MEMORANDUM DATE: December 12, 1994

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: OLAM SOUTHWEST AIR DEFENSE SECTOR
(TAC) POINT ARENA AIR FORCE
STATION, POINT ARENA, CALIFORNIA

Respondent

and Case No. SF-CA-20337

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R12-85, 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

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| OLAM SOUTHWEST AIR DEFENSE SECTOR (TAC) POINT ARENA AIR FORCE STATION, POINT ARENA, CALIFORNIA<br><br>Respondent | |
| and<br><br>NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,<br>LOCAL R12-85, AFL-CIO<br><br>Charging Party | Case No. SF-CA-20337 |

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 **JANUARY 11, 1995**, 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: December 12, 1994
Washington, DC

**UNITED STATES OF AMERICA**
**FEDERAL LABOR RELATIONS AUTHORITY**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**
**WASHINGTON, D.C. 20424-0001**

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| OLAM SOUTHWEST AIR DEFENSE SECTOR (TAC) POINT ARENA AIR FORCE STATION, POINT ARENA, CALIFORNIA<br><br>Respondent | |
| and<br><br>NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,<br>LOCAL R12-85, AFL-CIO<br><br>Charging Party | Case No. SF-CA-20337 |

Steven E. Sherwood, Esq.
For the Respondent

Gary J. Liebermann, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq., herein called the Statute, and the Rules and Regulations of the Authority, 5 C.F.R. § 2411, et seq. It was initiated by an unfair labor practice charge filed against the Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California (herein called the Respondent) by the National Federation of Federal Employees, Local R12-85, AFL-CIO (herein called the Union). The Complaint alleges that Respondent engaged in unfair labor practices within the meaning of section 7116(a)(1) and (5) of the Statute by unilaterally implementing a change in crew assignments for electronics technicians at Respondent's Radar Work Center.

A hearing was held before the undersigned in San Francisco, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by

Respondent and the General Counsel and have been carefully considered.[1]

*Findings of Fact*

Respondent is a long-range radar site assigned to the Tactical Air Command. The Radar Maintenance Work Center (herein called the Radar Center) provides 24-hour, 7 days a week radar surveillance, including maintenance, preventive maintenance, repairing malfunctions and recording events. Supervisors at the site include, Thomas Hayes, the Respondent's Station Manager; Ronald Dzuba, the Radar Center supervisor; and Leonardo Balambao, a supervisor.

At all times material herein, the Union was certified as the exclusive representative for Respondent's general schedule and wage grade employees, including electronics mechanics at the Radar Center. Respondent and the Union are parties to a collective bargaining agreement. At all times material herein, Michael Terry, who works as an electronics mechanic in the Radar Center, held the position of Union President, the official designated to receive notification of changes in conditions of employment.

*A. The work schedule of electronics mechanics at the Radar Center.*

There are eight electronics mechanics employed at the Radar Center who work in crews of two mechanics per shift. In order to supply 24-hour, 7 days a week maintenance coverage to the Radar Center, the four crews work a 28-day cycle rotating through a day shift (0800 to 1600) to a midnight shift (0001 to 0800), and finally an evening shift (1600 to 2400). These eight employees receive a four day break after finishing the midnight shift and rotating to the evening shift, and a two day break after finishing the evening shift and rotating to the day shift.[2]

The above schedule allows electronics mechanics employees to plan vacations in conjunction with the four days off between the midnight and evening shifts when scheduling their annual leave at the beginning of the year. Although Respondent's supervisors post a monthly schedule, Terry also drafts a yearly schedule for employees to assist them in

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[1] Respondent's unopposed errata to correct brief is granted.

[2] Electronics mechanics at the Radar Center alternate working alone the last two days of the day shift, thus, having one or two days off.

projecting their annual leave for their requests at the beginning of the year.[3]

In March 1992, Dzuba certified all eight of the electronics mechanics as being equally qualified to perform the required tasks of a WG-11 electronics mechanic. Not only did all eight have the same wage grade, all eight employees had the same position description. In addition, all the electronics mechanics are often required to work alone, with full responsibilities, and also are required to train new employees.

*B. Crew assignment changes prior to the Union becoming the exclusive representative in 1990.*

Prior to the Union gaining exclusive representative status in 1990, Respondent changed crew assignments of electronics mechanics at the Radar Center on a temporary basis for illnesses, and on a permanent basis if an employee was leaving the station.[4] Dzuba testified that on one occasion, back in 1987-88, before the Union was certified as the exclusive representative and prior to the onset of any bargaining obligations, Respondent realigned crews because two employees were not getting along. The crew realignment implemented in March 1992 was however, the first crew realignment since the Union was certified in 1990.

During that time, when Respondent realigned crews, normally the supervisors asked the individuals involved if they would rather remain with their crews and work with another employee or switch to another crew.

*C. Respondent posts changes in crew assignments in January 1992, and then rescinds change after Union submits bargaining request.*

On January 15, 1992, Dzuba posted the schedule for February 1992 which included changes in four employees' crews. Dzuba noted on the schedule the following:

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[3] The record includes a yearly schedule for 1993, and the implementation of the crew changes occurred in March 1992, the schedule is similar to previous schedules drafted by Terry in prior years, and this schedule has been used by supervisors as well.

[4] Dzuba testified that on one occasion, back in 1987-88, before the Union was certified as the exclusive representative and prior to the onset of any bargaining obligations, Respondent realigned crews because two employees were not getting along. A 1988 crew realignment, prior to the Union being certified, is not relevant.

> TO BETTER IMPROVE OUR OPERATION THE FOLLOWING CREW CHANGES ARE EFFECTIVE 31 Jan 92. Mr. Ackroyd will go to A Crew 2 FEB 92. Mr. Hays (sic) will go to B Crew 31 Jan 92. Mr. Roskie will go to C Crew 31 Jan 92. Mr. Matz will go to D Crew 4 Feb 92.

The Union did not receive any prior notification of the crew alignment changes before the schedule was posted on January 15, 1992. Furthermore, employees were not asked by supervisors about their preferences on crew assignment changes as happened in the past.

On January 16, 1992, the day after the crew changes were posted, Terry and his crew partner, Dave Ackroyd, who is not a Union official, discussed the changes with Dzuba and Balambao. Dzuba and Balambao informed Terry that the change in crews was made to alleviate a problem of two employees on a crew who were not getting along. Dzuba's testimony that three crews were having problems with each other, while not totally consistent with what he told Terry, that one crew was not getting along does establish a reason for the change. Dzuba also stated that as a result of the problems with the crews, maintenance work was not being completed, however, there is no evidence that any employee was disciplined for failing to complete an assignment. On that same day, Ackroyd expressed his concerns about his scheduled leave in conjunction with the four day break between his rotation from the midnight shift and the evening shift.[5] Ackroyd also explained to his supervisors that a change in his crew would affect his ability to care for his children as his wife's schedule had been coordinated with his crew assignment, and days off, prior to the change.

Later that same day, the Union submitted a written bargaining request to Station Manager Hayes. In the bargaining request, Terry submitted the Union's first proposal as follows:

> I request that the schedule change be held in abeyance until such time that the Union has been afforded the opportunity to negotiate on the Impact and Implementation of this schedule change.

After receiving the Union's bargaining request on January 16, 1992, Respondent's representatives contacted

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While there is testimony that Respondent maintained a flexible annual leave policy and was willing to accommodate employees' leave schedules, a change in an employee's crew could force that employee, who had scheduled a vacation, to take annual leave when those days would normally be regular days off.

civilian personnel at Travis Air Force Base who is responsible for servicing all the personnel at Respondent, for advice on how to proceed. That individual, Barbara Neilson, Chief of Labor and Employee-Management Relations, advised Respondent to pull down the schedule change and bargain with the Union. Neilson testified that under Article 3, § 4 of the parties' Agreement, Respondent was not required to give the Union advance notice because this was not a "significant change", but conceded that once the Union expressed an interest to bargain, there was a duty to bargain. Neilson also testified that Respondent was allowed to implement the realignment under Article 20, § 3 of the Agreement because the crew assignment change was "temporary." Contrariwise, Dzuba more accurately described the crew assignment change as permanent. On January 16, 1992, the schedule with the crew assignment changes, posted on January 15, 1992 was removed by Respondent.

*D. Respondent and Union discuss seniority as a basis for crew assignments on February 5, 1992, and Respondent again implements the crew assignment changes shortly thereafter.*

On January 28, 1992, Terry received a memorandum from Station Manager Hayes informing him of a "special meeting" scheduled for February 5, 1992. On that day, Terry met with Dzuba, Balambao and Hayes and discussed the crew assignments. At that time, there was no schedule change proposed, or "on the table." Dzuba, Balambao and Hayes expressed their views on why a change in the crew assignments should be made, while Terry proposed again that the crew realignment should be held in abeyance and the Union be allowed to negotiate. In addition to raising concerns voiced earlier by Ackroyd about how crew realignment would effect leave, Terry proposed that employees be allowed to select their crew assignments by seniority.

Respondent, by either Dzuba or Hayes, replied to the Union's proposal with its view that by selecting crew assignments based on seniority would not give it the flexibility in assigning employees. Respondent told Terry that it would consider the proposal, but at that time Respondent's representatives did not think they could accept it. Terry agreed to ask the employees about their preferences with respect to crew assignment changes, while Hayes was going to check with civilian personnel. At the conclusion of the meeting, Hayes told Terry that the parties would discuss crew realignment in the future, including any of the Union's proposals on how to implement the change. Hayes also informed Terry that he would give him his decision on whether to go ahead with the crew assignment changes when he returned from a business trip. Terry's impression that the parties would meet again to discuss crew assignments was based on Hayes' comments.

After February 5, 1992, neither Balambao nor Hayes received any request from the Union for the invocation of the Federal Mediation and Conciliation Service for its mediation assistance, or a notice from the Union that it was invoking the services of the Federal Service Impasses Panel. Similarly, after February 5, 1992 neither Balambao or Hayes received any additional proposals from the Union with respect to crew realignment.

Sometime between the meeting on February 5, 1992, but prior to February 12, 1992, Respondent's managers contacted Neilson at Travis. Although Neilson was not present at any of the meetings with the Union on the issue, including the February 5 session, she concluded nonetheless that Respondent had the right to make a decision on the crew realignment and to announce it.

Thereafter, on February 12, 1992, Hayes wrote Terry a memorandum stating that he appreciated the Union's contributions during the February 5 discussion concerning crew changes, but that he was planning on implementing the new crew assignments effective March 1, 1992. Terry did not receive the letter until February 14, 1992, the day the crew assignments were posted. The crew assignment changes posted on February 14, 1992 were the same changes that were initially posted in January 1992 and taken down by Respondent after recognizing its bargaining obligation. Respondent changed the crew assignments as announced on March 1, 1992.

*E. Grievance filed by employees on crew alignment change; Union pursues it at second step of the grievance procedure.*

On February 26, 1992, after the schedule change was posted at the Radar Center, several electronics mechanics initiated a grievance on the crew changes. Those employees alleged in the grievance that they were being unjustifiably segregated because other employees at Respondent's base had the ability to choose between several types of alternative work schedules. Radar Center employees thus sought the same opportunities as the other employees on base. Dzuba denied the first step grievance on February 26, 1992 asserting that alternative work schedules were not feasible at the Radar Center because it was the only 24-hour operation on the base.

Shortly after the first step grievance was denied by Dzuba, the Union represented the employees and filed a second step grievance with Station Manager Hayes. The issue there was the same as the first step i.e. that Radar Center employees were being segregated, or discriminated against, by not being able to choose their own schedules. The second step grievance did not raise any issues concerning Respondent's failure to notify, or bargain with the Union before imple-

menting the change in crew assignment. As a remedy for the grievance, the Union sought to negotiate with Respondent over the crew schedule using a seniority based system. On March 16, 1992, Hayes denied the second step of the grievance, maintaining that Dzuba had complied with all policies and regulations in making crew assignment changes, and there was no evidence of discrimination. Thereafter, the Union filed the instant unfair labor practice.

*F. Impact on employees of crew assignment change in March 1992.*

The crew assignment changes in March 1992 extended not only to disruptions in employees' planned annual leave and vacation plans, but also created problems with employees' child care responsibilities and commuting arrangements to the base. With respect to annual leave, the unique schedule of these employees allowed for a four day break between the midnight and evening shift and employees scheduled vacations in conjunction with the four day break. When Respondent unilaterally changed the crew assignments an employee like Ackroyd, who had scheduled a vacation around the four day break, would now be forced to take annual leave for those four days. Respondent maintains that throughout its discussions with the Union, it expressed its willingness to accommodate employees in any manner with respect to annual leave. Neilson, apparently was told by Respondent's management that it offered the Union a hundred percent accommodation for leave problems. She testified that this fulfilled Respondent's bargaining obligation. However, even if employees were allowed to adjust their annual leave, and take annual leave for the regular days off that had previously been scheduled, they would be forced to take annual leave when they normally would not have to.

The change in crew schedules also appears to have impacted directly on employees' child care commitments and travel arrangements to work. In this regard, Ackroyd and his wife coordinated their work schedules to allow one of them to watch their children during the day. When the crew assignment change was implemented with only two weeks notice, Ackroyd's wife (who is not a federal employee) was required to miss regular days of work to take care of their children, the days Ackroyd would have been off had the schedule remained the same. One employee was also required to make new transportation arrangements to work because of the crew change.

*Conclusions*

The General Counsel's position is that Respondent unilaterally changed a condition of employment by changing crew assignments in the Radar Center in March 1992, without fulfilling its statutory bargaining obligation, in violation

of section 7116(a)(1) and (5) of the Statute. It therefore asserts that the change in crew assignments posted by Respondent on February 14, 1992, and effective on March 1, 1992, was the first crew realignment since the Union became the exclusive representative of Respondent's employees in 1990. Prior to 1990, Respondent made crew assignment changes without a union representing employees, and therefore had no duty to bargain. In February/March 1992, the employees were represented and the Union sought to negotiate the crew realignments, but Respondent implemented before negotiations were complete.

Respondent makes several arguments, the most prominent being the instant unfair labor practice is barred under section 7116(d) of the Statute, that the changes in the crew assignments were de minimis, and finally, that the parties had reached impasse during the February 5, 1992 negotiation session.

*1. Whether the unfair labor practice is barred under section 7116(d) of the Statute.*

In determining whether a grievance is a jurisdictional bar to an unfair labor practice under section 7116(d) the Authority examines whether the subject matters of the unfair labor practice charge and grievance are the same, in terms of the factual predicate and theory. Thus, it specifically looks at whether the unfair labor practice charge and the grievance arose from the same set of factual circumstances and whether the theories advanced in support of the unfair labor practice charge and the grievance are substantially similar. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 43 FLRA 318, 323-24 (1991) (relying on the decision of the United States Court of Appeals for the District of Columbia Circuit in Overseas Education Association v. FLRA, 824 F.2d 61, 72 (D.C. Cir. 1987)).

In this case, the same set of factual circumstances underlie both the second step grievance and the later filed unfair labor practice and both were filed by the Union in its institutional capacity. To avoid this obstacle, the General Counsel maintains that the theories advanced in the two separately filed matters are different. Accordingly, it contends that the theory of the grievance is that some employees at Respondent received preferential treatment because they were permitted to make choices in their available work schedule through an alternative work schedule while the Radar Center employees were not allowed to do so. On the other hand, it contends that the unfair labor practice theory is not concerned with discrimination but rather, whether Respondent implemented a change in conditions of employment

without affording the Union the opportunity to bargain. Preferential treatment, in its view, is not at issue in the unfair labor practice case.

Respondent's disagreement is found in its assertion that the theory upon which both the grievance and the unfair labor practice are based arise, in essence, out of the existing duty to bargain over a change in conditions of employment for bargaining unit members. It therefore, argues that any remedy sought by the Union in either the grievance or the unfair labor practice would be predicated upon a violation of some existing duty to bargain.

The plain language of the grievance, reveals that it addresses only preferential treatment afforded to some employees. Although an arbitrator might concur with Respondent and find that there was in fact no preferential treatment, or discrimination, among its employees, there would be no need for the arbitrator to address the unfair labor practice issue, the failure of Respondent to negotiate the crew assignment changes. The same might also be true if the arbitrator found discrimination and ordered Respondent to negotiate with the Union in its institutional capacity, since such an order would still not impose any statutory obligation to bargain on Respondent. The fact that both situations sought a remedy of negotiation with the Union would therefore, seem irrelevant. Nor does it appear that the unfair labor practice issue would ever come before an arbitrator. In short, the grievance sought only to establish preferential treatment to employees, while the unfair labor practice sought to establish a statutory violation of Respondent's failure to bargain a change in working conditions. See Bureau of the Census, 41 FLRA 436, 446-447 (1991).

Based on the foregoing, it is found that while the factual situation in both the grievance and unfair labor practice are identical, the grievance does not address Respondent's Statutory obligation to bargain a change in working conditions and, therefore, the instant unfair labor practice is not barred by section 7116(d) of the Statute.

*2. Respondent had an obligation to bargain the change in crew assignments.*

The decision to change tours of duty is negotiable only at an agency's election under section 7106(b)(1) of the Statute. In Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532 (1988), the Authority held that a "tour of duty is the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative work week."

If the change in crew assignment had a foreseeable impact which was more than de minimis under the Statute then an obligation to bargain over the impact and implementation exists notwithstanding Respondent's right to make the change. There is little question that an obligation to bargain over impact and implementation of any change in job duties or work assignments can exist, even where management is exercising a section 7106 right. See, for example, U.S. Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, 35 FLRA 1039, 1047 (1990).

*A. The change in crew assignments involved a reasonably foreseeable impact which was more than de minimis.*

Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) established the standard to be applied in determining whether a change in conditions of employment by an agency is de minimis. There the current standard was established as follows:

> . . . In examining the record we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change of conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

The Authority also made it clear that the number of employees involved is not a controlling consideration in the a nalysis, and therefore, the number of employees involved in a change of employment conditions will not serve to extinguish bargaining obligations. SSA, supra; see also Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 45 FLRA 574 (1992). Understandably the de minimis inquiry does not focus primarily on the actual effect of a change in employees' conditions of employment, but on the foreseeable effect of the change. U.S. Customs Service (Washington, D.C.) and U.S. Customs Service, Northeast Region (Boston, Massachusetts), 29 FLRA 891 (1987).

Applying the above standards to this case, it appears that the change in employees' crew assignments does give rise to a duty to bargain. The instant change in crew assignments of four employees, under their unique schedule required them to report to work when normally they would have days off. Further, these employees regularly scheduled their vacations around the four day break between the midnight and evening shifts, and it seems to be reasonable to conclude that the change in crew assignments would have a disruptive effect on

employees' lives. Similar changes have already been found to have more than a de minimis impact, since action would disrupt responsibilities and commitments that employees had made predicated on the previously scheduled days off. See, e.g., Veterans Administration Medical Center, Prescott, Arizona, 46 FLRA 471 (1992). It was not only reasonably foreseeable that employees would be forced to rearrange travel plans, take more annual leave, and rearrange child care responsibilities, but Ackroyd and Terry informed and discussed with Respondent some of the complications the crew assignment change had on the employees' lives on separate occasions before Respondent implemented the change.

Respondent suggests that the impact of the crew assignment changes was outside the confines of the facility, such as child care responsibilities, spousal commitments, and travel plans, are not factored into the equation whether a change in conditions of employment is more than de minimis. Respondent finds these as personal inconveniences over which the "employee" has substantial control. Moreover, Respondent asserts the employee could significantly mitigate the effect. Authority's holdings are quite the contrary, for it has found that changes in conditions of employment which intrude on an employee's family, travel and/or educational plans and predicated on periods when the employee was not scheduled to be at work, are reasonably foreseeable impact and trigger a duty to bargain. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 39 FLRA 1357 (1991).

Based on the instant record, it is found that a reasonably foreseeable effect of the change of conditions of employment of bargaining unit employees existed and therefore, the change in conditions of employment had more than a de minimis impact herein.

In such circumstances, it is found that Respondent had an obligation to bargain concerning the impact and implementation of the crew assignment change herein.

*B. The crew assignment change was also substantively negotiable.*

Section 7106(a) of the Statute provides that subject to section 7106(b), nothing in the Statute shall affect management's right to assign work. Further, the right to assign work includes the right to determine whether individual employees possess the necessary qualifications, and the position or positions to which the work will be assigned. U.S. Department of the Treasury, Customs Service, 38 FLRA 770 (1990).

The record discloses that both prior to, and after the change in crew assignment was implemented on March 1, 1992, employees worked the same rotating schedule. The crew assignment change of employees at the Radar Center, who held the same grade, qualifications, and position descriptions is a matter which was substantively negotiable, and the Union's proposal to negotiate crew assignments by seniority was also negotiable.

In this case, the Union's proposal that crew assignments based on seniority does not interfere with management's rights. Such proposals concerning the assignment of employees from one or more shifts to another does not involve different positions or different duties, but only involves employees' performing the duties of their positions during a different shift of work. Thus a proposal based on service computation dates or seniority in determining such shift assignments, as was made by the Union here, would be negotiable. Department of the Air Force, Lowry Air Force Base, Colorado, 16 FLRA 1104, 1107 (1984).

The Union's proposal that crew assignments be based on seniority simply does not interfere with any management right because it does not prevent Respondent from securing any coverage it deems necessary, to determine when work will be performed. Nor does it interfere with Respondent's ability to assign particular duties to particular employees. See U.S. Customs, 38 FLRA 787. Furthermore, the proposal does not impact on the number of employees per shift, for here, the Union sought only to negotiate a method to select crew assignments by seniority.

As already noted, when the instant change was implemented by Respondent, all eight employees at the Radar Center were of the same wage grade, and certified by their supervisor as being equally qualified to perform their job duties. These employees all had the same position description, and performed the same duties. Although Respondent argues that it needed to maintain the flexibility to place a more experienced mechanic, a WG-11, with a newly hired, WG-8 mechanic, but the record demonstrated otherwise, because at the time the change was implemented, the mechanics were equally qualified WG-11 mechanics and there were no work

related distinctions between these employees.[6] In these circumstances, it appears that the Union's proposal did not affect management's right to assign work.

Accordingly, it is found that the subject of crew assignment changes was substantively negotiable.

*C. The parties' collective bargaining agreement does not cover the matter in dispute.*

A new framework for determining whether a provision in a contract covers a matter in dispute was established in Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993). First, the Authority determines whether the matter is expressly contained in the agreement, although recognized exact language is not required. If the provision does not expressly encompass the matter, the Authority determines whether the subject is inseparably bound up with, and thus plainly an aspect of a subject expressly covered by the contract.

Respondent admittedly has a bargaining obligation on the issue of crew assignments if bargaining is requested, but presents a two-fold argument concerning whether it had an obligation to give the Union advance notice of the change. First, it asserts that provisions in the Agreement allow it to make changes which are not significant without prior notification.[7] The provisions relied on by Respondent, Article 3, Sections 3-4, simply restates statutory rights and obligations. Thus, Section 3 discusses management's rights under section 7106 of the Statute and while Section 4 recognizes that under the Statute, and current case law, that even if management rights are exercised, a bargaining

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During the initial crew assignment change in January 1992, Terry was informed that the reason for the crew change was because two employees were not getting along and work was not being accomplished. Dzuba, however, testified that no employee had been disciplined for not completing an assignment. While Respondent had the right to make crew assignment changes for disciplinary reasons between two employees, since all the employees were equally qualified, the Union would still retain the right to negotiate crew assignments for the remaining crews by seniority.

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It is noted, that the General Counsel does not raise the question of advance notice in either its opening argument or in its brief. Therefore, it is deemed unnecessary to address the issue of whether adequate notice was given to the Union in this matter.

obligation over procedural and impact issues still remains.[8] Then it suggests that it was permitted to make the crew assignment change, without notice to the Union, under Article 20, § 3 of the Agreement because it resulted in only a temporary adjustment in the employees' schedule. Regarding this argument, Respondent's own witnesses seem to disagree on the temporary or permanent nature of the change in crews in March 1992. Furthermore, the record demonstrates that the change was more than merely a temporary adjustment. The change in crew assignments not only effected employees in the month following the change in March 1992, but the effects of the change were experienced for many months to follow. After the change in crew assignments, an employee who scheduled a vacation around his four day break for December 1992 would find himself having to take annual leave, or rearranging his vacation plans.

Based on the foregoing, it is found that the change was not a temporary adjustment, and therefore, the subject is not covered under the parties' Agreement and that the contractual provisions relied on by Respondent does not reveal that the Union waived any right to bargain concerning the realignment of the Radar Center crews.

*3. Respondent did not fulfill its duty to bargain and the parties did not reach impasse at the February 5, 1992 meeting.*

The record reveals that when Respondent posted the crew assignment change in February 1992, effective March 1992, it had not fulfilled its bargaining obligation, and the parties had not reached impasse. When Respondent first posted the crew assignment change in January 1992, the Union expressed its concerns of how the change would impact on employees, and then made a written demand to bargain. The demand to bargain included the proposal that Respondent hold the crew assignment change in abeyance until the change was negotiated. Thereafter, Respondent opted to pull down the crew assignment change and bargain with the Union over the issue. After notifying Terry of a "special meeting" on February 5, 1992, the Union proposed the changes be selected by seniority, and raised additional concerns of how the change would effect employees leave. Respondent informed Terry that it would consider the proposal and that the parties would discuss crew realignment in the future.

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[8] While Article 3, § 4 speaks in terms of Respondent's obligation over "significant changes," the term is not defined in the Agreement. Therefore, it is my view that the de minimis standard set out in Social Security Administration, supra, is applicable in this case.

Based on these facts, Neilson, who works at Travis, and was not in attendance at the February 5, 1992 session, concluded that Respondent had fulfilled its bargaining obligation and that Respondent should implement the crew realignment. She considered the fact that Respondent's managers had reassured her that they would fully accommodate employees on the leave issue.

*A. The crew assignment change was not necessary for the functioning of the agency.*

Respondent cites personality difficulties, safety concerns and performance concerns which it contends are "inextricably linked to the core . . ." of its mission as reasons for realignment of the crews.

It is clear that an agency is obligated to bargain before implementing a change in the conditions of employment of its represented employees. Department of the Air Force, Scott Air

Force Base, 35 FLRA 844, 852 (1990). The only potentially applicable exception is that of an acute need to implement the change before the negotiations, that is, that expedited implementation was required, "consistent with the necessary functioning of the agency." Social Security Administration, 35 FLRA 296, 302 (1990).

Case law reveals matters dealing with the duty to maintain the status quo while a bargaining impasse is reached before the Federal Service Impasses Panel. As articulated more fully in U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri, 23 FLRA 435 (1986), the principle applied in those cases is that the status quo must be maintained to the extent possible, that is, to the extent consistent with the necessary functioning of the agency. When an agency chooses to avail itself to this exception and thus to alter the status quo, it must be prepared to provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency. The Authority has also indicated that the phrase "consistent with the necessary functioning of the Agency, may be accurately paraphrased as "necessary for the [agency] to perform its mission." Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas, 23 FLRA 90 (1986).

Implementation of the crew assignment change before the completion of bargaining was not necessary for the functioning of Respondent as contemplated by the Authority. The crews had been together for over a three year period, and there is no evidence of employees being disciplined prior to the change for not completing assignments. In fact, Dzuba testified that when he spoke to employees about accomplishing maintenance tasks, they responded. In addition, Respondent contends that it realigned crews in the past under circumstances similar to this change without deferring to employees desires. Such an argument completely ignores the fact that there was no exclusive representative and therefore, no bargaining obligation at that time. Furthermore, the fact that Respondent did not implement the change when it had planned to on February 1, 1992, undermines any cogent argument that this change was necessary to perform its mission. In these circumstances, it is found that the crew realignment was not "consistent with the necessary functioning of the agency." Under these conditions it appears that there was no necessity for Respondent to implement the crew assignment prior to fulfilling its bargaining obligation.

*B. The parties were not at impasse following the February 5, 1992 meeting.*

It has been held that an agency violates the Statute when implementing changes in conditions of employment if it implements the changes absent an agreement by the parties, timely invocation of the services of the Federal Service Impasses Panel after impasse following good faith bargaining, or waiver of Union bargaining rights. U.S. Department of the Air Force, 832d Combat Support Group, Luke Air Force Base, Arizona, 36 FLRA 289 (1990). In Luke, supra, it was found that the parties were not at impasse since the respondent would not deviate from its intention to implement the change; the union's proposal not to implement was negotiable; impasse was not declared; the union clearly was not refusing to continue negotiations; there was no waiver by the union; and, no overriding exigency requiring immediate implementation. Furthermore, when the parties exhibit a willingness to bargain no impasse exists. See, also, Davis-Monthan Air Force Base, Tucson, Arizona, 42 FLRA 1267 (1991).

The record discloses that following the February 5, 1992 meeting, the parties were not at impasse with respect to crew assignment changes as contemplated by the Authority in Luke, supra. Rather, Respondent expressed a willingness to consider the Union's proposal, meet in the future, and never declared the parties to be at impasse. Nor did the Union seek the services of the Federal Service Impasses Panel. It must be kept in mind that the Union had negotiable proposals out-standing, including one requesting that the change be held in abeyance pending completion of negotiations. See United States Department of Justice, Immigration and Naturalization Service, Washington, D.C., 31 FLRA 145, 154 (1988) (holding agency had obligation to bargain over proposal to maintain status quo before implementing a change in employment conditions). Additionally, the actions of Respondent's representatives at the February 5 negotiation session demon-strate that the parties were not at impasse, and left the Union with the notion that future negotiation sessions would take place. In this regard, Respondent told the Union that it would consider the proposal on seniority and check with civilian personnel. Hayes also told Terry that he would be willing to discuss the implementation of the crew changes in the future.

Since neither of the parties declared an impasse but seemed to be convening the meeting until a later date, the Union could have reasonably believed that Respondent was considering its proposal by displaying a willingness to discuss the subject in the future. Consequently, when Respondent implemented the crew assignment change by posting the schedule on February 14, 1992, although the parties had

discussed the crew assignments, they were not in agreement, or at impasse, and the Union had not, as found earlier, waived its bargaining rights concerning this issue.

Finally, Respondent's expressed willingness to "accommodate" employees annual leave problems created by the change, does not relieve it of the obligation to bargain over the change.

Based on the above, it is found that Respondent implemented a change in conditions of employment without fulfilling its bargaining obligations in violation of section 7116(a)(1) and (5) of the Statute. It is further found that the change in crew assignment was a substantively negotiable matter as to the eight electronics mechanics who were equally qualified, and possessed the same grade and position description. Finally, it is found that the change in crew assignments had more than a de minimis impact on bargaining unit employees, thereby, giving rise to an obligation to bargain the impact and implementation of the crew assignments.

With respect to the remedy in this matter, the General Counsel maintains that a status quo ante is the only appropriate remedy in this matter. After reviewing Respondent's argument and applying the five factors of Federal Correctional Institution, 8 FLRA 604 (1982) it is found that a status quo ante remedy is appropriate in this case.

Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions of our employees exclusively represented by the National Association of Government Employees, Local R12-85, AFL-CIO by changing crew assignments of electronics mechanics at the Radar Maintenance Work Center, without first completing bargaining with the Union over the decision to change crew assignments, or over the procedures for implementing the change and appropriate arrangements for affected employees.

(b) Refusing to bargain with the National Association of Government Employees, Local R12-15, AFL-CIO

over the changes in working conditions of unit employees, such as the method by which crew assignments of Radar Maintenance Work Center personnel are made.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured 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) Upon request of the National Association of Government Employees, Local R12-85, AFL-CIO, rescind the crew assignments of the electronics mechanics at the Radar Maintenance Work Center that were made on February 14, 1992 (to begin March 1, 1992), and return to the crew assignments which existed prior to that date.

(b) Give notice to, and upon request, negotiate with the National Association of Government Employees, Local R12-85, AFL-CIO over the decision to change crew assignments of electronics mechanics at the Radar Maintenance Work Center.

(c) Post at its facilities in Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California, where bargaining unit members represented by the National Association of Government Employees, Local R12-85, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, 901 Market Street, Suite 220,

San Francisco, CA 94103-1791, in writing, within 30 days from

the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, December 12, 1994

ELI NASH, JR.
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY**

**AND TO EFFECTUATE THE POLICIES OF THE**

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT unilateral change working conditions of our employees exclusively represented by the National Association of Government Employees, Local R12-85, AFL-CIO by changing crew assignments of electronics mechanics at the Radar Maintenance Work Center, without first completing bargaining with the Union over the decision to change crew assignments, or over the procedures for implementing the change and appropriate arrangements for affected employees.

WE WILL NOT refuse to bargain with the National Association of Government Employees, Local R12-85, AFL-CIO over the changes in working conditions of unit employees, such as the method by which crew assignments of Radar Maintenance Work Center personnel are made.

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

WE WILL, upon request of the National Association of Government Employees, Local R12-85, AFL-CIO, rescind the crew assignments of the electronics mechanics at the Radar Maintenance Work Center that were made on February 14, 1992 (to begin March 1, 1992), and return to the crew assignments which existed prior to that date.

WE WILL give notice to, and upon request, negotiate with the National Association of Government Employees, Local R12-85, AFL-CIO over the decision to change crew assignments of electronics mechanics at the Radar Maintenance Work Center.

(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, San Francisco Region, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: (415) 744-4000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. SF-CA-20337, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

Steven E. Sherwood, Esq.
U.S. Air Force
Central Labor Law Office
1501 Wilson Boulevard, 7th Floor
Arlington, VA 22209

Gary J. Liebermann, Esq.
Federal Labor Relations Authority
San Francisco Region
901 Market Street, Suite 220
San Francisco, CA 94103-1791

**REGULAR MAIL:**

President
National Association of Government
Employees, Local R12-85, AFL-CIO
P.O. Box 806
Point Arena, CA 95468-0806

Dated: December 12, 1994
Washington, DC