UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

ARMY AND AIR FORCE EXCHANGE SERVICE, WACO DISTRIBUTION CENTER, WACO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4042, AFL-CIO Charging Party	Case No. DA-CA-50262

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 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 Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 23, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, JR.
Administrative Law Judge

Dated: August 22, 1996
Washington, DC

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

MEMORANDUM DATE: August 22, 1996

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: ARMY AND AIR FORCE EXCHANGE SERVICE, WACO DISTRIBUTION CENTER, WACO, TEXAS

Respondent

and Case No. DA-CA-50262

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4042, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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
FEDERAL LABOR RELATIONS AUTHORITY
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ARMY AND AIR FORCE EXCHANGE SERVICE, WACO DISTRIBUTION CENTER, WACO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4042, AFL-CIO Charging Party	Case No. DA-CA-50262

Carlos E. Vergara, Esq.
For the Respondent

Joseph T. Merli, Esq.
For the General Counsel

Alice Long
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

Decision

Statement of the Case

An unfair labor practice Complaint and Notice of Hearing was issued in this matter by the Dallas Regional Director on October 27, 1995. The complaint alleges that the Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas (herein the Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute
(herein the Statute) when management officials implemented a change in employees' work schedule as it related to Monday holidays without giving the American Federation of

Government Employees, Local 4042, AFL-CIO (herein the Union) prior notice or the opportunity to bargain over the impact and implemen-tation of the change. Additionally, the complaint alleges that Respondent violated the Statute when it bypassed the Union and dealt directly with bargaining unit employees.

A hearing in this matter was held in Waco, Texas. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel filed a post-hearing brief which has been carefully considered. Respondent did not file a 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.

Findings of Fact

The uncontroverted facts are as follows:

1. Respondent's mission is to supply goods to the various Army and Air Force post exchanges within Respondent's geographic area of responsibility. To accomplish its mission, Respondent maintains a Cycle Inventory Team (herein the CIT) made up of about a dozen bargaining unit employees.

2. Prior to December 8, 1994, when a federal holiday fell on a Monday, CIT employees would report to work on the previous Sunday as usual, be off from work the next day (Monday holiday), and then report back to work on Tuesday for the remainder of the week. Since CIT employees reported to work on Sunday of each week, CIT employees earned Sunday premium pay for that day.

3. In December 1994, Kathy Riojas was the CIT Manager. Sometime around December 12, 1994 Riojas held a meeting with CIT employees including Juan Garcia, who is also a Union steward. During this meeting Riojas negotiated directly with bargaining unit employees concerning a proposed change of the day on which the employees would observe Monday holidays. Riojas also passed around a written agreement which had been prepared by Joyce A. Breihof, Assistant Distribution Manager. The written agreement provided that if a majority of the employees agreed, the change proposed by Breihof that CIT employees would observe Monday holidays on Sunday rather than Monday would be implemented. The agreement had a line for each of the CIT employees to sign indicating agreement with the change.

4. A majority of the CIT employees signed the agreement prepared by Breihof at the Riojas meeting of December 12, 1994. Consequently, Breihof and Riojas implemented the change effective December 12, 1994 whereby, when a holiday fell on a Monday, CIT employees would observe the holiday on Sunday, that is, the employees would not report to work on Sunday as usual. Rather, they would take off on Sunday and report to work on Monday. This resulted in three consecutive days off rather than two days off, one day of work (Sunday), and the next day off due to the holiday.

5. The change has never been rescinded. As a result of the change, CIT employees have lost Sunday premium pay for each Sunday preceding a Monday holiday since December 12, 1994. The record reveals that the change was implemented without giving the Union prior notice and an opportunity to bargain over its impact and implementation.

Conclusions

A. Unilateral Change

Changes to employees' tours of duty involving holiday staffing and work schedules are negotiable as to impact and implementation. In *U.S. Department of Transportation, Federal Aviation Administration, (FAA)* 19 FLRA 482 (1985) the Authority found that the agency had a duty to provide the Union with prior notice and an opportunity to bargain over the impact and implementation of a change in holiday staffing which required employees to work on holidays. *See also Immigration and Naturalization Service, Honolulu, Hawaii,* 43 FLRA 608 (1991)(creation of a new work shift for unit employees required impact and implementation bargaining), *Veterans Administration Medical Center, Brockton, Massachusetts,* 37 FLRA 747 (1990)(finding that working hours and days off concerned general conditions of employment).

The change implemented here is similar to the change in *FAA, supra,* as it required CIT employees to work on certain holidays, namely, holidays which fell on Mondays. Furthermore, the record disclosed that as a result of the change, CIT employees now do not earn Sunday premium pay on Sundays prior to Monday holidays. The change was implemented without giving the Union prior notice and an opportunity to bargain over the impact and implementation of the change.
In addition, the loss of premium pay triggers a duty to bargain since it is more than *de minimis. Department of the*

Air Force, Scott Air Force Base, 33 FLRA 532, 544 (1988). Consequently, it is found and concluded that the Respondent herein committed an unfair labor practice as alleged, when it unilaterally implemented the change in the CIT Monday holiday schedule without giving notice to the Union or giving it an opportunity to bargain over the impact and implementation.

B. Bypass of the Union

Section 7114(a)(1) of the Statute provides that a labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for all employees in the unit. The Authority has long held that on matters which are properly bargainable with the exclusive representative, it is the sole spokesman of the employees, and any attempt by an agency to deal directly with employees concerning proposed changes in their conditions of employment, constitutes an unlawful bypass in violation of section 7116 (a)(1) and (5) of the Statute.

In *United States Department of Transportation, Federal Aviation Administration,* 19 FLRA 893 (1985), the Authority found that an agency violated section 7116(a)(1) and (5) of the Statute by posting a memorandum directly soliciting opinions of radar unit employees concerning a proposed change in conditions of employment by eliminating the evening shift on weekends, and by soliciting the opinions of unit employees at a meeting and in a posted follow-up memorandum thereafter, concerning proposed changes in shift hours contingent upon the availability of someone to work until midnight. The Authority found that agency management was not merely attempting to gather information or opinions concerning its operations but, directly sought the opinions of these bargaining unit employees as to proposed changes in their conditions of employment. Such conduct does indeed constitute an unlawful bypass of the exclusive representative since it concerns immediately contemplated changes in conditions of employment affecting unit employees, and was an attempt by management to negotiate or deal directly with unit employees concerning such matters. *See also, Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado,* 42 FLRA 1226, 1239, 1260 (1991)*; Department of Health and Human Services, Social Security Administration,* 28 FLRA 409, 431 (1987) *and Federal Aviation Administration,* 15 FLRA 100 (1984).

The uncontradicted evidence reveals that Breihof, through Riojas, negotiated directly with bargaining unit employees when she met with employees, discussed the matter,

and then presented them with a written agreement proposing to change conditions of employment. Juan Garcia who was present during the meeting, testified that when Riojas passed around the proposed agreement for the CIT employees to sign, Respondent was directly soliciting their views, comments, and approval of the planned change.[1] Such action amounted to direct negotiation with employees and, therefore, constitutes an unlawful bypass of the Union. Since Respondent offered no evidence and did not file a brief in the matter, there is no evidence to rebut Garcia's testimony that a bypass occurred.

Accordingly, it is found and concluded that a preponderance of the evidence demonstrates that Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally changing the tour of duty for CIT employees and by unlawfully bypassing their exclusive representative and

negotiating directly with unit employees concerning conditions of employment.

C. The Remedy

In addition to a cease and desist order and Notice to Employees the General Counsel seeks a make whole remedy for any employees who suffered loss of pay or benefits as a result of Respondent's unilateral implementation of the change, as well as a *status quo ante* remedy in the matter.

In *Federal Correctional Institution*, 8 FLRA 604 (1982), the Authority determined that the appropriateness of a *status quo ante* remedy in cases involving impact and implementation bargaining must be determined on a case by case basis. Balancing the nature and circumstances of a particular violation against the degree of disruption in government that would be caused by such a remedy, the Authority established five factors to consider in determining whether a *status quo ante* remedy would be appropriate. These factors were
1) whether notice was given to the Union by the agency concerning the change; 2) whether the Union requested impact and implementation bargaining; 3) the wilfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; 4) the nature and extent of the impact experienced by adversely affected employees; and 5) whether, and to what degree, a *status quo ante* remedy

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[1] Although Garcia is a Union steward there is no assertion that notice was given to him in his representative capacity.

would disrupt or impair the efficiency and effectiveness of the agency's operations.

Reviewing the five factors of *Federal Correction Institution, supra,* as they apply to this case, the evidence established the following: 1) Respondent never gave the Union any notice of the change; 2) the Union could not have submitted a request to bargain since it did not receive prior notice; 3) the wilfulness of the Agency's conduct is estab-lished by Breihof's written proposed agreement addressed to employees rather than the Union; 4) the nature and extent of the impact experienced by adversely affected employees included the loss of Sunday premium pay, and; 5) a *status quo ante* remedy would not disrupt or impair the efficiency and effectiveness of the Respondent's operations. In this regard, no evidence was adduced at the hearing to establish that a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of Respondent's operations. Consequently, it is my view that a *status quo ante* remedy is appropriate in this matter.

In light of the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and § 7118 of the Statute, the Army Air Force Exchange Service, Waco Distribution Center, Waco, Texas, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions for unit employees without first providing the American Federation of Government Employees, Local 4042, AFL-CIO, the exclusive representative of its employees, prior notice and an opportunity to bargain, by changing the tour of duty for employees in the Cycle Inventory Team on December 12, 1994 whereby employees observed any federal holiday which fell on a Monday on the preceding Sunday.

(b) Unlawfully bypassing American Federation of Government Employees, Local 4042, AFL-CIO, by dealing directly with employees in the Cycle Inventory Team, or any other unit employees, regarding changes in the tour of duty for employees working in the Cycle Inventory Team.

(c) In any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the change implemented on December 12, 1994 which altered the tour of duty for employees working in the Cycle Inventory Team whereby employees observed any federal holiday which fell on a Monday on the preceding Sunday and make whole any employee who suffered a loss of weekend premium, or any other pay, as a result of the change.

(b) Post at its facility in Waco, Texas 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 Center's Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas 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, D.C., August 22, 1996.

_____
ELI NASH, JR.
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 Army Air Force Exchange Service, Waco Distribution Center, Waco, Texas, 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 implement changes in working conditions for unit employees without first providing the American Federation of Government Employees, Local 4042, AFL-CIO, the exclusive representative of our employees, prior notice and an opportunity to bargain, by changing the tour of duty for employees in the Cycle Inventory Team on December 12, 1994 whereby employees observed any federal holiday which fell on a Monday on the preceding Sunday.

WE WILL NOT unlawfully bypass American Federation of Government Employees, Local 4042, AFL-CIO, by dealing directly with employees in the Cycle Inventory Team, or any other unit employees, regarding changes in the tour of duty for employees working in the Cycle Inventory Team.

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

WE WILL rescind the change implemented on December 12, 1994 which altered the tour of duty for employees working in the Cycle Inventory Team whereby employees observed any federal holiday which fell on a Monday on the preceding Sunday and make whole any employees who suffered a loss of weekend premium, or any other pay, as a result of the unlawful change.

(Activity)

Date: 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 of the Federal Labor Relations Authority, Dallas Region, whose address is: 525 Griffin Street, Suite 926, LB107, Dallas, TX 75202-1906, and whose telephone number is: (214) 767-0156.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH JR., Administrative Law Judge, in Case No. DA-CA-50262, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Carlos E. Vergara, Esq.
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P.O. Box 660202
Dallas, TX 75622-0202

Joseph T. Merli, Esq.
Federal Labor Relations Authority
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Alice Long, President
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1801 Exchange Parkway
Waco, TX 76712

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: August 22, 1996
Washington, DC