FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 13-02

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547 CHARGING PARTY	Case No. DE-CA-09-0233

Hazel E. Hanley, Esq.
For the General Counsel

Philip G. Tidmore, Esq.
Kyle T. Abraham, Captain
For the Respondent

Harley Hembd
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On April 7, 2009, the American Federation of Government Employees, Local 1547 (Charging Party/Union) filed an unfair labor practice charge against the Department of the Air Force, Luke Air Force Base, Arizona (Respondent/Agency). (G.C. Ex. 1(a)). After conducting an investigation, the Regional Director of the Denver Region of the Authority issued a Complaint and Notice of Hearing against the Respondent on March 25, 2010, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing and

refusing to bargain over the elimination of on-site pre-retirement seminars for bargaining unit employees. (G.C. Ex. 1(b)). In its answer, the Respondent admitted some of the allegations but denied that it committed an unfair labor practice, and asserted that the matter was not a condition of employment. (G.C. Ex. 1(c)).

A hearing was conducted in Phoenix, Arizona, on May 18, 2010. At the hearing, all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. A motion to enlarge the time for the filing of post hearing briefs was filed by the Respondent on May 26, 2010, and that motion was granted by Order dated June 3, 2010, which established June 25, 2010, as the date for submission of post hearing briefs. The General Counsel and Respondent filed timely post hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, the undersigned has determined that the elimination of on-site pre-retirement seminars for bargaining unit employees constituted a change in conditions of employment that was more than *de minimis,* and Respondent failed and refused to bargain over the change. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The American Federation of Government Employees, Local 1547 (AFGE), is the exclusive collective bargaining representative of certain employees at the Department of the Air Force, Luke Air Force Base, and is a labor organization within the meaning of § 7103(a)(4) of the Statute. (G.C. Exs. 1(b) & (c)). The Union serves as the agent of AFGE for purposes of representing bargaining unit employees at Luke Air Force Base. (*Id*.). The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Ex. 1(c)).

Department of Defense (DoD) Instruction Number 1412.3 and Air Force Policy Directive 36-8, directs the Respondent to provide civilian employees with information and counseling about retirement to educate them about the process and to facilitate their planning of a successful retirement. (G.C. Exs. 6 & 7). The manner in which information and education about retirement can be provided includes interviews, seminars, lectures, discussions, classroom training and home study. (G.C. Exs. 6 & 7; Tr. 159).

In September 2008, the Respondent informed bargaining unit employees via email that the Air Force had deployed Benefit eSeminar courses for appropriated fund civilian employees and explained that access to these courses was available on their computer system using an automated web application called Employee Benefits Information System (EBIS) which they could access via an Air Force Portal. (G.C. Ex. 2 & R. 3). In December of 2008, the Respondent notified appropriated fund civilian employees in the bargaining unit via email that pre-retirement seminars for CSRS and FERS employees would be conducted on

January 27 and 28, 2009, with one day of training focused on each retirement system. This email included the following language: Please note these seminars probably will not be held again. In the future employees will obtain this training via an on-line Benefit eSeminar course entitled "Planning for Your Retirement". (G.C. Ex. 2 & R. 3).

On the morning of January 27, 2009, Union President Harley Hembd sent Bryan Evans an email in which he complained about the Union not being given notice of the change in the format to be used for retirement training going forward, and demanded that the Respondent maintain the status quo of providing live on-site lectures and counseling for the employees. (G.C. Exs. 2 & 3). The Respondent thru Evans, replied to that email on the same day, informing Hembd that the pre-retirement seminars were not an assignment of work, explaining that they were voluntary and were not a condition of employment, therefore, the Respondent had no duty to bargain over the matter. (G.C. Ex. 3).

Union President Hembd replied to Evans that same day, explaining that the pre-retirement seminars were a benefit that had been provided to employees for years and that the provision of information about retirement was a condition of employment, that time and appropriated funds had been used in the past to provide such seminars because it was a condition of employment, and such training was necessary for employees who had to make decisions about timing and related matters that impacted the employee upon retirement. The email also indicated that employees would be adversely affected by changing the manner in which pre-retirement information was provided to employees and requested the Respondent to bargain over the changes. (G.C. Ex. 4). Evans responded to the second email on the same day and his reply to the second was similar to his first, emphasizing the voluntary nature of the participation and again contending that the seminars were neither an assignment of work nor a condition of employment. (*Id.*). He further opined that employees would not be adversely affected by not receiving face-to-face informational briefings because the Benefits and Entitlements Team (BEST) at Randolph AFB was available to them as well as the information regarding retirement that was now available on the Air Force's website. (i*d.*). No on-site, face-to-face pre-retirement seminars have been conducted at Luke Air Force Base since those conducted in January 2009. (Tr. 141).

DISCUSSION

Position of the Parties

General Counsel

The General Counsel alleges that Respondent violated section 7116(a)(1) and (5) of the Statute when it failed to provide the Union with notice or an opportunity to bargain prior to eliminating pre-retirement seminars provided on-site via live lecture and implementing a policy of providing pre-retirement counseling using self-guided online modules located on its computer system. The General Counsel contends that this constituted a change in conditions

of employment that was more than *de minimis*. While the General Counsel concedes that the changed involved the exercise of a management right under § 7106(a) of the Statute, it asserts that the Respondent had an obligation to bargain over procedures and appropriate arrangements for employees adversely affected by the change. Among the topics it identifies as potential areas for negotiation are access to the computer system, availability of computers, and designation of appropriate periods of time for using the online modules as well as telephonic consultation with the retirement experts located at Randolph Air Force Base. As a remedy, the General Counsel seeks an order imposing *status quo ante* relief, a requirement that the Respondent bargain to the extent required by the Statute upon request, and posting of a notice to employees signed by the Commander of Luke Air Force Base.

Respondent

The Respondent denies that it violated the Statute. In its answer and in testimony presented at hearing, the Respondent claimed that the failure to give notice and refusal to bargain upon the decision to change the manner in which pre-retirement training was provided from seminars with live lecture to online review of training modules did not change a condition of employment. However, Respondent's post hearing brief raised for the first time, the argument that the change was a permissive topic subject to bargaining only at the election of the Respondent under § 7106(b)(1) of the Statute, and one for which it elected to not bargain. In addition to asserting that no change in a condition of employment was made and that the change was a permissive subject, the Respondent contends that the impact of changing the method by which pre-retirement information and counseling was presented to employees was *de minimis*. Finally, the Respondent contends that a *status quo ante* remedy is inappropriate because the decision to not provide notice and an opportunity to bargain was based upon valid legal theories and that a considerable amount of money was spent upon providing pre-retirement training online which covers the same material as the live face-to-face pre-retirement seminars previously provided at Luke Air Force Base.

CONCLUSIONS OF LAW

Respondent Failed to Give the Union Notice and an Opportunity to Bargain

It is well established that prior to implementing a change in conditions of employment of bargaining unit employees, an agency is generally required to provide the exclusive representative of those employees with notice 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. *U.S. Dep't of the Air Force, AFMC, Space Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009)(*AFMC*).

In this case, the Respondent does not dispute that it did not provide the Union notice and an opportunity to bargain prior to eliminating the pre-retirement seminars presented on base by live lecture and implementing a policy of providing pre-retirement training using online self-guided modules that are available on its computer system. The Respondent

contends it had no obligation to provide notice and an opportunity to bargain because it did not change a condition of employment and if it did change a condition of employment it only changed the method in which the work was performed, and thus the change was subject to bargaining only at its election under § 7106(b)(1) of the Statute.

In resolving this matter, it is important to emphasize that the change imposed by the Respondent was a change in the manner by which pre-retirement information and counseling was presented to employees. While the agency did not cease providing pre-retirement training, it changed the amount of training from eight hours provided on-site by a qualified instructor, to about two and one half hours of individual self-directed modules provided on a computer system.

While testimony during the hearing suggested that there were eight online modules related to retirement that lasted a little more than five hours, the information in Respondent Exhibits 1 and 2 indicates that included in the eight modules is one entitled Financial Planning that was approximately 80 minutes long and a module titled New Employee Benefits Orientation that lasted approximately 88 minutes. While those modules are consistent with other educational requirements imposed by DoD Instruction 1412.3 and Air Force Policy Directive 36-8, they do not directly relate to retirement. In fact, when all the modules that relate to retirement, including those that are somewhat tangential are considered, the online training materials related to retirement that the Respondent now makes available to employees adds up to less than two and one-half hours of material.

The ability to retire and be entitled to an annuity as a result of dedicating years of service to one's country is one of the essential benefits of federal employment. Being able to retire at the conclusion of a long career with certainty that the federal government will honor its promise to provide an annuity in an amount that is consistent with the commitment it made at the start of that career is a prime reason employees forgo private sector riches and devote their lives to public service. In short, for a federal employee who commits their entire adult working life to federal service, a future retirement with the promised annuity is a benefit every bit as important as the compensation they earn daily and it may surpass that benefit in terms of importance. For this reason, prior cases involving the compensation benefit provide solid guidance in resolving the issues presented in this case. *U.S. Dep't of the Treasury*, 27 FLRA 919 (1987); *Dep't of the Navy, Mare Island Naval Shipyard, Vallego, Cal.*, 25 FLRA 465 (1987)(*Mare Island*).

While these cases involved changing the manner in which compensation was delivered to employees, the fact that they deal only with the manner in which paychecks were distributed, rather than an alteration, elimination or reduction of pay, enlightens the issues present in this matter. They provide guidance with respect to the Respondent's argument that changing the manner in which pre-retirement information was presented was a permissive subject, as well as the Respondent's argument that there was no change to a condition of employment.

On November 30, 1984, the Authority issued decisions and orders on negotiability issues in two cases involving the distribution of pay checks. *Fed. Employees Metal Trades Council, AFL-CIO*, 16 FLRA 619 (1984); *Am. Fed. of Gov't Employees, Local 1533*, 16 FLRA 623 (1984). Both cases involved union proposals that gave new employees the right to decide between having their paychecks distributed by hand at the work site or mailed to their homes, and to not be required to use electronic deposit. Upon initial review, the Authority determined that distribution of paychecks was a method or means of performing work, and the proposals were negotiable only at the agency's election under § 7106(b)(1) of the Statute. However, the U.S. Court of Appeals for the Ninth Circuit, rejected that decision as too broad, concluding that if the manner of distributing paychecks was a method or means of performing work, then any benefit like wages, hours, and working conditions that was a means of retaining a stable and committed workforce would fit within the methods or means exception of the Statute. *Fed. Employees Metal Trades Council v. FLRA*, 778 F.2d 1429 (9th Cir. 1985).

Opon remand from the Ninth Circuit, the Authority determined that the manner in which paychecks were distributed was not a method or means of performing work within the meaning of § 7106(b)(1) of the Statute. *Mare Island*, 25 FLRA at 465. The Authority then went on to conclude that the manner in which paychecks were delivered was a substantive condition of employment and rejected the argument that the procedure nature of the matter precluded it from being a condition of employment. The Authority held that the manner of paycheck delivery clearly fell within the definition of condition of employment in § 7103(a)(14) of the Statute and that its prior contrary holding would no longer be followed. *Mare Island*, 25 FLRA at 469.

Shortly after deciding *Mare Island*, the Authority addressed similar issues in *U.S. Dep't of the Treasury*, 27 FLRA 919, (1987). That unfair labor practice case involved a directive issued by the Department of the Treasury (*Treasury*) which required the Internal Revenue Service (*IRS*) and the U.S. Customs Service (*Customs*) to discontinue the practice of delivering paychecks, earning statements, savings bonds and W-2 forms, at an employee's worksite through a designated agent and required the employees to elect either electronic direct deposit or delivery by U.S. mail to their home. In its decision, the Authority concluded that the directive issued by Treasury precluded the IRS and Customs from bargaining as to the substantive matters encompassed in the directive and issuance of the directive was an unfair labor practice. As the *Mare Island*, *Treasury* and *Customs* cases all hold that the manner in which a benefit flowing from employment is related enough thereto to constitute a condition of employment and is not a method or means of performing work, the Respondent's arguments to the contrary in this case must fail.

Having determined that the manner in which training related to the benefit of retirement is not a method or means of performing work within the meaning of § 7106(b)(1), but is a condition of employment because it flows from the employment relationship, the Respondent's assertion that the change had a *de minimis* effect on conditions of employment must be considered.

In assessing whether the effect of a decision on conditions of employment is more than *de minimis*, 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. *E.g.*, *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000). In this case, the General Counsel and the Respondent offered various claims and tendered testimony from their witnesses regarding the relative value and merit of pre-retirement training presented in the differing formats. While many of the claims were conflicting and some of the testimony dubious given the witnesses' relative lack of experience or expertise with one or both of the formats they were attempting to assess and compare, a *de minimis* argument fails whenever the change has a negative effect on bargaining unit employees. Because the benefit of an annual opportunity to attend an eight hour seminar about retirement presented by a subject matter expert is not one that cannot be replaced with two and one-half hours of slide presentations with voice over narration. Furthermore, this change had more than a *de minimis* impact upon bargaining unit employees and that impact was negative.

Considered alone, the difference in time devoted to retirement training presented by the two training formats fails the *de minimis* standard. In fact, even if all the modules present in the Respondent's online course offerings were considered, the time difference in the online training versus the live seminar would be almost three hours, and such a difference would not constitute a *de minimis* change. However, the benefit bargaining unit employees lost as a result of the time reduction does not end with them receiving less training about their retirement options. They also lost the ability to ask questions and seek clarification in real time from a subject matter expert who was present in the room when their question arose. While the Respondent argues that employees have the ability to ask questions of subject matter experts located in their BEST, that team is located at Randolph Air Force Base, Texas. An employee at Luke Air Force Base can only consult with this team over the telephone and it requires a cumbersome process of reviewing the online training, annotating questions, some of which may require answers before the current online training module can be continued, then making a telephone call and getting an answer. While there was conflicting testimony about the time it takes to get a call through, let alone getting a reliable response to the question, the fact that getting a question answered in real time by a real person who is a recognized expert was lost, makes that another change that was more than *de minimis*.

In support of its claim that switching pre-retirement training from live seminars conducted on base to online self-directed modules on the Respondent's computer system had more than a *de minimis* effect on bargaining unit employees, the General Counsel argues that online slide shows are not as effective as face-to-face training, citing a factual determination in an earlier Authority decision. *AFMC*, 64 FLRA at 166. While the effectiveness of training provided by a live, face-to-face presentation as compared to a self-directed online slide show with voice over narration can be debated, the one thing that is certain is that they are vastly different formats. Furthermore, their effectiveness will vary in accordance with the learning ability of the individual. Some are visual learners, some are auditory learners and some are tactile learners. Some learn better in a group, others excel in a self-directed environment free of others, and while both sides in the case advocated for the

superiority of their preferred manner of providing pre-retirement training, in presenting the differences, each proves this was more than a *de minimis* change. Furthermore, the question of which manner of training might be best for a given group of employees is one that should be resolved by the parties in the course of negotiations and not through unilateral implementation of a change that resulted in bargaining unit employees receiving less training about their retirement benefit.

Therefore, I find that the Respondent violated the Statute when it failed to provide the exclusive representative with notice and an opportunity to bargain over changes in the manner in which the mandated pre-retirement training would be provided to bargaining unit employees.

REMEDY

The General Counsel requests a return to the *status quo ante*. Under Authority precedent, the factors to weigh in determining whether *status quo ante* relief is appropriate are: (1) whether, and when, notice was provided to the Union concerning the change; (2) whether, and when, the union requested bargaining; (3) the willfulness of the agency's conduct in failing to meet its bargaining obligation; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, or to what degree, the *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982).

In this case, the Respondent admits that it did not provide notice of the change to the Union because it did not believe it was a change to conditions of employment. While the Respondent contends that its decision was based upon valid legal theories, an agency's honest belief that it had no duty to bargain does not excuse the failure or mitigate its willfulness. *U.S. Dep't of Energy, WAPA, Golden, Colo.*, 56 FLRA 9, 13 (2000). Furthermore, the Union requested bargaining on the change prior to the last live, face-to-face seminar being conducted, when the notice of the training sent to bargaining unit employees indicated that this type of seminar would probably not be offered again. (G.C. Exs. 2 & 3). Thus, the first three factors all weigh in favor of implementing *status quo ante* relief.

With respect to the fourth factor, the impact upon employees was a reduction in the amount of retirement training they were provided, and a loss of the ability to get, on at least an annual basis, information about retirement from a subject matter expert in a convenient group setting where face-to-face interaction was available and employees who were planning to retire within five years could ask questions and share concerns. In short, the new Air Force training scheme gave employees with careers long enough to earn a retirement about three hours of self-directed, online training and the ability to call BEST. Thus, the new scheme altered their ability to prepare for retirement in a negative fashion.

The final factor to be considered is whether, or to what degree a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. In this regard, the Respondent argues that it spent a considerable amount of money providing online seminars which cover the same material as the live seminars and that it would be

inefficient and a waste of Respondent's resources in duplicating the seminars by reverting back to providing live seminars. However, for the reasons outlined above, I find that the modules provided to employees online either do not cover the same material, or they do not cover it to the same extent and depth as the live seminars. One cannot duplicate eight hours of live face-to-face training by providing less than three hours of training online and allowing employees to ask questions on a telephone call sometime later. Getting an answer later over the telephone does not duplicate getting an answer to a question as it arises during a live presentation. Thus, the argument that requiring a return to live seminars would be an inefficient use of resources is unconvincing. In fact, what it would do is reflect a legitimate intent to provide the training that is mandated. As to the concern that it would be a waste of resources, testimony at the hearing indicated that the cost of each seminar was two-thousand, five hundred dollars ($2,500). Thus, the annual cost for one seminar aimed at CSRS employees and another prepared for FERS employees at Luke AFB was five-thousand dollars ($5,000). (Tr. 140). The Respondent offered no evidence with respect to the cost of preparing the online seminars, and while there is an inherent value that flows from the economy of scale achieved by providing canned training online, offering a live seminar to CSRS and FERS employees on an annual basis at a cost of five-thousand dollars would not disrupt or impair the efficiency and effectiveness of Air Force operations. Therefore, every factor of the *status quo ante* evaluation weighs in favor of ordering *status quo ante* relief.

RECOMMENDATION

I find that the Respondent violated § 7116 (a)(1) and (5) of the Statute and recommend the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Authority's rules and regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the Air Force, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Eliminating on-site, live pre-retirement seminars for bargaining unit Employees without first notifying the American Federation of Government Employees, Local 1547 (Union), and providing it with an opportunity to bargain over the change to the extent required by the Statute.

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

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

(a) Restore the on-site, live pre-retirement seminars.

(b) Upon request of the Union, bargain concerning the elimination of on-site, live pre-retirement seminars and the substitution of on-line electronic and telephonic retirement information to employees to the extent required by the Statute.

(c) Post at Luke Air Force Base, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of Luke Air Force Base, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, D.C., October 26, 2012

_____

CHARLES R. CENTER
Chief 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, Luke 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 eliminate on-site, live pre-retirement seminars for our employees without first bargaining with the American Federation of Government Employees, Local 1547 (Union), and providing it with an opportunity to bargain to the extent required by the Statute.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce bargaining unit employees in the exercise of their right under the Statute.

WE WILL, restore the on-site, live pre-retirement seminars for bargaining unit employees.

WE WILL, upon request, bargain with the Union concerning the elimination of the on-site, live pre-retirement seminars and the online, electronic and telephonic substitute to the extent required by the Statute.

_____

(Agency/Activity)

Dated:_____ By:_____

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1391 Speer Boulevard, Suite 300, Denver, CO 80204, and whose telephone number is: (303) 844-5224.