

**66 FLRA No. 136**

UNITED STATES  
DEPARTMENT OF AGRICULTURE  
FOOD SAFETY AND INSPECTION SERVICE  
BOAZ, ALABAMA  
(Respondent)

and

NATIONAL JOINT  
COUNCIL OF FOOD INSPECTION LOCALS  
AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
AFL-CIO  
(Charging Party/Union)

AT-CA-08-0394

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DECISION AND ORDER

June 14, 2012

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Before the Authority: Carol Waller Pope, Chairman, and  
Thomas M. Beck and Ernest DuBester, Members

**I. Statement of the Case**

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally reducing the number of employees working overtime, and violated § 7116(a)(1) and (2) of the Statute by retaliating against employees for helping to file a grievance. The Judge found that the Respondent violated § 7116(a)(1), (2), and (5) as alleged.

For the reasons that follow, we deny the Respondent's exceptions and: (1) find that the Respondent violated § 7116(a)(1) and (5) of the Statute; (2) adopt, without precedential significance, the Judge's finding that the Respondent violated § 7116(a)(1) and (2) of the Statute; and (3) adopt the Judge's status quo ante and backpay remedies.

**II. Background and Judge's Decision**

**A. Background**

The facts are set forth in detail in the Judge's decision and are summarized only briefly here.

The Respondent employs food and safety inspectors to monitor operations at chicken-processing plants. *See* Judge's Decision at 3. Generally, the Respondent assigns two inspectors to each shift in each of the forty plants in the district at issue here. *See id.* at 15. When plants operate past the end of the evening shift, inspectors are required to stay and work overtime, performing what are known as "pack-out" duties. *Id.* at 3. *See also id.* at 10-11 (citing 9 C.F.R. § 381.37; Article 24, Section 1(a) of the parties' collective-bargaining agreement (CBA)).<sup>1</sup>

From August 2003 to July 2007, it was the Respondent's policy (the original policy) that both inspectors assigned to a plant's evening shift would perform pack-out duties. *See id.* at 15. In July 2007, the Respondent introduced a new policy (the new policy), which provided that only one inspector was needed to perform pack-out duties at most of the plants in the district. *See id.* at 4-5, 15. However, at the plant at issue here (the disputed plant), and at two other plants, the Respondent continued to follow the original policy, and both evening-shift inspectors continued to perform pack-out duties. *See id.* at 5; *see also id.* at 17, 19.

In March 2008, the Union notified management that it intended to file a grievance challenging the actions of a supervisor at the disputed plant (the supervisor). *See id.* at 4-5, 15. According to the Union, the supervisor violated the CBA when she filled in for an employee on sick leave, instead of assigning that work to a bargaining-unit employee. *See id.* at 4. On April 15, 2008, the Union filed the grievance. *See id.*

Shortly thereafter, the Respondent directed the supervisor to implement the new policy at the disputed plant by reducing, from two to one, the number of inspectors performing pack-out duties. *See id.* at 4-5, 16. The Respondent also directed the supervisor to make a similar change at another plant (second plant), whose inspectors she also oversaw. The supervisor informed inspectors at the disputed plant that, as of May 1, 2008, only one inspector would be needed to perform pack-out duties. *See id.* at 4. But the Respondent did not announce a similar change at the second plant. *See id.* at 4-5, 16.

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<sup>1</sup> Article 24, Section 1(a) of the CBA states, in pertinent part: "If overtime is required, it is the responsibility of the employee covering the assignment." Judge's Decision at 10.

On May 1, 2008, the Respondent implemented the reduction at the disputed plant. *See id.* at 4. The Respondent did not notify the Union or provide it with an opportunity to bargain over the reduction. *See id.* at 4, 6, 13. In response, the Union filed a ULP charge, and the GC issued the complaint at issue in this case. *See id.* at 1.

#### B. Judge's Decision

The Judge determined that by reducing the number of inspectors performing pack-out duties at the disputed plant, the Respondent changed a condition of employment, specifically, the opportunity to work overtime. *See Judge's Decision* at 13; *see also id.* at 7-8. The Judge also found that the Respondent "concede[d]" that it did not provide the Union with notice and an opportunity to bargain over the change. *Id.* at 6; *see also id.* at 13.

The Judge then considered the Respondent's claim that it was "required" to make the change at the disputed plant to comply with Food Safety Inspection Service Directive 12,600.2 (the directive)<sup>2</sup>, "national

<sup>2</sup> The directive states, in pertinent part:

A. The [Respondent] will take into account the efficient and effective use of inspection program personnel when approving establishments' operating schedules. [The Respondent is] also to consider the efficient and effective use of inspection resources when assigning inspection program personnel to perform . . . overtime service.

. . . .

C. [The Respondent is] to make reasonable efforts to combine establishments from regular inspection assignments during overtime periods to form temporary overtime assignments in an effort to equitably distribute the amount of reimbursable charges among establishments, while assigning overtime to inspection program personnel in a manner that provides for the efficient and effective use of inspection program personnel.

D. [The Respondent] should consider the following factors when forming assignments for inspection coverage during periods of reimbursable overtime . . . :

1. *The expected inspection workload during the reimbursable overtime period* — [the Respondent is] to make a concerted effort to form temporary overtime inspection assignments that approximate as closely as possible a full workload for the assigned employee. . . .

2. *The proximity of the establishments that will operate during overtime periods* . . . .

3. *The Labor-Management Agreement (LMA)* . . . [the Respondent is]

policy[. . .] legal billing," and the Respondent's computerized method of assigning work (MAW).<sup>4</sup> *Id.* at 8. The Judge noted, in this regard, that while the Respondent bears the cost of inspectors' regular hours, the plants reimburse the Respondent for inspectors' overtime and holiday work. *See id.* at 9; *see also id.* at 3 (citing 7 U.S.C. § 2219a).<sup>5</sup>

The Judge acknowledged the Respondent's claim that the directive required it to consider an inspector's "expected inspection workload" when assigning an inspector to perform pack-out duties, and the Respondent's claim that only one inspector was needed to perform pack-out duties. *Id.* at 8. However, the Judge stated that, under the directive, an inspector's workload was "but one" factor to consider, and was "not a controlling factor." *Id.* In this regard, the Judge found that the directive also required the Respondent to ensure that overtime assignments be "made in a manner consistent with" the CBA. *Id.* The Judge found that, in the CBA, the Union had bargained for the right to have two inspectors at the disputed plant in return for the Respondent's implementation of the MAW. *See id.* at 8-9. Additionally, the Judge found that the purpose of Article 24, Section 1(a) of the CBA was to "require the two inspectors . . . to remain on duty" past the end of the regular shift. *Id.* at 11. "[E]liminating overtime opportunities," the Judge stated, was the "very opposite" of the provision's "negotiated purpose." *Id.* Thus, the

to make temporary overtime assignments in a manner that is consistent with the requirements of the LMA.

Directive at 4-5. *See also* Exceptions, Attach. 2; Judge's Decision at 8.

<sup>3</sup> The Respondent does not explain what "national policy" is. *See* Exceptions at 7. *See also* Judge's Decision at 8. Therefore, we do not consider the Respondent's arguments relating to "national policy" further.

<sup>4</sup> Before the Judge, the Respondent also referred to another directive, FSIS Directive 12,600.1. *See* Judge's Decision at 8. As the Respondent's arguments before the Authority do not pertain to that directive, we do not consider it.

<sup>5</sup> Title 7 § 2219a of the United States Code states, in pertinent part:

The Secretary of Agriculture may--

(1) pay employees of the Department of Agriculture employed in an establishment subject to the Federal Meat Inspection Act (21 U.S.C. 601 et seq.) or the Poultry Products Inspection Act (21 U.S.C. 451 et seq.) for all overtime and holiday work performed at the establishment at rates determined by the Secretary, subject to applicable law relating to minimum wages and maximum hours; and

(2) accept from the establishment reimbursement for any sums paid by the Secretary for the overtime and holiday work, at rates determined under paragraph (1).

Judge determined that the Respondent's unilateral action at the disputed plant was not consistent with the CBA. *See id.* at 8-9, 11. Moreover, the Judge determined that nothing in the directive compelled the Respondent to implement the new policy. *See id.* at 12; *see also id.* at 8, 16. Thus, the Judge rejected the Respondent's claim that the directive required it to implement the new policy.

With regard to the Respondent's "legal billing" argument, the Judge reasoned that if assigning two inspectors to perform pack-out duties were illegal, then the Respondent would have "immediately and unilaterally implement[ed] the same change at other plants" like it had at the disputed plant. *Id.* at 9. But the Judge found that the Respondent had not done so at the second plant. *See id.* at 4-5, 16. The Judge also reasoned that if it was necessary to have two inspectors present during regular hours, then having two inspectors present during overtime could not be a "legitimate overbilling concern." *Id.* at 9. Further, the Judge noted that the Respondent did not present evidence that the disputed plant had "ever lodged a complaint, contested a bill[,] or filed suit over being billed for the use of two inspectors" performing pack-out duties. *Id.* Additionally, the Judge found, even if the MAW indicated that only one inspector was needed to perform pack-out duties at the plants in the district generally, that was not the case at the disputed plant. *See id.* In this connection, the Judge stated that the MAW "fails to recognize that the [disputed] plant runs two separate processing lines in different locations during overtime pack[-]out," and that those lines occur on "opposite sides of a fixed wall." *Id.* The Judge determined that the Respondent's "legal billing" argument was "more litigation argument than honest belief supported by legal authority," and that the Respondent "offered no support for such a claim, other than a tortured reading of its own directives." *Id.* at 10.

Based on the foregoing, the Judge found that the Respondent had not demonstrated that the original policy was illegal. *See id.* at 10, 13. Thus, the Judge found that the Respondent was not entitled to unilaterally implement the new policy at the disputed plant, and that it violated § 7116(a)(1) and (5) of the Statute by doing so. *See id.* at 13. In addition, the Judge found that the Respondent's actions were discriminatory, in violation of § 7116(a)(1) and (2) of the Statute.<sup>6</sup> *See id.* at 16-17.

The Judge also determined that a status quo ante remedy was appropriate. *See id.* at 18 (citing *Fed. Corr. Inst.*, 8 FLRA 604, 605-06 (1982)). He also awarded backpay under the Back Pay Act. *See id.* (citing

*U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998)).

### III. Positions of the Parties

#### A. Respondent's Exceptions

The Respondent asserts that it was entitled to implement the new policy at the disputed plant without bargaining, and that the status quo ante remedy is inappropriate, because the original policy was unlawful. *See* Exceptions at 9. Specifically, the Respondent contends that assigning two inspectors to perform pack-out duties is "contrary to [the] MAW, [the directive,] . . . and legal billing." *Id.* at 7 (citing 7 U.S.C. § 2219a; 9 C.F.R. §§ 307.4, 381.37).<sup>7</sup> With regard to the directive, the Respondent argues that the original policy is contrary to the requirement that the Respondent: (1) "consider the 'efficient and effective' use of inspection resources when approving establishments' operating schedules and [when] assigning inspection . . . personnel to perform . . . overtime;" and (2) "make a concerted effort" to form assignments that "approximate as closely as possible a full workload for the assigned employee." *Id.* at 8 (quoting the Directive at 4-5). The Respondent also asserts that it is "common sense that . . . overbilling a plant for inspection services would be . . . illegal." *Id.* With regard to the Judge's finding that the directive required the Respondent to ensure that overtime assignments be "made in a manner consistent with the [CBA]," Judge's Decision at 8, the Respondent argues: "Although the [Judge] is correct in his interpretation for normal situations involving overtime assignments[,] that does not apply in the present case, because the practice of using two [inspectors] to perform overtime pack[-]out duties [was] unlawful," *id.* at 8-9.

Also, the Respondent contends that it cannot assign inspectors to a plant without seeking reimbursement because, it argues, "Congress has not appropriated funds for the Respondent to pay overtime . . . to inspectors working in . . . plants." *Id.* at 7 (citing 7 U.S.C. § 2219a). Additionally, the Respondent claims that its "obligations under federal collective bargaining law are circumscribed by the limitations imposed by federal appropriations law." *Id.* (citing *U.S. Dep't of the*

<sup>6</sup> No exceptions were filed to this finding. *See* Exceptions at 4-5, 7-9. Accordingly, we adopt the finding without precedential significance under § 2423.41 of the Authority's Regulations. *E.g.*, *U.S. Sec. & Exch. Comm'n*, 62 FLRA 432, 433 n.4 (2008).

<sup>7</sup> Title 9 § 307.4 of the Code of Federal Regulations states, in pertinent part: "Each official establishment shall submit a work schedule to the area supervisor for approval. In consideration of whether the approval of an establishment work schedule shall be given, the area supervisor shall take into account the efficient and effective use of inspection personnel." 9 C.F.R. § 307.4(d)(1). Title 9 § 381.37 of the Code of Federal Regulations states, in pertinent part: "Each official establishment shall submit a work schedule to the area supervisor for approval. In consideration of whether the approval of an establishment work schedule shall be given, the area supervisor shall take into account the efficient and effective use of inspection personnel." 9 C.F.R. § 381.37(d)(1).

*Navy v. FLRA*, 665 F.3d 1339, 1347-48 (D.C. Cir. 2012) (*Navy*). See also *id.* at 6 (citing 7 U.S.C. § 2219a; 31 U.S.C. §§ 1301, 1341, 1350).<sup>8</sup> Finally, the Respondent asserts that Judge’s recommend status quo ante remedy is “inconsistent with [both the directive] and law,” specifically, 21 U.S.C. § 695.<sup>9</sup> *Id.* at 9.

#### B. GC’s Opposition

As relevant here, the GC argues that the Respondent fails to cite a law or government-wide regulation barring the original policy, and that the directive, the MAW, and 9 C.F.R. §§ 307.4 and 381.37 do not bar the original policy. See Opp’n at 10; see also *id.* at 12, 14. With respect to the Respondent’s claims regarding appropriations, the GC asserts that “Congress appropriated funds for the Respondent to conduct inspections.” *Id.* at 9 (citing 21 U.S.C. § 469). With regard to the Respondent’s citation to *Navy*, the GC argues that this matter is distinguishable because the Judge’s recommended order would “not require the Respondent to use appropriated funds to pay for personal expenses.” *Id.* (citing *Navy*, 665 F.3d at 1342, 1349-50).

#### IV. Analysis and Conclusions

The Authority has held that an agency may implement a change to correct an unlawful practice without first bargaining over the change.<sup>10</sup> See, e.g.,

*U.S. Immigration & Naturalization Serv., Wash., D.C.*, 55 FLRA 69, 73 n.8 (1999) (Member Wasserman dissenting) (*INS*). See also *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1530-31 (1994) (*Portsmouth*). The Authority has also held that it will not order a status quo ante remedy that would result in the reinstatement of an illegal practice. E.g., *GSA, Nat’l Capital Region, Fed. Protective Serv. Div., Wash., D.C.*, 52 FLRA 563, 568 (1996). See also *Portsmouth*, 49 FLRA at 1532-33. To support its claim that the original policy was unlawful, the Respondent cites: 7 U.S.C. § 2219a; 9 C.F.R. §§ 307.4 and 381.37; the directive; the MAW; principles of “legal billing;” and 21 U.S.C. § 695. Exceptions at 5-7, 9.

With regard to 7 U.S.C. § 2219a, that law states, as relevant here, that the Secretary of Agriculture “may . . . pay employees . . . for all overtime and holiday work performed at” a plant, and that the Secretary “may . . . accept from the [plant] reimbursement for any sums paid by the Secretary for the overtime and holiday work.” 7 U.S.C. § 2219a. The Respondent argues that 7 U.S.C. § 2219a prohibits the Respondent from paying inspectors to perform pack-out duties without receiving reimbursements from the plants. See Exceptions at 7. Even assuming that the Respondent’s interpretation of 7 U.S.C. § 2219a is correct, nothing in the original policy prevented the Respondent from seeking reimbursements from plants. See Judge’s Decision at 18-20. The Respondent also asserts that 7 U.S.C. § 2219a indicates that “Congress has not appropriated funds for the Respondent to pay overtime . . . to inspectors working in . . . plants.” Exceptions at 7. But as stated above, § 2219a provides that the Respondent “may . . . pay employees . . . for all overtime and holiday work performed at” a plant, and that the reimbursements from a plant cover costs already “paid by the Secretary.” 7 U.S.C. § 2219a. Further, under 21 U.S.C. § 469, Congress “authorized to be appropriated such sums as are necessary to carry out the provisions” of Title 21, Chapter 10 of the United States Code, which pertains to poultry inspection. 21 U.S.C. § 469. Thus, the Respondent does not demonstrate that Congress has not appropriated funds for the inspection work at issue here.

With regard to 9 C.F.R. §§ 307.4 and 381.37, the directive, the MAW, and principles of “legal billing,” the Respondent does not explain how the original policy violated these regulations, policies, practices, or principles. See Exceptions at 7-8. In this connection, the directive, and §§ 307.4 and 381.37, require the

<sup>8</sup> Title 31 § 1301 of the United States Code states, in pertinent part: “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” Title 31 § 1341 of the United States Code states, in pertinent part, that an officer or employee of the United States government may not “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,” and that he or she may not involve the government in a “contract or obligation for the payment of money before an appropriation is made unless authorized by law.” 31 U.S.C. § 1341(a)(1)(A) and (B). Title 31 § 1350 of the United States Code states, in pertinent part, that an officer or employee of the United States government “knowingly and willfully violating section 1341(a) . . . shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.” 31 U.S.C. § 1350.

<sup>9</sup> Title 21 § 695 of the United States Code states, in pertinent part: “The cost of inspection . . . under the requirements of laws relating to Federal inspection of meat and meat food products shall be borne by the United States except the cost of overtime and holiday pay paid pursuant to section 2219a of Title 7.” 21 U.S.C. § 695. We note that 21 U.S.C. § 468 — which appears to be the more relevant statutory section because it relates to poultry inspection — states, in pertinent part: “The cost of inspection . . . shall be borne by the United States, except the cost of overtime and holiday pay paid pursuant to . . . section 2219a of Title 7.”

<sup>10</sup> We note that, once an agency has implemented a change to correct an unlawful practice, the agency must provide the exclusive representative with notice and an opportunity to

bargain over the impact and implementation of the change. See *AFGE, Local 1367*, 63 FLRA 655, 657 (2009); *Portsmouth*, 49 FLRA at 1527-28; *Dep’t of the Interior, U.S. Geological Survey, Conservation Div., Gulf of Mex. Region, Metairie, La.*, 9 FLRA 543, 545-46 (1982). We also note that there is no dispute that the Respondent failed to do that in this case. See Judge’s Decision at 13; Exceptions at 7-9.

Respondent to consider “efficient and effective use of inspection personnel” when deciding whether to approve a plant’s work schedule. 9 C.F.R. §§ 307.4, 381.37; Directive at 4. *See also* Exceptions at 8. But the approval of a plant’s work schedule is not at issue here and, therefore, that aspect of the directive, and §§ 307.4 and 381.37, are not relevant. *See* Exceptions at 8. *See also* Judge’s Decision at 4-5.

The Respondent also asserts that the directive required it to: (1) consider the efficient and effective use of inspection resources when assigning inspectors to perform overtime; and (2) make a concerted effort to form assignments that approximate as closely as possible a full workload for the assigned employees. Exceptions at 8. But the Respondent does not demonstrate that these requirements rendered the original policy unlawful. *See* Exceptions at 7-9. *See also* Judge’s Decision at 8, 12, 16. In this regard, the Judge found that the Respondent “deems it necessary to use two” inspectors during regular hours at the disputed plant, and that one inspector performing pack-out duties could not simultaneously supervise both of the processing lines at the disputed plant. *Id.* at 9. The Respondent does not except to these findings. *See* Exceptions at 7-9. Thus, the Respondent provides no basis for finding that the original practice required the Respondent to use inspection resources inefficiently or ineffectively, or to form assignments that did not closely approximate a full workload for the assigned inspectors. *See id.* Moreover, the directive required the Respondent to make overtime assignments “in a manner that is consistent with the requirements” of the CBA, and the Respondent does not except to the Judge’s finding that unilaterally implementing the new policy was inconsistent with the CBA. Directive at 5; *see also* Judge’s Decision at 8-9, 11; Exceptions at 8-9. Therefore, the Respondent does not demonstrate that the Judge’s decision is contrary to the directive. Additionally, the Respondent does not explain how the MAW or principles of “legal billing” rendered the original policy unlawful. *See* Exceptions at 7-9.

The Respondent also argues that its “obligations under federal collective bargaining law are circumscribed by the limitations imposed by federal appropriations law.” *Id.* at 7 (citing *Navy*, 665 F.3d 1339). *See also id.* at 6 (citing 31 U.S.C. §§ 1301, 1341, 1350). The Anti-Deficiency Act, 31 U.S.C. § 1341, precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation. 31 U.S.C. § 1341(a)(1)(A) and (B); *Office of the Adjutant Gen., Mo. Nat’l Guard, Jefferson City, Mo.*, 58 FLRA 418, 420 (2003). The Purpose Statute, 31 U.S.C. § 1301, prohibits the use of funds for purposes other than those for which the funds were appropriated “except as otherwise provided by law.” 31 U.S.C. § 1301; *AFGE*,

*Local 1647*, 59 FLRA 369, 371 (2003). The Respondent does not assert, or provide any evidence, that reinstating the original policy would require it to: expend funds in excess of those appropriated or prior to their appropriation; or use funds for purposes other than those for which the funds were appropriated. *See* Exceptions at 6-9. Thus, the Respondent’s reliance on 31 U.S.C. §§ 1341 and 1301 is misplaced.<sup>11</sup>

With regard to the Respondent’s reliance on *Navy*, in that decision, the court found that federal appropriations law prohibited an agency from providing employees with free bottled water if the water from the agency’s drinking fountains was safe to drink. *See Navy*, 665 F.3d at 1339, 1348, 1350-51. The Respondent does not explain how the court’s finding in *Navy* relates to, or bars, the original policy. *See* Exceptions at 7.

Finally, 21 U.S.C. § 695 applies to reimbursements for overtime performed by meat inspectors, not the poultry inspectors at issue here. To the extent the Respondent intended to refer to 21 U.S.C. § 468, that statute provides, in pertinent part, that the “cost of inspection . . . shall be borne by the United States, except the cost of overtime and holiday pay paid pursuant to . . . section 2219a of Title 7.” 21 U.S.C. § 468. The Respondent does not explain how the original policy was inconsistent with 21 U.S.C. § 468.

For the foregoing reasons, the Respondent has not demonstrated that the original policy was unlawful, or that the status quo ante remedy would result in the reinstatement of an illegal practice. Therefore, we adopt the Judge’s finding that the Respondent violated § 7116(a)(1) and (5) by unilaterally terminating the original policy, as well as the Judge’s status quo ante and backpay remedies.

## V. Order

Pursuant to § 2423.41 of the Authority’s Regulations and § 7118 of the Statute, the Respondent shall:

### 1. Cease and desist from:

(a) Unilaterally changing employees’ assignments without providing the Union with notice and an opportunity to bargain over the change to the extent required by the Statute.

<sup>11</sup> As indicated previously, 31 U.S.C. § 1350 subjects violators of 31 U.S.C. § 1341(a) to various penalties. As we find that the Respondent has failed to demonstrate a violation of 31 U.S.C. § 1341(a), we do not consider 31 U.S.C. § 1350 further.

(b) Discriminating against employees by changing their assignments because they were involved in activities protected under the Statute.

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

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

(a) Rescind the May 1, 2008, change to employees' assignments.

(b) Provide the Union with notice and an opportunity to bargain over changes to employees' assignments to the extent required by the Statute.

(c) Make whole any employees adversely affected by the May 1, 2008, change in assignments by paying them backpay, with interest, for all pay that was lost as a result of the May 1, 2008, change.

(d) Post at the Respondent's Boaz, Alabama plant copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the District Director for the Boaz, Alabama plant, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notice 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.

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

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

The Federal Labor Relations Authority has found that the United States Department of Agriculture, Food Safety and Inspection Service, Boaz, Alabama, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY EMPLOYEES THAT:**

WE WILL NOT unilaterally change employees' assignments without bargaining over those changes with the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (the Union) to the extent required by the Statute.

WE WILL NOT discriminate against employees by changing their assignments because they have engaged in activities protected under the Statute.

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

WE WILL rescind the May 1, 2008 change to employees' assignments.

WE WILL provide the Union with notice and an opportunity to bargain over changes to employees' assignments to the extent required by the Statute.

WE WILL make whole any employees adversely affected by the May 1, 2008, change in assignments by paying them backpay, with interest, for all pay that they lost as a result of the May 1, 2008, change.

(Respondent)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA, 30303-1730, and whose telephone number is: (404) 331-5300.

**Office of Administrative Law Judges**

DEPARTMENT OF AGRICULTURE  
FOOD SAFETY AND INSPECTION SERVICE  
BOAZ, ALABAMA  
Respondent

and

NATIONAL JOINT  
COUNCIL OF FOOD INSPECTION LOCALS  
AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
Charging Party

AT-CA-08-0394

Paige A. Swenson, Esq.  
For the General Counsel

Sandra J. Fortson, Esq.  
For the Respondent

Charles S. Painter  
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 July 18, 2008, the American Federation of Government Employees (Charging Party/Union) filed an unfair labor practice charge against the Department of Agriculture, Food Safety and Inspection Service, Boaz, Alabama (Respondent/Agency). After conducting an investigation, the Regional Director of the Atlanta Region of the Authority issued a complaint against the Respondent on February 1, 2010, alleging that the Respondent violated §7116(a)(1) and (2) of the Statute by reducing the number of employees working reimbursable overtime from two to one, in retaliation for the Union filing a grievance over a supervisor covering a bargaining unit employee's shift during reimbursable overtime, and violated §7116(a)(1) and (5) of the Statute by reducing the previously negotiated number of employees working reimbursable overtime without providing notice and an opportunity to bargain over the unilateral reduction. As its Answer, the Respondent filed a copy of the complaint with responses to the various

allegations set forth therein, admitting some of the factual allegations but denying that it committed the alleged unfair labor practices.

The case was initially scheduled for a hearing on March 26, 2010, and a motion for an extension to file prehearing disclosures and to postpone the hearing was filed by the Respondent on March 11, 2010. That motion was not opposed by the General Counsel and it was granted by an order issued on March 12, 2010, which set the hearing for April 16, 2010. A second motion to postpone the hearing was filed by the Respondent on April 2, 2010, and while that motion was not opposed by the General Counsel, it was denied by an order issued on April 5, 2010. On April 6, 2010, the General Counsel filed a motion for partial summary judgment. Thereafter, an order moving the hearing date to April 23, 2010, was issued to allow time to consider the pending summary judgment motion and possible response. The Respondent filed a response to the motion for partial summary judgment on April 13, 2010, and the motion was denied on April 14, 2010, because genuine issues of material fact remained in dispute and an evidentiary hearing was needed to resolve those issues.

A hearing upon the matter was conducted in Gadsden, Alabama, on April 23, 2010. At the hearing, all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent filed 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 Respondent did not give the exclusive representative proper notice and an opportunity to bargain over changes to conditions of employment that were more than *de minimis*, and that the change made at the Boaz, Alabama, plant was implemented to discriminate against bargaining unit employees as retaliation and reprisal for Union activity. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

**FINDINGS OF FACT**

The National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (Union) is the exclusive collective bargaining representative of a nationwide unit of employees in the Respondent's Office of Field Operations and is a labor organization within the meaning of §7103(a)(4) of the Statute. (G.C. Ex. 1(c); Jt. Ex. 5). The Union and Respondent have, at all times relevant to this case, been parties to a collective bargaining agreement, which they referred to as the Labor Management Agreement (LMA). (Jt. Ex. 1).

The Respondent, is an agency within the meaning of §7103(a)(3) of the Statute, (G.C. Ex. 1(c); Jt. Ex. 5) who employs Consumer Safety Inspectors (CSIs/Inspectors) to inspect operations at food processing plants throughout

the United States. This case involves inspectors working at a plant designated as P-413 by the Agency, which is a Pilgrim's Pride plant located in Boaz, Alabama, where chickens are processed. (Tr. 55-57).

The Pilgrim's Pride company determines the hours of work at the plant, and inspectors from the Agency must conform their work hours to the schedule of the plant where they are assigned. LMA – Art. 13. At taxpayer expense, the Agency provides the requisite number of inspectors needed for two eight hour shifts per workday and the inspector's pay for forty hours of work each week is paid by the Agency using appropriated funds. (Tr. 22; 9 C.F.R. § 381.37). Any plant that operates in a manner that requires inspectors to work beyond a standard eight hour work day or forty hour work week results in the Agency billing the company operating the plant a rate sufficient to cover the cost of overtime paid to the inspectors who perform the additional work, and it is referred to as reimbursable overtime. (Tr. 22; 9 C.F.R. § 381.38-39; 7 U.S.C. § 2219a).

At the Boaz plant, the slaughter and evisceration of chickens, also referred to as first or fresh processing, is conducted on one line and processing of chickens started on that line during the second shift could not be accomplished by the end of the standard eight hour shift, so some amount of reimbursable overtime was required at the end of each second shift, Monday through Friday. (Jt. Ex. 5; G.C. Ex. 1(l) Dorsett's & Brown's affidavits). In addition to the first or fresh processing line, the plant also conducts a second or further processing line. That line actually cooks or further prepares raw chickens in some manner, and it too does not complete the processing of all chickens started on the second shift and requires reimbursable overtime at the end of every second shift, Monday through Friday. (Jt. Ex. 5; G.C. Ex. 1(l) Dorsett's & Brown's affidavits).

Prior to May 2008, the processing that was completed during reimbursable overtime, also referred to as pack out, resulted in the first/fresh line inspector earning two to three hours of overtime per second shift, while the further line inspector earned approximately four hours of overtime per second shift. (Jt. Ex. 5). The time difference reflects that processing on the first/fresh line culminates with raw chickens, while the second/further line takes longer due to cooking, grinding or other processes used in further processing the chickens. (Tr. 19). Under the negotiated LMA, inspectors are required to cover any reimbursable overtime that arises in conjunction with their assigned shift. (LMA, Art. 24). The Pilgrim's Pride plant in Boaz also conducts operations on three Saturdays and one Sunday each month which results in one inspector earning ten to twelve hours of overtime for each Saturday or Sunday they worked. (G.C. Ex. 1(l) Dorsett's & Brown's affidavits; Jt. Ex. 5).

Prior to August 2003, the Agency inspectors assigned to each shift at the Pilgrim's Pride plant in Boaz consisted of two on site GS-8 CSIs and one GS-9 patrolling CSI who had to visit and inspect processing at several plants during a given shift. (Tr. 21, 62-63). In August 2003, as part of its implementation of a

computerized method of assigning work (MAW), the Agency and Union negotiated a change to the positions and assignments utilized at the Boaz plant by eliminating the patrolling GS-9 CSI position and upgrading the two CSI positions from GS-8 to GS-9 consumer safety inspectors who were qualified to inspect the second/further processing line at that location. (Tr. 20-21, 47, 63, 66; Jt. Ex. 5; Resp. Br. at 6 ¶ D). The practice of using one CSI to inspect the first/fresh line and another to inspect the second/further line during regular shifts, as well as on reimbursable overtime continued from August 2003, until May 2008. *Id.*

On March 19 and 20, 2008, one of the two regularly scheduled second shift GS-9 consumer safety inspectors was not feeling well and asked her acting supervisor to be excused from working the overtime arising from her shift. (Jt. Ex. 5; Tr. 19, 46, 55-56). Dr. Katrina Foxworthy, the acting supervisor of the Boaz plant granted her request on both dates and covered the bargaining unit employee's absence by performing the overtime inspection duties herself. (Jt. Ex. 5; Tr. 19, 55-56). Within days, Union president Charles Painter learned of the supervisor's actions and complained to front line supervisor Dr. John Huie and district manager Dr. Paul Resweber, about the reimbursable overtime not being assigned to another bargaining unit employee, indicating that he would file a formal grievance if the matter could not be resolved informally. (Jt. Ex. 2; Tr. 44-45, 65-67, 69).

Painter wanted the Agency to pay overtime to another bargaining unit employee who was at the plant on those nights but not given the opportunity to perform the overtime. When he was unable to achieve an acceptable resolution of the matter, the Union filed a grievance on April 15, 2008, over the supervisor's performance of reimbursable overtime duties, asserting that there was another qualified bargaining unit employee available to perform that overtime work. (Jt. Ex. 2, 5). The grievance was received by the Agency on April 18, 2008, and denied by Dr. Paul Resweber on May 1, 2008. (Jt. Ex. 2; Tr. 18-20).

After that grievance was filed, the acting second shift supervisor who performed the overtime work advised the two bargaining unit CSIs regularly assigned to the second shift at the Pilgrim's Pride facility that a single CSI was all that was needed to perform inspections during the pack out processing completed on reimbursable overtime, rather than the practice of using one inspector for each line as had been in place since August 2003. (Jt. Ex. 5).

When the practice of using only one CSI for the pack out processing on reimbursable overtime was implemented on May 1, 2008, the two regular second shift inspectors agreed that one would perform the overtime needed at the end of every second shift, Monday through Friday, and that the other would work the overtime shifts that took place on weekend days. (Jt. Ex. 5; G.C. Ex. 1(l) Dorsett's & Brown's affidavits).

By April 2008, Dr. Resweber was aware that at least two processing plants in his district were using two consumer safety inspectors to conduct pack out inspections



on reimbursable overtime. However, the only plant where the practice was terminated was the Pilgrim's Pride facility in Boaz. (Tr. 36-38). Even though Dr. Resweber discovered that the practice of using two CSIs for overtime inspections was being utilized at P-559, the Tyson Foods plant in Albertville, Alabama, several months before the overtime dispute led to his discovering that the practice was also being used at the Boaz plant, cessation of the practice was implemented only at the Boaz plant, site of the Union grievance. (Tr. 26, 36-38). The Agency has permitted the practice of using two CSI positions to inspect pack out processing on reimbursable overtime to continue at plants P-559 Albertville and P-6 Blountsville in Alabama during the pendency of this complaint. (Tr. 38). At the time the practice of using two consumer safety inspectors for pack out processing was terminated at the Boaz plant but allowed to continue at the Albertville plant, Dr. Huie was the first line supervisor for the Boaz plant and acting first line supervisor at the Albertville plant, and Dr. Foxworthy was the second shift supervisor at the Albertville plant and the acting second shift supervisor for the Boaz plant. (Tr. 40, 42, 54-55).

## DISCUSSION

### Position of the Parties

#### General Counsel

The General Counsel contends that the Respondent changed conditions of employment when it reduced the number of employees performing CSI duties on reimbursable overtime during pack out processing from two to one and that the change was more than *de minimis*. The General Counsel also alleges that the change was an act of retaliation and reprisal by the Respondent in response to the Union's complaint and grievance over a supervisor's performance of overtime work typically assigned to a bargaining unit employee.

Regarding the first contention, the General Counsel notes that an agency incurs an obligation to bargain with a union before implementing a change in conditions of employment that has more than a *de minimis* effect on employees. *SSA, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646 (2004) *pet. for review denied sub nom. Assoc. of Admin. Law Judges v. FLRA*, 397 F.3d. 957 (D.C. Cir. 2005). Moreover, the Authority has held that changes affecting an employee's ability to earn overtime are more than *de minimis*. *United States Dep't of Veterans Affairs Medical Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004)(VAMC); *Pension Benefit Guaranty Corp.*, 59 FLRA 48, 51 (2003)(PBGC).

With respect to the second allegation, the General Counsel cites *Letterkenny Army Depot*, 35 FLRA 113 (1990)(*Letterkenny*) as the analytical framework under which allegations of discrimination must be reviewed under §7116(a)(2) of the Statute. The General Counsel argues that a *prima facie* case of retaliation and reprisal was established

upon the whole record and that the timing of a management action is significant in making such a determination. Contending that it established a *prima facie* case of retaliation and reprisal, the General Counsel asserts the Respondent failed to rebut that *prima facie* case because the Respondent's argument that the decision to reduce the number of employees performing inspection duties during pack out processing resulted from application of Agency policy rather than the overtime dispute is not credible.

#### Respondent

The Respondent argues that it did not give the Union notice and an opportunity to bargain over the decision to decrease the number of employees performing inspections on overtime during pack out processing because it was exercising a management right, the impact of the change was *de minimis*, the change was covered by the labor management agreement and the Union waived its right to bargain over the change it implemented.

## CONCLUSIONS OF LAW

### Respondent's Defenses for Failing to Give Notice and an Opportunity to Bargain

#### A. Management Right

The Respondent concedes that it did not provide the Union notice and an opportunity to bargain over the decision to reduce the number of consumer safety inspectors who inspected chickens on overtime as part of pack out processing at the plant in Boaz, Alabama. The first justification offered by the Respondent for failing to give notice and an opportunity to bargain is that it was exercising a management right under the Statute. (Resp. Br, IV (A)(1)). The Respondent is correct in its assertion that the assignment of work is a management right under §7106 (a)(2)(B) of the Statute, and generally, determining when overtime is needed and to whom it will be assigned is an exercise of the right to assign work. *AFGE, Local 3157*, 44 FLRA 1570, 1576 (1992).

However, the Respondent is misguided and mistaken in its assertion that it was excused from providing notice and an opportunity to bargain by virtue of the fact that it was exercising a management right. Prior to implementing a change in conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999) (*U.S. Penitentiary*). When, as here, an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency nonetheless has an obligation to give notice and bargain over procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a *de minimis* effect on the conditions of employment. *PBGC*, 59 FLRA at 50.

Given the Respondent's acknowledgment of impact and implementation bargaining obligations as part of the *de minimis* argument it set forth in section IV (A)(2) of its brief, it is difficult to understand why it elected to present this argument, let alone make it the first defense discussed in its brief. At hearing, the Agency presented witnesses who testified about the prior negotiations in 2003, related to similar matters, and who indicated that they did not give the Union notice and an opportunity to bargain because they believed the requirement was satisfied at the national level. So apparently, even those witnesses recognized that the exercise of a management right does not give an agency the right to make changes to conditions of employment without bargaining. Thus, the Respondent's contention to the contrary is not only inconsistent with Authority case law and its brief, it is inconsistent with the testimony of its witnesses. Both the front line supervisor and the district manager testified that they believed the directive they purportedly relied upon in making the change was negotiated nationally, and neither testified that notice and an opportunity to bargain was not required because a management right was being exercised. They just assumed that someone higher in the chain of command of the Agency had satisfied the obligation they recognized as necessary. (Tr. 22-29, 49-50). As the Respondent's defense that it was not required to give notice and an opportunity to bargain over a change to conditions of employment because it was exercising a management right is contrary to Authority precedent and unsupported by citation to any legal authority, it is without merit.

## B. De Minimis Change

The Respondent next argues that reducing the number of CSIs who performed pack out inspections on reimbursable overtime from two to one was a *de minimis* change under the totality of the facts and circumstances present in this case. In making this argument, the Respondent cites several reasons, the first being that it was exercising a management right. The Respondent argues that the fact that it was exercising a management right goes to the nature of the change element set forth in standard articulated by the Authority in *HHS, SSA, Region V, Chicago, Ill.*, 19 FLRA 827 (1985)(*SSA I*). Similarly, the Respondent contends that the change was *de minimis* because the change impacted only two employees out of numerous employees working in numerous similar plants, again relying upon the standard set forth by the Authority in *SSA I*.

However, what the Respondent's brief fails to acknowledge or address is the fact that the standard for determining when a change requires notice and bargaining was the subject of a subsequent Authority decision which substantially modified the standard to be applied in such cases by placing principal emphasis upon the nature and extent of the effect or reasonably foreseeable effect the change has on conditions of employment for bargaining unit employees. *HHS, SSA*, 24 FLRA 403, 407-08 (1986)(*SSA II*). Aside from changing the focus of the examination from the change to the effect of the change, the Authority also

held that the number of employees involved would not be a controlling consideration and the size of the bargaining unit would no longer be a factor. *Id.* at 408. Thus, the Respondent's argument that the change was *de minimis* because it was the exercise of a management right that impacted only two employees is unpersuasive.

In addition to failing to examine the *de minimis* issue under the framework established in *SSA II*, the Respondent's brief neither discusses nor distinguishes the Authority's well established precedent that changes in conditions of employment which adversely affect an employee's ability to earn overtime and differential pay is more than a *de minimis* change. *VAMC*, 60 FLRA at 318; *PBGC* supra; *U.S. Customs Serv., Sw. Region, El Paso, Tex.*, 44 FLRA 1128, 1129 (1992); *Dep't of the Treasury, U.S. Customs Serv.*, 19 FLRA 1155 (1985). While the Respondent contends that the loss of overtime is but a single factor to be considered, the Authority's precedent makes clear that whether a loss of overtime results from a change in tour of duty, organizational realignment, or a change in work assignments that resulted in employees no longer being called upon to perform overtime as they had in the past, a change to conditions of employment that prompts a loss of overtime is more than *de minimis*. While it may be a single factor, under Authority precedent, a change in the conditions of employment that reduce an employee's opportunity to perform overtime work can be the controlling factor in making a *de minimis* determination.

Although not related to the *de minimis* defense under which it is raised, the Respondent makes another argument in section IV (A)(2) of its brief that merits discussion before moving to the "covered by" defense set forth in section IV (A)(3). The Respondent asserts that it was required to make a change in the practice of using two CSIs to inspect pack out processing on reimbursable overtime at the Boaz plant because the use of two CSIs was contrary to the Agency's MAW, directives, national policy and legal billing. In support of this argument, the Respondent cites FSIS Directive 12,600.1 and 12,600.2. While counsel for the Respondent failed to seek admission of these directives into the record despite her intent to base a defense upon them, the directives are readily available in the public materials the Department of Agriculture makes available on their public website and I have taken official notice of these directives.

The Respondent's counsel and witnesses contended that the MAW in conjunction with FSIS Directive 12,600.2 was the basis for reducing the number of CSIs inspecting pack out processing on reimbursable overtime from two inspectors to one. However, a review of the directive reveals that the expected inspection workload during a reimbursable overtime period is but one of three factors a district manager should consider in forming assignments for inspection coverage during periods of reimbursable overtime on holidays, weekends, or weekdays, and it is not a controlling factor. While the second factor, the proximity of the establishments that will operate during the overtime periods was not applicable to the Boaz plant

because it ceased the use of patrolling inspectors as a result of the 2003 agreement negotiated the Union as part of implementing the MAW, the third factor a district manager is supposed to consider in making such overtime assignments is that they should be made in a manner consistent with the labor management agreement. Thus, the directive cited by the Respondent's managers as justification for the unilateral change they implemented specifically indicates that when forming overtime assignments they were suppose to consider the existing labor agreement and be consistent therewith. FSIS Directive 12,600.2 VIII (D)(3).

Furthermore, it was the undisputed testimony of Union president Charles Painter that the 2003 labor agreement entered into by the parties as part of negotiating implementation of the computerized MAW at the Boaz plant resulted in the elimination of a patrolling GS-9 inspector position and that the two fixed GS-8 positions at that plant were upgraded to GS-9 positions so the inspectors would be qualified to conduct inspections of the second/further processing line that completed its work using reimbursable overtime. (Tr. 63). Having negotiated the arrangement that was in place so it could use the computerized MAW, the Agency cannot then use the MAW to justify a unilateral change to the conditions of employment that were established as part of the negotiations over MAW implementation.

It is important to note that the Respondent's witnesses testified that two distinct processing activities are conducted as part of overtime pack out and those separate processing activities occur on opposite sides of a fixed wall. (Tr. 25, 49). Thus, a single inspector could inspect only one processing line at a time and whatever happened on the other side of the wall at any given moment would pass unseen by an inspector. While the Agency's MAW may deem such partial inspection coverage acceptable, there is legitimate reason to conclude that the public who benefits from a safe and sanitary food supply would prefer to have an inspector watching each processing line. This is especially true when the Agency deems it necessary to use two CSIs when inspections of those same lines are conducted at taxpayer expense. (Tr. 22). The fact that overtime inspection costs are reimbursed by the company operating the plant when it elects to use overtime to complete its processing makes it appear that it is the taxpayer who gets shorted by having only one inspector during overtime periods. When the taxpayer is paying for inspections the Agency has determined that two CSIs are needed to do the work, and yet when it becomes the company's financial obligation to reimburse the Agency, the Respondent asserts concern that the use two inspectors in accord with the negotiated labor agreement would result in illegal billing of the company for overtime work performed by the inspectors. This argument is without merit.

The fact that the standard eight hour shift is cut in half when only four hours of overtime is required does not mean that the two inspectors needed to inspect two separate processing lines can also be halved. While a formula of two inspectors for eight hours equals one inspector for four hours

may seem accurate when the calculation is made by a computer program that is assigning work, it fails to recognize that the plant runs two separate processing lines in different locations during overtime pack out. Thus, a single inspector could inspect only one processing line at a time while they are run on reimbursable overtime and maintaining an inspector on each line throughout the reimbursable overtime period just as the Agency requires on a regular shift is not a legitimate overbilling concern.

Further indication of the unmeritorious nature of the Respondent's overbilling concern is the fact that Respondent presented no evidence that the Pilgrim's Pride plant had ever lodged a complaint, contested a bill or filed suit over being billed for the use of two inspectors during reimbursable overtime pack out processing. *See Roy Bryant Cattle Co. v. United States*, 463 F.2d 418 (5<sup>th</sup> Cir. 1972). Finally, as discussed in detail below, the Respondent's alleged concern about illegal billing for overtime is belied by its failure to immediately and unilaterally implement the same change at other plants where the practice of using two CSIs for reimbursable overtime pack out processing was being used, one of which it knew about months in advance of the Boaz plant. This inconsistency in elimination of the practice is further indication that the Respondent's assertions of concern about the legality of billing for the use of two inspectors during reimbursable overtime is more litigation argument than honest belief supported by legal authority. Were illegality a legitimate contention with an actual legal basis, it would have been Respondent's best defense, but the Respondent offered no support for such a claim other than a tortured reading of its own directives.

### C. Covered by the LMA

The Respondent contends that unilaterally reducing the number of CSIs assigned to inspect overtime pack out processing at the Boaz plant was authorized by the terms set forth in Section 1(a) of Article 24 in the labor management agreement negotiated with the Union. That section states in pertinent part:

If overtime is required, it is the responsibility of the employee covering the assignment. This provision shall not apply to situations such as a combination of assignments, emergencies, reduced inspection requirements, and when the employee can locate a voluntary, qualified, and available replacement at no additional expense to the Agency.

The Respondent contends that the clause "If overtime is required" makes the determination of when overtime is needed a management right that is a condition precedent to determining who will perform it. "Consequently, without a decision by management that overtime will be worked, . . . there is no employee entitlement to overtime compensation."

Aside from not presenting a legitimate “covered by” defense, this argument misconstrues the meaning of this paragraph and again completely ignores the essential question of whether or not the Agency had the right to unilaterally change a condition of employment without giving notice and an opportunity to bargain. The mere fact that the parties had negotiated an article in their collective bargaining agreement entitled Overtime, does not mean that any issue involving overtime was covered by the provision. A subject matter must be more than “tangentially” related to a contract provision in order to establish that the subject matter is covered by the agreement. *U.S. Dep’t of the Treasury, IRS*, 56 FLRA 906, 911-12 (2000).

The Respondent’s own brief concedes that “the LMA is silent on the issue of who has the authority to determine whether overtime is required to be worked;” but then asserts that such determinations flow from management’s right to assign work, citing *AFGE Council 215*, 60 FLRA 461 (2004). However, establishing that an assignment of overtime is a management right is just as ineffective as a defense under the covered by doctrine as it is for failing to give notice and an opportunity to bargain over a change to conditions of employment. Were the only question at hand one of whether or not assignment of overtime is an assignment of work and thus, a management right, the Respondent would prevail. But, that is not the only or even the determinative question in this case regardless of the number of times Respondent presents it as a defense for its actions.

Furthermore, the fact that assigning overtime involves the exercise of a management right is even less compelling in this case because the determination of when a CSI will perform overtime work at the processing plant being inspected is not always or even typically decided by the Agency. Under the Agency’s regulations, the decision to work overtime can be made by the official establishment to which the inspector is assigned. 9 C.F.R. § 381.37. This unique feature of the relationship between the Agency, the inspector and the plant to which they are assigned may explain why the LMA is silent on the issue of who has authority to assign overtime. It also reveals the true purpose of Section 1(a) in Article 24 of the LMA. The clause “If overtime is required” reflects that the need for bargaining unit employees to work overtime is typically a function of a request from the plant being inspected. Since the Respondent needs to be able to satisfy such requests using inspectors already assigned to work the regular shift at that location, the Respondent sought, and received through collective bargaining, an agreement with the Union that bargaining unit employees already working the regular shift would accept the responsibility of working such overtime. This particular provision was not included in the LMA to preserve a management right, it was a concession obtained from the bargaining unit that assures the Agency that a request to work overtime made by the plant being inspected can be met with the additional work performed by those already assigned to the regular shift. This avoids having to call in other inspectors or mandating overtime work on an

involuntary basis using some other negotiated procedure which does not meet the needs of the plant operator.

Rather than being a contractual provision that permits unilateral elimination of overtime work, this provision establishes who must work overtime when such time is requested by a processing plant. In this case, the Boaz plant routinely continued to process chickens on two separate lines during overtime pack out. The fresh or first side typically ran for another two to three hours past the end of the regular second shift, while the further or second side typically ran for another four hours because it involved heat treatment or cooking of the chicken. (G.C. Ex. 1(I) Dorsett’s & Brown’s affidavits; Tr. 19). Under this LMA provision, inspectors working the second shift from which the overtime flowed were contractually obligated to work the overtime as well. Since the plant routinely asks for overtime to complete processing operations started on multiple lines during the regular eight hour second shift, the Respondent can use this provision to require the two inspectors who were inspecting separate lines at different locations within the plant to remain on duty until their respective processing line finishes the last chicken, even if one of the inspectors wants to stop working at the end of their regular shift. Thus, the Respondent’s reliance upon this LMA provision as justification for eliminating overtime opportunities is the very opposite its negotiated purpose.

#### D. Waiver

Having failed to present a compelling argument for *de minimis* impact or to present an arguable explanation of how its action in reducing the number of CSIs conducting pack out inspections on overtime was covered by the LMA, the Respondent goes one bridge further by presenting waiver as its final justification for why unilateral implementation of a change to conditions of employment did not violated the Statute. Given that this argument is made despite Respondent’s admission in its Answer and concession in its brief that it did not give the Union notice because it was not obligated to bargain the change, one can only marvel at the pretzel logic presented in the Respondent’s brief to argue that the notice requirement essential to a waiver argument was met. Although the Respondent acknowledged and even cited the notice requirement contained in *U.S. Army Corps of Eng’rs, Memphis, Tenn.*, 53 FLRA 79, 81 (1997)(*Corps of Eng’rs*), the Respondent argues that the issuance of FSIS Directive 12,600.2 in July 2007, sufficed as adequate notice of the change to conditions of employment subsequently made at the Boaz plant in May 2008. Fortunately, the Respondent cites no precedent from the Authority or other court wherein the waiver of a legal right was found absent provision of adequate notice.

The Respondent’s argument that notice of a change in conditions of employment at the Boaz plant was provided to the Union by virtue of all employees being sent an email about FSIS Directive 12,600.2 in July 2007, is simply without merit. Even if the entire directive was attached or incorporated into the body of the email message, an email announcing the release of a new directive sent to all

employees does not apprise an exclusive representative of any change, let alone the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change. *Corps of Eng'rs*, 53 FLRA at 82-83; Tr. 64. For the reason outlined above related to the directive's requirement that its application be consistent with the labor agreement, it would have been just as reasonable, if not more so, for an exclusive representative to conclude that FSIS Directive 12,600.2 would result in no change to previously negotiated agreements over assignment of work and overtime, rather than assuming that changes were certain. Further, adequate notice should not require the exclusive representative to make any assumptions. With respect to the Respondent's argument that notice was provided by virtue of changes made at other locations, that approach was rejected by the Authority in *DHHS, Public Health Serv.*, 31 FLRA 498, 508-09 (1988).

Aside from providing no indication of what, when or how anything would change at the Boaz plant, the argument that the issuance of FSIS Directive 12,600.2 via a general email to all employees in July 2007, provided notice of a change to the exclusive representative also disregards the fact that affected employees were not told about any change until April 2008, shortly before implementation in May 2008. Respondent provides no explanation for the lapse in time between the action it purports to be notice and implementation of the change. However, that passage of time is the least of the flaws in Respondent's argument because in answering the complaint, the Respondent admitted early in the litigation process that it did not give notice. (G.C. Ex. 1(c)). Therefore, additional discussion of the Respondent's waiver defense is not necessary. An exclusive representative has no obligation to request bargaining over a change for which it was not given notice and the Respondent previously admitted the fact that it did not give notice. Thus, when Authority precedent is applied to the facts previously admitted, it cannot be found that the Union waived the right to bargain over the change unilaterally implemented by the Respondent.

### The General Counsel's Case

Having concluded that the Respondent offered little in the way of an actual defense to the allegation of implementation without notice and bargaining set forth in the General Counsel's complaint, I find that the General Counsel established by a preponderance of the evidence a violation of §7116(a)(1) and (5) of the Statute. 5 C.F.R. § 2423.32. The Respondent implemented a change to the conditions of employment for bargaining unit employees without giving proper notice and providing an opportunity to negotiate over the change that was more than *de minimis*. *PBGC*, 59 FLRA at 51; *U.S. Penitentiary*, 55 FLRA at 715.

From August 2003, until May 2008, the Respondent kept the two CSIs assigned to the second shift at the Boaz plant on duty for the routinely scheduled reimbursable overtime which allowed inspection of the

first/fresh and second/further lines to continue until the processing was completed as part of pack out. Those inspectors remained on duty only until the chickens on their respective lines were processed to completion. This meant that one employee, the first/fresh inspector, typically worked between two and three hours of overtime at the end of each second shift Monday through Friday, and the other employee, the second/further inspector, worked approximately four hours of overtime each regular work day. The time difference resulted from the fact that further processing involved cooking the chickens and was more complex than fresh processing.

In April 2008, the Union complained to management about an acting supervisor who worked two reimbursable overtime shifts in the place of the bargaining unit inspector, rather than assigning the overtime to another bargaining unit employee. This substitution occurred after the regular inspector, who was required by the LMA to work the overtime, asked to be excused from that requirement. Furthermore, the acting supervisor who was the subject of the complaint was ultimately the supervisor who informed the two regular second shift inspectors that two inspectors were no longer needed to conduct inspections during the reimbursable overtime that arose at the conclusion of every second shift and that as of May 2008, only one could work the overtime. As a result of this change, which altered the previously negotiated practice of using both GS-9 inspectors, the opportunity to work overtime was reduced for each bargaining unit employee, as was the amount of pay they could earn in a given pay period. As this change to conditions of employment was made without notice and an opportunity to bargain, the Respondent violated §7116(a)(1) and (5) of the Statute and the question of whether the change made was an act of discrimination to discourage union membership in violation of §7116(a)(2) must be addressed.

### The Discrimination Allegation

The General Counsel contends that the Respondent's decision to reduce the number of CSIs working the two processing lines at the Boaz plant during reimbursable overtime from two to one discriminated against those CSIs because their Union complained and filed a formal grievance over an acting supervisor's assigning overtime to herself rather than assigning it to another bargaining unit employee. In support of its theory, the General Counsel points to the timing of the change, contending that it was implemented shortly after the Union filed the grievance and argues that such timing is sufficient evidence to conclude that reducing the number of inspectors used during reimbursable overtime was retaliation and retribution for the Union grievance over the related incident.

Although the Respondent's brief neither acknowledges the separate §7116(a)(2) allegation, nor discusses the *Letterkenny* analytical framework for assessing discrimination cases, it does offer something of a defense to the alleged discrimination in that the Respondent contends that the decision to reduce the number of inspectors working reimbursable overtime at the Boaz plant was made pursuant

to FSIS Directive 12,600.2, which was issued in July 2007, prior to the Union filing its grievance. In essence, the Respondent asserts that it did not illegally discriminate against the CSIs because the Union filed a grievance, instead claiming that it reduced the number of inspectors by half because only one inspector was needed when the MAW was applied pursuant to the new directive.

While a substantial portion of the Respondent's case at hearing was devoted to establishing that the decision to reduce the number of CSIs working overtime at the Boaz plant was made in response to FSIS Directive 12,600.2 and prior to the Union filing a grievance, after reviewing the whole record, neither of these contentions is supported by the evidence and I find that the Respondent discriminated against bargaining unit employees as retaliation and reprisal for Union activity.

In *Letterkenny*, the Authority established the analytical framework for reviewing allegations of discrimination under §7116(a)(2) of the Statute. Under that framework, the General Counsel has the burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* at 118. Whether the General Counsel has established a *prima facie* case is determined by considering the evidence on the record as a whole, not just the evidence presented by the General Counsel. *Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000). The timing of a management action is a significant factor in determining whether the General Counsel has established a *prima facie* case of discrimination. *VAMC*, 60 FLRA at 319; *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 568 (1990); *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 35 FLRA 891, 900 (1990).

Despite the Respondent's assertions to the contrary, it is clear from the record that from the time FSIS Directive 12,600.2, was issued and effectuated in July 2007, until May 2008, the Respondent made no change to the number of CSIs performing inspections during reimbursable overtime at the Boaz facility. While Dr. Resweber testified that he told the management of all forty plants under his supervision with operations similar to the Boaz plant to discontinue the use of two CSIs for pack out processing inspections conducted on reimbursable overtime in July 2007, all forty did not implement such a reduction. In fact, Dr. Resweber testified that at a district meeting in the fall of 2007, he discovered that Plant 559 in Albertville, Alabama, was using two CSIs for overtime pack out inspections and that plant has continued that practice through the date of the hearing. (Tr. 36-38).

While the Respondent contends that plants using two CSIs for overtime pack out inspections was a topic of discussion at a district meeting in April 2008, and that a

second directive to discontinue the practice was issued then, prior to the Union filing a formal grievance over the supervisor's failure to assign overtime to a bargaining unit employee, the fact that the reduction was discussed and ordered before the formal grievance was filed is not persuasive in assessing the motives of the Respondent. Although Doctors Resweber and Huie were vague and uncertain in their testimony about whether or not Union president Painter had discussed the overtime dispute with them prior to filing a formal grievance, Painter had no such doubt. (Tr. 16, 45, 67). More importantly, the earlier conversations between Painter, Resweber and Huie were documented in the formal grievance which indicated that telephone conversations with Doctors Huie and Resweber took place on or about March 26, 2008. (Jt. Ex. 2). Thus, there is no doubt that the witnesses were aware of the Union's activity on behalf of the inspectors working at the Boaz plant prior to the April 2008, district meeting and it is more likely than not that the situation in Boaz was the reason the matter was being discussed during that meeting. Therefore, the Respondent's argument that the directive to implement a change in overtime assignments at the Boaz facility was given at that meeting and uninfluenced by Union activity because management was not aware of the activity until the formal grievance was received on April 18, 2008, is not supported by the record.

Furthermore, the witnesses' professed lack of recall about the calls made by Union president Painter are not credible. (Tr. 16, 45). As the witnesses' testified with certitude about discussions regarding overtime inspections that occurred at district meetings in the fall of 2007 as well as the spring of 2008, their inability to recall discussing a supervisor's performance of overtime typically assigned to a bargaining unit employee with a union president complaining about the action provides reason to doubt their testimony about why the action was taken.

While not recalling such a telephone call may have been consistent with and an essential element of the defense theory presented by the Respondent at the hearing, not recollecting an event is not the equivalent of a denial. Under these facts, it was an equivocation that does nothing to rebut the testimony of Union president Painter (Tr. 67), and the documentary evidence. (Jt. Ex. 2).

Although the Respondent argues that changes to overtime assignments were made at other plants within the district managed by Dr. Resweber prior to the dispute arising at Boaz, the fact that the Respondent made similar changes at other plants without Union objection is of little relevance when the overtime arrangements at the Boaz plant were previously established by the terms of a negotiated agreement reached as part of implementing a computerized MAW in 2003. More importantly, the fact that the Respondent knew that other locations, such as the Albertville plant, continued to use two CSIs for reimbursable overtime inspections months before discovering that the practice remained in place at the Boaz plant, and yet did not terminate the practice at Albertville with the same urgency used at Boaz, demonstrates that the

change at the Boaz plant was motivated by something other than the application of agency directives. In this regard, it is particularly telling that the acting supervisor who implemented the change at the Boaz plant with such haste was the subject of the Union's initial complaint. Furthermore, while she was the regular supervisor at the noncompliant Albertville plant and only the acting supervisor at the Boaz plant, and despite the fact that the email from Dr. Huie directed her to reduce the number of inspectors working reimbursable overtime at both locations, she implemented the change only at the Boaz plant. (Tr. 38, 54-55; Jt. Ex. 4).

While doubtful, it could be argued that Doctors Resweber and Huie were only trying to implement a directive they did not understand or mistakenly interpreted as requiring them to reduce the number of inspectors conducting inspections on reimbursable overtime irrespective of the prior labor agreement. However, given that the change was implemented at the Boaz plant where the complaint and grievance arose, but not at the Albertville plant where the continued use of two CSIs was first discovered, that difference alone could be enough to conclude that Union activity at the Boaz plant was the cause for the discrimination exhibited towards the inspectors at that location. But there is even more reason to reach such a conclusion when the two plants that were treated differently were supervised by the same individual who was the subject of the Union's complaint and grievance. Even if Doctors Resweber and Huie were only implementing what they believed the Respondent's directives required with no animus for the Union, I find that the discriminatory manner with which the supervisor implemented the directive at one location but not the other, clearly demonstrates animus by some portion of the Respondent's management, whether or not it flowed from those higher in command. Thus, the inspectors who saw their overtime opportunity reduced were discriminated against and subjected to retaliation and reprisal for the Union activity of complaining and filing a formal grievance over the supervisor working overtime routinely performed by bargaining unit employees under the negotiated agreement.

I conclude that the employees against whom the discriminatory action was taken were engaged in the protected activity of assisting the Union with a grievance about overtime assignments and that such activity was a motivating factor in the change to conditions of employment made by Respondent at one location but not at another. Therefore, the justification offered by the Respondent for making the change was pretextual and I find that the General Counsel presented a *prima facie* case of discrimination which the Respondent did not rebut by proving that there was a legitimate justification for the action and that it would have taken the same action even in the absence of the protected activity. *Letterkenny*, 35 FLRA at 113.

Had the Respondent provided notice and an opportunity to bargain over the change, the existence of the prior labor agreement and the consideration of it required by the Respondent's directive could have resulted in no change

being made at the Boaz plant. Thus, the testimony of the Respondent's witnesses about the certainty of implementation of the change at all plants where CSIs conducted inspections is not credible. This change was not negotiated nationally by labor relations personnel at Respondent's headquarters as those witnesses had assumed, and the *de minimis* justification cited by the Respondent's labor relations personnel in response to Union president Painter's questions about the change was invalid. (Tr. 29, 50, 64). As the Respondent's own witnesses believed bargaining was required at some level of recognition, and the outcome of such negotiations cannot be determined absent them taking place, the Respondent cannot demonstrate that the change would have been made in the absence of protected activity and the witnesses' testimony to the contrary is not persuasive.

The record demonstrates that the Respondent permitted inspectors at plants that were not the source of a complaint or grievance to continue using two inspectors for reimbursable overtime inspections. (Tr. 38). While the Respondent asserts that reductions were not made at the other plants where two inspectors were used because this unfair labor practice charge was filed, that excuse offers no explanation for why the same change was not made at the other plants in the months prior to the date this charge was filed. (Tr. 38). As the only real distinction between the three plants identified in the record as subject to such a change is that the Boaz plant was the source of a complaint and grievance over reimbursable overtime, I find that the Respondent committed an unfair labor practice in violation of §7116 (a)(2) of the Statute, and it did so in retaliation and reprisal to discourage union activity by bargaining unit employees.

#### **The Request for Status Quo Ante and Back Pay**

As relief for the Respondent's violations in this case, the General Counsel seeks a return to the status quo ante and an award of back pay. Other than contending that the change it made did not violate the Statute, the Respondent presented no argument in its post hearing brief specifically addressing the status quo ante or back pay requests. However, the Respondent did present testimony at the hearing and argue in its brief that the reduction in the number of CSIs conducting inspections on reimbursable overtime would have been implemented, even if bargaining was required and completed. (Tr. 30-31; Resp. Br. at 17).

Where management has exercised its reserved rights under §7106 of the Statute without fulfilling its duty to bargain with the exclusive representative over procedures and appropriate arrangements pursuant to §7106(b)(2) and (3) of the Statute, a status quo ante remedy may issue. *Federal Correctional Institution*, 8 FLRA 604, 605 (*FCI*). In that case, the Authority listed specific criteria for determining whether a status quo ante remedy is appropriate in such circumstance. *See id.* at 606. The criteria includes whether and when notice was given to the union by the agency concerning the action or change decided upon,

whether and when the union requested bargaining on the procedures or appropriate arrangements, the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute, the nature and extent of the impact experienced by adversely affected employees, and whether and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

Because no notice was given in this case, evaluation of the Union's request to bargain is not possible, thus, the first two elements in *FCI* support a return to the status quo ante, as does the Respondent's clear willfulness in making the change without bargaining. In essence, the Respondent made the change without bargaining under the mistaken belief that it could do so because assignment of overtime is part of management's right to assign work. While ill advised and demonstrating a fundamental failure to understand the requirements of the Statute, the Respondent's failure to discharge its bargaining obligation was willful and thus supports application of a status quo ante remedy. As to the impact upon the affected employees, the Respondent and General Counsel stipulated to the substantial financial loss those employees experienced as a result of being denied the opportunity to work overtime and similar losses would continue unless the parties return to the terms to which the parties agreed in the August 2003 agreement. (Jt. Ex. 5). So the impact on affected employees also supports a status quo ante remedy. Finally, the Respondent presented no evidence that a return to the status quo ante would disrupt or impair the efficiency and effectiveness of agency operations. As a status quo ante remedy would mean that the company operating the plant would again be subject to two inspectors whose overtime is paid for by that company, this case presents a factual scenario where the effectiveness of the agency's operations are actually improved by a return to the status quo ante and that improvement would be at no expense to the agency. Thus, disruption or impairment of operations is not present and I find that a status quo ante remedy is appropriate in this case under each of the factors outlined in *FCI*, 8 FLRA at 106.

Under the Back Pay Act, an award of back pay is authorized 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. *United States Dep't of Health & Human Serv.*, 54 FLRA 1210, 1218-19 (1998). As applied here, the record includes a stipulation of fact and affidavits from the impacted employees which establishes they would have worked more overtime had the Respondent not unilaterally reduced the number of inspectors working on reimbursable overtime from the number determined by prior agreement. (Jt. Ex. 5; G.C. Ex. 1(l)). Therefore, I find that the award of back pay is appropriate in this case. Furthermore, because the Respondent committed a discrimination violation under §7116(a)(2), as well as a violation of §7116(a)(1) and (5), for refusing to bargain over impact and implementation, the additional bargaining typically necessary to determine whether back pay is

appropriate in cases involving a refusal to bargain impact and implementation is not required in this case. *Federal Aviation Admin., Washington, D.C.*, 27 FLRA 230 (1987). The inspectors at the Boaz plant had their opportunity to work reimbursable overtime reduced while those at the Albertville and Blountsville plants did not, and the discriminatory act of reducing their overtime opportunity was a personnel action that resulted in their pay being reduced because the Union complained about a supervisor working overtime rather than assigning it to a bargaining unit employee. Therefore, an award of back pay is consistent with the requirements of the Back Pay Act. 5 U.S.C. § 5596.

## CONCLUSION AND RECOMMENDATION

I find that the Respondent violated §7116 (a)(1)(2) and (5) of the Statute and recommend that the Authority adopt the following Order:

### ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of Agriculture, Food Safety and Inspection Service, Boaz, Alabama, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions of bargaining unit employees represented by the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (Union), including a reduction in the number of inspectors assigned to inspect on reimbursable overtime without first notifying the Union and giving it an opportunity to bargain to the extent required by the Statute.

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

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

(a) Rescind the decision to assign only one GS-09 CSI to the pack out processing inspections conducted during reimbursable overtime at the Boaz, Alabama plant, and return to the practice of using two CSIs to perform inspections on reimbursable overtime and properly compensate the four affected employees for lost overtime, including interest.

(b) Give notice and upon request, bargain with the Union to the extent required by the Statute, over the procedures and appropriate arrangements related to changing the number of GS-09 CSIs who inspect pack out processing during reimbursable overtime.



(c) Post at the Boaz, Alabama plant where CSI inspectors 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 District Director, for the Boaz, Alabama plant, 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, Atlanta 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., January 6, 2012.

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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 Agriculture, Food Safety and Inspection Service, Boaz, Alabama 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** unilaterally implement changes in working conditions of unit employees in the bargaining unit represented by the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (Union), including a reduction in the number of inspectors assigned to inspect pack out processing on reimbursable overtime without first notifying the Union and giving it 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 rights assured them by the Statute.

**WE WILL**, rescind the decision to assign only one GS-09 CSI to the pack out processing inspections conducted during reimbursable overtime at the Boaz, Alabama plant, and return to the practice of using two CSIs to perform inspections on reimbursable overtime and properly compensate the four affected employees for lost overtime, including interest.

**WE WILL**, provide the Union with advance notice concerning any intended changes in working conditions, including any intent to change the number of employees assigned to inspect during reimbursable overtime and, upon request, bargain with the Union to the extent required by the Statute over the procedures and appropriate arrangements for employees adversely affected by these actions.

\_\_\_\_\_  
(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, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.