FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-20
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA
RESPONDENT

Case No. AT-CA-11-0365

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3690
CHARGING PARTY

Patricia J. Kush
For the General Counsel

Alicia Daniels-Lewis
For the Respondent

Lionel Phillip
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

The Federal Correctional Institution in Miami had a disproportionately high level of inmates needing outside medical care, and the Agency often assigned overtime when an inmate needed to be transported to, and guarded at, a hospital. Only those employees with a special certification could guard inmates outside of the prison. For years, however, the Agency assigned overtime in a way that ensured that all employees had the same opportunity to work overtime, without regard to whether they were certified to guard inmates outside of the prison. In April and May 2011, the Agency unilaterally changed its method of assigning overtime, reducing the overtime opportunities available to the non-certified employees.

An unfair labor practice charge was filed and, in December 2011, the Agency and the Union entered a bilateral, informal settlement agreement. The settlement agreement required the Agency to provide back pay to the employees who lost out on opportunities to work

overtime due to the Agency's unilateral change. But the Agency could not reach agreement with the Union as to how much back pay the employees were owed, so they refrained from paying any back pay whatever. As a result, the settlement agreement was withdrawn and the unfair labor practice complaint was reissued.

Because the Agency refused to pay employees any back pay, the Agency violated the settlement agreement. And because the Agency ended the use of roster adjustments without providing the Union with proper notice and an opportunity to bargain over the change, the Agency violated § 7116(a)(1) and (5) of the Statute.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

This case was initiated on May 27, 2011, when the American Federation of Government Employees, Local 3690 (the Union or Charging Party) filed an unfair labor practice charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI), Miami, Florida (the Agency or Respondent). GC Exs. 1(a) & 1(b). On October 19, 2011, after investigating the charge, the Regional Director (RD) of the Atlanta Region of the FLRA, on behalf of the General Counsel (GC), issued a Complaint and Notice of Hearing (the 2011 Complaint) alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by changing overtime procedures without properly notifying the Union or bargaining over the change. GC Ex. 1(b). On November 14, 2011, the Respondent filed an Answer to the 2011 Complaint, denying that it had violated the Statute. GC Ex. 1(c). On December 19, 2011, the RD approved a bilateral, informal settlement agreement, and the 2011 Complaint was withdrawn. GC Ex. 1(g). On April 10, 2012, the RD determined that the Respondent had failed to comply with the settlement agreement, so the RD revoked the settlement agreement and issued a new Complaint and Notice of Hearing (the 2012 Complaint). GC Ex. 1(*l*). The 2012 Complaint alleged again that the Respondent violated § 7116(a)(1) and (5) of the Statute by unilaterally changing the way it assigned overtime, and it further alleged that the Respondent failed to comply with the settlement agreement.[1] GC Ex. 1(*l*). On May 7, 2012, the Respondent filed a new Answer to the Complaint (the 2012 Answer), denying that it breached the settlement agreement or violated the Statute. GC Ex. 1(m). A hearing was held in this matter on June 13-14, and August 22-24, 2012, in Miami, Florida. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC filed a post-hearing brief which I have fully considered.

[1] The GC also alleged that an Agency official made a statement to employees that violated § 7116(a)(1) of the Statute. GC Ex. 1(b) at ¶20, GC Ex. 1(l) at ¶30. The GC abandoned that claim at the hearing, and I will not consider it. GC Br. at 3 n.1.

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

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. GC Exs. 1(*l*) & 1(m). The American Federation of Government Employees (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit of employees at the U.S. Department of Justice, Federal Bureau of Prisons (BOP). *Id.* The Union is an agent of AFGE for the purpose of representing bargaining unit employees at the FCI Miami. *Id.* The AFGE and the BOP are parties to a nationwide collective bargaining agreement, known as the Master Agreement. R. Ex. 1; GC Ex. 24; Tr. 221, 464, 466, 709-10. The Union and the Respondent are parties to a local supplemental agreement, a 2004 memorandum of understanding. GC Ex. 3; Tr. 781-82.

FCI Miami is a low security institution with approximately 1400 to 1500 inmates and approximately 225 bargaining unit employees, about 125 of whom are correctional officers Tr. 33, 829. The facility houses a larger-than-average number of inmates with health problems; as a result, employees are often needed to escort these inmates to and from hospitals and other outside medical providers, and to guard the inmates while they are receiving outside care. Tr. 32, 37, 729-31, 813, 927. These trips directly affect staffing levels and account for most of the overtime that the Agency assigns, because an employee assigned to transport duty will either be called in for overtime or will be reassigned to transport duty from his regular post within the prison, which will then need to be filled by another employee. Tr. 33, 95-96, 595-96, 609, 729, 734-36, 799-800, 810-13.

All employees who want to work overtime sign up on a computerized list and indicate the specific shifts they want to work.[2] *See* Tr. 26, 48-50, 116, 452, 491, 547, 588, 600-01. Employees on the list are ranked according to how long they had gone without working overtime, with the employee who has gone the longest without overtime at the top of the list. Tr. 605-06, 995. Not all employees are eligible to escort inmates outside the prison, however. In order to be eligible to guard inmates outside of the prison, employees must obtain special training and become certified in basic prisoner transportation (BPT); somewhere between a third and a half of all bargaining unit employees have BPT certification. Tr. 33-34, 218, 599-600, 606, 711, 736-37, 815, 831-32, 944. This rule gives BPT-certified employees a built-in advantage in earning overtime, even though Article 18, Section p of the Master Agreement also requires that overtime be "distributed and rotated equitably among bargaining unit employees[.]" R. Ex. 1 at 47-48; *see also* footnote 7 below.

For many years – since 1996, if not earlier – management at FCI Miami balanced the need to assign certified employees for medical escort duty with the mandate to equitably distribute overtime by making what are called "roster adjustments." Tr. 50-54, 594, 607,

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[2] The Agency kept a separate overtime list for food service employees, but for our purposes, the Agency maintains only one overtime list. Tr. 493, 695-96, 875-76.

610, 665-66, 699-700, 743-45, 747-51, 795, 951, 1019; *see also* GC Ex. 6 at 2. The process, overseen by the captain and carried out by lieutenants (Tr. 46, 469-70, 603, 724), worked as follows. If the Agency needs an employee to work overtime guarding an inmate outside the prison – at a hospital, for example – a lieutenant will follow standard procedure and ask the employee at the top of the overtime list whether he or she wants to work overtime. Tr. 493, 594, 604-04, 967, 975. If the employee is BPT-certified and agrees to work overtime, then he or she will be directly assigned to an overtime shift guarding the inmate at the hospital. Tr. 715-16, 801, 975. No roster adjustment is required in this case. But if the employee at the top of the overtime list is not BPT-certified, then the lieutenant will find a BPT-certified employee who is already assigned to work on that shift at a post that does not require BPT certification and reassign (or "roster adjust") him or her to escort duty, on regular time; the non-BPT-certified employee who agreed to work overtime will then be assigned to work the other employee's post inside the prison.[3] Tr. 50-54, 811. After an employee works overtime (or declines it), that employee goes to the bottom of the overtime list. Tr. 47, 220-21, 491, 595, 601, 606-08, 618, 669, 674, 884, 978, 995, 1223-24. It may take a few days for an employee to get back to the top of the list, or it may happen more quickly.[4] Tr. 675-76, 995, 1037-38.

If the lieutenant assigning overtime calls the employee at the top of the list, but the employee doesn't answer, or if that employee is already scheduled to work on that shift, the lieutenant will bypass that employee and go to the next person on the list. In order to bypass an employee, the lieutenant must enter a "user remark" into the computerized system, explaining why the employee is being bypassed. Tr. 979-82. If, for example, a lieutenant bypasses an employee because he or she is not BPT-certified, the lieutenant enters a user remark such as "not BPT." Tr. 118, 981; *see also* GC Exs. 12-14. Bypassed employees retain their positions on the overtime list. Tr. 48.

Around the middle of March 2011, a management official came across a memorandum of understanding (MOU) that had been negotiated locally by representatives of FCI Miami and the Union, dated June 16, 2004.[5] GC Ex. 3. Somehow, both the Union and management had long since forgotten about the MOU. Tr. 59-61, 521-23, 580, 612, 698, 701, 723, 743, 745-46, 782, 798, 839, 841-42, 913-14, 988, 1107, 1109-10. The MOU provided (among other things) that overtime would be "hired for the post which is vacant[,]"

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[3] The Agency also makes roster adjustments in other contexts. But for our purposes, a roster adjustment is the reassignment of a BPT-certified employee from inside the prison to outside the prison, made so that a non-BPT-certified employee can work overtime.

[4] An employee can work two overtime shifts in a single day (*see* Tr. 49-50, 148-49, 471-72, 588), but such double-overtime shifts are not common (*see* Tr. 149, 575, 618, 995), in part because employees cannot work more than sixteen hours during a twenty-four-hour period (Tr. 587-88).

[5] In January 2011, if not earlier – i.e., even before the MOU was discovered – Lieutenant Rick Langley and at least one other lieutenant had not been making roster adjustments. GC Exs. 1(h), Attach. 12 at 33; Tr. 96-97, 242-43, 742-43, 754, 766, 801-05, 910, 913-14, 1019. However, the majority of the eleven lieutenants at FCI Miami had been making roster adjustments on a regular basis up to the time the MOU was discovered.[5] Tr. 50-55, 591-92, 594, 607, 742-43, 765, 795, 829, 951; GC Exs. 12-14.

and that if an employee is "next on the sign-up list and that person is not qualified based on a lack of experience, that staff member will be bypassed."[6] GC Ex. 3 at 2. Acting Human Resources Manager Jack Jenkins showed the MOU to Langley and left a copy for Bryan Dobbs, who was Captain from July 2008 through January 2012, and who happened to be out on vacation. Tr. 839-40. Although the management officials at the prison in 2011 had no knowledge of the circumstances of how the MOU had been negotiated, or why it had fallen into disuse, they interpreted the language of the MOU as barring roster adjustments for non-BPT-certified employees. GC Ex. 6; Tr. 748-49, 750-51, 756, 788, 811, 841, 845, 951.

Also in March of 2011, Union President Lionel Phillip began getting complaints from employees that they had not been offered overtime for a few weeks; after investigating, Phillip came to believe that the lieutenants were bypassing non-BPT-certified employees on the overtime list, even though the Union had not been notified of any change in overtime procedures. Tr. 56-57, 559, 595. Phillip brought this to the attention of Warden Kenneth Atkinson, who said he was not aware of the situation but would look into it. Tr. 63-65, 69-71, 740-42. Shortly thereafter, Phillip forwarded to Atkinson an email, dated April 3, from Giovanni McKenzie, a non-BPT-certified correctional officer, in which she said that her position on the overtime list had not moved in two weeks, and that only BPT-certified employees were getting called. Tr. 72-73; GC Ex. 5.

Upon viewing McKenzie's email, it was "very clear" to Warden Atkinson "that something was being changed" and that he needed to talk to Captain Dobbs about it. Tr. 741-42. Dobbs then made the warden aware of the 2004 MOU and that Lt. Langley had already begun changing the overtime procedure. Tr. 742-43. Atkinson felt that the existing system of roster adjustments "was a nightmare" and "unfair" to BPT-qualified employees, and he

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[6] The MOU states, in pertinent part:

> During the implementation of the new Correctional Services Overtime Program [negotiated nationally] it is likely that issues will arise that may or may not be covered by this agreement. Some of which will require additions, deletions, or changes to this agreement. Both parties agree to make each other aware of issues as they arise, and to arrange a meeting between both parties to mutually agree on a solution. Any changes to this agreement will be in writing and signed by both parties.
>
> . . . .
>
> Both parties agree Overtime will be hired for the post which is vacant. Adjustments to the roster to accommodate someone's post preference will not be permitted (e.g. I will accept the overtime if I can work the compound). Some posts require experienced staff. If a staff member is next on the sign-up list and that person is not qualified based on a lack of experience, that staff member will be bypassed. . . .

GC Ex. 3 at 1, 2; *see also* Tr. 253-54.

interpreted both the MOU and the Master Agreement[7] as barring roster adjustments.[8] Tr. 748-49, 751, 788, 811, 841, 845, 951-52. The warden decided that while they should re-implement the overtime procedure set forth in the MOU, they should do so only after notifying the Union and giving it a chance to bargain. Tr. 747-49, 844. Since the lieutenants had prematurely changed the procedure, Atkinson instructed Dobbs "to go back to the way that we had been doing things[]" (Tr. 748-49) and then give the Union the opportunity "to do impact and implementation[]" regarding a return to the MOU-mandated overtime procedure. Tr. 749.

With this in mind, Dobbs met with Phillip on April 11, advised him of the MOU's existence, and told him that the Agency intended to re-implement it after the parties had negotiated its impact and implementation. Tr. 847. Dobbs also sent Phillip and the Union a memo that same day confirming their conversation, attaching a copy of the MOU, and offering the Union a chance to bargain the impact and implementation of the MOU, which Dobbs said would take effect on May 16. GC Ex. 6. In the memo, Dobbs "acknowledge[d] that we have created a past practice" of making roster adjustments. GC Ex. 6 at 2; Tr. 951.

On approximately the same day that the Union received this notice of the Agency's intent to implement the MOU, Phillip sent Warden Atkinson a memo requesting to negotiate over the change in overtime procedures and the implementation of the 2004 MOU. GC Ex. 4.[9] Then, on April 13, Phillip sent a second memo to the warden, requesting to engage in "midterm bargaining" on the MOU. GC Ex. 7. Phillip asserted that the MOU

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[7] Article 18, Section p is the pertinent portion of the Master Agreement. It states, as relevant here:

> Specific procedures regarding overtime assignments may be negotiated locally.
>
> 1. when Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees.

R. Ex. 1 at 47-48.

[8] In this regard, Atkinson testified that the Master Agreement barred roster adjustments because it provided that "you would hire the overtime for the vacant post and you hire qualified staff" i.e., BPT-certified employees, "to work that overtime[,]" instead of non-BPT-certified employees. Tr. 750. By contrast, Union witnesses testified that the term "qualified employees" in Article 18, Section p does not pertain to whether an employee is BPT-certified. Tr. 28-29, 213-14, 225-27, 708, 711.

[9] The memo is dated April 1, but it seems likely that the listed date was a clerical error. Phillip was not very certain about the precise dates of many events, and Warden Atkinson was fairly certain that he didn't receive the Union's memo until after his email exchange with Phillip on April 3 (GC Ex. 5) and until after Dobbs had notified Phillip of the 2004 MOU. Tr. 757-61. While the exact date of the memo is not material, I find that the Union most likely sent it on April 11, or in any case prior to the Union's second request to bargain on April 13.

conflicted with the "essence" of the Master Agreement regarding overtime: that is, "to ensure overtime is distributed fairly and equitably." *Id.* The Union demanded that overtime procedures not be changed, or the MOU implemented, until negotiations were completed. *Id.*

Emma Fernandez, a Human Resources Manager at FCI Miami (Tr. 1105), responded in an April 20 memorandum that the Agency would not engage in midterm bargaining, but would bargain with regard to the MOU's impact and implementation. GC Ex. 8. Phillip and Fernandez tentatively agreed that Phillip would meet with management on May 10, but no one from management showed up at the meeting. GC Ex. 9; Tr. 85, 270, 1115, 1165, 1205-06. So, later that day, Phillip emailed Fernandez, asking if he could meet with management on May 12. *See* GC Ex. 25. At the hearing, Fernandez initially claimed that Phillip "did not contact me []" to schedule another meeting. Tr. 1164. But once she was shown a copy of Phillip's May 10 email, Fernandez testified, "I recall something like that. Yeah, I recall trying to set up another meeting and I don't believe we could . . . ." Tr. 1165. Phillip did not specifically recall receiving a reply from Fernandez, and management did not meet with Phillip or any other Union representative before implementing the MOU. Tr. 90, 270, 789, 854-55, 1190.

Phillip acknowledged that he never submitted any written proposals in conjunction with his request to negotiate, but he insisted that "[m]y proposal to impact and implementation was to cease, that it [the MOU] not be implemented. That was my proposal." Tr. 275.[10] On May 19, Phillip emailed incoming Warden Robby Wilson and cc'ed Atkinson in a last-ditch attempt to prevent the implementation of the 2004 MOU, but Atkinson denied the request. R. Ex. 5; Tr. 300. On May 20, Dobbs informed all personnel that the Agency was going to begin complying with the MOU. GC Ex. 10; R. Ex. 7; Tr. 856-57. Going forward, when an inmate needed to be guarded outside of the prison on overtime, a lieutenant would bypass non-BPT-certified employees on the list and attempt to assign overtime to a BPT-certified employee. *See* GC Exs. 12-14; Tr. 1059. This clearly reduced the opportunities non-BPT-certified employees had to work overtime. Tr. 33, 811-13; GC Ex. 12-14.

At the hearing, the GC's witnesses – all of whom were non-BPT-certified – testified that the Agency's decision to end the practice of making roster adjustments reduced the amount of overtime they and other non-BPT-certified employees subsequently worked. McKenzie testified that prior to mid-March 2011, she had regularly been working sixteen hours of overtime per pay period, with an occasional pay period in which she worked as little as eight hours, or as many as thirty-two hours, of overtime. Tr. 556, 572-73, 580; GC Ex. 23. After mid-March 2011, she often worked no overtime or, at most, eight hours of overtime in a pay period. Tr. 557; *see also* GC Ex. 23 at 1-6. And while there were pay periods prior to mid-March 2011 when McKenzie did not work overtime, it was much more common for her

[10] There is no evidence indicating that the Union had a contractual obligation to submit bargaining proposals when invoking bargaining. GC Ex. 24; Tr. 466-67, 787.

not to work overtime after that date. Tr. 597-98. Agency records from October 2010 to February 2012 show that between May and December 2011, the Agency often bypassed McKenzie for overtime because she was not BPT-certified. GC Ex. 14; Tr. 119. For example, in November 2010 (i.e. before the change was made), McKenzie was bypassed for medical overtime thirteen times, but in November 2011 (after the change) she was bypassed 142 times. GC Ex. 14.

Cruz testified that after the MOU was implemented, non-BPT certified employees generally did not get as many chances to work overtime as BPT-certified employees. In Cruz's words, non-BPT-certified employees "got screwed big time. If we got one overtime a month, that was a lot." Tr. 666. In this connection, the Agency records from November 2010 to February 2012 show that between May and December 2011, the Agency regularly bypassed Cruz for overtime because he was not-BPT-certified. GC Ex. 13.

Phillip testified that he noticed in March 2011 that he had gone from working overtime "every week and every weekend" – often twenty-four hours a week – to "one 8-hour overtime [shift] a month." Tr. 95, 97. Agency records spanning from October 2010 to February 2012 show that between May and December 2011, the Agency repeatedly bypassed Phillip for overtime because he was not BPT-certified. GC Ex. 12. In November 2010, Phillip was not bypassed a single time for medical overtime, but was bypassed 179 times in November 2011. *Id.*

On May 27, 2011, Phillip filed an unfair labor practice charge alleging that the Respondent's actions violated the Statute. GC Ex. 1(a). The parties tried to resolve the dispute through post-implementation bargaining, but this failed, and, on October 19, the RD issued the 2011 Complaint. Tr. 862-72; GC Ex. 1(b); R. Exs. 8-13.

Two months later, the Agency and the Union agreed to settle their dispute, and on December 19, the Regional Director approved a bilateral, informal settlement agreement. Attachment to GC Ex. 1(g). The settlement agreement provided, among other things, that:

> The Respondent will provide back pay, from the date the 2004 MOU was first implemented in 2011, up until the date the Respondent returns to the *status quo ante* as required by the Notice, to bargaining unit employees who should have been offered overtime but were skipped on the overtime roster because they were not BPT-qualified.

GC Ex. 1(g), Attach. at ¶4. The agreement also provided that a "BPT overtime committee" made up of two Union and two management representatives would meet to determine which employees should receive back pay and how much they should receive. *Id.* at ¶5. In determining the appropriate amount of back pay, the committee would follow certain "guidelines," including that "[a]ll employees" on the overtime roster "who should have been offered overtime but were skipped because they were not BPT-qualified will receive backpay for the number of hours of overtime they would have received if they had

been offered and accepted the overtime opportunity . . . ." *Id.* The agreement further provided that, within sixty days after approval of the settlement agreement – February 17, 2012 – "the Agency will reimburse the employees who are entitled to backpay as identified by the BPT overtime committee, and the Agency will reimburse the employees in the amounts agreed to by the BPT overtime committee." *Id.* at ¶6. It also required the Agency to electronically post a "Notice to All Employees" advising them of the settlement and stating that the Agency would rescind its implementation of the 2004 MOU. *Id.* at ¶1 and attached Notice. Thirty days after the RD's approval of the settlement agreement, the Agency was required to notify the RD in writing as to the steps the Agency had taken to comply with the settlement. *Id.* at 2.

Pursuant to the settlement agreement, the committee – Phillip and correctional officer Gregory Cruz for the Union, Dobbs and Lieutenant Andre Warren for the Agency – first met on January 11 and 12, 2012.[11] Tr. 145, 603-04, 606. During these meetings, the committee began the process of identifying employees who were bypassed because they were not BPT-certified. Tr. 145-46, 613, 632, 879, 943, 945. There was a dispute as to when the period for back pay should begin – Phillip wanted it to begin in February 2011, if not earlier, while Dobbs wanted it to begin in May 2011 – but ultimately it was agreed that the period for back pay would begin in March 2011. Tr. 151, 366-69, 461-62, 503, 622, 624, 894-95, 897, 931, 1128-29, 1198; R. Ex. 16.

The Union and the Agency had very different views of how to calculate back pay. At the hearing, Cruz and Phillip testified that the Agency agreed in the first two meetings to provide back pay either for two bypasses a day, or even for every time an employee was bypassed. Tr. 146, 614, 621, 633. At some point, however, the Agency insisted on limiting back pay to no more than eight hours of overtime per day in which one or more bypasses occurred, and Phillip decided to go along with that approach, at least tentatively. Tr. 146, 380. Dobbs, by contrast, testified that the Agency had never agreed to provide back pay for every bypass or for every day in which a bypass occurred. Tr. 883, 903-04.

The BPT overtime committee next met on January 23, 2012. Tr. 158; R. Ex. 20. Lieutenant Bobby Roy replaced Dobbs as one of the Agency's representatives. Tr. 158-59, 630, 990; R. Ex. 20. The Union continued to push for back pay for every bypass, but received no agreement on this from the Agency. R. Ex. 16; Tr. 678-79, 1060. The Agency had not discussed any specific figures, but Phillip and Cruz were nevertheless confident,

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[11] There is conflicting testimony as to whether there was a meeting on January 11. On the one hand, Dobbs recalled meeting on January 11 and 12 (Tr. 886, 898), and he referred to the January 11 meeting in a March 20, 2012, memorandum. R. Ex. 21. Phillip also referred to a January 11 meeting in a January 17, 2012, email (GC Ex. 1(h)), but he stated at the hearing that he was unsure whether the first meeting was on January 11 or 12. Tr. 1224. On the other hand, Cruz was certain that the first meeting took place on January 12, and both he and Phillip indicated that Dobbs attended only one meeting. Tr. 158, 629-30, 1224-25. I find that a preponderance of the evidence indicates that there was a meeting on January 11, in addition to January 12. The testimony as to what happened on which day is inconclusive, however, so I refer to the January 11 and January 12 meetings as if they were a single meeting.

based on McKenzie's overtime records, that the Agency owed between $400,000 and $500,000 in back pay overall. Tr. 169-73, 387, 998.

The committee met at additional times in January and February. Tr. 161, 381-82, 680. By early-to-mid February, the committee had identified when each employee had been bypassed due to the lack of BPT certification. Tr. 161, 165, 632-33, 637, 680, 997, 1051; R. Ex. 20. The Agency's representatives assured Phillip and Cruz that employees would soon receive back pay, which was due February 17. Tr. 162, 533-34. But the BPT overtime committee did not reach an agreement on the amount of back pay due to the employees, and the Agency failed to provide any back pay by the February 17 deadline. GC Ex. 1(k); Tr. 167, 633.

On January 17, 2012, the Union wrote to the RD and argued that the Agency was not complying with various aspects of the settlement agreement. GC Ex. 1(h). The Agency responded to the RD on February 2 and contended that it had returned to the pre-2011 overtime procedures and posted a notice of the settlement agreement as required, and that it was "making every effort" to ensure that employees would be compensated. GC Ex. 1(j). In a letter dated February 28, the RD informed the Agency that it appeared, based on the Region's own investigation, that the Agency had not complied with the settlement agreement. GC Ex. 1(k). The RD set a new deadline – March 15, 2012 – for the Agency to fully comply with the settlement agreement and to provide evidence of its compliance, including the dates that employees received back pay. The RD also reiterated that the Agency should contact an official in the RD's office if there were any problems. *Id.* at 2; GC Ex. 1(i) at 2.

The BPT overtime committee next met on March 9, 2012. At the meeting, Roy informed the Union that the Agency would provide back pay based on the following formula: a non-BPT-certified employee who had signed up for overtime three or more times in a week would receive overtime pay for two eight-hour shifts, and a non-BPT-certified employee who was signed up for overtime one or two times in a week would receive overtime pay for one eight-hour shift. R. Ex. 17;[12] Tr. 995. Roy testified that he "came up with this formula" to reflect the fact that employees who accept overtime will go to the bottom of the overtime list and then will not usually be called again for a few days. Tr. 995. Roy's formula would have paid employees approximately $246,000 in gross back pay, although that figure needed to be adjusted to account for employees who, for example, had been out on leave. R. Ex. 17 at 1; Tr. 175-76. Phillip and Cruz rejected the formula as being contrary to what they believed the Agency had previously agreed to – one day's worth of overtime pay for every day in which a non-BPT-certified employee was bypassed. Tr. 174-75, 420, 627-29, 688. Roy, however, claimed that the Agency had never agreed to that formula. Tr. 1013-14.

The Union did not provide a formal counterproposal at the meeting, though Phillip asked why management could not provide back pay for every day in which a non-BPT-certified employee was bypassed. He also asked for more time to study the formula Roy had

[12] Roy explained the compensation formula and its rationale at the March 9 meeting but did not give the Union representatives any documents showing which employees were entitled to what amounts of back pay. Tr. 175-76.

presented. Tr. 178, 420, 999, 1047, 1050. Later that day, Fernandez emailed Phillip a memorandum summarizing the meeting and asking Phillip for any counterproposals. R. Ex. 17. Phillip neglected to open the email and did not see it until several months later, when he was preparing for this hearing. Tr. 411-12

A final meeting was held on March 13, 2012. Phillip, Cruz, and Roy were joined by Acting Captain Kevin Burden, who was filling in for Warren. Tr. 178, 1005; R. Ex. 18. When Burden walked in the room, Cruz asked, "what is Lt. Burden doing here?" because Burden had not been involved in the prior negotiations, and because Cruz had a pending EEO complaint against Burden. Tr. 642; *see also* Tr. 179-80. According to Phillip, Burden got up from his chair and started "making [a] big scene[]" Tr. 180-81. Burden continued "yelling" and "standing up from his chair, . . . arguing and pointing at" Cruz for a few minutes. Tr. 682, 436, 648. Burden started to walk out of the room (Tr. 180, 648), and in Roy's words, Burden "specifically told me, 'Lt. Roy, come on, we don't – you know, you don't have to listen to this.'" Tr. 1005-06; *see also* Tr. 649. Burden then left the room. Tr. 180-81, 649. According to Phillip, Roy said, "If you have a problem with Mr. Burden being here, the meeting is terminated." Tr. 181. Neither Phillip nor Cruz responded directly to that ultimatum, even though Roy repeated it two or three times. Tr. 435. Phillip and Cruz asked Roy if the meeting was over, and Roy said, "I don't know yet; I guess so." Tr. 1006. As the meeting broke up, Roy gave him a document listing the amount of back pay the Agency was willing to pay to each employee. R. Ex. 19; Tr. 182-83, 429-32.[13] The back pay total, which had previously been quoted as $246,032.84 (R. Ex. 17), was reduced to $237,854.69, to account for employees having been on leave, at training, or already working a regular shift. R. Ex. 19; Tr. 182-83, 431, 535.

Phillip, Cruz, and Roy left the room and saw Burden in the hallway talking with Fernandez. Tr. 187-88, 1005-06. Fernandez asked Roy if he would meet without Burden, and Roy said yes. Tr. 1006. Fernandez testified that she then asked Phillip if he would meet without Burden, though Phillip did not recall being asked. Tr. 1006, 1009-10, 1149, 1151, 1190. According to Roy and Fernandez, Phillip and Cruz conferred with each other for about five minutes, after which Phillip said that management had terminated the meeting, and he left. Tr. 1006, 1148-50; R. Ex. 18.

The next day, Fernandez forwarded to Phillip a memo drafted by Roy, which described the breakdown of the March 13 meeting, stated that management was "prepared to initiate payment to the affected employees by March 15, 2012[,]" and requested the Union's "cooperation in bringing this matter to closure." R. Ex. 18; Tr. 998-99, 1145-46. On March 16, Phillip responded to the memo by sending an email to Warden Wilson regarding the breakdown of the March 13 meeting. GC Ex. 17. Phillip said later that he wrote Wilson in the hope that the warden would tell Burden and Roy to "go back to [the] table and . . . fix this." Tr. 188, 443. In his email, Phillip indicated that the management negotiators had refused to allow the Union representatives to have any input as to the amounts due to each employee, and that on each issue the management representatives had demonstrated a take-it-

[13] Phillip was given all of the Respondent's Exhibit 19 except for the cover page, which explains the Agency's methodology in calculating back pay. Tr. 430-31.

or-leave-it attitude rather than negotiating. (GC Ex. 17). The parties did not hold any meetings regarding the back pay issue after March 13, and they had no further written communications on the issue after Phillip's March 16 email.

The Agency did not make any payment of back pay to employees, either by the March 15 deadline or any time thereafter. GC Exs. 1(*l*), ¶8 & 1(m), ¶8; Tr. 188-89, 651, 1055, 1091-92, 1204, 1086. At the hearing, Warden Wilson testified that the Agency did not provide back pay because there was no "amount being agreed to" by the BPT committee, and because it appeared that the Union was planning to litigate the issue even if the Agency paid the approximately $238,000 it had offered on March 13. Tr. 1086, 1092. But there is also no evidence in the record that the Agency communicated with the FLRA Regional Office regarding its problems in reaching a back pay agreement with the Union, other than an email dated February 2, 2012. GC Ex. 1(j); *see also* Tr. 1056-57, 1096. Wilson testified that he was "under the impression" that the Agency's attorney contacted the Regional Office after March 13, but he did not have "specific knowledge" of such conversations. Tr. 1096.

Subsequently, the RD revoked the settlement agreement and issued the 2012 Complaint. GC Ex. 1(*l*).

POSITIONS OF THE PARTIES

General Counsel

The GC makes two basic arguments: that the Agency unlawfully implemented a change in overtime procedures without fulfilling its bargaining obligations, and that it breached the settlement agreement by failing to pay back pay to bypassed non-BPT-certified employees.

With regard to the unilateral change, the GC argues first that the parties at FCI Miami had clearly adopted a practice of adjusting the overtime roster for the benefit of non-BPT-certified employees, and that the Agency unilaterally changed this practice on at least two occasions, first tentatively and then permanently. The GC asserts that the practice of roster adjustments had become a condition of employment, as it met the criteria articulated in *U.S. Dep't of Labor, Wash., D.C.*, 38 FLRA 899, 908 (1990) and subsequent cases. Therefore, the Agency could not change its practice of making roster adjustments without fulfilling its bargaining obligations, even if the practice conflicted with the parties' collective bargaining agreements. *Def. Distrib. Region W., Lathrop, Cal.*, 47 FLRA 1131, 1133-34 (1993) (*Defense Distribution*).[14]

[14] The GC notes the testimony of at least one Agency witness that roster adjustments violate both Article 18, Section p of the Master Agreement and the 2004 MOU. Tr. 748-52, 841. While the GC argues that the practice does not conflict with the Master Agreement, it concedes that it "might be contrary" to the MOU. GC Br. at 28-29. Nonetheless, the principle articulated in *Defense Distribution* still requires the Agency to negotiate before changing such a practice.

The GC submits that the Union made timely requests to bargain over the change, first in Phillip's memo dated April 1, 2011 (GC Ex. 4) and again in Phillip's April 13, 2011 request for "midterm bargaining" (GC Ex. 7). The Union thereby demonstrated its intent to negotiate both the substance and the impact and implementation of the change. According to the GC, the substance of the 2004 MOU was itself negotiable, as it constituted procedures for assigning overtime to qualified employees. *Am. Fed'n of Gov't Employees, Council 215*, 60 FLRA 461, 467 (2004) (*Council 215*). Moreover, even if the change was not substantively negotiable, the phrasing of the Union's request is not determinative in demonstrating an intent to bargain. *U.S. Dep't of Health & Human Servs., Pub. Health Serv., Indian Health Serv., Indian Hosp., Rapid City, S.D.*, 37 FLRA 972, 979-81 (1990) (*Indian Health*). By implementing the change on May 20, 2011, the Agency acted before any negotiations had taken place, and the GC argues that any post-implementation discussions that occurred that summer did not satisfy the Agency's bargaining obligation. *See Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9, 23 (1981).

In support of its claim that the Agency breached the settlement agreement, the GC makes three additional arguments: (1) most fundamentally, the agreement required the Agency to pay back pay to those employees who lost overtime because of the unlawful change; (2) the agreement specifically required the Agency to reimburse employees for each time they were bypassed for overtime, within certain explicitly enumerated limits; and (3) an agreement by the BPT overtime committee on the exact amount of backpay was not a condition precedent for the fulfillment of the obligation to reimburse employees.

In this regard, the GC tries to rebut the Respondent's apparent chief defense, i.e. that the settlement agreement required a consensus of the overtime committee. (*See, e.g.*, Warden Wilson's testimony at Tr. 1086.) The GC argues that paragraph four of the settlement agreement – which states that the Agency "will provide back pay" and does not refer to the overtime committee – required the Agency to provide back pay without regard to whether the committee has agreed on an overall amount. And while paragraph six of the settlement agreement states that the Agency will provide back pay "in the amounts agreed to by the BPT overtime committee," the GC contends that the settlement agreement did not characterize the committee's agreement on an overall amount of back pay as a condition precedent. Citing *Mularz v. Greater Park City Co.*, 623 F.2d 139, 142 (10th Cir. 1980) (*Mularz*), the GC submits that courts generally refrain from imposing conditions precedent unless they are clear from the language of the agreement. Further, the GC argues that reading a condition precedent into the settlement agreement would be: contrary to the central purpose of the settlement agreement of providing affected employees back pay;[15] absurd, as it would give the Agency's representatives an incentive to avoid reaching agreement; and harsh and unreasonable, as it would result in affected employees receiving no back pay, a result that is clearly contrary to the intent of the settlement. *See U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 25-26 (2000); *Grupo Portexa, S.A. v. All Am. Marine Slip*, 954 F.2d 130, 140 (3d Cir. 1992) (*Grupo Portexa*); Williston, *Interpretation & Construction of Contracts*, Ch. 2 §§ 619-20 (4th ed. 2012).

[15] *See Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1131 (3d Cir. 1969) (*Ludwig*).

As a remedy, the GC requests that the Respondent be ordered to pay employees back pay for all shifts that they were bypassed for overtime. *See U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 37 FLRA 278, 292-93 (1990). The GC disputes the back pay formulas that were proposed by the management representatives on the overtime committee, as those formulas sought to reimburse employees for less than all of the shifts in which they were bypassed. The GC notes that during the negotiation of the settlement agreement, the Agency specifically negotiated exceptions to the general rule of reimbursing employees for all shifts in they were bypassed: Paragraphs 5(a)-(c) of the agreement exclude employees from getting back pay for days they were on sick or annual leave or if they were already working regular time during those hours. If the parties had intended to also exclude employees from back pay for every shift in which they were bypassed, it would have been inserted with these other provisions. *See, e.g., In re Celotex Corp.*, 487 F.3d 1320, 1334 (11th Cir. 2007).

Respondent

The Respondent did not file a post-hearing brief. Its position, however, was set forth in its opening statement at the hearing and through its witnesses' testimony.

In her opening statement, counsel for the Respondent argues that it implemented the 2004 MOU lawfully. Tr. 21. With regard to roster adjustments, counsel acknowledged that "some lieutenants who are responsible for assigning overtime to employees did, in fact . . . [begin] roster adjusting employees," and that the Agency made roster adjustments, at least "on occasion." Tr. 17. However, the Respondent asserted that roster adjustments were contrary to the Master Agreement and the MOU, and that "there can be no . . . practices implemented at the local level that would . . . be out of compliance with the Master Agreement." Tr. 16-17.

With respect to its bargaining obligation concerning roster adjustments, the Respondent contends that once it "discovered" the MOU, it "gave notice to the Union in writing that it was going to come back into compliance with the MOU." Tr. 17. Further, the Respondent argues that the Union "was given an opportunity . . . to engage in impact and implementation bargaining." Tr. 17. However, it asserts that the Union "never set forth any proposals to management." Tr. 18. Thus, the Respondent argues, "[t]here never was a reason for management to sit down" with the Union. Tr. 18. In light of the Union's apparent lack of interest in impact and implementation bargaining, the Agency "moved forward with the implementation" of the MOU. Tr. 18. The Respondent adds that it did bargain with the Union after implementing the MOU in May 2012. Tr. 18-19.

In her opening statement, the Respondent's counsel also argued that it "attempted in good faith to comply with the settlement agreement." Tr. 21. In this regard, she asserted that after several fruitless meetings with the Union, "management eventually came up with . . . a just and fair compensation model," but the Union never provided counterproposals and "accused [management] of unilaterally deciding who would be paid and what amount they will be paid[.]" Tr. 20. Further, counsel explained that once the GC "notified the Agency that there were allegations of non-compliance," the Agency had no incentive to "[pay] what

they thought was right," because the Agency would "end right back up in the same place if [the amount of back pay] wasn't sufficient." Tr. 20. Therefore, the Agency determined that it would be "better for the Judge to make a decision with respect to . . . whether . . . in the spirit of the settlement agreement, [the Agency] attempt[ed] to comply." Tr. 20-21. I note that in its 2012 Answer, the Respondent denied violating the settlement agreement, but admitted the GC's claim that the settlement agreement "required the Respondent to provide back pay" by the deadline the established by the RD. GC Exs. 1(*l*) ¶7 & 1(m) ¶ 7.

ANALYSIS AND CONCLUSIONS

The Respondent breached the settlement agreement

A regional director may approve a written settlement agreement. 5 C.F.R. § 2423.10. This includes a bilateral, informal settlement agreement, which is the kind of settlement agreement at issue here. 5 C.F.R. §§ 2423.10, 2423.12(a); GC Exs. 1(*l*) & 1(m). Informal settlement agreements can be issued post-complaint. 5 C.F.R. § 2423.25(a)(1). A regional director may reinstitute formal proceedings if the respondent fails to comply with the settlement agreement. *Id.* In the ensuing proceedings, the respondent may challenge whether, in fact, it breached the settlement agreement, and if so, whether it committed the unfair labor practice originally alleged in the complaint. *Fed. Aviation Admin., Aviation Standards Nat'l Field Office, Mike Monroney Aeronautical Ctr., Okla. City, Okla.*, 43 FLRA 1221, 1231 (1992). In determining whether a respondent breached a settlement agreement, the General Counsel has the burden of proof, and the issue is whether there was "good faith compliance" with the agreement. *Veterans Admin. Med. Ctr., Bath, N.Y.*, 12 FLRA 552, 565-66 (1983) (*VA Bath*).

In interpreting the meaning of the settlement agreement, I apply the standards and principles applied by arbitrators and the federal courts. *See U.S. Dep't of Veterans Affairs, N. Ariz. VA Health Care Sys., Prescott, Ariz.*, 66 FLRA 963, 965 (2012) (*VA Prescott*). In doing so, I look first at the plain language of the agreement. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 65 FLRA 61, 61 66 (2010). In addition, I consider the purpose of the agreement and whether a given interpretation would lead to harsh or unreasonable results. *Grupo Portexa*, 954 F.2d at 140; *Ludwig*, 405 F.2d at 1131; Elkouri & Elkouri, *How Arbitration Works*, 461-63, 470-72 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003) (Elkouri). Clauses, if ambiguous, should be read as a covenant or promise, rather than creating a condition precedent. *Mularz*, 623 F.2d at 142. Generally, contracts include an implied covenant of good faith and fair dealing. Elkouri at 478; *cf. VA Bath*, 12 FLRA at 566. This is similar to the principle of reason and equity, which is an inherent part of every collective bargaining agreement. Elkouri at 478 (quoting *United Steelworkers v. New Park Mining*, 273 F.2d 352, 356-57 (10th Cir. 1959)).

The Agency's underlying argument relating to its compliance with the settlement agreement is that it was only required to pay (in the words of paragraph 6) back pay "in the amounts agreed to by the BPT overtime committee." Accordingly, when the committee could not reach an agreement on back pay, the Agency had no obligation to provide back pay in any amount whatever. This flies in the face of the full language of the agreement, as well as reason.

The plain language of the settlement agreement requires the Agency to provide back pay. The Agency itself never disputes the fact that it was required to pay some amount of back pay to the bypassed employees. Paragraphs 4, 5, and 6 of the agreement are devoted to the issue of back pay. Paragraph 4 sets forth the back pay obligation unconditionally: there is no mention of a BPT committee, but simply a promise to "provide back pay" within a defined time period "to bargaining unit employees who should have been offered overtime but were skipped on the overtime roster because they were not BPT-qualified." GC Ex. 1(g), Attach. at ¶4. Paragraph 5 establishes the BPT overtime committee as a mechanism for determining which employees will receive the back pay, and in what amounts, but the context of the agreement strongly suggests that the committee is merely a procedural means of carrying out the overriding purpose of providing back pay to the employees. The settlement agreement does not characterize agreement on the overall amount of backpay as a condition precedent to the Agency's back pay obligation, and interpreting it in such a manner would produce a manifestly unjust result. It would leave the bypassed employees with no reimbursement whatever, when even the Agency agreed that they were entitled to reimbursement for being bypassed. This would also be an unreasonable result, as it would reward the Agency for failing to reach agreement on the overall amount of back pay. It makes no sense to interpret a provision in such a way that one party is rewarded for refusing to agree on an amount of liability.

The Agency's counsel and witnesses sought to blame the Union for the committee's failure to reach a back pay agreement, but the record reflects that both sides contributed to the breakdown of the committee's deliberations. For instance, Agency witnesses claimed that when the initial committee meetings got bogged down in a dispute over the date on which back pay was to start, management insisted that the settlement agreement specified March of 2011. In fact, early emails show that management insisted on starting back pay from May 2011, while the Union insisted that management had started bypassing non-BPT-certified employees in March 2011 and wanted back pay to begin on that date. R. Ex. 14. The settlement agreement itself called for back pay to start "from the date the 2004 MOU was first implemented in 2011," but didn't specify a month or day. GC Ex. 1(g), Attach. at ¶4. While the Union continued to insist that some employees had been bypassed as early as February 2011 (R. Ex. 15), this issue should have been easily resolved when the committee examined the overtime rosters for the period.

Testimony from committee members on both sides demonstrates that despite their early disagreements, the committee made significant progress, as they examined overtime rosters for every pay period between March 2011 and January 2012, and as they identified every employee who had been improperly bypassed. By mid-February of 2012, the process

appeared to be nearing its conclusion, and it appeared that the only step remaining was to multiply each employee's pay rate by the number of times he or she had been bypassed, and then to subtract those shifts in which these employees were ineligible for back pay because they were on leave or already working on that shift. The committee members discussed exactly when the employees might receive their back pay, and there was optimism that this might be done before the initial deadline of February 17, 2012, specified in the settlement agreement.

What exactly caused the failure to meet the initial deadline for reimbursement is not explained in the record, but when the deadline passed, the Regional Director advised the Agency on February 28 that it had not complied with the settlement agreement; he extended the deadline for compliance to March 15, and he urged the Agency to contact his office if it had any questions or problems. GC Ex. 1(k) at 2. Notwithstanding this warning, the Agency did not meet with the Union again to negotiate back pay until March 9, and at no time in February or March 2012 did any Agency official contact the Regional Director regarding any difficulties it was having.

I am also skeptical of the Agency's claim that its attempts at compliance were truly made in good faith. In this regard, the Agency failed to meet the original deadline for paying affected employees (GC Ex. 1(k)), and it waited until March 9, just four days before the RD's new deadline, to present the Union with a back pay formula. GC Ex. 1(k); R. Ex. 17; Tr. 167, 175-76, 410, 434, 633, 1008. The back pay formula presented to the Union on March 9 was a significant departure from anything in evidence previously concerning the amount of back pay owed,[16] and the Union members of the committee estimated it to be about half of what the employees were owed, if they were paid for each time they were bypassed. *Compare* GC Ex. 17 *and* R. Ex. 17. The Union's estimate appears consistent with the rationale offered by management for the formula in its March 9, 2012 memo (R. Ex. 17). On March 13, after his presence was challenged by Cruz, Burden angrily left the meeting, making it clear to Phillip, Cruz, and Roy that the meeting was over. The Agency made no serious attempt to revive the March 13 meeting or to schedule another one before the March 15 deadline. Tr. 104-06, 180-81, 434, 436, 649; R. Ex. 18. Perhaps most crucially, the Agency did not ask the RD for assistance, even though it was required to notify him of the steps it was taking to comply with the settlement agreement. GC Exs. 1(g), (k); Tr. 1096-97. If the Agency negotiators felt that the Union was not bargaining in good faith, they should have addressed this concern to the FLRA officials who had negotiated the settlement agreement and who were charged with enforcing compliance. Instead, Warden Wilson testified that, after the March 13 meeting, the Agency made a calculated decision not to comply with the settlement agreement, and the Respondent acknowledged as much in its opening statement. Tr. 20-21, 1092.

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[16] Indeed, in her email of February 2, 2012, to the Regional Director, regarding the Agency's efforts to comply with the settlement agreement, Agency counsel cited the parties' dispute as to the starting date for back pay but said nothing about whether employees should be reimbursed for every shift in which they were bypassed. Rather, the evidence of record suggests that this issue was first articulated by the Agency in its March 9 proposal to the Union. *See, e.g.*, R. Ex. 17.

Although primary blame for the breakdown in negotiations rests with the Agency, some actions of the Union during this process deserve some criticism as well. For instance, Agency officials faulted the Union, with some justification, for not offering counter-proposals during the negotiations, but the Union was itself given no comprehensive written proposal from management until March 9.[17] At times, the Union members of the committee seemed to be taunting the management members at the prospect of collecting back pay. R. Ex. 20. Additionally, Phillip either failed to open Fernandez's March 9 memo or failed to respond to it, but the memo arrived so late in the process that it is doubtful that even a detailed response from the Union would have avoided a breakdown. Cruz should not have challenged Burden's presence at the March 13 meeting, but Burden's outraged response and walkout signaled the end of the meeting, and of the negotiations.

Ultimately, however, the Agency knew that it had agreed to pay back pay to those employees who had been bypassed. The agency had identified 37 employees who met the criteria for back pay, and it acknowledged that those employees were entitled to at least $237,000 in back pay (see R. Exs. 17 & 18). It had agreed to reimburse these employees by February 17, a deadline that had been extended to March 15 and that was only days away. It could have communicated with the Regional Director and offered an explanation of its back pay offer, in order to demonstrate its good faith, but it chose not to. It could have paid the 37 identified employees the amounts of back pay that it believed they were owed, but again it chose not to. If the Agency had taken the latter action, it could have made at least a reasonable claim that it was trying in good faith to comply with the settlement agreement. But in refusing to pay anything to employees who it recognized were entitled to compensation, the Agency lost any claim to the high ground and demonstrated conclusively that it had violated the settlement agreement.

For all of these reasons, I find that the Agency violated the settlement agreement, and that the GC was warranted in reissuing the unfair labor practice complaint.

The Respondent violated the Statute by unilaterally refusing to bargain with the Union over the implementation of the MOU

Prior to implementing a change in conditions of employment, an agency is required to 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, if the change will have more than a *de minimis* effect on conditions of employment. *See, e.g., U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009). The extent to which an agency is required to bargain depends on the nature of the change. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (*Bastrop*). For instance, a union may be entitled to negotiate over the actual decision, in other words the substance of the change. S*ee, e.g., Dep't of the Navy, Puget Sound Naval*

[17] Unlike most negotiations, neither side in this case engaged in any systematic exchange of written proposals and counter-proposals, which would have facilitated communication between the parties and enabled the Regional Director (or me) to objectively evaluate the parties' good or bad faith.

Shipyard, Bremerton, Wash., 35 FLRA 153, 155 (1990). If, on the other hand, an agency's decision constitutes an exercise of a management right under section 7106(a), the decision itself may not be negotiable, but the agency may nonetheless be required to negotiate over the impact and implementation of that decision; *see, e.g., Bastrop*, 55 FLRA at 854-55.

The condition of employment that was changed in this case involved overtime assignment procedures. Management's right under § 7106(a)(2)(A) and (B) to assign employees and to assign work includes the right to assign overtime and to determine when overtime will be performed. *Council 215*, 60 FLRA at 464. But unions may negotiate, pursuant to § 7106(b)(2), provisions that require an agency to assign overtime to employees on an overtime callback roster, as long as the agency retains the right to determine who is qualified to be on the roster. *U.S. Dep't of Veterans Affairs Med. Ctr., Coatesville, Pa.*, 55 FLRA 138, 140-41 (1999); *see also Council 215*, 60 FLRA at 467.

The Authority has long recognized that parties may establish conditions of employment through past practice. *U.S. Dep't of the Air Force, U.S. Air Force Acad., Colo.*, 65 FLRA 756, 758 (2011) (*Air Force Academy*); *see also Dep't of the Navy, Naval Underwater Sys. Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980). For a condition of employment to be established through a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *Air Force Academy*, 65 FLRA at 758. As relevant here, the practice must be known to management, responsible management officials must knowingly acquiesce in the practice, and the practice must continue for a significant period of time. *U.S. Dep't of Homeland Sec., Border & Transp. Directorate, Bureau of Customs & Border Prot.*, 59 FLRA 910, 914 (2004). The Authority has found that a period of "several years" suffices for purposes of establishing a past practice. *Air Force Academy*, 65 FLRA at 758. A past practice may be considered binding on the parties even when it modifies the terms of a collective bargaining agreement. *VA Prescott*, 66 FLRA at 965; *Defense Distribution*, 47 FLRA at 1133-34; *but see U.S. Dep't of Housing & Urban Dev., Rocky Mountain Area, Denver, Colo.*, 55 FLRA 571, 574 (1999) (where local parties were prohibited from negotiating practices that conflict with nationwide agreement, local practice was not binding).

Once an agency has provided adequate notice of an impending change, the union is responsible for requesting bargaining over the change. *U.S. Dep't of Def., Def. Commissary Agency, Peterson AFB, Colo. Springs, Colo.*, 61 FLRA 688, 692 (2006). But a union is not required to submit specific bargaining proposals with its request to bargain, unless the parties' CBA expressly imposes such a requirement. *Id.* at 694 n.5. Further, a union does not waive its right to bargain by requesting substantive bargaining rather than impact and implementation bargaining. *See Indian Health*, 37 FLRA at 980.

From at least 1996 to March 2011, the vast majority of the Agency's lieutenants regularly made roster adjustments, and from July 2008 through January 2012, those roster adjustments were carried out with the full knowledge and (at least) acquiescence of Captain Dobbs. Tr. 54-55, 591-92, 594, 607, 723, 742-43, 765, 795, 828-29, 951; GC Exs. 12-14. This supports a conclusion that roster adjustments were an established past practice in 2011.

At one point in the hearing, Dobbs tried to minimize the extent of that practice, saying that roster adjustments "could occur" "on occasion," but that there was "just no way" that lieutenants would make roster adjustments on a regular basis. Tr. 941-42. This is neither credible nor consistent with the evidence as a whole. Dobbs himself referred to roster adjustments as a past practice, as did Atkinson, and the practice was so entrenched that Dobbs and the warden felt it was necessary to inform the Union and all staff about the change. Tr. 795, 951; GC Exs. 6, 10. The overtime records admitted into evidence (GC Exs. 12-14) confirm that roster adjustments for non-BPT-certified employees were a well-established aspect of the procedure for assigning overtime at FCI Miami. Whether the practice was universal at the FCI or not, the evidence demonstrates that it was widespread.

The Respondent argues, however, that the past practice was illegitimate, because it conflicted with the 2004 MOU as well as Article 18, Section p of the Master Agreement. This argument is clearly incorrect with regard to the National Agreement, and it is immaterial with regard to the MOU. The first sentence of Article 18, Section p explicitly permits the parties to negotiate "[s]pecific procedures regarding overtime assignments . . . locally."[18] Both the 2004 MOU and the practice of making roster adjustments for non-BPT-certified employees were locally-negotiated procedures; accordingly, the Master Agreement permitted either type of arrangement. While the Agency may be correct that the practice of roster adjustments for non-BPT-certified employees conflicted with the MOU, there is no reason that the MOU should take precedence over the past practice, as both were adopted at the local level and were equally valid. *See VA Prescott*, 66 FLRA at 965-66.

I therefore find that roster adjustments were a past practice that the Agency could not change without first providing notice and an opportunity to bargain.

On at least three different occasions, the Agency unilaterally ended the practice of making roster adjustments. First, in January or February of 2011, Langley and at least one other lieutenant stopped making roster adjustments, and did so without notifying the Union. *See* note 5 above. Second, on April 18, 2011, Dobbs unilaterally ended the practice of roster adjustments (again without notifying the Union), although he rescinded the action two days later, in accordance with Warden Atkinson's instruction. Tr. 844-45. Finally, on May 20, the Agency implemented the MOU and ended roster adjustments permanently, without bargaining over the change. Although Dobbs gave the Union written notice of the final implementation, it was put into effect without bargaining.

Testimony from both Union and Agency witnesses makes it clear that after the Union submitted written demands to bargain on or about April 1 and April 13 (GC Exs. 4 & 7), the parties made some efforts to arrange a negotiation session, but they never actually met until long after the MOU had been re-implemented on May 20. *See* GC Exs. 8 & 9; R. Exs. 8-13.

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[18] *See also*, in a different context, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 191, 193 (2009) ("Nothing in the plain wording of Article 18, Section p(1) [of the Master Agreement] speaks to, or limits, assignment of prisoner transport or the qualifications to perform such assignments.").

The Agency sought to discuss the impact and implementation of the MOU after the implementation had actually occurred, prompting Phillip to inquire, "why close the barn after the horse is out." R. Ex. 11. A discussion of the issue was ultimately held on an unspecified date, but no agreement was negotiated by the parties. Tr. 859, 873, 875.

In light of these facts, it is clear that the longstanding past practice of roster adjustments for non-BPT-certified employees was terminated without bargaining. The Union did not at any point waive its dual requests to negotiate both the substance and the impact and implementation of the 2004 MOU. [19] Whatever reasons there may have been for the delay in negotiations in April and May of 2011, it is clear that the Agency simply stuck to its preconceived time schedule of implementing the MOU on May 20, notwithstanding the absence of any negotiations whatever. The Agency asserted that it did not need to bargain with the Union because Phillip had requested midterm bargaining. GC Ex. 8. But Phillip's first request (GC Ex. 4) pertained also to the impact and implementation of the change, and the Agency was obligated to bargain with the Union before implementing the change, regardless of the label that the Union attached to the bargaining. *See Indian Health*, 37 FLRA at 980. And while the Agency may be commended for seeking to discuss the MOU after it was a *fait accompli*, those discussions did not satisfy the Agency's duty to negotiate first. *Soc. Sec. Admin.*, 55 FLRA 978, 980 (1999).

Because the Agency implemented its decision to stop making roster adjustments without satisfying its bargaining obligations, it violated § 7116(a)(1) and (5) of the Statute.

REMEDY

When an agency fails to meet its obligation to bargain over a matter that is substantively negotiable, as in this case,[20] the Authority orders a *status quo ante* remedy in the absence of special circumstances. *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 53 FLRA 1664, 1671 (1998). The Respondent has not cited any special circumstances here. Rather, it previously agreed to rescind the 2004 MOU (and apparently did so in January 2012); to notify and bargain with the Union before seeking

[19] While it is not material to my conclusion that the Agency violated the Statute by implementing the MOU without bargaining, it appears to me that the Agency was obligated to bargain over whether to implement the MOU at all. To put it slightly differently, the Union was perfectly within its rights to propose that the MOU not be implemented at all. The distinction between "substantive' and "I and I" bargaining is inapplicable here. The practice of making roster adjustments was, as already discussed, an effort to balance the principle of equitably rotating overtime with the Agency's right to determine who is qualified to perform medical transports. It is a "procedure," negotiated pursuant to § 7106(b)(2), that management follows in exercising its statutory right to assign overtime. In order to change such a procedure, the Agency must be willing to negotiate whether the change itself is warranted, not simply the impact and implementation of the proposed change.

[20] Even if the re-implementation of the MOU were not substantively negotiable, the factors set forth in *Fed. Corr. Inst.*, 8 FLRA 604 (1982), would still warrant a status quo ante remedy.

re-implement the MOU or any other change to the practice of roster adjustments; to compensate the employees who were bypassed for overtime by paying them back pay; and to post a notice to employees, and I find these remedies appropriate here.

An award of back pay is authorized under the Back Pay Act when an appropriate authority determines that: (1) an aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials. *Soc. Sec. Admin.*, 64 FLRA 199, 205 (2009) (*SSA*).

With regard to the first requirement, employees affected by an unfair labor practice are affected by an unjustified or unwarranted personnel action. *U.S. Sec. & Exch. Comm'n*, 62 FLRA 432, 438 (2008). With regard to the second requirement, the Authority has found that back pay is appropriate where it has been established that employees would have worked more overtime had management not implemented a unilateral change. *See U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) (*IRS*).

Where a fact finder has found the specific requirements giving rise to entitlement to back pay, there is no requirement that the fact finder identify the specific employees entitled to back pay and calculate the amount of back pay. *See id.* 67 FLRA at 105; *U.S. Dep't of Transp., FAA*, 63 FLRA 646, 648 (2009) (quoting *U.S. Dep't of Transp., FAA, Wash., D.C.*, 55 FLRA 322, 326 (1999)). Rather, a determination of the specific individuals who would have worked overtime is a question to be resolved in compliance proceedings. *See IRS*, 67 FLRA at 106; *U.S. Customs Serv., Sw. Region, El Paso, Tex.*, 44 FLRA 1128, 1141 (1992).

However, in light of the fruitless negotiations that the Union and Respondent conducted pursuant to the settlement agreement, specific discussion of the method of calculating back pay is appropriate here. Generally, the Authority orders an agency to "make whole any employees adversely affected by the change in overtime practice by paying them back pay, with interest, for all pay that they lost as a result of the change." *See, e.g., SSA*, 64 FLRA at 205. The settlement agreement (attachment to GC Ex. 1(g), ¶5) sought to require precisely this, by ordering the Agency to pay "backpay for the number of hours of overtime they would have received if they had been offered and accepted the overtime opportunity[.]" Exceptions to this rule were also specified, so that employees on sick or annual leave, or employees already working on the shift in question, would not be entitled to back pay. *Id.* at ¶5(a)-(d). As noted in the General Counsel's brief, the plain language of this provision entitles an employee to back pay for each shift he or she was bypassed. The Respondent carefully negotiated a variety of exceptions to that general rule, but there is no exception that permits the Respondent to pay employees for half, or any other fraction, of the total shifts in which they were bypassed, as the management members of the overtime committee sought to do in March 2012. The settlement agreement expressly provides that a skipped employee will be assumed to have accepted those overtime opportunities, and the Respondent is not free to add other exceptions or rules to the process. The remainder of the calculations can be resolved in the compliance process.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to section 2423.41(c) of the Rules and Regulations of the Authority and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute) it is hereby ordered that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Miami, Florida, shall:

1. Cease and desist from:

(a) Unilaterally changing the way it distributes overtime between BPT-certified and non-BPT-certified employees, including the practice of making roster adjustments, without first providing notice to the American Federation of Government Employees, Local 3690 and affording it an opportunity to bargain over the change.

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

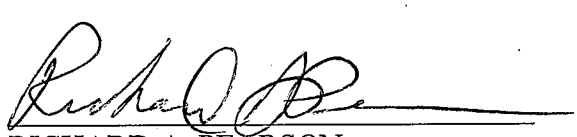
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Provide back pay, with interest, from the date the Respondent first changed its roster adjustment practices in 2011, up until the date the Respondent returned to the status quo ante, to employees who were bypassed for overtime because they were not BPT-certified. An employee's back pay shall be based on the number of hours of overtime they would have received if they had been offered and accepted the overtime, for each shift in which they were bypassed.

(b) Post copies of the attached Notice on forms furnished by the Federal Labor Relations Authority. The forms shall be signed by the Warden. The Respondent shall post the signed Notice on its bulletin boards and intranet for 60 days, and distribute the Notice by email to all bargaining unit employees, within 14 days from the issuance of this order.

(c) Pursuant to section 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Region Office, 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, D.C., March 13, 2015



RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Miami, Florida, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the way we distribute overtime between BPT-certified and non-BPT-certified employees, including the practice of making roster adjustments, without first providing notice to the American Federation of Government Employees, Local 3690, and affording it an opportunity to bargain over the proposed change.

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

WE WILL provide back pay, with interest, from the date the Respondent first changed the past practice in 2011, up until the date the Respondent returned to the status quo ante, to employees who were bypassed for overtime because they were not BPT-certified. An employee's back pay shall be based on the number of hours of overtime they would have received if they had been offered and accepted the overtime, for each shift in which they were bypassed.

_____
(Agency/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 be communicated directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, N.E., Suite 1950, Atlanta, GA 30303, and whose phone number is: (404) 331-5300.