Office of Administrative Law Judges

DEPARTMENT OF THE AIR FORCE
355TH MSG/CC
DAVIS-MONTHAN AIR FORCE BASE, ARIZONA
Respondent

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2924
Charging Party

Case No. DE-CA-06-0373

Hazel E. Hanley, Esquire
For the General Counsel

Phillip G. Tidmore, Esquire
Tom Burhenn, Esquire
For the Respondent

John Pennington
For the Charging Party

Before: SUSAN E. JELEN
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 United States Code, 5 U.S.C. §7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Part 2423.

On July 17, 2006, the American Federation of Government Employees, Local 2924 (Union or Local 2924) filed an unfair labor practice charge with the Denver Region of the Authority in Case No. DE-CA-06-0373 against the Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona (Respondent or Davis-Monthan). (G.C. Ex. 1(a)) On February 7, 2007, the Regional Director of the Denver Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by assigning a bargaining unit employee to perform security checks and aircraft area checks in addition to his duties as a taxi driver, without giving the Union notice and the opportunity to negotiate to the extent required by law. (G.C. Ex. 1(b)) On March 5, 2007, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(c))

On March 6, 2007, the Respondent filed a Motion to Dismiss, asserting that the complaint in this matter should be dismissed pursuant to section 7116(d) of the Statute, due to a prior filed grievance. On March 13, 2007, the General Counsel filed its Opposition to Respondent's Motion to Dismiss, asserting that there was no prior filed grievance and the Motion to Dismiss should be denied. On March 14, 2007, the Chief Administrative Law Judge for the FLRA, Office of Administrative Law Judges, issued an Order Denying Respondent's Motion to Dismiss. The Respondent renewed its Motion to Dismiss at the hearing.

A hearing was held in Tucson, Arizona, on April 4, 2007, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent have filed timely post-hearing briefs, which have been fully considered.

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

Davis-Monthan AFB is an activity of the United States Air Force, which is an agency under 5 U.S.C. §7103(a)(3). (G.C. Exs. 1(b) & (c)) During all times material to this matter, John Suhay was the Chief, Motor Pool Operations and Beatriz Clifton was the Labor Relations Officer for Davis-Monthan AFB. (G.C. Exs. 1(b) & (c); Tr. 26, 113) They were both supervisors and/or management officials under 5 U.S.C. §7103(a)(10) and (11), and acted on behalf of the Respondent. (G.C. Exs. 1(b) & (c)) Mike O'Halloran has been the Director of Maintenance for the Aerospace Maintenance and Regeneration Center (AMARC) since April 17, 2006. (Tr. 133) AMARC is located in a secure, fenced area within Davis-Monthan AFB, and covers approximately 2000 acres. There are approximately 4000 aircraft on the AMARC property. AMARC is a DOD mandated facility and is responsible for the storage and disposal of aircraft as well as the regeneration and reclamation of aircraft and aircraft parts. (Tr. 133-135)

AFGE Local 2924 is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Ex. 1(b), 1(c)) At all

times material to this matter, John Pennington has been the President and Donald Child has been the Vice President for Local 2924. (Tr. 11, 148) Lewis A. Henderson has been an employee under 5 U.S.C. §7103(a)(2) and a member of the bargaining unit represented by Local 2924. (G.C. Ex. 1(b), 1(c)) Henderson was in the military from 1952 to 1978 and began working as a civilian employee at Davis-Monthan in 1980. (Tr. 57-58) In March 2003, he was given a light duty assignment as a van driver and in October 2003 was assigned to the AMARC motor pool. His current supervisor is John Suhay. There are two taxi drivers in the AMARC motor pool, Henderson and Chris Lenars. (Tr. 59-60)

Prior to March 2006, [1/] Henderson was a taxi driver with certain specific responsibilities. Henderson drove a seven passenger mini-van. Every morning, after reporting to work, Henderson checked the fluid levels of the van, filled up as needed, and reported any discrepancies on FTO Form 1800. This generally took no more than thirty minutes. Henderson was then responsible for picking up various oil and fuel samples at different shops located within AMARC, such as the Aerospace Ground Equipment Section, Hydraulic Shop, Propulsion Shop, F-4 Hangar, and the Aircraft Receiving Branch. (Tr. 60-62, 81, 113-114) Henderson would then deliver the various samples to the Non-Destructive Inspection (NDI) lab, which is located about four (4) miles from the motor pool, and sometimes to the Tucson Air Guard, which is located about seventeen (17) miles from the motor pool. Henderson was responsible for two runs during the day, one in the morning and one in the afternoon. The runs for all the samples usually took around 1½ to 1¾ hours, each time. (Tr. 62-64, 100-101) Certain fuel samples were higher priority and were called "red cap" samples. With these red cap samples, Henderson would wait for the NDI lab to run its tests and return their findings to the originating AMARC shop. (Tr. 61)

Henderson was also responsible for transporting personnel, generally flight crews and pilots who were transporting planes to Davis-Monthan. Usually there was a schedule of when the pilots/crews were arriving, but occasionally Henderson would be called by the motor pool dispatcher to pick up pilots/crews. Henderson would drive these passengers to various locations on and off the base, such as housing or the Tucson Airport. Upon request, Henderson would also give the passengers a tour of the AMARC grounds. (Tr. 64, 106)

The other taxi driver, Chris Lenars, was generally responsible for the mail route, but Henderson would cover this duty if Lenars was not available. (Tr. 65, 98)

On or about March 7, Suhay informed Henderson that the taxi drivers would have the responsibility for the AMARC area security check, in addition to their normal job responsibilities. Henderson was to receive training from Rene Martinez. Since the area security check would require driving on rough terrain, Lenars was excluded from this assignment, due to physical limitations. (Tr. 67)

That same day, Henderson met Martinez at the test flight building and rode with Martinez as he explained the security checks. Martinez had a three ring binder, which contained an example of previous inspections, blank paper for the report that was to be completed every day, as well as maps of the AMARC area. (G.C. Ex. 3; Tr. 68-69). As they drove around, Martinez explained the security checks, particularly pointing out areas close to the fence line where coyotes dug holes. (Tr. 69) Martinez also drove Henderson down the flight line, and showed him where he was supposed to review the aircraft that were parked in this area. Martinez explained that he was going to write up one example of a T-38 which was parked and the canopy, tail section, and two ejection seats had been removed and/or disassembled and placed on the ground. Martinez indicated that this was a typical example of something that could be written up during the security check. (Tr. 69-70) Martinez also indicated that there was lots of leeway in what was reported and Henderson would have to make judgment calls. (Tr. 72-73)

The training lasted 1½ hours, and at the end, Martinez gave Henderson the binder. Martinez did the write up for that day, using the notes he had made on a blank sheet of paper to input into the form on the computer. (Tr. 71-72) The standard practice was for the inspection report to be completed on the computer and then e-mailed to Job Control. Job Control would then be responsible for any corrections/changes. (Tr. 74)

After the training, Henderson briefed Suhay, expressing concerns that the actual write ups appeared to be discretionary. Henderson was also concerned how this would affect his position description. (Tr. 72) [2/]

1. From this point, all dates in the decision are in 2006, unless otherwise specified.

2. Also on March 7, Suhay sent an email to his supervisor concerning the new assignment to Henderson and raising concerns regarding the amount of time that would be spent on the security checks and report and the priority of the work. (Tr. 118-126; G.C. Ex. 31) There was no response to Suhay's email. (Tr. 126)

Henderson first thought it would take him 2-3 hours to write up each report. Henderson was unfamiliar with using a computer and had never used the computer or dealt with email before this assignment. He did get help from one of his coworkers, Jim Atkinson, with working on the computer. After about eight days of Atkinson's assistance and training, Henderson was able to do the work on his own. (Tr. 74-75) [3/]

Henderson has continued to do these security checks, which include checking the fence line as well as checking aircraft, since March 2006. (Tr. 114) He is responsible for submitting his report on a daily basis. (G.C. Exs. 4, 8, 10, 23, 24, 27, 28, 29; Tr. 84, 85) He also makes a monthly report of any noted discrepancies that have not been repaired or corrected. (G.C. Exs. 19, 20, 22, 25, 26, 30; Tr. 84) If he is not available, the security checks are not accomplished that day. (Tr. 97) Henderson continues to be responsible for the fuel sample pickups and returns and the "red caps" continue to be a priority. Further, picking up flight crews and pilots is a priority over the security checks, and he will stop a security check for that work. (Tr. 81, 109)

Sometime after he was assigned the security checks, Henderson spoke with Don Child, the Union Vice President, who was representing him on another issue, regarding his new assignment. (Tr. 78, 151) Henderson supplied Child with a copy of his position description and the checklist. (G.C. Ex. 5; Tr. 78-79) Henderson did not request that Child file a grievance or authorize the Union to file a grievance regarding the assignment of the safety checks. (Tr. 79) There has been no change to Henderson's hours of work, job series or grade, as a result of the assignment of the security checks. (Tr. 107, 115) Henderson works for the same supervisor and from the same location. (Tr. 136-140)

John Pennington is the individual authorized for the Union to receive notice of changes in working conditions. He did not receive notice of the additional security checks assigned to Henderson from the Respondent. (Tr. 16)

On Tuesday, April 25, at 9:25 a.m., Child sent an email to Beatriz Clifton, Labor Relations Officer, with the subject of "Security Checks". The email was also sent to Suhay and Henderson. (G.C. Ex. 7; Tr. 151) The email stated, as follows:

> Per our conversation on the issue of taxi drivers doing security check on AMARC I am requesting that you respond to the following:
>
> 1. Are security Checks part of the position description (PD) of a Taxi Driver?
>
> 2. Would adding this change of duties to the Taxi Drivers require a desk audit for the position?
>
> 3. What are the responsibilities and liabilities of the Taxi Drivers that perform this new duty?

(G.C. Ex. 7)

Earlier the same day, Child had filed a grievance pursuant to Article 30, Section 11 [4/] of the parties' collective bargaining by email to Clifton. (G.C. Ex. 1(d), Attachment 1) This Section 11 grievance concerned the manning of the AMARC control room, and related health and safety issues. (Tr. 24, 27, 152-154)

On May 3, Clifton sent an email to Child, apologizing for the delay in getting back to him and indicat-

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3. The AMARC Checklist for Area Checks states "The purpose of this checklist is to provide guidance to a driver that will drive through all the areas of AMARC to check for security, damage and abandoned AGE equipment. A map of AMARC will be issued to the driver. The map will show the most critical areas to be checked and where fueled aircraft are located. This duty will be performed on a daily basis. While performing this duty the driver will have a radio and the call sign for this assignment will be ROVER 1." The form then lists seven guidelines:

> 1. All areas will be checked for security. Look for holes in the fence, any unusual activity, and any unauthorized vehicles without proper identification, etc. Document items found in the space provided below.
>
> 2. Areas with fueled aircraft will be checked to ensure that there are no aircraft leaking fuel.
>
> 3. Look for AGE equipment that has been left behind by work crews.
>
> 4. Look for damage: This means aircraft or equipment damage, or damage to stored items in AMARC.
>
> 5. Look at aircraft tie downs and look for items that should be tied down and are not (think wind damage).
>
> 6. During wet conditions the daily check will still be accomplished, however the driver will stay on hard surfaces.
>
> 7. Check for FOD [Foreign Object Damage] in and around all areas being inspected. Especially around parked aircraft on the flightline ready to fly to include taxiway and the receiving ramps. Check the flightline entry control points and the area between gates 42 and 42A.

The form then has an area to list any issues found during the daily security check. (G.C. Exs. 4, 8, 10, 19-30)

4. This was the first time the Union had filed a grievance under Article 30, Section 11, Union/Employer Grievance. Most grievances filed by the Union were under Article 30, Section 7. The Section 11 grievance procedure eliminates the steps required in the standard Section 7 grievance and allows for faster resolution. (G.C. Ex. 2, pp. 33-34; Tr. 156, 157)

ing that she would be contacting Jeff Peterson and John Suhay for a scheduled meeting. (G.C. Ex. 1(d), Attachment 1). Child responded to her email on the same date, stating:

> The issue with Mr. Peterson is a separate issue from Mr. Suhey (sic).
>
> Mr. Peterson (Safety Issue Grievance)
>
> Mr. Suhey (sic) (Security Checks Issue)
> Should this meeting (sic) with them together?

(Tr. 158-159)

On May 16, Clifton and Child met with Suhay at noon and then met with Peterson at 1:00 pm. Suhay was not involved in the Peterson meeting; nor was Peterson involved in the Suhay meeting. During the meeting with Suhay, the parties discussed the assignment of the security checks to Henderson; Clifton indicated she thought this was a classification issue and was not subject to a grievance under the parties' collective bargaining agreement. There was no discussion regarding the control room issues during the meeting with Suhay. (Tr. 29, 160)

On June 9, Clifton sent Child the Respondent's position regarding the Section 11 grievance on the control room, entitled Subject: Union/Employer Grievance / Health and Safety of all AMARC Employees. Also included in this response was the Respondent's position with regard to the security checks.

> 2. Regarding Mr. Suhay meeting [on May 16 at 1200], we discussed the motor vehicle operators being assigned work out of their position description. After reviewing your Union/Employer Grievance input, we could not identify where you stated that this was an issue and how this is considered a Union/Employer Grievance. This is a classification issue and is non grievable IAW LMRA Article 30, Section 2.b.f. Although, management is currently seeing into reclassifying these positions due to your input. [5]

(G.C. Ex. 1(d), Attachment 2; Tr. 30)

According to Child, the Union received the answer that it wanted in the Section 11 matter concerning the job control room issues, and was therefore satisfied with the response. Further, since the Union had not tied the security check issue into the Section 11 grievance, it did not occur to Child to correct Clifton's combining the two issues in her response. (Tr. 161-162) Child denies that the Union ever filed a grievance on behalf of Henderson and asserts that at the time of Clifton's June 9 letter the matter was still under investigation. (Tr. 162) The Union asserts that the Section 11 grievance concerned the control room and was not related to the motor pool issue and the assignment of security checks to Henderson. (Tr. 18-19, 24)

On July 17, Pennington, on behalf of Local 2924, filed the unfair labor practice charge with the Denver Region in this matter. (G.C. Ex. 1(a))

Section 7116(d) Issue

Whether the unfair labor practice charge in this matter is barred by an earlier filed grievance, in accordance with section 7116(d) of the Statute?

Positions of the Parties

Respondent

The Respondent asserts that the complaint in this matter should be dismissed pursuant to section 7116(d) of the Statute since the Union filed a grievance prior to filing the unfair labor practice charge in this matter. In this case, since the grievance proceedings were filed first, the proper processing is through the parties' negotiated grievance procedure and not the unfair labor practice procedure.

The Respondent asserts that on April 25, the Union filed a union/employer grievance under the parties' collective bargaining agreement. (G.C. Ex. 1(d), Attachment 1) The performance of security checks by the Respondent's personnel was one of two issues in the grievance. The Respondent's Labor Relations Officer Beatriz Clifton set up two separate meetings on May 16, with two supervisors, John Suhay and Jeff Peterson. The Union Vice President Donald Child, who filed the grievance, attended both meetings. During the meeting with Suhay, the participants discussed the security checks that Henderson was performing. Child noted that the security checks were additional duties and indicated he thought they were a change in Henderson's working conditions. At the end of the meeting, Clifton indicated this appeared to be a classification issue and requested Suhay forward it to classification. The Respondent filed its response to the grievance on

5. An audit of Henderson's position was conducted by Pauline Dudoit sometime during the summer of 2006. Dudoit accompanied Henderson on his regular rounds (collecting samples and taking them to the NID lab), as well as driving around the AMARC security fence and checking aircraft. During this audit, Henderson was called away from the security check to pick up a flight crew, which he did immediately. (Tr. 141-45)

June 9, which addressed the Union's position of Henderson's security check duties being a change in working conditions. (G.C. Ex. 1(d), Attachment 2) The Union could have pursued this matter to arbitration under Article 20, Section 5 which addresses other duties as assigned under an employee's position description. On July 17, the Union filed an unfair labor practice on the same issue, *i.e.*, a change in working conditions for Henderson. (G.C. Ex. 1(d), Attachment 3; G.C. Ex. 1(a))

The Respondent argues that the Union filed both the grievance and the unfair labor practice charge. Further, Child admitted that the Union discussed the grievance and the unfair labor practice charge at the Union Board meetings. The Union's theory in each case was a change in working conditions. In both cases the Union wanted to bargain the change in working conditions of Henderson performing the security checks. The Respondent also asserts that the Union had the discretion to file both the grievance and the unfair labor practice on security area checks. The Respondent therefore concludes that the legal elements for a section 7116(d) bar exist and the ULP charge in this matter must be dismissed.

General Counsel

The General Counsel asserts that consideration of the unfair labor practice charge in this matter is not barred by section 7116(d) of the Statute. Although the Union raised questions concerning the assignment of security checks and aircraft area checks to taxi drivers, the Union never filed a grievance concerning this issue.

According to the General Counsel, the subject matter of the April 25 Section 11 grievance had no connection with the subject matter of the unfair labor practice charge and complaint. The grievance was linked to three discrete individual grievances filed on behalf of employees of the AMARC control room, and essentially raised various health and safety issues relating to manning problems of the control room. Further, the grievance did not even arise from the same factual circumstances of the ULP charge and complaint. The scope of the grievance was confined to the circumstances involving the manning of the AMARC control room, and makes no mention of Henderson or references Henderson's new security inspection and reporting duties. Henderson, the affected employee in the ULP, has no connection with the control room, other than to file his daily security checklist reports. Henderson's factual circumstances had nothing to do with the aggrieved parties in the grievance.

Further the legal theory of the grievance differs from the unilateral change theory alleged in the complaint. The grievance alleges breaches of the agency's obligations under the Air Force regulations and the parties' Article 17, Health and Safety, provision of the collective bargaining agreement. The ULP charge and complaint allege a Statutory violation, *i.e.*, the failure to give Local 2924 notice and opportunity to bargain over procedures and appropriate arrangements to mitigate the adverse impact of the newly imposed security check duties and reports on a taxi driver, Henderson.

The General Counsel asserts that the Respondent's d-bar defense is based only on the misguided attempt by Clifton to incorporate the assignment of security check duties to Henderson into the April 25 Section 11 grievance involving the AMARC control issues. Despite Child's pointed effort in his May 3 email to separate the issues, an effort acknowledged by Clifton when she scheduled separate meetings, Clifton nevertheless took it upon herself to combine the issues when she issued her June 9 response to the Union's Section 11 grievance.

Finally, the General Counsel asserts that, even if the issues involving Henderson could somehow be construed as raised in a previously filed grievance, it cannot be suggested that the issues were raised at the discretion of the aggrieved party. Henderson never requested that the Union file a grievance on his behalf, and Child was still investigating the circumstances surrounding the assignment of security checks to Henderson in order to determine the best course of action. Any ruling in the Respondent's favor would, in effect, allow agency management to make the Union's choice of forum. This would completely undermine the requirement that the choice of forum be in the discretion of the aggrieved party. Thus the General Counsel urges that the Respondent's section 7116(d) defense be rejected.

Analysis

The Authority's implementing Statute does not permit parties to litigate the same issue under both grievance/arbitration procedures and as an unfair labor practice. Thus, under section 7116(d) of the Statute, issues which can be raised under a grievance procedure may be raised under the grievance procedure or as an unfair labor practice (ULP), but not under both procedures. This policy was established to prevent needless duplicative and repetitive litigation. *United States Department of Labor, Washington, D.C. and American Federation of Government Employees, Local 12*, 59 FLRA 112 (2003) (*DOL*).

Whether a grievance is barred by an earlier-filed ULP, or vice-versa, requires examining whether the grievance involves the same "issues", that is, whether the grievance arose out of the same factual predicate as the ULP and whether the legal theory advanced in support of the grievance and the ULP are substantially similar. When both tests are met, section 7116(d) bars the subsequent action. *See OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 801-802 (1996), and cases cited therein.

In order to determine whether there can be a section 7116(d) bar in this matter, it must first be determined whether an actual grievance exists pertaining to Henderson's assignment of security checks. The grievance as filed by the Union on April 25 does not specifically reference Henderson or the assignment of his new duties, but instead deals with various health and safety issues relating to manning the control room in AMARC. It is clear from the evidence that Henderson was not involved in the control room and had no involvement in the issues set forth in the grievance. The Respondent asserts, however, that there were two issues in the April 25 grievance and that the second issue involved Henderson and the assignment of the security checks. If the Henderson issues were somehow incorporated into the April 25 grievance, then the issue of whether there was a section 7116(d) bar would have to be addressed. The GC argues that the Henderson issues were not incorporated into the grievance, and therefore, there can be no section 7116(d) bar.

After a careful review of the evidence, I find that the April 25 grievance cannot stand as a section 7116(d) bar to the ULP filed in this case. On its face, the April 25 grievance does not involve Henderson and his new duty assignments, but specifically relates to control room issues. While the Union had the authority to expand the grievance to include the Henderson issues, it is equally clear that the Union did not do this. Rather, it was the Respondent's labor relations officer who incorporated the two issues into the grievance. Although the Union vice president sent a second email to the labor relations officer approximately 90 minutes after the grievance was filed, there is no indication that his questions regarding the Henderson matter were incorporated in the grievance. Further, at his insistence, two separate meetings were arranged with the supervisors, *i.e.*, Suhay and Peterson, and the Union vice president specifically noted that they involved separate issues. (G.C. Ex. 1(d), Attachment 1) The fact that the labor relations officer was confused and meshed the two issues together in her response to the grievance cannot stand as the Union's election of procedures. [6/] While it certainly would have been a better practice if the Union had responded to the Agency's June 9 response with an explanation that the Henderson issue was not included in the grievance, the Union's failure to do so does not make the grievance something it is not.

The Authority has recognized that the clear purpose and effect of section 7116(d) is to prevent relitigation of an issue in another forum after a choice of procedures in which to raise the issue has been made by the aggrieved party. *Federal Bureau of Prisons and American Federation of Government Employees, Local 3690*, 18 FLRA 314 (1985); *American Federation of Government Employees, Council 170, Local 2128 and United States Department of Defense, Defense Contract Management Agency, District West, Hurst, Texas*, 58 FLRA 316 (2003) (The Authority found that §7116(d) did not apply; the Union had filed the grievance on behalf of unit employees, and the Agency filed the ULP charge on its own behalf.); *American Federation of Government Employees, Local 3475 and U.S. Department of Housing and Urban Development*, 55 FLRA 417, 418-19 (1999) (in order for a ULP charge to bar a subsequent grievance, both the ULP charge and the grievance must have been filed in the discretion of the same aggrieved party). In this matter, it was the Respondent rather than the aggrieved party that determined that a grievance had been filed in this matter; therefore, there was not an election at the discretion of the aggrieved party. [7/]

In conclusion, I find that the April 25 grievance did not include the issue relating to the assignment of security checks to Henderson. Under these circum-

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6. In her response to the grievance, Clifton even states "we could not identify where you stated that this [security check issue] was an issue and how this was considered a Union/ Employer Grievance." (G.C. Ex. 1(d), Attachment 2). The simple explanation for this inability is that the security check issue was never a part of the Section 11 grievance and the Respondent cannot appropriately attempt to combine the two issues.

7. There is no evidence that the Union was attempting to use both the grievance procedure and the unfair labor practice procedure in its efforts on behalf of Henderson. Child is an experienced Union representative and has no problems with the concept of filing grievances. If the Union had wanted to file a grievance over the assignment of duties to Henderson, it was perfectly capable of doing so. Rather the evidence shows that Child first asked for information in his April 25 email, which continued in the meeting with the labor relations officer and the supervisor, Suhay. The Union is entitled to seek information without first filing a grievance under the parties' negotiated grievance procedure. Since this is exactly what the Union did in the Henderson matter, the Respondent cannot turn such conduct into a grievance by its own mistaken characterization.

stances, the grievance did not arise out of the same set of factual circumstances and the legal theories advanced in support of the charge and the grievance were not substantially similar. *See U.S. Department of Housing & Urban Development, Denver, Colorado and American Federation of Government Employees, Local 3972*, 53 FLRA 1301, 1317 (1998).

Even if I was to somehow find that the Henderson matter had been incorporated into the April 25 Section 11 grievance, I would still not find a section 7116(d) bar. In that regard, while the grievance would be found to arise out of the same factual circumstances, *i.e.*, the assignment of security checks and airplane checks to Henderson, the second test would not be met. The evidence fails to establish that the legal theory advanced in support of the grievance was substantially similar to the legal theory advanced by the ULP. Specifically, the grievance theory (and with no written grievance, any theory is speculative at best) appeared to concern the position description of the taxi driver, whether a desk audit would be required, and the responsibilities and liabilities of the taxi driver as a result of the new duties. (G.C. Ex. 7) The ULP, however, concerned the unilateral change in working conditions and the Respondent's failure to notify the Union and afford it the opportunity to bargain the impact and implementation of the change. The legal theories were therefore not substantially similar and no section 7116(d) bar could be attached. *See, DOL*, 59 FLRA at 115 and cases cited therein. Further, as noted above, I would also find that there had not been an election of the grievance procedure over the ULP procedure at the discretion of the aggrieved party.

In conclusion, since the Union did not file a grievance over the Henderson issue, there cannot be a section 7116(d) bar in this matter, and the Respondent's motion to dismiss is denied.

Issue

Whether the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to give the Union notice and the opportunity to bargain regarding the impact and implementation of the addition of security inspection duties to one of the taxi drivers at Respondent's AMARC facility?

Positions of the Parties

General Counsel

The General Counsel concedes that the Respondent's decision to assign the security duties to Henderson involved the exercise of a management right under section 7106(a) of the Statute, but asserts that the Respondent was still obligated to give the Union notice and an opportunity to bargain over procedures and appropriate arrangements for employees adversely affected by a change where the change has more than a *de minimis* impact on unit employees. *United States Department of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 857 (2002) (*Willow Grove*); *Department of Health and Human Services, Social Security Administration, Field Assessment Office, Atlanta, Georgia*, 11 FLRA 419 (1983) (Authority adopted ALJ's finding a violation due to more than *de minimis* impact when quality review specialists were assigned additional new duties to travel, show video tapes, answer questions at SSA offices, etc.) The General Counsel submits that the assignment of security check and aircraft area check duties to Henderson, with the concomitant submission of daily reports and monthly summaries of his unresolved findings, constituted a change in conditions of employment that resulted in greater than *de minimis* impact on Henderson, and that the Respondent therefore violated the Statute by failing to provide the Union with an opportunity to bargain.

The General Counsel further argues that the definition of "conditions of employment" should not be construed as narrowly as the Respondent asserts, and references to Chairman's Cabaniss' concurring opinion in *U.S. Department of the Veterans Affairs Medical Center, Sheridan, Wyoming*, 59 FLRA 93, 95 (2003). Section 7103(a)(14)'s definition of "conditions of employment" encompasses not only "personnel policies" and "practices" affecting working conditions, but also "matters whether established by rule [or] regulation, or otherwise" affecting working conditions. The definition allows establishment of conditions of employment by other means.

Respondent

The Respondent admits that it did not give notice of the assignment of additional duties to taxi driver Henderson, but asserts that its actions were not in violation of the Statute. The Respondent asserts that the facts establish that it only changed working conditions of Henderson, not any conditions of employment. He still drives vehicles, picks up passengers, follows checklists, observes safety regulations and rules, does impromptu tours of AMARC for aircrews, delivers oil samples to NDI for testing, and still carries a radio. Additionally, he still works for the same employer and works at the same location. AMARC has had the established past practice of modifying work assignments in response to

mission and workload fluctuations. This change in working conditions is not something that the Respondent is legally required to bargain with the Union under the Statute.

Citing to Chairman Cabaniss' concurring opinion in *United States Department of Labor, Occupational Safety and Health Administration, Region 1, Boston, Massachusetts*, 58 FLRA 213, 216-17 (2002) (*DOL, OSHA*), the Respondent argues that a change in "conditions of employment" usually requires notice to the bargaining unit of the opportunity to bargain while a change in "working conditions" has no such requirement. The Respondent further notes that conditions of employment are personnel policies, practices and matters, whether established by rule, regulation, or otherwise, that affect working conditions, except for certain matters which relate to political activities, classification of positions, or other matters specifically provided for by Federal statute (5 U.S.C. §7103(a)(14)). A matter which is not a condition of employment cannot become a condition of employment through either past practice or agency agreement. *See U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899 (1990). If a past practice does not affect a current working condition then it is not a condition of employment.

The Respondent further asserts that the assignment of work is a management right and any impact in this case is only *de minimis* in nature. An agency does not have to bargain on changes in conditions of employment over proposals by the union unless those changes materially affect and have a substantial impact on conditions of employment. *SSA, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646 (2004). (Although new position involved some change in duties and tasks, the Judge found the duties of the two positions were substantially similar. The employee's reassignment involved no loss in pay or grade and the anticipated effect on the remaining clerks should be minimal since the reassignment was directed as a result of decrease in workload.)

Analysis and Conclusion

Prior to implementing a change in conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999). When, as here, an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency nonetheless has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a *de minimis* effect on conditions of employment. *See Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-08 (1986); *Pension Benefit Guaranty Corporation*, 59 FLRA 48, 50 (2003) *(PBGC); 92 Bomb Wing, Fairchild Air Force Base, Spokane, Washington*, 50 FLRA 701, 704 (1995).

In applying the *de minimis* doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 913 (2000); *PBGC*, 59 FLRA at 51.

Section 7114(b)(2) of the Statute requires an agency and union to "negotiate in good faith" concerning any conditions of employment. Section 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." In determining whether a matter about which a union seeks to bargain concerns a "condition of employment", the Authority applies the test set out in *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*), which considers whether the matter pertains to unit employees and whether it has a direct connection to their work situation or employment relationship. *See Social Security Administration*, 55 FLRA 978, 980 (1999).

In this matter, Henderson's duties as a taxi driver were expanded to include new security inspections and reporting. Although he continued to drive in various locations throughout ARMARC, his expanded duties also required driving on rougher terrain as well as the cultivation of new skills of inspecting, communicating and reporting. Further, these new duties required him to exercise higher degrees of discretion and independent judgment than previously required. I find, in agreement with the General Counsel, that the evidence clearly establishes that Henderson's additional security and reporting duties directly pertain to his position as a unit employee and have a direct connection to his work situation. Under these circum-

stances, the additional security and reporting duties concern a "condition of employment". [8/]

The Respondent argues that Henderson's additional security check duties were minor and that his primary responsibilities of delivering oil samples and picking up pilots and crews were unchanged. I find, however, that the new security checks were a significant addition to Henderson's duties. These additional duties were permanent in nature and done on a daily basis. [9/] They differed from his normal duties and involved driving on different terrain. Further, these new duties required Henderson to submit a written report on a daily basis, as well as a monthly report designating all previous discrepancies that had not been corrected. Henderson had only previously manually filled out a form regarding his vehicle; he had never been required to use a computer or deal with email. These new duties required that he obtain such computer skills in order to complete his assignments. The Respondent correctly notes that Henderson's supervisor, hours of work, rate of pay, job title, and location of work were not changed. However, the evidence reflects that his new duties, while secondary to his normal responsibilities, took from 1 to 3 hours of his time on a daily basis. His own supervisor, Suhay, expressed a concern over the amount of time that his new duties were taking, although there was never any response from higher level management. (G.C. Exs. 32 and 33; Tr. 126, 128-129) *See Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848 (1999). (Change in practice requiring foremen to be at the gate at least 30 minutes every day was more than *de minimis* because the new practice added a procedure that occupied employees for at lease 30 minutes every day.) *See also, General Services Administration, National Capital Region, Federal Protective Service Division, Washington, D.C.*, 52 FLRA 563 (1996), where the Authority found a change in practice more than *de minimis* because the new practice added a procedure that occupied employees anywhere from 2 to 90 minutes a day. The Authority stated that "it is reasonable to conclude that a time-consuming . . . procedure would, in turn affect working conditions involving such matters as work assignments and appraisals. In these circumstances, the impact of the change on employees' working conditions is more that *de minimis.*" *Id.* at 567-68.

Based on the totality of the circumstances, I find that the additional duties assigned to Henderson effected a change that was greater than *de minimis*. Under these circumstances, the Respondent was obligated to give the Union notice and an opportunity to bargain regarding the impact and implementation of the change. The Respondent's failure to give the Union notice and an opportunity to bargain was therefore a violation of the duty to bargain under section 7116(a)(1) and (5) of the Statute.

Remedy

Where an agency has failed to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a *status quo ante* remedy using the factors set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (FCI). *U.S. Army Corps of Engineers, Memphis District, Memphis Tennessee*, 53 FLRA 79, 84 & n.4 (1997) (*Army Corps, Memphis*) and *Willow Grove*, 57 FLRA 852, 857-858. The *FCI* factors are: (1) whether and when notice was given to the union by the agency concerning the change; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a *status quo ante* remedy would disrupt or impact the efficiency and effectiveness of the agency's operations. *United States Immigration & Naturalization Service, Washington, D.C.*, 55 FLRA 69, 70 n.3 (1999); *Willow Grove*.

The appropriateness of a *status quo ante* remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. *FCI*, 8 FLRA at 606. The Authority requires that a conclusion that a *status quo ante* remedy would be disruptive to the operations of an agency be "based on record evidence." *Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas*, 53 FLRA 749, 763 (1997).

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8. As noted above, the Respondent cited to the concurring opinion of Chairman Cabaniss in *DOL, OSHA*, 58 FLRA at 216-7, in which she draws a distinction between "conditions of employment" established by rules, regulations, policies and practices for the entire bargaining unit and "working conditions" which apply only to individual employees. In as much as the Authority has declined to apply this distinction in its decisions, I find it unnecessary to further consider this matter.

9. The Respondent has not argued that the additional duties were only assigned to one bargaining unit employees. The Authority has held that the number of employees affected is not a controlling consideration in determining whether a change is *de minimis*. *See, e.g., Veterans Administration Medical Center, Phoenix, Arizona*, 47 FLRA 419, 424 (1993) (change affecting single employee not *de minimis*); *Willow Grove*, 57 FLRA 852, 857 (change affecting three lead guards not *de minimis*).

With regard to the first factor, the evidence establishes that the Respondent did not give notice to the Union of the decision to assign the taxi driver certain specific duties. With regard to the second factor, the evidence reflects that the Union only learned of the new work assignment in May 2006, approximately two months after the start. Although the Union never requested to bargain over the issue, it did continue to seek information and discuss the issue with the various Agency representatives. The third factor relates to the willfulness of the Respondent's actions. Since there was no evidence that the Respondent ever considered giving notice to the Union or even acknowledged a bargaining obligation in this matter, I can only find the Respondent's conduct in this matter to be willful. With regard to the nature and extent of the adverse impact on bargaining unit employees, as noted above, I have found the change to be more than *de minimis* in nature. While this is a subordinate duty for Henderson, and he can be called away from the security checks to engage in his other primary work, *i.e.* transporting passengers and materials, the evidence remains that this duty engages approximately 20% of his time on a daily basis and requires filling out a daily report. Therefore, the final effect on Henderson was substantial. Under these circumstances, the first four factors weigh in favor of a *status quo ante* remedy. The fifth factor concerns whether and to what degree a *status quo ante* remedy would disrupt or impact the efficiency and effectiveness of the agency's operations. The Respondent argues that such a remedy would have a substantial impact, while the General Counsel asserts that the Respondent offered no evidence in support of its assertion. In agreement with the General Counsel, I find that the record evidence does not support that a *status quo ante* remedy would be disruptive to the operations of the Respondent. The Respondent furnished little, if any, evidence regarding the disruption of its operation. Thus, weighing the factors set forth in *FCI*, I find that a *status quo ante* remedy is appropriate in this matter. *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky*, 38 FLRA 647 (1990).

Based on the totality of the conduct in these matters, I therefore find that the Respondent failed in its obligation to give the Union notice and an opportunity to bargain over procedures and appropriate arrangements to mitigate the adverse impact of the additional duties on the taxi driver. The Respondent's conduct in unilaterally implementing the new security checks and aircraft area checks was in violation of section 7116(a)(1) and (5) of the Statute. Having concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute, I recommend the Authority issue the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Assigning security checks and aircraft area check duties to taxi drivers, without first affording the American Federation of Government Employees, Local 2924, with notice and the opportunity to bargain over procedures and appropriate arrangements.

(b) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

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

(a) Rescind the assignment of security checks and aircraft area check duties to taxi drivers, including Lewis A. Henderson.

(b) At the request of the Union, bargain concerning the assignment of security checks and aircraft area check duties to taxi drivers to the extent required by the Statute.

(c) Post at its facilities copies of the Notice To All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of Davis-Monthan Air Force Base, 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 members and employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC, July 25, 2007

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Arizona, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement the assignment of security checks and aircraft area check duties to taxi drivers, without first affording the American Federation of Government Employees, Local 2924 (the Union), with notice and the opportunity to bargain over procedures and appropriate arrangements.

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 rescind the assignment of security checks and aircraft area check duties to taxi drivers.

WE WILL, at the request of the Union, bargain concerning the assignment of security checks and aircraft area check duties to taxi drivers to the extent required by the Statute.

_____
(Agency)

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

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

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