UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: January 27, 2010

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
Respondent

AND Case Nos. DA-CA-08-0179
DA-CA-08-0180

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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Charging Party

Case Nos. DA-CA-08-0179
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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 1, 2010**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: January 27, 2010
Washington, D.C.

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

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION EL PASO, TEXAS Respondent AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO Charging Party	Case Nos. DA-CA-08-0179 DA-CA-08-0180

William D. Kirsner
For the General Counsel

Cecilia T. Tran
Charisma Lam
For the Respondent

James A. Stack
For the Charging Party

Before: RICHARD A. PEARSON
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 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On February 22, 2008, the American Federation of Government Employees, National Border Patrol Council, Local 1929 (the Union or the Charging Party) filed two unfair labor practice charges against the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas (the Agency or Respondent). After investigating the charges, the Regional Director of the Dallas Region of the Authority consolidated the two charges on

September 21, 2009, and issued a Complaint and Notice of Hearing, alleging that the Agency had solicited and selected employees to serve on two newly established details, a Move Team and an Inventory Team, without first notifying the Union and giving it an opportunity to negotiate, in violation of section 7116(a)(1) and (5) of the Statute. The Respondent filed its Answer to the Complaint on October 16, 2009, asserting, among other defenses, that it had no duty to bargain concerning either of the two details, that the Union had knowledge of the details, and that the details were implemented in accordance with the Agency's statutory right to assign work.

A hearing was held in this matter on October 26 and 27, 2009, in El Paso, Texas. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent have filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

The events of this case took place at the Agency's El Paso Station, one of eleven Border Patrol stations in the El Paso Sector. The El Paso Station, which has approximately 300 employees (Tr. 286), is headed by the Patrol Agent in Charge (PAIC), a position held in 2008 by Michael Pomeroy. The chain of command under the PAIC includes Field Operations Supervisors, who each manage several supervisory border patrol agents, who in turn supervise teams of border patrol agents. Tr. 361, 442-43.

The American Federation of Government Employees, National Border Patrol Council (AFGE), is the certified collective bargaining representative of a nationwide unit of Border Patrol agents. G.C. Ex. 2. It negotiated a collective bargaining agreement (CBA) in 1995 with the predecessor of the Department of Homeland Security. Jt. Ex. 1. Although that contract has expired and a new agreement has not yet been negotiated, the parties have continued to honor and apply its terms. Tr. 52-55. The Charging Party is an agent of AFGE authorized to represent employees of the Agency in New Mexico and West Texas. Tr. 47.

In 2001, the Charging Party negotiated an agreement entitled the Detail Process Team Standard Operating Procedures, El Paso Station (the DPT Agreement), with the person who was then the PAIC of the El Paso Station. G.C. Ex. 4. Whereas the CBA (see, e.g., Article 16H) refers only to details in general and provides only a minimal procedural framework regarding details, the DPT Agreement lists at least fourteen different types of details that recur frequently and specifies detailed procedures for how employees will be offered and chosen for these assignments. Immediately after listing the fourteen most common details, the DPT Agreement states: "In Station details that are not listed and identified in this policy shall be subject to negotiation with the Local Union in accordance with the Statute and Article 3A of the Collective Bargaining Agreement." G.C. Ex. 4 at section V(A)(3).

The DPT Agreement has continued to be applied by the parties at the El Paso Station since its execution in 2001. Tr. 193-95, 293. Pursuant to that agreement, two bargaining unit employees serve on the Detail Process Team at a time, for six-month terms. (Since the events of this case, the size of the DPT has been reduced to one employee.) The DPT members write and post announcements for details and training; review employee applications (referred to as memoranda) to assure that applicants meet the eligibility criteria (if any) for each type of detail or training; maintain a roster of eligible employees; notify employees, in order of seniority, who are next in line for details; and submit the names to Station management for final approval. Tr. 202-06, 249, 253-56, 293, 335-39. The PAIC or his assistant can veto the selection of an employee for a detail or training, but that rarely happens. Tr. 336-39.

The charges filed by the Union in this case relate to two details[1] that were implemented by the El Paso Station management in early 2008, two details which did not follow the procedures set out in the DPT Agreement. One of these was the Inventory Team, which performed a complete inventory of all high-cost and sensitive equipment maintained by the Station, including vehicles, computers, radios, radiation detectors and night vision devices. Tr. 375-76, Resp. Ex. 3. Because of deficiencies that had been identified in prior years' inventories, Station management decided in November 2007 to assign a supervisory border patrol agent, Carmen Bueno, to oversee the 2008 inventory and to work with a team of bargaining unit employees who would be assigned to working on the inventory project for as long as it took. Tr. 312-13, 376-77. Ms. Bueno sent emails in late December 2007 or early January 2008 to the Field Operations Supervisors who conduct the "musters" with employees at the start of each shift, asking them to solicit volunteers to work on the inventory. Tr. 428-29. She received the names of six employees who had volunteered for the work, and she chose all six of them to perform the work, which was to officially begin by January 14, 2008, and to finish by June 30, 2008.[2] Nadia Montanez, one of these employees, testified that she

[1] The Respondent studiously avoids using the term "detail" and calls the actions assigning employees to the Move Team and the Inventory Team "assignments." While I understand Respondent's reluctance in using a term that might suggest the applicability of the DPT Agreement, I find there is no way of avoiding that document, and I further find that the assignment of bargaining unit employees to the Move Team and Inventory Team constituted "details," as that term is defined in section 3(B) of the DPT. As at least one witness noted, details are a specific type of assignment (Tr. 58-59), and it is important to use the terms as accurately as possible, rather than clouding their meaning by referring to details simply as assignments. I recognize that the Respondent disputes that the DPT Agreement was binding on its actions in assigning employees to these two teams (Tr. 317), but that does not alter the fact that the assignments in question here were "details."

[2] There was no clear testimony as to the precise time period that employees were assigned to this team. Resp. Ex. 3, the department-wide memo outlining the schedule and responsibilities of the inventory teams, specifies that the inventory was to begin by January 14 and end by June 30, and Ms. Bueno generally confirmed this (Tr. 416, 419), but she was not asked whether employees were working full-time on the inventory project for that entire period. Mr. Pomeroy, the PAIC, testified that work on the project took between a week and two weeks (Tr. 341-44), but I do not fully credit this estimate. His

volunteered for the project at the request of Ms. Bueno, who was also her regular supervisor, but that she was allowed to leave the team when she learned of the formation of the Move Team. Tr. 17-19. She received training concerning the inventory procedures on a computer module and worked on the project "for a few days." Tr. 17. She estimated that she worked on the Inventory Team in February or March 2008 (*id.*), but I find it more likely that it was in January, in light of other testimony concerning the starting date of the inventory project and the formation of the Move Team. While working on the Inventory Team, she and the other volunteers were not required to wear their uniforms; they all worked on the day shift, regardless of what shift they had previously been assigned to, and they worked mostly inside the Station building, in contrast to their border control duties, which are primarily outdoors and in uniform. Tr. 20. For the period that they worked on the Inventory Team, Montanez and the other employees did so on a full-time basis. Tr. 20-21, 436. Prior to the formation of the Inventory Team, the Agency did not notify the Union of its plans or give the Union an opportunity to bargain over the impact and implementation of the project. Tr. 68-69, 317, 427.

The other detail in dispute is the Move Team, which was created in order to plan the logistical aspects of the El Paso Station's move into a new headquarters building, about twelve miles away from the old one. Tr. 444. Officials of the Agency had been planning the move since about 2001, and in the early planning stages the Agency had negotiated with the Union concerning general parameters of the new building, such as the layout and design. Tr. 218-19. The groundbreaking for the building occurred in 2006, but detailed plans for what items in the old building would be moved to the new one, and how this process would occur, did not begin in earnest until early January of 2008. Tr. 363-68, 444. The PAIC decided that a Field Operations Supervisor, Charles Matteo, would be assigned to lead a team of supervisors and bargaining unit employees who would work full-time to plan all details of the move. Tr. 366. Mr. Matteo drafted a memorandum, dated January 14, 2008, which was posted on the "muster board" of items to be read by supervisors at the daily musters, and which solicited employee volunteers to serve on the team planning the move. Tr. 23, 447, 449-50; Resp. Ex. 2. Employees were given a deadline of January 17 to submit memoranda of interest to the PAIC. Resp. Ex. 2. Approximately six employees submitted memoranda, and of these, two bargaining unit employees from El Paso Station were selected, as well as one employee from a different station and two supervisors. Tr. 450-52.

When the Move Team was selected, the plan called for moving into the new building in August of 2008, but due to a variety of delays, the new headquarters building was not ready for occupancy until June of 2009. Tr. 26-27, 444. During this period, the team members worked full-time on the move, working in plain clothes on a day shift and primarily indoors, with occasional trips outdoors. Tr. 30-34, 264-68. By working the day shift,

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recall of the details of the inventory project was not clear. While I believe that he was at all times trying to be truthful in his testimony, I cannot rely on his testimony that the Inventory Team worked for only one or two weeks, especially in light of the previously-noted evidence that the project was to last from January to June.

employees did not have the opportunity to earn night and weekend differential pay; Ms. Montanez estimated that during her time on the Move Team, she earned about $100 to $150 less per pay period because of this. Tr. 33-34, 42-43, 268. While they were serving on the Move Team, the members performed no border or "line watch" duties, but instead they developed a moving plan, prepared a budget, wrote purchase and procurement documents such as statements of work, and monitored the work of the contractors. Tr. 24, 30, 261-62, 445. Shortly after the new building was opened in June 2009, the team was disbanded. Tr. 262, 454.

With regard to the Union's involvement in the formation and work of the Move Team, there was a conflict between the testimony of the Agency and Union witnesses. Mr. Pomeroy, the PAIC, stated that while he never sent a written notice to the Union regarding the creation of a team to plan the move that would include bargaining unit employees, nor did he bargain over these matters, he did invite Union officials to join the team as members. Tr. 304-05, 317-18. In January 2008, "the same time that this memo [Resp. Ex. 2] went out", he met personally with Robert Russell, the Union's Fourth Vice-President and the Union official with whom he had most frequent contact, and told Russell that he wanted him to be a member of the team. Tr. 304-05. According to Pomeroy, Mr. Russell responded favorably to the invitation, and he thought that Russell would participate on the team; in fact, however, Russell "chose not to follow up on that", and he did not initially participate on the Move Team. Tr. 305, 307. At some uncertain time later, Mr. Russell and another Union Vice-President, Stuart Harris, came to Pomeroy and Assistant PAIC Zamora to protest some decisions that had been made by the Move Team. Pomeroy told Russell that he thought Russell was already a member of the team. Tr. 306. Russell said that he was too busy with Union business to participate on the Move Team, but that Harris would join the team very soon, as he was about to end his rotation on the DPT Team and could devote his time to the move. Tr. 306. Harris did join the Move Team in late June of 2008 and served on it full-time until the new building was completed. Tr. 259, 262. Mr. Zamora, the Assistant PAIC, and Mr. Matteo, the leader of the Move Team, generally corroborated Pomeroy's testimony, although they were not present at the January discussion between Pomeroy and Russell. Zamora testified that although the Union was not sent advance written notice of the formation of a Move Team, it received notice by virtue of the posting of the memorandum to employees soliciting volunteers for the team. Tr. 383-84. Zamora believed that Russell was involved with the Move Team's work as early as January 2008, as he assisted management in creating a database and a privately-shared drive on the computer network for storing all documents and information related to the move. Tr. 373-74, 385. Both Zamora and Matteo also recalled a second discussion with the Union, initiated by Russell and Harris, who objected to changes in the décor of the new station. Pomeroy agreed that they should be involved in those decisions and invited Russell to join the team, but Russell suggested that Harris be added to the team instead. Tr. 395-97, 477-80. Neither Zamora nor Matteo could recall even the approximate date of this second discussion, but they both placed it near the time that Harris was leaving the DPT and was therefore available to join the Move Team. *Id.*

Employee witnesses gave slightly different descriptions, particularly of the Union's role in the initial stage of the Move Team's work. Union Vice-President Russell testified that

he first learned of the existence of such a team when he saw members of the team working in plain clothes inside the Station. Tr. 202. He "vaguely" recalled asking either the PAIC or his assistant why the team had not been announced through the DPT Team and being told that management had the right to assign work and needed to pick people who were qualified, prompting Russell to file an unfair labor practice charge. Tr. 207, 209. Although he was not directly asked about it, he did not describe any meeting with management that he attended when the Move Team was first created, in which he or Union Vice-President Harris was invited to join the team. Harris's first memory of discussing the Move Team with management was some time after the team had already been in place, when Russell had protested changes the team was making to the floor plan of the new building, at which time the PAIC invited the two of them to join the team. Tr. 258-60. Ms. Montanez, however, recalled that Russell and Harris (and possibly Union President Stack as well) were present at the initial meeting of the newly-formed Move Team in January 2008, when the PAIC explained to them what they would be doing. Tr. 30, 40. She stated that none of the Union officials actually participated in the daily work of the team, but "they were both [Russell and Harris] considered members, but on the Union side, of course." Tr. 30. All witnesses, management and Union alike, agreed that Harris ultimately joined the Move Team on a full-time basis. This occurred, they all agreed, shortly after Russell and Harris protested the changes being made in the floor plan, which caused Pomeroy to state that he thought Russell had been on the Move Team from the start; that, in turn, resulted in Russell briefly joining the team for a week or two, until Harris ended his DPT rotation and joined the Move Team for the duration of its work. Tr. 215, 258-60, 306, 395-97, 477-80. Harris was the only person who could pin down the date of his joining the Move Team, since he knew that it coincided with the end of his six-month detail on the DPT Team, which ended on June 21, 2008. Tr. 248, 259.

Testimony was also offered regarding the remedy sought by the General Counsel. The GC asks that if the Respondent is found to have committed an unfair labor practice, the Respondent should be required to post a notice of the violation not only on its bulletin boards, but also to send employees a copy of the notice through the Station's internal email system and to place it in the read-and-initial logbook for every employee to sign. Union officials Stack, Russell and Harris all testified that the Agency has been utilizing email and other types of electronic communication more and more in the last few years as its primary means of communicating with employees, and that it has been posting less information on the "physical" bulletin boards located around the Station. Tr. 71, 85-86, 101-03, 228-29, 269. Even some management witnesses agreed that the Agency is "evolving" in its means of communicating with employees and is becoming "more e-mail-centric." Tr. 400-01, 473-77. The managers also testified that an impediment to relying on email is the ongoing reluctance of some employees to check their email regularly. Tr. 400, 476. Witnesses identified a wide range of information – some related to personnel and daily work issues, some related to employee benefits, some related to Station-wide, Sector-wide or Department-wide policies, and some related to social matters – that is distributed to employees through the Agency's internal email system, and they indicated that a large amount of this information is no longer

posted on either the unlocked "public" or "cork" bulletin boards or on the so-called "EEO" board that is locked and covered with glass. G.C. Ex. 5a-5i, 9-17. The employee witnesses also described a "read-and-initial logbook," also called a signature roster or a post-log book, in which Station managers place those documents that they most want employees to read, and which employees are required to initial or sign after reading. G.C. Ex. 6; Tr. 145-49, 230-31, 269-70. The Union witnesses further stated that the most effective way of communicating information to employees now is through email, because that is how the Agency communicates with employees and because employees understand that they must read their email to keep up with what is happening at the Agency. Tr. 85-86, 115, 132-33, 150-52, 269-70. Conversely, they believed that traditional bulletin boards are the least effective means of communicating information to employees, because the Agency places so little important information there. Tr. 85-86, 151, 269. Union President Stack testified that he was aware of no law or Agency rule or policy preventing the distribution of FLRA notices on the Agency's email system. Tr. 130. No Agency witness was asked a similar question, but none of them offered any testimony to contradict Stack's assertion.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel argues that the Respondent, in reassigning or detailing bargaining unit employees from their normal border patrol duties to the Inventory Team and the Move Team in early 2008, changed their conditions of employment in more than a *de minimis* manner; as a result, it asserts, the Respondent had a duty to provide advance notice of these changes to the Union and an opportunity to negotiate over the impact and implementation of those changes. The GC cites Authority decisions holding that the subject of details and assignments may be negotiable; *e.g., NTEU*, 53 FLRA 539, 574 (1997)(requirement that employees on detail not be disadvantaged for promotion is negotiable); *Laborers Int'l Union*, 9 FLRA 703 (1982)(while management retains the right to establish the qualifications for a position and to determine which employees meet those qualifications, the union may demand negotiation of procedures to be used in selecting among equally qualified candidates). The General Counsel further disputes the Respondent's efforts to cite negotiability decisions as a basis for its own actions in this case, since the Respondent here did not even give the Union a chance to negotiate or to submit proposals.

In support of its contention that the details had more than a *de minimis* impact on the employees' conditions of employment, the GC cites a variety of factors: the details lasted from at least several weeks to a year and a half; some of the employees had their shift changed; they worked indoors instead of outdoors; the nature of the work was entirely different from their normal assignments, thereby enabling them to demonstrate and develop skills for advancement that they might not otherwise have had; and they lost the opportunity to earn shift differential pay. The General Counsel further argues that the Agency's failure to

notify or to negotiate with the Union cannot be excused on the grounds of exigent circumstances. Based on the Respondent's conceded failure to notify the Union in advance of the two details, the GC cites Authority precedent that such failure to provide adequate notice is a violation of section 7116(a)(1) and (5). *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999)(*Bastrop).*

The GC also disputes the Respondent's assertion that its implementation of these details was "covered by" the CBA. The General Counsel only discusses the CBA provisions (notably Article 16) briefly, concluding that the CBA "does not address specific types of details, in-station details, or address local bargaining rights or obligations as relates to in-station details." GC Brief at 2-3. Instead, the GC focuses on the DPT Agreement negotiated between the local parties (i.e. Local 1929 and the El Paso Station) and submits that this document filled in the many blanks left missing in the national contract. The Respondent has continued to follow the DPT Agreement and has never disavowed it, although the GC argues that the Respondent has in this case chosen to ignore it. Specifically, the DPT Agreement requires negotiation with the Union over any in station details that are not listed in the agreement. GC Ex. 4 at 9. Thus the General Counsel concludes not only that the covered by defense does not excuse the Agency's actions, but that the negotiated agreements between the parties affirmatively required the Agency to negotiate before implementing the Move Team and Inventory Team details.

Finally, the General Counsel urges me to order the Respondent to expand the notice-posting remedy beyond the traditional bulletin boards to the Respondent's email system and to the read-and-initial logbooks that it keeps.[3] The GC concedes that the Authority has thus far refused to order the dissemination of a ULP notice through an agency's email system, expressly rejecting such a recommendation by the Administrative Law Judge in *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Florence, Colo.*, 59 FLRA 165, 173-74 (2003)(*Florence*). The GC asserts that the factual record in the instant case overcomes the evidentiary deficiencies of the *Florence* case: where the Authority found that the evidence there did not demonstrate that the requested posting was "reasonably necessary and would be effective to recreate conditions and relationships with which the violation interfered or to effectuate the purposes and policies of the Statute",[4] the GC has gone to great lengths to introduce exhibits and testimony from a variety of witnesses, including at least one manager, that the Agency's use of email for both important and mundane communications has evolved to the extent that it is now the primary means of communicating with employees, and that physical bulletin boards are rarely utilized by employees at the El Paso Station any more. Therefore, utilizing the analytical framework outlined in *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 160-61 (1996)(*Warren AFB*), the GC submits that the evidence here

[3] The GC calls this the "post-log book," but my reading of the record indicates that the most commonly used and comprehensible term is the "read-and-initial logbook."

[4] 59 FLRA at 174.

demonstrates (1) that no legal or public policy objection to the proposed remedy exists; (2) that the proposed postings are necessary to effectuate the purposes and policies of the Statute; and (3) that posting the ULP notice only on the Respondent's physical bulletin boards would not effectuate those same purposes and policies.

Respondent

The Respondent makes three basic arguments as to why it had no obligation to notify the Union or negotiate concerning the two details; then, alternatively, it argues that it did provide at least constructive notice to the Union, but the Union submitted no proposals in response. With regard to its duty to bargain, the Agency asserts first that the details were an exercise of its section 7106(a)(2)(B) right to assign work, including the right to select which employees should perform the work, and in support it cites numerous negotiability decisions finding proposals that infringe on this right nonnegotiable. *See, e.g., NFFE, Local 7*, 53 FLRA 1435 (1998); and *AFGE, Council 214*, 8 FLRA 425, 427-28 (1982). It argues that the Union's insistence that it is not seeking to contest management's right to assign work is false, and that the Union's efforts would improperly direct management when and how to exercise its reserved rights. Resp. Brief at 18.

The Respondent further asserts that it had no obligation to notify or bargain with the Union because the impact of the details on employees' conditions of employment was *de minimis*. In the Agency's view, the only change that resulted was that the employees were able to work in plain clothes and mostly indoors. Moreover, they suffered no adverse consequences from the change. While some of them moved from the evening or night shift to the day shift, all employees rotate shifts at various times. In all other respects, the employees' job, the expectations on them, and their employment standards remained the same.

The Agency's final basis for asserting it had no duty to provide notice or bargain is that the two details are covered by the CBA. The linchpin of this argument is Article 16(H), which begins by stating: "The parties recognize that details to other positions and activities are necessary and an integral part of mission accomplishment." Jt. Ex. 1 at 24. The provision goes on to require documentation for certain types of details of fifteen days or longer; prohibits the use of details for certain purposes; offers some protections for employees detailed to lower positions; requires competitive procedures for some types of details; and allows employees to grieve details for certain reasons. *Id.* Respondent then turns to Article 3A of the CBA, which sets out the parameters of mid-term bargaining at either the national, regional or local levels when management proposes changes to existing rules or practices, and states: "Nothing in this article shall require either party to negotiate on any matter it is not obligated to negotiate under applicable law." *Id.* at 4. Respondent finally cites Article 5(C) of the CBA: "This Agreement is not intended to abolish, solely by exclusion herefrom, any understandings or agreements which have been mutually acceptable to the parties. Such understandings or agreements may not conflict with the master

Agreement." Based on these provisions, the Respondent asserts that details are covered by the CBA and therefore need not be negotiated at the local level. It cites *AFGE, National Border Patrol Council*, 54 FLRA 905, 910-11 (1998), in which the Authority held that the national union's proposals regarding long-term details were covered by the very same CBA provisions that are in dispute in the instant case.

In conjunction with its covered by defense, the Agency rebuts the General Counsel's invocation of the DPT as a basis for requiring bargaining. Referring to Article 5(C) of the CBA, Respondent asserts that the locally-negotiated DPT may not conflict with the national agreement and may not be interpreted to require the Agency to negotiate over any of its reserved management rights. Moreover, the Agency argues that section V(A)(3) of the DPT (referring to negotiation in accordance with CBA Article 3A on details not listed in the DPT), does not require bargaining at all: since CBA Article 3A only requires negotiation of changes "not covered by this agreement [the CBA]", and since details are indeed covered by Article 16(H) of the CBA, the Agency reasons that section V(A)(3) does not come into effect here at all.

With regard to notice, the Respondent submits that the Union "had sufficient notice via personal meetings with Patrol Agent in Charge Michael Pomeroy and Assistant Patrol Agent in Charge Salvador Zamora." Resp. Brief at 14. It cites *U.S. Air Force v. FLRA*, 681 F.2d 466 (6th Cir. 1982), and *U.S. Dep't of Air Force, Laughlin AFB, Texas*, 4 FLRA 469, 477 (1980), to support the principle that verbal notice to a union steward is sufficient under the Statute. The Respondent asserts that Station management sought a collaborative relationship with the Union in regard to the details and indeed sought the advice and participation of Union Vice-Presidents Russell and Harris throughout the process of moving to a new building. Having been afforded notice, the Union could have submitted impact and implementation proposals, but chose not to do so, thereby waiving its right to bargain.

As a remedy, the Respondent opposes the need for posting a notice anywhere except on the El Paso Station's bulletin boards. Distributing the notice on the Agency's email system and in the read-and-initial logbook are nontraditional remedies that require proof that has not been presented in this case, citing *Warren AFB* and other cases. The Agency argues that it is not equipped for these types of postings, as it is only "experimenting" with email as a means of communicating with employees. It asserts that the traditional bulletin board posting is the most effective form of notice and should not be expanded.

Analysis

Before implementing a change in conditions of employment affecting bargaining unit employees, an agency is required to provide the exclusive representative with notice of, and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *Bastrop*, 55 FLRA at 852. The extent to which an agency is required to bargain over such changes depends on the nature of the change. In some situations, a union may be entitled to bargain over the substance of the actual decision. *See, e.g. Dep't of the Navy, Puget Sound*

Naval Shipyard, Bremerton, Wash., 35 FLRA 153, 155 (1990). When the decision to change a condition of employment is an exercise of a management right under section 7106 of the Statute, the substance of the change is not negotiable, but the agency nonetheless is obligated to bargain over the impact and implementation of the change. *Bastrop*, 55 FLRA at 852. In either instance the change, to be negotiable, must have more than a *de minimis* effect on conditions of employment. *Soc. Sec. Admin., Office of Hearings & Appeals, Charleston, S.Car.*, 59 FLRA 646 (2004).

In order to fulfill its statutory obligation, the agency must notify and bargain with the union over a proposed change before the change goes into effect. *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9, 11 (1981)(*Scott AFB*). This means not only that the union must be notified in advance, but also that the agency must preserve the *status quo* until the negotiations have been concluded. *See U.S. Dep't of Justice, Immigration and Naturalization Serv.*, 55 FLRA 892, 902-03 (1999). Further, the notice "must be sufficiently specific or definitive regarding the actual change contemplated so as to adequately provide the union with a reasonable opportunity to request bargaining." *Ogden Air Logistics Center, Hill Air Force Base, Utah*, 41 FLRA 690, 698 (1991); *see also Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 855 (2002)(*Willow Grove*). A mere passing reference to a change, in a context unlikely to put the union on notice of its meaning, does not satisfy this requirement. *Dep't. of Army, Harry Diamond Laboratories, Adelphi, Md.*, 9 FLRA 575, 576 (1982).

The first question then is whether the formation of the Move Team and the Inventory Team constituted more than *de minimis* changes in the conditions of employment of bargaining unit employees. The evidence demonstrates that both details significantly altered the working conditions of the team members, as well as the procedure for placing employees on details. The Respondent in its brief tries to minimize the importance of working indoors, but for agents patrolling the border in the El Paso area, the elements of nature are a significant and often difficult factor that can make their work much more difficult than that of an office worker. For the period of their details, however, the Move Team and Inventory Team members were essentially office workers, occasionally going outdoors to check on vehicles or equipment stored nearby or to inspect progress in construction of the new Station. More significantly, the nature of their work was totally different from that of most agents at the Station: instead of dealing with aliens and possible illegal activity, they were doing office work. Some employees might consider this a welcome respite from the normal rigors of the job, while others might consider it a distraction from more important duties; regardless, it was significantly different work, and it offered employees (such as Ms. Montanez and Mr. Harris) the chance to learn new skills such as inventory, contracts and procurement, skills that might make them more well-rounded and attractive as candidates for promotion. Tr. 24, 261. While all employees may be subject to having their shifts changed periodically, employees selected to these teams could ensure that they would work on the day shift. For some employees, working a day shift is an advantage (Tr. 267-68), but it also carries with it

the loss of a significant amount of shift differential pay (Tr. 42-43). *See U.S. Dep't of Veterans Affairs Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004)(*VA Leavenworth*). Management also utilized an entirely different procedure for announcing the openings on these details and for filling the openings. While the DPT Agreement contains very specific procedures for doing this, the DPT Team was not used at all here. The originally anticipated length of the Move detail (seven to eight months) was also a significant amount of time to perform (and to be evaluated on) a totally different type of work than these employees normally did. While, as I noted in footnote 2, *supra*, the record is not clear how long the Inventory Team detail lasted, I do not consider this fact material to my decision. I find that it is more likely that the detail lasted from mid-January to late June 2008, rather than the one-to-two weeks estimated by PAIC Pomeroy, but the impact on employees of working on the Inventory Team for even one or two weeks would still be more than *de minimis*, in light of the other factors I have already cited.

The Respondent also argues that an agency decision "to the advantage of bargaining unit employees should not be subjected to the same level of scrutiny as one that would result in the adverse effect to bargaining unit employees." Resp. Brief at 16. It is not clear whether Respondent is asserting this principle as part of its *de minimis* analysis, but that seems to be its import. The Agency does not cite any Authority precedent for this point, and I could find none. The relevant cases refer to "the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment." *See, e.g., VA Leavenworth*, 60 FLRA at 318. Sometimes the effects will be adverse, and sometimes they will be beneficial, but they are all relevant. Moreover, a change that benefits a group of selected employees often affects nonselected employees adversely, and that is at least partially why unions are permitted by section 7106(b)(2) to negotiate procedures governing management's exercise of its reserved rights. In our case, therefore, the Union would have had a legitimate interest in negotiating a procedure (perhaps one similar to that which already existed in the DPT) to ensure that all employees had a fair opportunity to learn of the openings on the Move Team and Inventory Team and to submit applications. I had the opportunity to address this point in the context of a unilaterally-imposed salary increase in *United States Securities & Exchange Comm'n*, 62 FLRA 432, 450 (2008)(*SEC*), *enf'd sub nom. U.S. Sec. and Exch. Comm'n v. FLRA*, 568 F.3d 990 (D.C. Cir. 2009). I noted there that the confusion among litigants may arise from the use of the phrase "employees adversely affected" in section 7106(b)(3), which authorizes the "impact" portion of "impact and implementation" bargaining. Thus the Respondent is at least partially correct, in that a union may have little or nothing relevant to negotiate in the way of appropriate arrangements, when an agency has proposed a change that only benefits employees. This does not alter, however, the fact that the agency is obligated to provide the union advance notice of the change and to bargain over procedures or implementation proposals, and it does not mean that beneficial changes are *de minimis*.

The next issue that I will consider is the negotiability of the subject of details, but I must confess to being more than a little confused by the Respondent's arguments on this point. The Agency devoted a large portion of its brief to proving that the right to assign

employees is reserved to management by section 7106(a), and that the Union was insisting that it, rather than management, decide who would be assigned to the two disputed details, and in other respects seeking to impose burdensome procedural limitations on management's assignment of work. The Agency did briefly concede that the Union had the right to negotiate over "procedures which management officials of the agency will observe in exercising any authority under [section 7106]" and "appropriate arrangements for employees adversely affected by the exercise of any authority under [7106] by such management officials." Section 7106(b)(2) and (3), respectively. But no sooner than it agreed it had to bargain over the impact and implementation of the details, the Respondent contends that the Union failed to request bargaining, despite adequate notice, and thus the Union waived its right to bargain. Resp. Brief at 13-14. Then the Respondent returned to discussing the *de minimis* nature of the changes and the importance to the Agency of being able to make work assignments quickly and effectively. *Id.* at 15-19. I will defer the issue of notice to a later section, because it is distinct from the question of negotiability, and dependent on a finding that the Agency had a duty to negotiate.

Despite the Respondent's efforts to treat it as a disputed issue in this case, it is clear that the Union did not seek, nor has the General Counsel sought on the Union's behalf, the right to negotiate over the substance of the Agency's decision to assign bargaining unit employees to work on the two details. As the Respondent states, the right to assign work is reserved to management by section 7106(a)(1) and (2) of the Statute, and this right includes the right to determine which employees will perform the work and when it will be performed. *National Education Association, Overseas Education Association, Laurel Bay Teachers Association,* 51 FLRA 733, 739 (1996). But the Authority has also long held that unions are entitled to bargain over the impact and implementation of changes in assignments and details. *Soc. Sec. Admin., Area IX of Region IX,* 51 FLRA 357, 369 (1995)(*SSA Area IX*). It is only impact and implementation bargaining that is sought here.

While the Respondent urged in its brief that the two details created in this case were of great operational importance and that advance notice and negotiation would interfere with the Agency's work, it never directly discussed the case law regarding the "necessary functioning" defense. *See SEC*, 62 FLRA at 436-38. Neither the General Counsel nor its witnesses questioned the necessity or importance of the two details, and the Respondent's own witnesses offered ample evidence that the Agency had known about the details for quite some time. The planning for the move had been ongoing for years, and indeed the Union had been a party to some of that planning, but it had not been apprised prior to January 2008 that employees were going to be assigned full-time to implement the move. Ms. Bueno had been planning the Inventory project since at least November 2007, leaving time to notify the Union and bargain prior to the creation of the team in mid-January, if the Agency had been so inclined. The idea that the necessary functioning of the El Paso Station depended on implementing these two details without bargaining is simply not supportable.

The Respondent's next defense is that the subject of details is covered by the CBA, thus relieving it of the obligation to notify the Union or give it an opportunity to bargain. This argument has considerable merit, if we look only at the CBA. Indeed, there is a growing

body of case law involving the same union, the same agency and the same CBA provisions that are disputed again in our case. In 1998, the Authority upheld an arbitrator's award that concluded the United States Border Patrol (then a part of the Department of Justice), was not obligated to bargain with the AFGE's National Border Patrol Council over the union's proposed mid-term proposals regarding long-term details, a subject that had previously been raised and then dropped by the agency. *AFGE, National Border Patrol Council,* 54 FLRA 905, 906 (1998)(*AFGE*). The arbitrator reviewed the various portions of the CBA[5] on the subject of details (including Article 16H) and found that the "accumulated contractual terms . . . cover all details." *Id.* The Authority compared the relevant CBA provisions and noted that they "are more comprehensive than those found sufficient to satisfy the agency's bargaining obligation" in *USDA Forest Service, Pacific Northwest Region, Portland, Or.*, 48 FLRA 857 (1993). The Authority distinguished those two cases from *SSA Area IX*, *supra,* 51 FLRA at 372, where the parties had negotiated a supplemental agreement that "consciously reserve[ed]" the union's right to bargain on all types of details not expressly addressed in the CBA. *AFGE*, 54 FLRA at 911. The Authority thus held that the union's proposals regarding details were covered by the CBA, and the agency was under no obligation to negotiate further.

In 2002, the Authority had occasion to cover much the same ground, in the context of an unfair labor practice case, in *United States Border Patrol Livermore Sector, Dublin, Calif.*, 58 FLRA 231 (2002)(*Livermore*). In that case, a manager at the agency's Livermore Sector notified the president of National Border Patrol Council Local 2730 that two employees were being temporarily reassigned to different offices. The parties engaged in limited negotiations on the subject, but sector management cut off discussions and contended that the issue of details was covered by the CBA and thus did not require negotiations. The union and agency agreed that the reassignment of the two employees constituted a change in their conditions of employment, and that the subject of details was covered by the national agreement (*id.* at 237, 239), but the union claimed that the reassignments were not details. The ALJ concluded that the reassignments were details and thus were covered by the CBA, and the Authority agreed. *Id.* at 232 (then-Member Pope dissenting).[6]

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[5] The CBA described in *AFGE* is the same agreement that is still being applied in full by the parties in the instant case. It took effect in 1995, expired in 1998, was "rolled over" for a year or two, and has continued to be followed by the parties since then, even though a successor agreement has not been negotiated. Tr. 52-55; Jt. Ex. 1.

[6] A further issue discussed by the ALJ, but which the Authority found unnecessary to decide, was whether the "covered by" rule and defense may be used by a party to a CBA that has expired and not been rolled over. 58 FLRA at 232-33 and nn.7, 8. The CBA that had already expired when the *Livermore* case was litigated has not yet been renegotiated, and the Authority has not yet definitively ruled on the applicability of the covered by defense after the expiration of the CBA; but in light of my ruling on other issues here, it is not necessary for me to decide that unresolved question either. For other cases in which the expiration of this same CBA has caused the Respondent and the Union, on either the national or local level, to dispute without resolution over the applicability of the covered by

There is, however, a significant difference between the facts of the instant case and of the *Livermore* and *AFGE* cases. In our case, the parties at the El Paso Station continued the bargaining process concerning details after the national CBA had been signed, and they produced the DPT Agreement. Indeed, it was negotiated in 2001, at a time when the national agreement had long expired, although the CBA was still being followed by the parties. In this crucial respect, our case resembles *SSA Area IX* and requires a similar result. Just as in *SSA Area IX*, the parties have a collective bargaining agreement that has a variety of provisions on the subject of details, but those CBA provisions were supplemented by a narrower agreement focused on certain procedural aspects of details and the continuing obligation to bargain on details. As the Judge stated in *SSA Area IX*, the type of details in dispute was "clearly treated" in the CBA, and "perhaps without any other consideration the Union, under [the covered by doctrine], would not be entitled to notice and an opportunity to negotiate concerning the impact and implementation of the detail." 51 FLRA at 371. However, he went on to find that the separately negotiated Letter of Understanding had to be considered as well. He interpreted the various agreements in accordance with the guidelines of so-called "*IRS* doctrine,"[7] and concluded that "the Union was consciously reserving the Statutory right to notice and an opportunity to bargain on all other forms of details. 51 FLRA at 372. He therefore ruled that the covered by defense was not applicable to the agency's refusal to bargain and that it had violated the Statute. *Id.* at 373.

As I noted earlier, the Authority in *AFGE* also recognized the significance of supplemental agreements to a CBA, when it distinguished *SSA Area IX* from the circumstances of the *AFGE* case. 54 FLRA at 911. It recognized that by a supplemental agreement, parties could require bargaining over certain contractual provisions that would otherwise be covered by the CBA. And that is exactly what we have in the instant case. The CBA addresses many questions regarding details: in Article 16(H) it recognizes that the Agency will need to detail employees as a necessary part of its operations, but it requires documentation of such actions and affords employees some protections against Agency abuse of its right to detail. Article 26(N) and (O) provide additional safeguards to employees on detail. But the CBA says nothing about the process of detailing employees within a Station, particularly when the Station may have a number of types of details that recur on a regular basis. In the absence of any negotiated agreement concerning these latter issues, they would, pursuant to the first prong of the "covered by test,"8 be considered to be covered by the broader provisions of the CBA. After some history of conflict and litigation in El Paso

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defense, *see also U.S. Dep't of Justice, Immigration & Naturalization Svc., Washington, DC,* 55 FLRA 93, 99 (1999); *United States Immigration & Naturalization Svc., United States Border Patrol, Del Rio, Tex.,* 51 FLRA 768, 773 (1996), *aff'd sub nom. National Border Patrol Council, Local 2366 v. FLRA*, 114 F.3d 1214 (D.C. Cir. 1997).

[7] *Internal Revenue Service, Wash., D.C.*, 47 FLRA 1091 (1993).

[8] *United States Dep't of Health and Human Svcs., Soc. Sec. Admin., Balt., Md*., 47 FLRA 1004 (1993)

regarding details, training and collateral duties, the parties at the El Paso Station decided to negotiate a much more detailed set of procedures, in which bargaining unit employees are utilized to perform most of the mechanical work of keeping track of the many different details and training opportunities and announcing those opportunities to employees. Tr. 53-54. Among other things, it defined the many types of details (Section 3(B)) – the very issue that had been the subject of litigation in *Livermore, supra*. I will not attempt to assess whether each of these provisions constitutes a "procedure" or an "appropriate arrangement" within the meaning of section 7106(b)(2) and (3) of the Statute, but the overall document is certainly an attempt by the parties to reach mutual agreement on a framework for the management at the El Paso Station to exercise its right to assign work and to decide which employees shall perform work in a manner that is also fair to employees. The parties continued to apply the DPT Agreement at all relevant times since May of 2001, and while the parties obviously dispute whether the Respondent violated the DPT Agreement in creating the Move Team and the Inventory Team, neither party has repudiated the agreement or sought to renegotiate it. In deciding whether the Respondent had a duty to negotiate with the Union before creating these two teams, the DPT Agreement must be interpreted and applied under the *IRS* analysis.

Recently, the Authority issued a decision in *Soc. Sec. Admin.*, 64 FLRA 199 (2009)(*SSA)*, explaining how the covered by and *IRS* doctrines can overlap. It noted in particular, that "in the bargaining context, the *IRS* doctrine applies only "when a party 'relies on a contract provision *specifically concerning bargaining* (such as a reopener or zipper clause)' that relates to the parties' bargaining obligations." 64 FLRA at 202, *citing United States Dep't of Energy, Western Area Power Admin., Golden, Col.*, 56 FLRA 9, 12 (2000)(emphasis in *SSA* decision). In our case, it is the Union that relies on the DPT Agreement: it asserts that section V(A)(3) of the DPT Agreement affirmatively obligated the Agency to bargain over the Move and Inventory teams, and further that it rebutted the Agency's covered by defense in regard to the CBA. I agree, and I hardly see how it can be interpreted otherwise. While the supplemental agreement in *SSA Area IX* was quite complex in its multiple references to a duty to bargain, section V(A)(3) of the DPT Agreement is quite simple and direct: "In Station details that are not listed and identified in this policy shall be subject to negotiation with the Local Union in accordance with the Statute and Article 3A of the Collective Bargaining Agreement." *See* 64 FLRA at 202. Thus the provision meets the prerequisite set out above in *SSA*: section V(A)(3) does specifically concern bargaining that relates to the parties' bargaining obligation. It serves essentially the same purpose as a reopener clause, in that requires the parties to resume bargaining when they confront a type of in Station detail that is not specified in the DPT Agreement. Section V(A)(2) lists 14 types of in Station details, none of which resembles the Move Team or the Inventory Team. Section V(A)(3) thus requires the parties to return to the bargaining table to negotiate the details "in accordance with the Statute and Article 3A of the [CBA]."

Grasping onto that last phrase before it goes underwater a third time, the Respondent argues that the DPT Agreement refers to Article 3A of the CBA's provision that "[n]othing in this article shall require either party to negotiate on any matter it is not obligated to negotiate

under applicable law." Jt. Ex. 1 at 4. This is true, but it gains nothing for the Agency's cause. Respondent simply falls back on its management right to assign work, which we have already determined to be subject to impact and implementation bargaining. Looking at CBA Article 3A in its entirety, the meaning of the DPT Agreement's reference to Article 3A is clear: Article 3A sets forth the structure, on the national, regional and local levels, for the appropriate representatives of each party to conduct impact and implementation bargaining. It specifies time periods for the parties to make proposals and to respond, and provides for the logistics of the negotiations, such as travel and per diem expenses. The DPT Agreement cites Article 3A not to offer the Respondent another excuse to refuse to bargain, but a framework for the bargaining that is familiar to the parties and otherwise absent from the DPT Agreement. The Respondent also cites Article 5C of the CBA, which provides that any side agreements negotiated by the parties "may not conflict with the master agreement." Jt. Ex. 1 at 8. But the DPT does not conflict with the CBA; it merely steps into a void left by the CBA with regard to how details and training opportunities will be assigned, something that is very common in local agreements between collective bargaining parties that interact at several organizational levels. The CBA provides some protections for employees and limitations on management's exercise of discretion, but it leaves many aspects of the process unspoken and it spells out no procedures for the actual assignment of details. Absent the DPT Agreement, the provisions of the CBA are sufficient to "cover" the issue of details, but the provisions of the DPT Agreement do not actually *conflict* with the master agreement. In general at least, the provisions of the DPT simply spell out in depth the procedures and arrangements for the detail process at the El Paso Station, in full accordance with the intent and meaning of Articles 3A and 5C of the CBA and section 7106(b) of the Statute.

For these reasons, I reject the bases on which the Respondent denies that it had a duty to provide notice and to bargain with the Union regarding the Move Team and Inventory Team details. Instead, I find that it had a duty to provide the Union with advance notice of the details and to allow the Union to engage in impact and implementation bargaining on the details.[9] That finding does not end this case, however. I still must evaluate whether the Respondent fulfilled those obligations, the first of which is notice.

With regard to the Inventory Team, this question is simple: the Respondent never notified the Union of the team in any way, shape or manner. Ms. Bueno, the supervisor in charge of the Inventory Team, testified that she never notified the Union or offered to bargain with it; neither did her supervisors, Pomeroy and Zamora. Tr. 427, 317-18. 384-85. After

[9] For what it's worth, I emphasize that pursuant to section V(A)(3) of the DPT Agreement, the Agency is simply required to negotiate in accordance with the Statute and Article 3A of the CBA – it is not required to conduct the Move and Inventory details in the exact same way as those details which are already listed in the DPT Agreement. Based on the Respondent's brief, it seems to believe that negotiating with the Union over these two details would mean the Union would "dictate how bargaining unit employees should be selected for assignments. Specifically, [by using seniority as the basis for selection] . . ." Resp. Brief at 24. While the Union might indeed seek to negotiate procedures similar to those in the DPT Agreement, such an outcome is entirely subject to the vagaries of good faith bargaining.

discussing the inventory process with Pomeroy and Zamora, Bueno sent an email to the Field Operations Supervisors, asking them to announce the formation of an Inventory Team and to solicit volunteers among the bargaining unit employees. Tr. 416. All of the employees who volunteered were selected for the team. Tr. 437-39. The Union learned of the detail the same time as all employees: through the announcement at muster by the FOSs. This is not advance notice, and it does not meet the requirements of the Statute. *Willow Grove*, 57 FLRA at 855; *Scott AFB*, 5 FLRA at 23. While a union is normally required to submit a request to bargain, it cannot do so if it was never notified of the change, or if it was notified in a manner that indicates the change has already been decided upon. *Willow Grove, supra* at 856, *citing United States Dep't of Labor, Wash., D.C.*, 44 FLRA 988, 990, 994, 1007 (1992). By learning about the Inventory Team after the decision had already been made and management was in the process of soliciting team members, the Union here was clearly confronted with a *fait accompli*; bargaining would have been futile, and thus it was not required to do so. The Respondent violated section 7116(a)(1) and (5) of the Statute.

The question of notice is a bit more convoluted with regard to the Move Team, but the outcome is the same. The Union in general, and Vice President Russell in particular, had been informed for several years about the planning for a move to a new Station, and there had even been some bargaining on aspects of the early planning several years prior to 2008. I credit PAIC Pomeroy's testimony that he sought to involve Russell in the move planning in 2008. Russell was considered by management to be computer-savvy, and they utilized that expertise in aspects of creating a database or shared drive for documents related to the move. While the date of the meeting is unclear, I credit the testimony of several witnesses that Pomeroy had met at least with Russell at some point in January 2008 and asked him to be a member of the Move Team. The timing of this meeting is crucial, however, and on this score the management witnesses could give no clear or even approximate date. The only testimony that relates the meeting to a date was Ms. Montanez's statement that Russell was present when she and the other newly selected members of the Move Team were briefed on the project by Pomeroy (Tr. 40)(which would place it at about January 17 to 20); and Pomeroy's statement that it occurred "[w]hen we had the idea to create the move team" (Tr. 304). When asked to date the meeting more specifically, Pomeroy said, "The same time, Your Honor. The January – the same time that this memo went out." Tr. 305. The "memo" he referred to was the solicitation of volunteers for the Move Team, which was dated January 14. Because Pomeroy's memory of the date was so sketchy, and because his estimate is very close to that of Montanez, I find that Russell was first told about the Move Team at the same meeting that Montanez and the other newly selected members attended with PAIC Pomeroy. In other words, the Union received no advance notice at all, but was brought into the planning process when the team or detail was a *fait accompli*. As with the Inventory Team, this does not satisfy the Statute.

Even if Pomeroy's discussion with Russell had been prior to the meeting that Montanez and the new team members attended, it certainly was not much more than a few days earlier, and this is little better, for purposes of proper notice and bargaining. Pomeroy

said he met with Russell "the same time that this memo went out." So if he met with Russell on January 14, he still was notifying the Union at the same time as he was notifying the bargaining unit that the team was being selected. This is still a *fait accompli*.

It is clear from the overall testimony of the Respondent's witnesses that while they believed they had no duty to bargain with the Union in relation to the formation of these teams (see Tr. 317), they did at least want to involve the Union in the planning of the move. I credit that they felt the Union representatives could provide valuable input to them in making the move a smooth and efficient process. The problem is that this is not the same as engaging in collective bargaining, or I&I bargaining. Russell, and later Harris, were viewed as team "members," and their opinions were as valuable as the opinions of other employees, but they were not seen as bargaining representatives. While management is not required to take dictation from Union representatives during bargaining, management must engage in a give-and-take process with a view toward reaching agreement; that is quite different from listening to an employee's opinion and then making an executive decision.

Also absent from this entire process is the presence of Union President Stack. Pomeroy made it clear that he didn't feel he needed to notify Stack of his actions, including his actions regarding these two teams, and that he used Russell, who worked at the El Paso Station, as his contact from the Union. Tr. 305. Pomeroy also testified that in the El Paso Sector, notices to the Union pursuant to Article 3A of the CBA must be sent by Sector management, not the Station's PAIC; thus it is apparent that Pomeroy simply avoided the formalities of Article 3A, certainly in this case and apparently in other situations as well, by communicating verbally with the Union official closest to him, i.e. Russell. The Union had previously notified the Respondent that notices of changes were to be sent to the Union President (Tr. 49), and the Authority has held that a union has the right to designate representatives for specific purposes such as this. *Willow Grove*, 57 FLRA at 855; *Federal Aviation Admin.*, 23 FLRA 209, 217 (1986). This was simply another way in which the Agency's notification to the Union of the implementation of the teams was belated and inadequate. Even when the PAIC met with Russell and asked him to participate in the activities of the Move Team, it was far from clear, in this context, that he was advising Russell of a change in conditions of employment, thereby inviting the Union to request bargaining and to submit proposals. *See Willow Grove*, 57 FLRA at 856; *U.S. Dep't of Interior, Bureau of Reclamation*, 20 FLRA 587, 599 (1985). Written notices to the Union President pursuant to CBA Article 3A make it clear that a change is being planned and that the Union is invited to respond; oral notices to a lower Union official asking him to "join the team," so to speak, do not afford the same clarity and leave all parties guessing as to what their responsibilities are.

For all of the reasons stated above, I conclude that the Respondent failed to give the Union proper notice of its intent to create a Move Team and an Inventory Team. The Union therefore could not be expected to request bargaining or submit proposals. By its actions, the Respondent violated section 7116(a)(1) and (5) of the Statute.

Remedy

In most respects, the remedy for the Respondent's unfair labor practices is clear: it is uncontroverted that I issue a cease and desist order, require the Respondent to bargain with the Union regarding procedures for the assignment of employees to the Inventory Team,[10] and require the Respondent to post an FLRA-drafted notice regarding its unfair labor practice, signed by the El Paso Station PAIC, in "conspicuous places where notices to employees are customarily posted." That is the traditional language used by the Authority regarding where and how such notices are posted. The only remaining issue in dispute here is whether such notice should be posted only on the Station's "physical" bulletin boards, or whether they should also be posted by the Respondent in its read-and-initial logbook and through an email to employees.

I will first dispose of the General Counsel's request to have the FLRA notice placed in the read-and-initial logbook. This is, in any sense of the terms, not only a "nontraditional" but an "extraordinary" remedy, and the GC has not demonstrated the need for this. On the other hand, sending the notice to all bargaining unit employees at the El Paso Station in a one-time email is, in many respects, simply putting it in another "place where notices to employees are customarily posted," and requires more analysis.

First I must review the legal framework for framing appropriate remedies for unfair labor practices. Sections 7105(g) and 7118(a)(7) of the Statute vest the Authority with broad discretion in framing appropriate remedies. *Warren AFB*, 52 FLRA at 160, *citing Dep't of the Army, U.S. Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995). But there are limits to this discretion, among them the instruction that remedies must "effectuate the policies of the Statute." *United States Dep't of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 445 (1990). The Authority in *Warren AFB* then noted that the posting of a notice to employees is one of several "traditional" remedies that are provided in virtually all cases where an unfair labor practice is found. *Warren AFB*, 52 FLRA at 161. The General Counsel, however, sought an additional remedy, which the Authority described as "nontraditional," of requiring the agency's commander to issue a memorandum reminding supervisors and managers of their obligations under section 7114(a)(2)(A) (the specific provision violated in that case). *Id.* at 153, 161. For such remedies, the Authority stated that the appropriate standard is:

> [A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.

[10] There was testimony from several witnesses that the Inventory Team is now an annual detail, repeated in 2009 as it was handled in 2008. Affirmative relief is therefore warranted with regard to this detail. The Move Team, on the other hand, was a one-time project and is unlikely to be repeated in the foreseeable future. Requiring bargaining on that issue is therefore moot.

52 FLRA at 161, citing *Safford, supra,* 35 FLRA at 444-45.

The Authority found the remedy of issuing a special memorandum to managers unwarranted by the facts of the case. The violations consisted of two formal discussions held without a union representative, with no evidence of a pattern of violations. These facts did not demonstrate why the traditional cease and desist order and notice posting would be inadequate to accomplish the stated objective of deterrence. 52 FLRA at 162.

In this context, we have the legal parameters for evaluating the necessity of posting the FLRA notice in the Agency's read-and-initial logbook. It clearly is not the type of remedy that the Authority normally orders, and thus would qualify as nontraditional, thus putting the burden on the GC of satisfying the questions in the above-quoted paragraph from *Warren AFB.* It goes further than simply extending the traditional technological means of posting a notice, in that it requires the Station's managers to engage in an interactive process with all bargaining unit employees, first requiring the managers to advise employees of the notice and then to require the employees themselves to sign a paper that they have read the notice. This relief is significantly different in kind, and not merely in scope, from posting on bulletin boards. Moreover, contrary to the GC's contention, this is not the way that the Respondent typically communicates with its employees at the Station; instead, it is a special form of communication that the Respondent reserves for information that it most wants employees to read and understand. As with the memorandum to managers sought in the *Warren AFB* case, while education is always a salutary objective, the evidence does not demonstrate that this particular educational tool is necessary here to get the word to employees. I find that it is particularly objectionable in that it imposes an affirmative obligation on every employee at the Station to read the notice and sign a form, with the Agency's management acting as enforcers for the Authority. There is no parallel in our case precedent for putting the employees and the Agency in such a relationship. The evidence does not support a finding that it is necessary to effectuate the policies of the Statute.

This brings us to the question of posting the notice by email, and to the *Florence* case, the first case I am aware of in which an ALJ of the Authority recommended, or the Authority even discussed, such a form of notice posting.[11] In its section heading rejecting an email posting, the Authority called it "extraordinary," and in the body of its opinion the Authority called it "nontraditional." It is not clear that these two terms have distinct meanings, and I will interpret them as synonymous, in the context of the legal framework of *Warren AFB.* In *National Guard Bureau,* 57 FLRA 240, 245 (2001), cited by the Authority in *Florence,* the Authority restated the two remedial purposes of posting a notice: it demonstrates to employees that (1) the Authority will vigorously enforce rights guaranteed by the Statute, and (2) the respondent recognizes and intends to fulfill its obligations under the Statute.

[11] The ALJ also ordered posting the notice on the agency's television monitors. Happily, even though the El Paso Station has a similar television monitor, the General Counsel has not requested posting in that manner, and I will not consider it.

National Guard involved a dispute over the scope, not the method, of the notice posting: the GC sought a nationwide posting and the agency sought to limit it only to certain bargaining units. In our case, all parties agree that a Stationwide posting is appropriate, but they disagree on the technology for doing so. Nonetheless, the dual purposes of posting a notice remain the lodestars for evaluating whether the remedy "effectuates the policies of the Statute."

As noted in *Warren AFB*, 52 FLRA at 161, the questions that must be answered in evaluating nontraditional remedies are "essentially factual": is the remedy reasonably necessary? Would it be effective to recreate the conditions and relationships that have been violated, and to effectuate the policies of the Statute, including deterrence? In *Florence*, the ALJ described the evidence regarding the agency's methods of communicating with employees, (59 FLRA at 182, 191), but it is very difficult to compare the quality or quantity of that evidence to the record in the instant case. In *Florence*, the ALJ noted that the agency used official bulletin boards as well as the LAN computer system to communicate information such as vacancy announcements and thrift savings plan information; it also used its email or LAN system for similar types of information, as well as notices of official meetings and meetings of employee organizations, birth and death announcements, and sales of tickets. *Id*. at 182. He did not, however, explain in any detail how those facts demonstrated the necessity of the email posting or its link to the effectuation of the purposes of a notice posting. *Id*. at 191. The Authority found that the evidence did not demonstrate the necessity of an email posting. *Id*. at 174.

The General Counsel in the current case sought to fill that evidentiary void by introducing extensive testimony, and offering numerous exhibits, illustrating the many ways that the Respondent communicates with its employees, and seeking to evaluate the effectiveness of the means of communication. I cannot say with any confidence how much the agency in *Florence* used email, but I can say with considerable certainty that the Department of Homeland Security and the El Paso Station of the Border Patrol use their email system to communicate virtually all information that it disseminates to bargaining unit employees. More importantly, the record reflects that the email system is now the Respondent's primary method of communicating to employees. Furthermore, the record suggests that physical bulletin boards are being used progressively less by employees as time passes, and that these bulletin boards currently are not viewed by employees as an up-to-date source of necessary information. The evidence indicates that in the Station there is a muster room that has an unsecured bulletin board, as well as a glassed-in board that is kept locked by management, each of which contains announcements of various sorts. *See, e.g.*, G.C. Ex. 5a-i, which illustrate both types of boards.[12] While both boards have an FLRA notice posted, the notice is much more visible on the locked board (G.C. Ex. 5c) than on the unsecured board (G.C. Ex. 5i, where it is partially blocked by other notices). A significant problem with the locked board, however, is that it mainly contains information that is years old, and often

[12] While most of these photos were taken at the Alamagordo Station, testimony indicated that its boards were similar in all relevant respects to those at the El Paso Station.

obsolete. G.C. Ex. 5d, e, f and g. This tends to corroborate the witness testimony that employees do not view the bulletin boards, or at least the one secured by Respondent, as a useful source of information important to them. While I recognize that much of the testimony was offered by Union officials who have a stake in this case, I believe that the testimony in the nature of opinion is supported by the documentary evidence. Moreover, while the Union officials have a stake in this case, they have a larger stake in ensuring that any notice of the Respondent's unfair labor practice is read by as many employees as possible, and that interest coincides with the purposes of the Statute here.

The policy of the National Labor Relations Board regarding email dissemination of remedial notices is currently in a state of transition and uncertainty. The Board, like the Authority, customarily orders parties who have committed unfair labor practices to post a Board-drafted notice "in conspicuous places including all places where notices to employees are customarily posted." *International Business Machines Corp.*, 339 NLRB 966, 967 (2003)(dissenting opinion of Member Walsh). The *IBM* case appears to be the first one in which the Board addressed the question of posting the standard notice electronically, and the majority in *IBM* refused to order it because the issue had not been raised before the ALJ. 399 NLRB at 967 (majority opinion). Subsequent to that decision, the Board has returned to the issue in two cases,[13] and each time it has deferred full consideration of the issue due to the lack of an evidentiary record, and despite sentiment by some Members that the traditional notice-posting language encompasses "new communication formats, including electronic posting…." *Nordstrom*, 347 NLRB at 294-95 n.5; *see also*, *Valley Hospital*, 351 NLRB at 1250 n.1.

Most of the bargaining unit employees in the instant case are border patrol agents who work outdoors for a large part of their day. They spend a limited amount of time at the start and end of their day at the Station itself, and the evidence reflects that most, if not all, of them use at least part of that time to check their email on the Agency computers that are provided for them. All witnesses, both employees and managers, felt that there were an adequate number of computers at the Station for them to check their mail, although sometimes they have to wait. Managers are strongly encouraging employees to check their email daily, as that is where they can always find the most up-to-date information that they need for their work. Tr. 400-02, 476. Some employees have been reluctant to use their computers, but these people seem to be far outnumbered by those who use their email rather than physical bulletin boards.

This review of the evidence brings me back to the standards for framing an appropriate remedy. Although the previously quoted paragraph from *Warren AFB*, 52 FLRA at 161, includes a reference to "recreat[ing] the conditions and relationships with which the unfair labor practice interfered," I do not see that this is relevant in evaluating the scope or

[13] *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250 (2007); *Nordstrom, Inc.* 347 NLRB 294 (2006).

method of posting a notice to employees in a case such as ours, where the Respondent has unilaterally changed conditions of employment. It would be more relevant to evaluating an affirmative remedy, as in *Safford*, where an employee was denied a union representative at an interview and the Authority ordered that the interview be repeated, with a union representative present. 35 FLRA at 448. In a case such as ours, where the Respondent has made a unilateral change, no form or method of notice is going to recreate the conditions that were interfered with. Rather, the twin lodestars for our guidance in determining the effectiveness of a notice are those cited in *National Guard Bureau* and reiterated in *Florence*, 59 FLRA at 173: does the notice posting demonstrate to employees that the Authority will vigorously enforce rights guaranteed under the Statute and that the Respondent recognizes and intends to fulfill its obligations under the Statute?

I note here that the testimony revealed no legal or public policy objections to disseminating a notice by email. Tr. 130. None of the Respondent's witnesses raised any such concerns.

In light of the evidence in our record, I am convinced that while it is still important to post our notice on the Respondent's physical bulletin boards, that alone will not adequately accomplish the two purposes of a notice, cited above. In an environment such as the El Paso Station, where most employees spend most of their day in the field and have only short periods of time inside the Station, they are spending that time increasingly at their computers and not milling around the Station. They do attend daily muster, and the unsecured bulletin board is in that room, so posting an FLRA notice there has some likelihood of reaching most employees. The official, locked bulletin board appears to represent the least likely source of information for employees, and it is unlikely that most employees look at that board with any regularity. But the GC has demonstrated that the greatest number of employees rely on their email as their primary source of information, and that the Respondent does as well. If the FLRA notice telling employees that the Respondent has violated the Statute is disseminated to them through the Agency's email system as well as on the bulletin boards, it would communicate the strongest message possible to employees that the Authority is protecting their rights and that the Respondent recognizes its violation and is taking steps to rectify it. Conversely, if the notice is disseminated only on the bulletin boards, I believe that more employees will fail to see it, and it will convey a weaker message to employees than if they saw it in their email. For these reasons, I find that posting the notice by email, as well as on bulletin boards at the Station, is reasonably necessary to effectuate the statutory purposes for which these notices are designed.

Accordingly, I recommend that the Authority issue the following remedial Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas (the Respondent):

1. Cease and desist from:

(a) Changing the conditions of employment of bargaining unit employees without providing the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (the Union), with adequate advance notice and an opportunity to negotiate to the extent required by the Statute.

(b) Implementing and staffing details, including the Inventory Detail, without complying with the obligations imposed by the Statute and the parties' negotiated agreements.

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

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

(a) Eliminate the Inventory Detail, and not reinstate it without first providing notice to the Union and, upon request, bargaining with the Union to the extent required by the Statute and the parties' negotiated agreements.

(b) Post at the El Paso Station facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Station's Patrol Agent in Charge, 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.

(c) Disseminate a copy of this Notice signed by the Station's Patrol Agent in Charge, through the Station's email system to all bargaining unit employees at the El Paso Station.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas 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 herewith.

Issued, Washington, DC, January 27, 2010.

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the conditions of employment of bargaining unit employees without providing the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (the Union), with adequate advance notice and an opportunity to negotiate to the extent required by the Federal Service Labor-Management Relations Statute.

WE WILL NOT implement or staff details, including the Inventory Detail, without complying with the obligations imposed by the Statute and by the parties' negotiated agreements.

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

WE WILL eliminate the Inventory Detail, and we will not reinstate it without first providing notice to the Union and, upon request, bargaining with the Union to the extent required by the Statute and the parties' negotiated agreements.

_____
(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, Dallas Region, Federal Labor Relations Authority, and whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, Texas, 75202-1906 and whose telephone number is: (214) 767-6266.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case Nos. DA-CA-08-0179 & DA-CA-08-0180, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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REGULAR MAIL:

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_____

Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: January 27, 2010
Washington, DC