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

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, HONOLULU DISTRICT OFFICE, HONOLULU, HAWAII

Respondent

and

Case No. 8-CA-00345

NATIONAL IMMIGRATION AND NATURALIZATION SERVICE COUNCIL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2886, AFL-CIO

Charging Party

Mary Reiko Osaka, Esq.
For the Respondent

Dennis J. Smith
For the Charging Party

Gerald M. Cole, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for Region VIII, issued a Complaint and

Notice of Hearing alleging Respondent violated the Statute by instituting an additional work shift for unit employees without notifying the Union or providing it with an opportunity to negotiate concerning the impact and implementation of the change.

A hearing on the Complaint was conducted in Honolulu, Hawaii 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.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the National Immigration and Naturalization Council, American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various of Respondent's employees including Immigration Officers, and AFGE Local 2886 has been the agent of AFGE for the purpose of representing those employees.

Respondent generally employees approximately 40 Immigration Officers (Inspectors) at the Honolulu International Airport to inspect passengers upon their arrival on international flights. Inspectors were assigned to one of various shifts including daytime shifts beginning at 5:30 a.m., 6, 7, and 8:00 a.m.; a 4:00 p.m. to 12 midnight shift; and a midnight to 8:00 a.m. shift. Sometime prior to March 1990 the number of international flights arriving at the Honolulu International Airport between 10:00 p.m. and 2:00 a.m. substantially increased requiring Respondent to increase the number of Inspectors available during these arrivals. When additional Inspectors were needed previously, Respondent usually called five or six Journeymen (GS 9-12) Inspectors working on the daytime shifts to work overtime to accommodate the workload.1/ However, to meet the increase in arrivals

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1/ The number of Inspectors called in to work overtime depended upon the number of passengers scheduled to arrive. One Inspector for each 60 passengers was the ratio normally applied when "calling out" employees for overtime. Qualified part time GS-7 and GS-9 Inspectors were called only occasionally.

Respondent decided to establish a 9:00 p.m. to 5:00 a.m. shift.[2] On February 27 Respondent's District Director, Ronald Radcliffe, addressed the following letter to Dennis Smith, the President of the Local 2886:[3]

> Effective March 11, 1990, there will be a minimum of three officers assigned to a 9:00PM - 5:00AM shift at Honolulu International Airport during the basic work week.
>
> This new shift is being implemented because of the increase in foreign arriving flights presenting passengers for inspection within the shift's time frame.
>
> The shift will be manned as additional inspectors become trained and available and it will not impact on the number of inspectors currently available for assignment during the peak arrival shifts.
>
> The shift will be incorporated into the fair and equitable rotation of all shifts among all officers. Consideration will be given to "volunteers" for permanent assignment to the shift.
>
> Pursuant to Article 9A of the Agreement, Union has ten work days to respond to the proposed change.

The 9:00 p.m. to 5:00 a.m. shift was implemented on March 11, 1990. The shift began with four volunteers and was later increased to six Inspectors. Implementation of the shift resulted in the loss of overtime pay for Inspectors on other shifts and a loss of night shift differential which was paid to employees working these hours at premium pay rates.

2/ Respondent also considered increasing the number of Inspectors on the 4:00 p.m. to midnight and midnight to 8:00 a.m. shifts to provide sufficient Inspectors.

3/ Sometime in February 1990 Smith heard a "rumor" that Respondent might be considering adding a 9:00 p.m. to 5:00 a.m. shift and notified the District Director that if such materialized, he wished to be notified for bargaining purposes.

Respondent normally notified Union President Smith of labor-management matters by sending such notices to a designated Post Office box.[4] However, Radcliffe's letter to Smith concerning establishing the new shift was given to a Supervisory Inspector on detail at the District Office to distribute to the Union and others. The Supervisory Inspector, being unfamiliar with the normal delivery process, deposited the letter in Smith's worksite mail box which was located in the District Office. Smith had previously notified management that he would be away from the office on leave and Union business from February 28 to March 16. Accordingly, Smith did not become aware of the new shift's implementation until March 18. On March 27 Smith met with District Director Radcliffe and informed him that he had not received notice of the change. Radcliffe expressed surprise and later Smith received the following letter from Radcliffe dated March 27:

> Prior to my meeting with you today it was my understanding that the Union had been properly notified of my desire to implement a 9:00 p.m. - 5:00 a.m. shift. If you were not properly notified it was an unintentional error.
>
> I am amenable to appointing a management bargaining team to meet with the Union's designated representative for the purposes of engaging in post implementation bargaining. Please provide me with a complete listing of the specific items and/or proposals that you wish to negotiate by April 6, 1990, if possible.

The Union responded on April 1, 1990 indicating it wished to negotiate on the shift implementation and requested various data from Respondent. By letter of April 5, Respondent provided the information. On April 9 the Union indicated it wished to negotiate over the rotation of officers through the new shift; the personnel who would be assigned to the shift; the procedures to be used if the Activity did not receive sufficient volunteers; and the number of Inspectors to be assigned to the shift. The

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4/ When Smith was away from the office he had another person check his Post Office box and relate the contents of any management correspondence concerning Union or representational matters.

Union also asked to be supplied with information at negotiations concerning additional flights which caused the need for the shift.

Representatives of the parties met for negotiations on April 18, 1990. While the Union made no specific proposals, Union President Smith did raise issues relating to the effect of the new shifts on 4:00 p.m. to 12:00 midnight employees' leave time; the prospect of senior Inspector's being assigned to the new shift more frequently than others; and too many Inspectors being assigned in advance of overtime flights.5/ Smith sought additional information concerning a management study addressing arrival statistics used to justify implementation of the new shift and the number of overtime callouts since the new shift was implemented. Smith was told to put his request in writing and the meeting ended. Thereafter, Smith made a written request for the data which was denied and no further negotiations occurred, Smith having indicated that negotiations would be recessed until the Union received the information it requested.6/

The 9:00 p.m. to 5:00 a.m. shift was discontinued on July 1, 1990 at which time Respondent increased the number of Inspectors on the 4:00 p.m. to midnight and midnight to 8:00 a.m. shifts.7/

Additional Findings, Discussion and Conclusions

The General Counsel contends Respondent violated section 7116(a)(1) and (5) of the Statute when it

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5/ Union President Smith repeatedly attempted to raise the question of whether the new shift was justified by the workload but management considered the matter nonnegotiable and refused to discuss it.

6/ The Union filed an unfair labor practice charge concerning the refusal to supply the requested material. A Complaint issued regarding the refusal to supply the number of overtime callouts since implementation of the shift. That matter was consolidated with the case herein but was resolved several weeks before the hearing in this case when Respondent provided the information to the Union.

7/ Overtime assignments did not increase after the existing shifts were enlarged.

unilaterally implemented the new 9:00 p.m. to 5:00 a.m. shift without notice to the Union and providing it with an opportunity to bargain about the impact and implementation of the change. The General Counsel urges that the appropriate remedy should include requiring Respondent to make whole all employees who suffered a loss in overtime pay, with interest.

Respondent contends that it attempted in good faith to notify the Union of the change and its failure to give notice to the Union was an "innocent mistake" exhibiting no "desire or intent" to avoid its Statutory responsibilities. Therefore, Respondent concludes, it did not refuse to "consult or negotiate in good faith" as required by the Statute. Respondent urges that, in any event, neither a status quo ante remedy nor a backpay award is warranted in this case.8/ Respondent further argues that even if backpay is awarded, the backpay period should culminate when negotiations on the matter ceased.

Clearly, where an agency changes or establishes a tour of duty it is obligated to notify and negotiate with the exclusive representative over the procedures to be observed by management in changing or establishing the tour of duty and appropriate arrangements for employees adversely affected by management's exercise of its authority. See Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532 (1988), affirmed on other grounds sub nom. National Association of Government Employees, Local R7-23 v. FLRA, 893 F.2d 380 (D.C. Cir. 1990). It is also well established that good faith or state of mind is not a defense to an agency changing a condition of employment without fulfilling its bargaining obligation. See Marine Corps Logistics Base, Barstow, California, 33 FLRA 196 (1988) at 199, 202-203; Scott Air Force Base, supra, at 544; Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and Newark Air Force Station, Newark, Ohio, 21 FLRA 609 (1986); Internal Revenue Service (District, Region, National Office Units), 16 FLRA 904 (1984); and United States Department of the Interior, Lower Colorado Dams Project, Water and Power Resources Service, 14 FLRA 539 (1984); See also Department of the Army Reserve Personnel Center, St. Louis, Missouri, 32 FLRA 665 (1988) at 672-673 for a similar holding regarding statements

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8/ The General Counsel does not seek restoration to the status quo ante.

or remarks made by management. Accordingly, since Respondent's defenses are without merit they are rejected and I conclude Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally establishing the 9:00 p.m. to 5:00 a.m. shift without notifying the Union and providing it with an opportunity to bargain on the impact and implementation of the change in tour of duty before establishing the new shift.

I further conclude a status quo ante remedy is warranted in the circumstances herein based upon the factors set forth in Federal Correctional Institution, 8 FLRA 604 (1982). However, since the new shift has been abolished a status quo ante remedy need not be provided.

Respondent urges that if a make whole remedy is ordered the extent of the relief should be determined through negotiations between the parties since there is no way of ascertaining the identity of the individuals who would be made whole. The record clearly reveals implementation of the new shift resulted in a reduction of overtime assignments. Calculators from Respondent's records contain information reflecting the number of flights and passengers arriving during the period the new shift was in place. Information is available to construct the number of Inspectors who would have worked overtime and the number of hours which would have been worked and premium pay, including night shift differential, earned during the period the new shift was in effect. Thus, the number of employees and the specific amount of money lost by employees due to Respondent's action can be constructed. However, the specific employees who would have accepted the overtime assignments is not so easily ascertained. Nevertheless, the record indicates overtime assignments are made alphabetically with employees being given the option of declining an overtime assignment. Overtime time and earnings for all Inspectors are recorded and a maximum earning level is imposed. Inspector's past histories of accepting or rejecting overtime can be reconstructed. Accordingly, sufficient information is available to the parties to calculate the equitable distribution of backpay to affected employees through compliance proceedings. See 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 (1990).

I further, reject Respondent's contention that backpay, if awarded, should terminate when negotiations were discontinued. Respondent relies upon the holding in N.L.R.B. v. Cauthorne, 691 F.2d 1023 (D.C. Cir. 1982) at 1025 wherein the court held in a case arising under the National Labor Relations Act that "an impasse reached following a unilateral change marks the end of the period for which any backpay may be awarded. To hold otherwise would be patently unfair." Respondent acknowledges however that negotiations in the case herein terminated fairly quickly without proposals being offered or discussed. Thus it is clear that bonafide negotiations culminating in an "impasse" did not occur.[9/] Moreover, in my view after a unilateral change has been imposed on an exclusive representative, bargaining without the condition being restored to the status quo ante places the Union at a considerable disadvantage. Matters concerning the implementation of the change are "off the table" and numerous impact matters may have already been experienced. Therefore, in order to properly remedy the violation the back-pay period should not be shortened merely because the parties negotiate and fail to come to agreement on the matter. See Allied Products Corporation, Richard Brothers Division, 218 NLRB 1246 (1975) where the National Labor Relations Board held that after an unlawful unilateral change has been made:

> . . . the fact that Respondent presented the Union with a *fait accompli* at the outset of negotiations must necessarily have obstructed meaningful bargaining. To hold that bargaining in such circumstances is an adequate substitute for remedial action would unwarrantedly relieve Respondent of its statutory obligation to maintain existing benefits during negotiations and unjustifiably ignore the rights of those employees who may have been adversely affected by Respondent's breach of that duty. (Footnote omitted.)

9/ Section 2470.2 of the regulations relating to the Federal Service Impasses Panel defines "impasse" as:

> . . . that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

Accordingly, in view of the entire foregoing and the record herein, I conclude Respondent violated section 7116(a)(1) and (5) of the Statute and recommended the Authority issue 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 the United States Immigration and Naturalization Service, Honolulu District Office, Honolulu, Hawaii, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions of bargaining unit employees duty-stationed at the Honolulu Airport by establishing a new 9 p.m. to 5 a.m. shift without first notifying the American Federation of Government Employees, Local 2886, AFL-CIO, herein the Union, and affording it an opportunity to negotiate over the impact and implementation of said change.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them 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) Make whole all affected journeyman Immigration Officers, in accordance with the Back Pay Act, with interest, who suffered a reduction in overtime and premium pay as a result of the establishment of the 9 p.m. to 5 a.m. shift implemented on March 11, 1990 and discontinued on July 1, 1990.

(b) Notify the Union of any intended changes in tours of duty or shifts and upon request, negotiate concerning the impact and implementation of such changes.

(c) Post at its United States Immigration and Naturalization Service, Honolulu District Office, Honolulu, Hawaii, facilities 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 District Director and shall be posted and maintained for sixty (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 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, San Francisco 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 herewith.

Issued, Washington, DC, August 27, 1991.

SALVATORE J. ARRIGO
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 implement unilateral changes in the working conditions of bargaining unit employees duty-stationed at the Honolulu Airport by establishing a new 9 p.m. to 5 a.m. shift without first notifying the American Federation of Government Employees, Local 2886, AFL-CIO, herein the Union, and affording it an opportunity to negotiate over the impact and implementation of said change.

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

WE WILL make whole all journeyman Immigration Inspectors, in accordance with the Back Pay Act, with interest, who suffered a reduction in overtime and premium pay as a result of the establishment of the 9 p.m. to 5 a.m. shift implemented on March 11, 1990 and discontinued on July 1, 1990.

WE WILL notify the Union of any intended changes in tours of duty or shifts and upon request, negotiate concerning the impact and implementation of such changes.

____
(Activity)

Dated: __________________ By: ______________________________
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Sub-Regional Office, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 484-4000.