnesses that they considered Snipes to be an electrically-qualified supervisor. I reject the General Counsel's suggestion that I draw an adverse inference from Respondent's failure to call Snipes as a witness, as I consider this to be a tangential issue.

coverage for both buildings that comprise the NCC complex, and permits the members of the crew to work in pairs where desirable for safety or the needs of the job. Tr. 30, 82-84, 92, 522-23, 583-86. According to the management witnesses testifying, the optimal staffing pattern on each shift consists of two people who are experienced in electrical work (i.e., one electrician and an electrically-qualified supervisor) and two engineers. Tr. 517-523, 677. If an absent employee could not be replaced with someone else from the same trade, then someone from the other trade would be used as a "4th man," to maintain a full crew and to assist in the event of emergency. Tr. 522-23. It is normally no problem to replace an absent engineer with another engineer, since eight of the twelve bargaining unit employees are engineers. It is, however, more difficult on occasion to fill in for an absent electrician, and it was on this issue that the instant dispute arose.

Overtime Practice Prior to March 2003

The underlying dispute which prompted this case involves the order in which employees are offered the opportunity to work overtime to cover for an absent crew member. Prior to March 2003, there was no written policy or procedure for offering such overtime opportunities. Tr. 206, 614. Although there were provisions in the parties' collective bargaining agreement that addressed the assignment of overtime, they were apparently viewed within the Facilities Maintenance office as not relevant to the circumstances at NCC. Tr. 253-54, 576, 765. As for the actual practices for assigning overtime to cover for absences, what emerged at the hearing was a dichotomy between the perceptions of the management and the bargaining unit employee witnesses who testified, concerning the sequence in which employees were contacted and offered the overtime. One point not disputed, however, is that it was the supervisors who made the calls to employees to offer them overtime in the event of unscheduled absences. Tr. 34, 251, 531-32, G.C. Ex. 11.

The witnesses at the hearing who were currently bargaining unit employees testified that, historically, the sequence in which offers to work overtime were extended was: first, bargaining unit employees in the same trade as the absent employee, followed by bargaining unit employees in the other trade, followed by supervisors. Tr. 31-33, 104-106; 200. Under this system, if an electrician was on leave or otherwise absent, the first group of employees contacted and offered the opportunity to work overtime was the other bargaining unit electricians. If none of them was available to work the overtime, the bargaining unit

engineers would then be contacted, and if none of them was available, supervisors would be offered the overtime.[5]

The management witnesses presented a different picture of the procedure that was used prior to March 2003. According to James Greener, who was General Foreman from 1991 to 2002, the policy was to offer overtime first to bargaining unit employees in the same trade as the absent employee, then to supervisors, and then to bargaining unit employees in the other trade. Tr. 519-23, 568-69. The other management witnesses who testified on this issue corroborated Greener's account. Tr. 611-13, 678-79, 716-17.

In other words, the discrepancy between the managers' testimony and the bargaining unit members' testimony centered on which group received second priority for overtime. Everyone agreed that the first priority went to employees in the same trade as the absent employee. But they disagreed whether bargaining unit employees of the other trade, or supervisors, were called next.

There was also agreement among both sides' witnesses that because the overtime rules were not in writing, problems arose in administering the policy. Sometime in the late 1990's or early 2000, General Foreman Greener had a series of discussions with Union Steward Harold Rusk about overtime and other issues involving the NCC maintenance employees. According to Greener, some employees felt that others were manipulating the overtime procedures to the advantage of their friends and at the expense of others, and there were disputes about details such as how long employees had to return a phone call. Tr. 553-56. Eventually he asked the employees to give him suggestions as to how the procedure should work. Tr. 556-57. Rusk generally corroborated this account, recalling that Greener asked for his help in resolving these and other problems, but he said that he told Greener that these were disciplinary matters which Greener needed to handle as the manager. Tr. 428-35. Both Greener and Rusk testified that James Hawkins, who was then a bargaining unit engineer, participated in at least one of these meetings, and that Hawkins showed them a document he had prepared, a detailed "flow chart" that contained a step-by-step procedure for supervisors looking

[5] According to some of the bargaining unit witnesses, an exception to this order was made if the supervisor on a crew was not an electrician. In that situation, electrically-qualified supervisors got priority over the bargaining unit engineers in being offered the overtime, to ensure that the crew had at least one person who was electrically qualified. Tr. 108-09, 217-19, 249.

for someone to replace an absent engineer.[6] Tr. 429, 559. This document was identified as G. C. Ex. 11, and it has a handwritten date of January 1, 1999 on it. According to Greener, this document represented Hawkins's understanding of the overtime procedures as they had been followed up to then, and that it was an attempt to formalize those procedures but not to change them. Tr. 562-64. Under the procedures set forth in G.C. Ex. 11, if an engineer could not be found to replace an engineer, supervisors would be called next, follow by electricians.

Another engineer, Brian McDermott, testified that after a grievance had been filed regarding overtime call-in procedures, Greener had asked employees on each of the crews to get together and put down on paper their understanding of how the process worked. Tr. 253-56. McDermott's crew and Hawkins's crew each prepared a document with this task in mind; the two men compared them and found their versions to be virtually identical. Tr. 256.[7] Hawkins's testimony about the origin of his "flow chart" essentially agrees with that of McDermott, but Hawkins added that engineers at that time did not oppose the general policy of calling supervisors before engineers to replace an absent electrician. He said that engineers were generally hesitant to work near high-voltage equipment and didn't seek priority over supervisors in replacing an electrician. Tr. 615-16; *see also* Greener's testimony at 555.

General Foreman Greener also testified that at the end of his meetings with Hawkins and Rusk concerning overtime procedures, he felt that Hawkins's flow chart was too complicated for his liking. Tr. 563. Therefore, he retained the unwritten procedures as he understood them, which essentially boiled down to calling members of the same trade first, supervisors second, and members of the other trade last. *Id*.

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This document was not limited to specifying the sequence in which employees would be contacted. It covered such details as which of the two engineers on a shift would be offered the overtime first, the length of time allowed for someone who was contacted by telephone to return the call, and what factors might disqualify an employee from working a particular overtime assignment. However, it did not address the parallel problem of finding a replacement for an absent electrician.

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McDermott placed these events (partly with the leading of his counsel) at the summer of 2002, but I find that 1999 is more consistent with the evidence as a whole.

Based on all the evidence, I find (as the Respondent argues) that prior to March 2003, the longstanding practice at the NCC was to offer overtime to supervisors before offering it to bargaining unit employees of the "other" trade. Although the procedures followed by supervisors may have varied as to some of the details, the testimony given by supervisors was consistent that when an electrician was absent, other electricians would be called first, supervisors second, and engineers last; when an engineer was absent, bargaining unit electricians would be called last. I find it credible and sensible that preference would be given to someone who was knowledgeable and experienced in the particular trade before resorting to someone who was not. This is consistent with the fact that the work of both trades, and especially the high voltage electrical work, involved hazards with potentially serious consequences for both the safety of the employees and the operations of the NCC and called for specific experience and training. Although the supervisors, with one possible exception (Snipes), tended to have a professional background in one trade or the other, it seems likely that in their capacity as supervisors of crews consisting of both trades, they would have become more knowledgeable about both trades than a bargaining unit employee in the "other" trade. Additionally, because the supervisors were the ones who actually made the calls to offer overtime, they were better positioned to know what sequence was used than those who received the calls and, consequently, the supervisors' account of the policy and practice was more authoritative. This is particularly true given the lack of written procedures and the frequency with which there was a need to arrange coverage for a crew member's absence. It seems to me that it would be very difficult for someone not involved in making the calls to accurately discern a pattern in the order that employees were contacted.

Some of the bargaining unit employees who testified did not offer convincing explanations supporting the basis for their understanding of the practice. For example, when asked how he was aware of the practice applied, Pawlowicz simply stated that was the way it had always been and when he worked in the "main complex," that's how they did it. Tr. 33. McDermott relied on the fact that there were instances when employees of one trade covered for employees of the other trade on overtime. The fact that there were instances that this occurred does not, however, establish the order in which offers were made. Another bargaining unit employee, Curtis Guinn, provided more concrete support for his understanding. Guinn testified that shortly after he first started working at the NCC in 1997, Greener asked him to work overtime for an electrician. According to

Guinn, he told Greener he was not an electrician and asked why the supervisors weren't working the overtime, to which Greener replied that the overtime had to go to bargaining unit employees first. Tr. 201. Guinn stated that one of the problems with the manner in which overtime was offered was that there was nothing in writing and it was always "in people's heads." Tr. 206, 229. Guinn also testified that he didn't work overtime covering for an electrician more than a couple of times a year. Tr. 241. Moreover, the excerpts from time sheets and work records do not support the General Counsel's or the employees' version of the pre-2003 practice. Since we do not know from these records who was actually contacted on a given day and who turned down offered overtime, it is impossible to draw any conclusions about the actual policy from the documents. On the whole and when weighed against other evidence and the circumstances, I do not find the evidence persuasive that supervisors, prior to March 2003, received last priority in being offered overtime to fill in for absent electricians and engineers.

The diagram prepared by Hawkins in 1999 (G.C. Ex. 11) corroborates the pre-2003 overtime priorities described by the managers. Although that diagram was limited to coverage for an absent engineer, I see no reason that a different policy would have been followed for absent electricians, especially given the heightened level of hazards that accompany electrical work. The testimony of both bargaining unit witnesses and supervisors was consistent in suggesting that Hawkins's "flow chart" was an attempt not to change the existing overtime priorities but rather to put into writing and to flesh out in more detail the existing policy. Hawkins was a bargaining unit engineer at the time he drafted this document, and in the flow chart, priority is given to supervisors over bargaining unit electricians to fill in for an absent engineer. If the pre-2003 policy was as described by the General Counsel's witnesses, then bargaining unit electricians should have had priority over the supervisors, and G.C. Ex. 11 should reflect that priority. It is highly unlikely that Hawkins would have proposed to change the existing policy in 1999 in a way that would have given priority to supervisors over bargaining unit employees such as himself; much more likely is that the flow chart represented, as Hawkins and Greener stated, an attempt to put into writing the existing policy and priorities. As such, the document is persuasive evidence not only that supervisors were called before electricians to replace an absent engineer, but also that supervisors were called before engineers to replace an absent electrician.

Consequently, despite the many discussions between the General Foreman, NCC employees and the Union prior to 2003 regarding overtime calling procedures, the rules for assigning overtime to replace absent crew members remained unwritten when Hawkins became General Foreman in September 2002. Tr. 608. By his testimony, Hawkins had long felt there was a need for written procedures to cover all aspects of this issue. Tr. 663-64. When he became General Foreman, one of his first projects was to develop a written policy. Tr. 663.

March 2003 Memorandum Regarding Overtime

In a ten-page memorandum dated March 1, 2003, Hawkins issued a comprehensive set of procedures for assigning overtime and for when employees would be "charged" for turning it down. G.C. Ex. 2. While it covered the issues addressed in his 1999 proposal, the new document was in a narrative, rather than a flow chart, format, and it covered many details not addressed previously. The cover memo stated that the procedures were being issued on a "90-day trial bases" (sic), and it asked employees to tell him of any problems with the procedures that might arise during the trial period. *Id.* at p. 1. The cover memo further stated that after the trial period and the receipt of any comments, the overtime procedures would be sent to management and the Union. *Id.* The overtime procedures that Hawkins issued set forth relatively comprehensive details for the process of making overtime assignments including, among others, the order in which employees should be offered the overtime, how many times the phone should be allowed to ring in conjunction with making the offer, how long an employee had to respond to a phone call or page, and circumstances that would disqualify an employee from a particular overtime assignment. Significantly, the March 1 procedure provided that the order in which employees would be offered overtime opportunities was: 1) employees of the same trade as the absent employee; 2) employees of the other trade; 3) supervisors; and 4) the General Foreman. *Id.* at pp. 8-10.

At the hearing, Hawkins characterized the overtime priorities set forth in his March 1 memo as a departure from prior practice, and he explained that the process he developed was designed to afford engineers more opportunity to work with electricians so they could learn electrical work. Tr. 619-20. According to Hawkins, he hoped that the engineers would acquire knowledge and a better understanding of overall operations so that they could assist electricians on a more advanced level and not be limited to carrying things and serving as a safety back-up. Tr. 649, 667. This objective, however, was not articulated in the memorandum or

the written procedure. Although two crew supervisors who testified at the hearing were aware of Hawkins' intention, it does not appear that it was communicated to the bargaining unit employees on the crews, whose testimony indicated that they remained uninformed of Hawkins' expectations. Tr. 681-82, 719, 862-63, 125-26, 208-09.

Hawkins stated that he provided a copy of the March 2003 procedures to the affected employees; Allen Pierce, his division director; and Union steward Rusk, in that order, on or about March 1, 2003. Tr. 656. Hawkins asserted that he took a copy to Rusk's Union office after giving a copy to Pierce but had nothing in writing to confirm that he provided a copy to Rusk or any other Union official. Tr. 622-23. According to Hawkins, Rusk never got back to him with any comments on the procedures. Tr. 623. Rusk denied receiving the document from management and asserted that the first time he saw it was when an employee gave him a copy in February 2004. Tr. 439. Allen Pierce, Director of Building Services and Hawkins's supervisor in 2003, testified that Hawkins advised him that he had given a copy of the March 1 procedures to Rusk. Pierce also said that he had a conversation with Rusk on March 12, in which Rusk acknowledged having received a copy. Tr. 734-35, 759-60.

November 13 Memorandum Regarding Overtime

In a memorandum dated November 13, 2003, and addressed to "NCC Shop Personnel," Hawkins cited the departure of one of the electricians and his inability to hire a replacement, and he announced that a "major change" was going into effect on November 23, with respect to the assignment of overtime to cover for absent electricians.[8] G.C. Ex. 3. In the memo, Hawkins stated it was mandatory that an electrician be on site at all times, and to that end all shifts were to include an electrician or a supervisor with an "electrical background by trade." *Id.* With respect to coverage for absent electricians, it provided that overtime would be first offered to the remaining electricians and then to the shift supervisors; whatever remained unclaimed would then be offered to the engineers. The memorandum advised that in the event a shift was left without an electrician, Hawkins would do any necessary last-minute rescheduling to ensure that one was present. *Id.* By its terms, the memorandum was limited to altering the process for assigning overtime to cover for absent electricians; it did not make any changes

8 This created a second vacancy in the ranks of the electricians. G.C. Ex. 3. The first vacancy occurred when electrician, Tim Smith, was promoted to supervisor in April 2003. Tr. 715, 719.

with respect to overtime assignments relating to coverage for absent engineers, nor did it change any other aspect of the detailed procedures set forth in the March 1 memo.

Hawkins acknowledged that at the end of 90 days under the March 1 trial procedures, he did not review the program with the Union, as he had previously stated he would, nor did he terminate the practice of giving engineers priority over supervisors in covering for absent electricians at that time. Tr. 623. Rather, he did not take action until a second electrician vacancy arose. Tr. 624. According to Hawkins, the trial proved unsuccessful because the engineers did not take advantage of the opportunity to learn about high-voltage electrical work by assisting the supervisors in such tasks and when the second electrician vacancy left him extremely short on electricians, he felt that he had no choice but to terminate the experiment. Tr. 624-25. Pierce echoed this view, testifying that engineers filling in for electricians refused to actually perform the electrical work required. Tr. 736-39.

Notice to the Union

Although Hawkins put the November 13 memorandum out to "the men," he acknowledged that he did not give a copy of the document to the Union. Tr. 625-26, 642. Pierce, however, stated that he gave Rusk a copy of Hawkins's memo on November 20, 2003, when Rusk came to his office to pick up some keys. Tr. 740, 770. Pierce testified that he told Rusk that the trial wasn't working out, the "guys" were not doing the work, and so they were ending it. Tr. 741. According to Pierce's account, Rusk said "okay." Tr. 741. Rusk, on the other hand, asserted that no one from management ever gave him a copy of the November 13 memo, and that he first received a copy from a bargaining unit employee who sought to file a grievance relating to overtime in February 2004. Tr. 439-40.

Mylo Martin, who in 2003 was serving as an Assistant Chief Steward for the Union, testified that he became aware of the change in overtime practice at the NCC around December of 2003, when an employee informed him that the way overtime was being assigned had changed. Tr. 404-06. According to Martin, he looked into the matter and, among other things talked to Rusk, who had no knowledge of the change. Tr. 407. Rusk testified he did not remember Martin asking him about the overtime matter. Tr. 447-48.

For some time, Rusk was a Union steward located in the NCC building, and the evidence shows that in various instances the managers there dealt with him regarding

employee issues. Tr. 407, 410, 428-29, 456-59, G.C. Ex. 12. Pierce thought Rusk was the appropriate point of contact for the Union with respect to the March 1 and November 13 memos, asserting it was consistent with a practice he thought had been approved by John Gage of dealing informally with the Union on matters that were limited to the maintenance staff at NCC.[9] Tr. 760. Barbara Lorandos, a labor relations manager for the Agency, asserted that in practice, notices of changes in conditions of employment have been given to either the local Union representative in the NCC building or the Union President depending on "the relationship of the individuals." Tr. 792-93. Union officials who testified contended that notices regarding changes in conditions of employment were supposed to be directed to the President of the Union. Tr. 401, 809. Cynthia Ennis, the President of the Union at the time of the hearing in this case, asserted that then-president Gage notified the Agency, "I guess 10 or 15 years ago," that such notices should be directed to the President. Tr. 815-16. Ennis maintained that notice to the President was the normal practice observed by the parties regardless of size of the component involved in the change, and that remains the policy and practice.[10] Tr. 809, 815-16, 822. As evidence of this, she offered three pairs of letters exchanged between different Agency managers and the Union. G.C. Ex. 17. In each of these instances, the Agency notified Ennis of changes in working conditions and offered to negotiate. Ennis acknowledged that the issue of which Union official to notify had not come up in the last 10 to 15 years. Tr. 816. According to Ennis, Rusk had the authority to act on behalf of the Union with respect to things such as grievances and meetings with management and employees, but not to receive notifications of changes in conditions of employment. Tr. 813, 822. Ennis stated that if a steward such as Rusk was given such a notice, the Union would expect him to do nothing "because the agency knows that they have not notified the union." Tr. 814.

Article 4 of the collective bargaining agreement deals with negotiations during the term of the agreement on management-initiated changes. While the procedures are slightly different, depending on what level of the SSA organization the change affects, in each such section the contract essentially states that the Agency will provide

[9] Gage was a previous president of the Charging Party. Tr. 815.

[10] Although Ennis thought there was a written document in which the parties agreed that all notices of changes in conditions of employment should be directed to Gage, such document was not produced at the hearing. Tr. 815.

"timely written notice" to the "designated Union representative." *See, e.g.*, Article 4, Section 3 of Resp. Ex. 6 at p. 18.

As a factual matter, I credit Hawkins's testimony, corroborated by Pierce, that he gave Rusk a copy of the March 1 memorandum on or about that same date. Hawkins did not describe any conversation that accompanied this event other than Rusk commenting that it looked fine to him. Given the casual circumstances in which the notice was given, it is not surprising that Rusk has no memory of it. Additionally, it does not appear that Hawkins presented it to Rusk as a notice of a proposed change in working conditions, a trial program, or in any way elaborated on its significance. That Rusk may not have paid much attention to what was being given him is also consistent with Rusk's acknowledgment that the work schedules of the NCC crews were alien to him and something that he didn't get involved with in detail. Tr. 467. I found Hawkins to be a forthright witness, and I note that he readily admitted that he had not given a copy of the November 13 memorandum to Rusk. Consequently, I find it more likely that Rusk simply forgot that Hawkins gave him a copy of the March 1 memorandum rather than that Hawkins misrepresented the facts.

I also credit Pierce's testimony that he gave Rusk a copy of the November 13, 2003 memorandum on November 20. As with Hawkins's delivery of the March memorandum, Pierce's delivery of the November 13 memorandum was very informal. Specifically, Pierce gave a copy to Rusk when the latter came by the former's office for another reason. According to Pierce's description, the communication regarding the memorandum between the two was very limited. Consistent with my finding that the existence of the March 2003 trial may never have registered on Rusk, it is quite plausible that he may not have paid much attention to the November 2003 memo when Pierce gave it to him and easily could have forgotten about it. Furthermore, that Pierce's message may not have made a lasting impression on Rusk harmonizes with Rusk's testimony that he tended not to get involved with the work schedules of the crews. Tr. 428-35. As with the March 2003 notice, I find that it is more likely that Rusk simply forgot that Pierce gave him a copy of the November 13

memorandum than that Pierce manufactured the account that he gave.[11]

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel

The General Counsel alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute on or about November 13, 2003, when it instituted a change in overtime scheduling procedures that had more than *de minimis* impact on bargaining unit employees without providing the Union with adequate notice and an opportunity to bargain to the extent required by the Statute.

In the General Counsel's view, the evidence establishes that since 1991, management at the NCC had a practice of offering overtime to cover for an absent electrician in the following order: (1) other bargaining unit electricians; (2) bargaining unit engineers; and (3) supervisors. The G.C. claims the written procedures Hawkins distributed in March 2003 reflected the order that had been followed in offering overtime to the various groups of employees since 1991 and did not change anything in that regard. Regardless of whether the above-cited overtime procedures had been in effect since 1991 or only (as claimed by the Agency) since March 2003, the General Counsel asserts that Hawkins's November 13, 2003 memo changed overtime assignment procedures that had been in effect for a significant period of time. The General Counsel maintains that the change implemented in November 2003 reduced the potential for overtime work by the engineers and, consequently, had a detrimental effect on their earnings.

The General Counsel further contends that the Agency failed to provide the Union with proper notice of either the March 1 or November 13 memos. While insisting that Rusk was not given a copy of either notice, the G.C. alternatively argues that the notification described by Hawkins and Pierce

[11] Other evidence also suggests that Rusk's memory with respect to events relating to the November memorandum and change was faulty. Specifically, Rusk had no memory of Assistant Chief Steward Martin's inquiry to him about the matter. Martin's testimony in this regard was very credible. It would be only logical that Martin would have checked with Rusk, the steward located at the NCC, in his efforts to determine what had occurred after he learned of the change in overtime practice at the NCC.

was not legally sufficient, because the documents did not make clear to Rusk what was involved and were not provided in time to provide a meaningful opportunity for bargaining. Moreover, the General Counsel asserts Rusk was not the proper Union official for purposes of providing notification of changes in conditions of employment.

The General Counsel acknowledges that the Agency has the right under section 7106 of the Statute, when filling vacant electrician positions on a shift, to give preference to employees with training and experience in that field before resorting to employees who did not. The G.C. contends, however, that Respondent had the obligation to afford the Union the opportunity to bargain over the impact and implementation of that decision. Additionally, the General Counsel argues that the Respondent's alleged need to have electricians, rather than engineers, cover for absent electricians did not constitute an exigency that justified implementation prior to bargaining.

With respect to remedy, the General Counsel relies on the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*), and asserts that a *status quo ante* remedy is appropriate. Applying the *FCI* criteria, the General Counsel argues that the Respondent failed to give adequate notice to the Union and thus prevented the Union from requesting bargaining. The G.C. characterizes the Respondent's conduct in failing to bargain as willful and the impact experienced by the bargaining unit employees as serious. According to the General Counsel, the record does not establish that a return to the *status quo ante* would disrupt the efficiency and effectiveness of the Agency's operations, and the Respondent's claims to this effect are speculative and unsupported.

In addition to *status quo ante* relief, the General Counsel requests that make-whole relief in the form of back pay for missed overtime be ordered, and that the Commissioner of Social Security sign a notice to employees.

The Respondent

The Respondent denies that it committed an unfair labor practice. It first contends that the General Counsel failed to establish that the November 13 memorandum issued by Hawkins constituted a change in conditions of employment. The Respondent denies that it had a long-standing practice of giving engineers priority over electrically-qualified supervisors in making overtime assignments, arguing this is contrary to the evidence and to logic and inconsistent with the parties' collective bargaining agreement. The Respondent characterizes the collective bargaining agreement as generally giving preference to qualified employees in making overtime assignments. The evidence shows, it argues, that with the exception of the period from March to November 2003, when the trial procedures were in effect, the long-standing practice was that engineers were allowed to fill in for absent electricians "only as a last resort." Resp. Brief at 21 and 24. According to Respondent, an analysis of the number of times that engineers filled in for electricians shows that although a "drastic" increase in engineers' overtime occurred during the trial period relative to pre-March 2003 periods, the number leveled off to something closer to pre-March 2003 figures during an 8-month period beginning in November 2003.[12] Resp. Brief at 27-28. In Respondent's view, this shows that the procedures implemented in November 2003 were consistent with the practice that had been in effect from 1991 to March 2003.

The Respondent maintains that even assuming a change occurred, it fulfilled its bargaining obligation by giving the Union adequate notice and an opportunity to bargain. More specifically, the Respondent contends that Pierce provided a copy of the November 13 memorandum to Union steward Rusk and that the Union failed to request bargaining in a timely manner. In asserting that providing notice to Rusk fulfilled its notice obligation, the Respondent disputes Ennis's claim that such notices are required to be sent to the President of the Union. Respondent also points to a history of relations between Rusk and the NCC managers that reflects the Agency's claim that the Union had delegated to Rusk the authority to handle labor relations affecting the NCC maintenance employees.

As to the relief sought by the General Counsel, the Respondent maintains that a remedy requiring reinstatement of the *status quo ante*, backpay and posting of a notice

[12] Although the figure dropped back, it nevertheless remained somewhat higher than those for the pre-March 2003 periods relied on as a comparison.

signed by the Commissioner is inappropriate. Applying the *FCI* factors, the Respondent asserts that despite being provided a copy of the November 13 memorandum, the Union failed to request bargaining. Further, Respondent contends the engineers did not suffer any reduction in overtime earnings as a result of the implementation of the November 13 memorandum and, consequently, it had no adverse impact on them. According to the Respondent, a return to the *status quo ante* would disrupt the effectiveness and efficiency of agency operations. In support of this last claim, it avers that such a remedy would result in circumstances where: shift supervisors could have to perform the work of an absent electrician in addition to their own; electricians could not work in pairs for purposes of assisting and cross-checking; the power supply could be vulnerable to a failure that in turn could compromise the functioning of the NCC; a shift could lack a high-voltage electrician; and health and safety could be jeopardized.

With respect to backpay, the Respondent argues that the circumstances of this case do not satisfy the requirements for an award under the Back Pay Act. Specifically, the Respondent contends the employees did not suffer either an unwarranted personnel action or a reduction in pay. Also, the Respondent asserts the Back Pay Act requirement of a nexus between the alleged unwarranted personnel action and the alleged reduction in pay is not satisfied, because there is no evidence engineers would have been willing to work overtime even if it had been offered them.

The Respondent argues that in the absence of evidence that any manager above the level of Pierce, who is a division director, had knowledge of or involvement in the decision to issue the November 13 letter, requiring the Commissioner of the Social Security Administration to sign any notice that might be ordered is unreasonable. Respondent asserts that in the event posting of a notice is ordered, the appropriate signatory should be Hawkins.

Analysis

As a general matter, prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative of the affected employees with notice of the change and an opportunity to bargain, if the change will have more than a *de minimis* effect on conditions of employment. *See, e.g., United States Department of Veterans Affairs Medical Center, Leavenworth, Kansas*, 60 FLRA 315, 318 (2004) (*VA, Leavenworth*).

In this case, the Respondent denies that the practices identified in the November 13 memorandum constituted a change. In addressing this question, a review of the chronology of events relating to the practice of offering overtime assignments for the purpose of covering for absent employees on the four crews might be helpful. As I found above, prior to March 2003, there was an unwritten, but well-established, practice of offering overtime in the event of a bargaining unit employee's absence in the following order: (1) bargaining unit employees in the same trade; (2) shift supervisors; (3) bargaining unit employees in the other trade. In March 2003, this order was changed when Hawkins instituted a detailed written procedure which set the following priorities for overtime: (1) bargaining unit employees in the same trade; (2) bargaining unit employees in the other trade; and (3) shift supervisors. The written policy that Hawkins issued in March was not limited to the sequence in which overtime would be offered, but addressed a number of other aspects of overtime assignment as well.

Although Hawkins characterized the written policy he issued in March as a 90-day trial, it remained in effect without modification until he announced in his November 13, 2003 memo that a "major change" would take place effective November 23. The November memo did not, however, rescind the March 2003 policy, but instead it altered only some of its features, most notably those pertaining to the replacement of absent bargaining unit electricians. Nothing in the November 13 memorandum altered the other portions of the March policy, and nothing in the record suggests that any action was taken to do so. Consequently, it appears that other than changing some of the provisions relating to offering overtime to cover for an absent electrician, the March policy remained in effect.[13]

Although there was considerable evidence entered into the record concerning the issuance of the March 2003 policy, that event is not encompassed by the complaint in this case. The important question is not whether the March memo changed conditions of employment, but whether the November memo did so. Nonetheless, the March policy certainly has relevance to the determination of whether the November memorandum constituted a change in conditions of employment. In the view of the bargaining unit employees, the Union and the General Counsel, the March memo merely put into writing the

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For example, there is no evidence that the terms of the March policy pertaining to the process for offering overtime in the event an engineer was absent were changed. It is worth noting that the body of the March memo was seven pages in length, while the November memo was just over one page.

overtime sequence that had existed since 1991; thus the November memo changed a practice that had existed for over twelve years. In the view of the Agency, the break in a twelve-year practice occurred in March, and the November memo merely returned employees to the 1991-March 2003 *status quo*; in this view, the higher overtime priority for bargaining unit employees over supervisors only existed from March 1 to November 22, 2003. Although I share the Agency's view on this point, that does not alter the fact that the November memo changed the overtime policy that existed at that time for replacing electricianss. It changed an eight-month-old policy rather than a twelve-year-old policy, but it undeniably changed the policy.

The test used by the Authority in determining whether a past practice exists is whether the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *See, e.g., U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals*, 55 FLRA 454, 456 (1999). While I agree with the Respondent that it did not begin giving priority to "other trade" employees over supervisors until March 2003, I nonetheless consider the period from March 1 to November 22 to be a "significant" period, especially in the circumstances of this case. Here, the March 1 memorandum represented an intentional choice of policy that was issued in written form by management. It was not simply a practice that evolved gradually or appeared in the workplace unannounced and uncontrolled by management.[14] Although the March policy had a 90-day duration attached to it when it was announced, it continued in effect in full for over eight months, and many parts of it remained in effect at the close of the hearing or beyond. Particularly in view of its origin as a written policy promulgated by management, and the fact that it exceeded its originally planned life span by several months and even then was effectively only modified rather than rescinded, I find that eight months

[14] Often in "past practice" cases, there is a factual question as to what the practice itself is, or whether either or both parties were conscious of the details of the practice. *See, e.g., Social Security Administration, Regional Office of Quality Assurance and Performance Assessment, Dallas, Texas*, 56 FLRA 1108, 1113-14 (2001); *Defense Distribution Region West, Tracy, California*, 43 FLRA 1539, 1559-61 (1992). In such cases, more time will be needed to discern a legally significant practice. But when agency management explicitly publishes a written policy, its existence is immediately apparent, and it carries the agency's enforcement powers from the first day.

constitutes a significant period of time. *See U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899, 909 (1990) (fact that agency continued providing bottled water for three months after city water was certified as potable was a factor in determining sufficient period of time to establish a practice). The evidence indicates, and there is no claim to the contrary, that the March-November policy was consistently exercised and followed by both parties.[15] I conclude, therefore, that by the time Hawkins issued the November 13 memorandum, the March 1 policy had become an established practice with respect to a condition of employment.[16]

I find that the change in the overtime procedures announced in the November 13 memorandum constituted a change in the existing practice with respect to the order in which employees were offered overtime to cover for absent electricians. In this regard it reordered the sequence in which offers would be made, and it gave engineers a lower priority than they had under the March 1 policy. This affected their potential with respect to the amount of overtime that they could work and, by extension, their earnings. Although the Respondent asserts that the General Counsel failed to meet its burden with respect to proving the alleged violation, it does not specifically argue that the alleged change was *de minimis*.[17]

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[15] In particular, the testimony of supervisors Reeves and Smith indicates the policy was applied. Tr. 682, 698, 719.

[16] There is no dispute that the assignment of overtime constitutes a condition of employment within the meaning of the Statute, and Authority case law confirms that it is. *See, e.g., VA, Leavenworth*, 60 FLRA at 318 (change that adversely affects an employee's ability to earn overtime has a more than *de minimis* effect on conditions of employ-ment). In his March 1 memo launching the "trial" of the new policy, Hawkins himself recognized the negotiability of this issue, as he vowed to have a permanent policy negotiated with the Union. G.C. Ex. 2 at p. 1.

[17] In conjunction with its arguments concerning the General Counsel's proposed remedy, the Respondent claims that bargaining unit employees suffered no adverse effect as a consequence of the implementation of the November 13 memorandum, in that the number of times engineers filled in for electricians remained somewhat higher than levels prior to March 2003. Respondent suggests the continued high incidence of overtime for engineers was a result of the second electrician vacancy that occurred in November 2003. Resp. Brief at 27.

In determining whether a change has more than a *de minimis* effect on conditions of employment, the Authority looks at the nature and extent of the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *See, e.g., VA, Leavenworth*, 60 FLRA at 318. Here, the effect cited by the General Counsel was on the potential for engineers to work overtime. Both parties submitted documents that purported to show how many times engineers worked overtime in place of electricians during different periods, and both parties attempted to challenge the accuracy of information in the other's documents. Also, there was anecdotal evidence in the form of testimony from engineers concerning how their overtime earnings and opportunities fared before and after the implementation of the November 2003 policy change. Although this evidence may be an indicator of the number of offers of overtime made to engineers in conjunction with the absence of an electrician, it has somewhat limited value in terms of actually showing how the implementation of the November 13, 2003, memorandum affected the potential for engineers to work and earn overtime. This is because other variables may have affected the amount of overtime offered to, and actually worked by, the engineers. For example, efforts to reach engineers by telephone with an offer of an overtime opportunity could have been unsuccessful or offers of overtime could have been declined by the engineer. Additionally, circumstances may have rendered an engineer ineligible for overtime in a particular instance.[18]

Despite the lack of precise or reliable evidence in the record that establishes the number of instances in which engineers were offered an opportunity to work overtime to cover for an electrician before and after the November 13 memorandum, the work records do support a general conclusion that the changing overtime policies had a definite impact on the amount of overtime worked by engineers for absent electricians. The Respondent itself noted that prior to March 2003, engineers worked for electricians occasionally, but not frequently; between March and November 2003, they worked for electricians much more often; and after November 2003, they worked less than before November but more than in the pre-2003 period. Resp. Brief at 26-28. This is consistent with common sense: it stands to reason that changing the sequence in which the various groups of employees were offered overtime would affect the likelihood of such an offer being made to employees in the second and third groups. That is, the lower in the sequence an

[18] For example, employees were generally prohibited from working more than 16 continuous hours. G.C. Ex. 2.

employee is, the more likely it is that someone higher in the sequence will accept the offer before it gets to him.[19] Thus, I find it was reasonably foreseeable that engineers would, and that they indeed did, work less overtime after the implementation of the November 13, 2003 memo than they would have, if the March 1 policy had continued unmodified.

I find unpersuasive the Respondent's contention that because engineers worked somewhat more overtime covering for electricians after November 23 than they did before March, the engineers' overtime was not adversely affected by the implementation of the November 13 memorandum. The existence of two electrician vacancies during the post-November 21 period would certainly have produced an increased need for overtime coverage relative to what existed prior to March 1, when there was only one electrician vacancy. What Respondent's argument does not take into account is that if the March-November policy had remained intact, engineers would have almost certainly worked even more overtime than they did. In determining the impact of the November 13 memorandum, the appropriate comparison is between the overtime performed by engineers before March 1 and the overtime they performed between March 1 and November 23. The Respondent's own graph illustrates how significantly the engineers' overtime increased between March and November. Resp. Brief at 28.

Generally, changes in conditions of employment that adversely affect an employee's ability to earn overtime are more than *de minimis*. *See, e.g., VA, Leavenworth*, 60 FLRA at 318. Hawkins himself understood this when he called the change "major" in his November 13 memo. As discussed above, I conclude that the implementation of the November 13 memorandum decreased the overtime opportunities available to the engineers and, consequently, had more than a *de minimis* effect on their conditions of employment. Therefore, the Agency was obligated to afford the Union the opportunity to

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[19] In this regard, there is no evidence that there was any rule or practice of equalizing overtime opportunities generated by unplanned absences.

bargain prior to the implementation of the November 13, 2003 memorandum.[20]

Turning to Respondent's contention that it gave appropriate notice to the Union prior to the implementation of the November 13 memorandum, and that the Union failed to request bargaining in a timely manner, I conclude that the Respondent did not fulfill its obligations in this respect. First, and most importantly, the timing and manner of the Agency's notice was inadequate; secondly, notice to the Union steward rather than the Local President was insufficient.

The Authority has held that when an agency asserts as a defense that a union waived its right to bargain, the agency has the burden of proving that it gave the union adequate notice. *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999). More specifically to the facts of this case, the Authority has often stated that the purpose of the statutory notice obligation is to afford a union a reasonable opportunity to bargain prior to the implementation of a change in conditions of employment. *See, e.g., Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Illinois*, 44 FLRA 117, 125 (1992); *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981). Notice that does not afford the union an opportunity to bargain prior to the implementation of a change does not

[20] Here, the record shows that the November 13 memo represented an effort to ensure coverage for absent electricians by someone better qualified than engineers to do electrical work whenever possible. It is well established that management's right to assign work under section 7106(a)(2)(B) of the Statute includes the right to determine the particular qualifications and skills needed to perform the work and make judgments as to whether particular employees meet those qualifications and skills. *Professional Airways Systems Specialists and United States Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 61 FLRA 97, 99 (2005). The right to assign work encompasses work that is performed on overtime. *U.S. Department of Defense, Defense Logistics Agency, Red River Army Depot, Texarkana, Texas and National Association of Government Employees, Local R-14-52*, 55 FLRA 523, 526 (1999). However, while the Agency's determination regarding the sequence in which overtime would be offered constituted an exercise of its right to assign work, it had an obligation under section 7106(b)(2) and (3) to give the Union timely notice of the policy and the opportunity to negotiate over procedures and appropriate arrangements.

satisfy an agency's statutory obligation. Nor is the union afforded adequate notice when changes are presented to it as a *fait accompli* or after they have been announced to bargaining unit employees as a decision made. *United States Department of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 856 (2002) (*Willow Grove*); *U.S. Department of Labor, Washington, D.C.*, 44 FLRA 988, 990, 994 (1992) (*Department of Labor*).

Here, the notice given to the Union consisted of Pierce handing Rusk, the Union steward for the NCC, a copy on November 20, 2003, of the November 13 memorandum that had been issued to bargaining unit employees by Hawkins a week earlier. By its terms, the memorandum presented the change as a decision that had already been made and would go into effect on November 23, 2003. In view of the fact that it was provided to the Union only three days before the change was to become effective (two days of which were a weekend) and in the form of a decision that had been made and announced to employees, this did not provide the Union with a reasonable opportunity to bargain prior to implementation. In *Department of Labor,* 44 FLRA at 1007, the agency announced a change in parking regulations on April 9, to become effective on May 1; on April 10, the agency gave a copy of the announcement to the union. Both the ALJ and the Authority rejected the agency's argument that this gave the union 21 days to negotiate, as the change was already a *fait accompli* at that point. *Id.* at 994, 1007. Pierce's casual handing of the November 13 memo to Rusk on a Thursday of a policy change that had already been given to employees and was to go into effect on Sunday, hardly constitutes a meaningful opportunity to bargain. Rusk was not invited to bargain; he was simply told of a decision that had already been made. Therefore the Union did not waive its right to bargain by failing to request bargaining after Rusk received the memo. *See also Willow Grove*, 57 FLRA at 856.

As for giving the notice to Rusk rather than Ennis, it is well established that a union has the right to designate its representatives when fulfilling its responsibilities under the Statute. *See Willow Grove*, 57 FLRA at 855, and cases cited therein. This right includes designating representatives for specific, limited purposes, including the receipt of notices of changes in conditions of employment. *Id.* A failure to notify the representative designated by the Union constitutes a failure to provide adequate notice of the changes. *See also Department of Health and Human Services, Social Security Administration, Field Assessment Office, Atlanta, Georgia*, 11 FLRA 419 (1983).

The evidence in this case was extremely murky as to whether the Union had previously designated[21] its president as the person to receive all notices of changes in conditions of employment (as the Union insists), or whether the parties had a mutually accepted practice of handling labor relations matters involving the NCC maintenance employees with the NCC steward (as the Respondent insists). Union president Ennis testified that her predecessor had sent a letter to the Respondent years ago that the president was to receive all such notices, but she could not produce that letter. Division Director Pierce, on the other hand, testified that the previous Union president had not wanted to get involved in labor matters involving this tiny shop of twelve employees and had encouraged management to deal with the shop steward informally. Tr. 760-64. But Pierce's description of this arrangement was quite nebulous: he recognized that

> as far as renovations and other issues that would, you know, actually impact the employees as far as the cafeteria or anything that would impact parking or whatever, then we did give, you know, notifications to the Union, to the shop, of the Union president, at that time John Gage.

[Tr. 761]. Even Rusk conceded that he had informal discussions with managers in the NCC about situations that might arise with employees (Tr. 428, 432, 459), but none of those situations (at least prior to March 1, 2003) involved notice of changes in conditions of employment. None of the principals in the dispute, therefore, could actually identify any direct basis for their understanding of who was to be notified.

The best, albeit imperfect, evidence on this point was the letters sent by three different managers from different components of the Agency, notifying the Union of changes in conditions of employment. G.C. Ex. 17. Although none of the letters was sent by officials at the NCC, and thus they do not demonstrate that Pierce or his subordinates followed the same practice, these letters do suggest that there was a general practice (and an understanding among management) of sending notices of changes to the Union president. While

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[21] The parties' collective bargaining agreement is no help on this issue. It simply refers to a requirement that the Agency send notice to the "designated Union representative," but it does not identify who is so designated at each level of the bureaucracy. Resp. Ex. 6, Article 4, Sections 2, 3, 4.

Hawkins simply handed the March 1, 2003 notice to Rusk, this incident by itself does not demonstrate that the Union had designated Rusk to receive notices. The letters in G.C. Ex. 17, however, do reflect a pattern and similarity of action by managers throughout the Agency: even though some of the changes identified in G.C. Ex. 17 are confined to a very small group of employees, the official notice of change was sent to the Union president, not to the steward on site. Moreover, in each instance the Union president responded promptly by identifying a particular representative whom she delegated to handle the matter thereafter. This reflects a degree of bureaucratic efficiency on the Union's part that is necessary for a large organization to run smoothly. It indicates that even though Ms. Ennis routinely delegated responsibility for handling specific cases to members of her staff, Agency managers understood that the formal notices should go to Ennis, so that she could keep track of everything that was going on.

Based on the available evidence, the Respondent has not persuaded me that NCC management had been told by the Union that notices of changes in conditions of employment among the NCC maintenance staff should be given to the NCC steward. Rather, I believe that Hawkins and Pierce mistakenly and unreasonably assumed that they could notify Rusk of official changes, based on their prior informal discussions of employee problems with Rusk. The general practice of the Agency and the Union was for notice of changes to be sent to the Union president, and that practice should have been followed here.

For both of the reasons explained above, I conclude that the Respondent did not properly notify the Union of the changes articulated in the November 13 memorandum or afford the Union the opportunity to bargain prior to implementation. Accordingly, the Respondent violated section 7116(a)(1) and (5) of the Statute.

The Remedy

Status Quo Ante

As remedy, the General Counsel urges that an order be issued requiring return to the *status quo ante*, backpay, and posting of a notice to employees.

Where, as here, an agency has failed to bargain over the impact and implementation of a decision involving the exercise of management rights under section 7106 of the Statute, the Authority determines the appropriateness of a *status quo ante* remedy by applying factors identified in

FCI, *supra*, 8 FLRA 604. 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 adversely affect the efficiency and effectiveness of the agency's operations.

As I found above, the Respondent did not provide the Union with timely notice of the change in overtime priorities. Rather, notice that was given was given only three days before the effective date of the change and after the change was announced to bargaining unit employees as a *fait accompli*. Moreover, the notice was provided on a Thursday for a change that was to take effect the following Sunday. Although the crews affected by the change worked a seven-day week, it does not appear that the Union representatives involved were on a similar schedule. Additionally, notice of the change was not given to the appropriate Union official. The Union did not request bargaining prior to the effective date of the change, but the Union cannot be faulted for a failure to request bargaining when what it received from the Respondent was last-minute notice of what amounted to a *fait accompli*.

In applying the third factor, the Authority determines whether an agency's failure to discharge its bargaining obligations is intentional. *See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.*, 56 FLRA 351, 358-59 (2000). Here, Respondent chose when to give notice to the Union and to the employees as well as when to implement the change announced in the November 13 memorandum. In view of Respondent's control over the timing of the notice to the Union relative to notice to the affected employees and the implementation date, I find that the choice to give the Union untimely notice was intentional. Consequently, I find that the Respondent's conduct in failing to discharge its bargaining obligation was willful.

As discussed above, the effect on employees was that the engineers were given a lower priority than they previously enjoyed in terms of the order in which overtime to replace absent electricians was offered. It follows that they likely received fewer offers to work overtime after November 2003 than they would have received had the March-November policy been continued; indeed, the incomplete work records seem to bear out this likelihood. As discussed above, the existence of a second electrician vacancy may

have increased the amount of overtime available to engineers and reduced any actual loss of overtime earnings relative to other periods. The reordering of priority for offering overtime, however, would necessarily have an adverse effect on the engineers by limiting the potential increase in opportunity to work overtime that they would otherwise have enjoyed as a result of the second electrician vacancy. I note, however, that the overtime opportunities lost involved work for which, in management's view, the engineers lacked qualification.

The Respondent argues that an order requiring it to reinstate the practice of giving engineers priority over supervisors in working overtime for absent electricians would increase the likelihood that a crew would not be staffed by individuals qualified to work with electricity. The Respondent claims that this would place its operations, which are dependent on an uninterrupted power supply, as well as its employees, at increased risk. The General Counsel contends that there is no evidence that such mishaps have occurred when engineers covered for electricians in the past.

Despite the fact that there have been many times when an engineer covered for an absent electrician, the Respondent has not cited any instances in which this actually caused or contributed to an incident resulting in harm to agency personnel, property, or operations. But the Respondent's witnesses did identify situations in which engineers refused to perform electrical work or assist an electrician around high-voltage equipment, and this is indicative of the potential for a serious accident or loss of operations. I do not believe that the Agency must wait for a crisis to meet its burden of proof here. In view of the gravity of the harm that can result from working with electricity and high-voltage equipment, the appropriate focus of the inquiry in applying the fifth *FCI* factor should not be on the likelihood that something will happen but rather on the potential harm that could result if something did happen. The circumstances here do not involve the same magnitude of harm as in *U.S. Department of Transportation and Federal Aviation Administration*, 48 FLRA 1211 (1993), which involved the operations of the national airspace system. That decision is, however, relevant as a guide to the appropriate focus of inquiry when the *status quo ante* carries with it the potential for mishaps that may have catastrophic consequences. The potential for harm in this case is comparable to that discussed in *Willow Grove*, 57 FLRA at 857-58, where the Authority also found a *status quo ante* remedy inappropriate. Here, it is undeniable that one of the risks of working with high-voltage electricity is

death. Although fatalities may not be a common event at the NCC, they are a very real possibility. In light of these facts, I find that requiring the Respondent to reinstate a practice in which employees who are less qualified to work with electricity are given priority over better qualified employees would have the real potential to interfere with the efficiency and effectiveness of the Respondent's operations.

I find that the need to minimize the potential for mishaps involving the agency's electrical power system outweighs the adverse effects of the loss of overtime opportunities on the engineers, as well as the other *FCI* factors. In the circumstances of this case, ordering a return to the *status quo ante* would not be appropriate given the gravity of the potential risk to personnel and operations that is involved in high-voltage electrical work and the need to have adequately qualified staff available to perform electrical tasks to the fullest extent possible.

Backpay

The Authority has held that backpay is an appropriate remedy for an unlawful refusal to bargain over the impact and implementation of a decision when such an award meets the requirements of the Back Pay Act, 5 U.S.C. § 5596(b)(1)(a). *See, e.g., Air Force Flight Test Center, Edwards Air Force Base, California*, 55 FLRA 116, 125 (1999) (*Edwards AFB*); *Pueblo Depot Activity, Pueblo, Colorado*, 50 FLRA 310, 311 (1995) (*Pueblo Depot Activity*). Under the Back Pay Act, make-whole relief is available to an employee who was affected by an improper or unwarranted personnel action that resulted in withdrawal or reduction of pay, allowances or differentials. A failure to bargain in violation of section 7116(a)(5) constitutes an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. *Federal Aviation Administration, Washington, D.C.*, 27 FLRA 230, 232-33 (1987) (*FAA*). In order to establish that a failure to bargain resulted in a loss of pay, allowances or differentials, the Back Pay Act does not require that the those seeking backpay bear the "insurmountable burden" of demonstrating a "but for" relationship between the failure to bargain and the loss, but only that they show "the likelihood of a 'causal nexus' between the two." *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and U.S. Department of Health and Human Services, Social Security Administration, Hartford District Office, Hartford, Connecticut*, 37 FLRA 278, 289 (1990) (*SSA, Hartford*). Consideration of make-whole relief, including

back pay, is required independent of *status quo ante* relief. *U.S. Department of Health and Human Service, Social Security Administration*, 50 FLRA 296, 299-300 (1995). Thus, back pay may be awarded even where a *status quo ante* remedy is not appropriate. *See, e.g., Pueblo Depot Activity*, 50 FLRA at 311.

Where an unlawful failure to bargain has occurred, a backpay remedy is available only when it is clear that the violation resulted in a loss of pay, allowances or differentials to some employees; it is not available if the effect on employees is "totally speculative." *SSA, Hartford*, 37 FLRA at 292. When a backpay award is appropriate, the determination of the amount to be paid is left to the compliance stage. *Id.* Where, however, it is clear that some employees have lost pay, allowances, or differentials as a consequence of an unlawful refusal to bargain, but there is no way to ascertain their identity through compliance proceedings, the parties are allowed to establish the required causal nexus by determining the extent of the make-whole relief through negotiations. *Id.* Under Authority precedent, establishing the causal nexus through negotiations entails retroactive application of any agreement resulting from a bargaining order issued as remedy for the refusal to bargain for the purpose of determining the extent to which employees lost pay, allowances or differentials. *See, e.g., American Federation of Government Employees, SSA Council 220, AFL-CIO v. FLRA*, 840 F.2d 925, 931 (D.C. Cir. 1988); *FAA*, 27 FLRA at 234. An instance in which the Authority applied this concept occurred in *Pueblo Depot Activity*. In that case, the Authority found that an agency failed to bargain prior to creating a team of employees to work on eliminating a backlog and that the establishment of the team affected overtime allocation. In addressing the issue of backpay relief for employees who lost overtime, the Authority found that there was no way to ascertain through compliance proceedings which employees would have been selected for the team and assigned overtime work had the parties bargained. In view of this, the Authority ordered retroactive bargaining and that backpay be awarded consistent with the outcome of that bargaining. *See* 50 FLRA at 312.

As I have found in this case, the record establishes that some employees lost overtime as a consequence of the reordering of priorities in making overtime offers. I find that the circumstances here are distinguishable from those present in *Pueblo Depot Activity* in that it should be possible to ascertain during the compliance stage how much overtime the engineers lost through reconstruction from available records. The evidence in this case indicates

records are available that would show when electricians were absent and which employees worked overtime filling in for them. There was an established and accepted order for extending overtime offers within the various groups of employees.[22] Reconstruction based on available records may not produce a perfect result with respect to determining whether or not a particular employee would have accepted an offer on a particular day. It seems, however, that a perfect result on that point would be equally elusive if retroactive application of any agreement reached as a consequence of a bargaining order in this case were used to determine lost pay as long as employees remained free to turn down an offered overtime opportunity. In any event, as suggested in *United States Immigration and Naturalization Service, Honolulu District Office, Honolulu, Hawaii*, 43 FLRA 608, 619 (1991) (*INS, Honolulu*), past history of an individual employee's track record of accepting or rejecting overtime could be reconstructed and may provide assistance if it becomes necessary to determine who would have accepted the overtime on a given occasion. I find that the determination of how much back pay individual employees should receive is a matter that can appropriately be resolved through compliance proceedings rather than through negotiations. *See INS, Honolulu*.

Notice to Employees

The Authority's normal practice is to direct that any notice to employees posted pursuant to a remedial order issued in an unfair labor practice case be signed by the highest official of the activity responsible for the violation. *See, e.g., U.S. Department of Veterans Affairs*, 56 FLRA 696, 699 (2000). Here, the General Counsel proposes that the notice be signed by the Commissioner of SSA, while the Respondent argues that the appropriate signatory is James Hawkins, the General Foreman, who it asserts was responsible for implementing the change alleged as a violation. Neither suggestion appears appropriate to me.

The events in this case all occurred with the National Computer Center, and it does not appear that any official

[22] The offer was extended within the various groups as follows: first, to employees on the shift that immediately preceded the one on which there was an absent employee; second, to employees on the following shift; and third, to employees on the crew that was off on the particular day. The two engineers on each crew were designated as "odd" and "even" and the one whose designation corresponded to the day of the month on which the vacancy occurred got priority in the order of overtime offers. Tr. 31-33; 247-248; G.C. Ex. 2.

above Pierce, the Director of Building Services for the NCC, had any direct involvement in the implementation of the change in overtime policy or in notifying the Union. While Hawkins made the decision to change the policy, he clearly discussed it with, and received approval from, Pierce, who was the person who served notice on the Union steward. The buck, it seems, stopped with Pierce, and he should therefore be the person who signs the notice to employees.

Having found that the Respondent committed an unfair labor practice in violation of section 7116(a)(1) and (5) of the Statute, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Social Security Administration (the Agency) shall:

1. Cease and desist from:

(a) Changing the procedure for offering overtime to employees at the National Computer Center without providing the American Federation of Government Employees, Local 1923, AFL-CIO, (the Union), adequate notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Upon request, bargain in good faith with the Union to the extent required by the Statute regarding the change in overtime procedures implemented on November 23, 2003, at the National Computer Center.

(b) In accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, make whole all Utility Systems Repairer-Operators (engineers) at the National Computer Center for overtime pay they were improperly denied because of the unlawful change in overtime procedures implemented on November 23, 2003.

(c) Post at the Social Security Administration, Baltimore, Maryland, 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 Building Services, National Computer Center, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that these Notices are not altered, defaced, or covered by other material.

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

Issued, Washington, DC, May 23, 2006

_____

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 Social Security Administration (the Agency) 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 NOT change the procedure for offering overtime to employees at the National Computer Center without providing the American Federation of Government Employees, Local 1923, AFL-CIO, (the Union), adequate notice and an opportunity to bargain to the extent required by the Statute.

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

WE WILL, upon request, bargain in good faith with the Union to the extent required by the Statute regarding the change in overtime procedures implemented on November 23, 2003, at the National Computer Center.

WE WILL make whole all Utility Systems Repairer-Operators (engineers) at the National Computer Center for overtime pay they were improperly denied because of the unlawful change in overtime procedures implemented on November 23, 2003.

_____
(Respondent)

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 any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is:

55 W. Monroe Street, Suite 1150, Chicago, Illinois 60603-9729 and whose telephone number is: 312-353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. WA-CA-04-0172, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

Susanne S. Matlin, Esq. 7000 1670 0000 1175 1181
Counsel for the General Counsel
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Steve Fesler, Esq. 7000 1670 0000 1175 1204
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6410 Security Boulevard
Baltimore, MD 21235

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: May 23, 2006

Washington, DC