65 FLRA No. 158

UNITED STATES
DEPARTMENT OF THE AIR FORCE
U.S. AIR FORCE ACADEMY
COLORADO
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1867
(Charging Party/Union)

DE-CA-07-0305

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DECISION AND ORDER

April 27, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC). The Respondent filed an opposition to the GC'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 eliminating the past practice of providing base taxi service to and from the office of the employees' exclusive representative (Union) without prior notice or opportunity to bargain.

The Judge found that the Respondent did not violate the Statute as alleged and recommended dismissal of the complaint.

Upon consideration of the Judge's decision and the entire record, we grant the GC's exceptions and issue the attached order.

1. Chairman Pope's separate opinion, dissenting in part, is set forth at the end of this decision.

II. Background and Judge's Decision

A. Background

The Respondent, located on an Air Force base, maintains a base taxi service. Judge's Decision at 25. Upon request to the dispatch office, the taxi service shuttles employees throughout base grounds. *Id.* The Union office is located on base about four or five miles from most employees' work stations. *Id.* at 26. Since at least the early 1990's, rather than drive, employees used the taxis for travel to and from the Union office. *Id.* at 28, 33-34. In early 2007, the Respondent discontinued this use of the taxis. *Id.* at 29. The Union then filed the unfair labor practice charge that resulted in the instant complaint.

B. Judge's Decision

The Judge found that the Respondent did not violate § 7116(a)(1) and (5) of the Statute. Although he recognized that employee use of the base taxis for travel to and from the Union office is a condition of employment, he found that the evidence did not establish that it was a past practice. *Id.* at 27, 35. In making this determination, the Judge applied the Authority's framework for establishing a past practice, which provides that the practice must have been (1) consistently exercised over a significant period of time and (2) either followed by both parties or followed by one party and not challenged by the other. *Id.* at 27 (citing *U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001)).

Applying the first part of the Authority's framework, the Judge found that the practice of "employees [being] given taxi rides to and from the Union office whenever they wanted them" was consistently exercised "for several years at least," until it was unilaterally terminated by the Respondent in January of 2007. *Id.* at 28-29.

However, applying the second part of the test, the Judge determined that the GC did not present sufficient evidence to establish that the practice was followed by both parties, or followed by one party and not challenged by the other. Specifically, the Judge determined that the GC did not prove that the Respondent knew of the alleged past practice and that responsible management officials acquiesced to it. *Id.* at 33-34.

In finding that the Respondent had no direct knowledge of the practice, the Judge noted that the taxi logs documented only two instances of rides to the Union office from 2002 to 2007. *Id.* at 30. He

reasoned that this number of rides did not suffice to establish the Respondent's direct knowledge of the practice, even though he also recognized that "dispatch logs are not a reliable record of the actual use of the base taxi service." *Id.* at 29.

The Judge also found that there was insufficient evidence to impute knowledge of the practice to the Respondent, even though the Judge cited unrefuted evidence showing that the Respondent's lead labor representative expressly agreed to employee use of the taxi service in the early 1990's. Specifically, the Judge cited the testimony of Michael R. Little, the former local Union President, that the Respondent's lead labor representative, Steve Furman, expressly agreed to this practice in a bargaining session. *Id.* at 33-34. Little testified that, in return, the Union withdrew its bargaining proposals that would have provided the Union with reserved parking spaces at every base building. *Id.* It was undisputed at the hearing that a need for employee use of the taxis existed because the Union office was a significant distance from the work stations of the bargaining unit members and parking spaces were limited. *See id.* at 28. However, the Judge found it unclear whether Furman's express agreement was made before or after the Union opened its office on base grounds. *Id.* at 34. The Judge also found it unclear whether the agreement could have applied to travel between locations where the bargaining unit members work rather than for travel to and from the Union office. *Id.*

The Judge therefore concluded that, while the cumulative testimony indicated that the Respondent may have known about this use of the taxis, to find so would be "conjecture," which is "no substitute for direct or circumstantial evidence . . . ." *Id.* at 34.

Moreover, the Judge found that there was no evidence that any responsible management official acquiesced to the practice. *Id.* at 30. The Judge noted that the Respondent has a duty to bargain only if it is established that responsible management officials knew of the alleged past practice and took no action to stop it. *Id.* However, the Judge determined that the GC did not present sufficient evidence establishing knowledge on the part of responsible management officials. *Id.*

In determining whether a responsible management official acquiesced to the practice, the Judge construed the term "responsible management official" to mean "a management representative with knowledge of and responsibility for the implementation of the Respondent's transportation policies." *Id.* at 33. Although the Judge acknowledged that Furman and his successor lead labor representatives had knowledge of the practice, he found that they did not qualify as responsible management officials because they "were not involved in matters related to the taxi service." *Id.*

III. Positions of the Parties

A. GC's Exceptions

The GC argues that the Judge erred in concluding that responsible management officials did not know of and acquiesce to the practice of providing taxi service for employee travel to and from the Union office. Exceptions at 1. Specifically, the GC alleges that the Judge erred in declining to impute knowledge of the practice to the Respondent. *Id.* at 9 (citing *Def. Distrib. Reg. W., Tracy, Cal.*, 43 FLRA 1539, 1560 (1992) (*Def. Distrib.*); *Lowry Air Force Base, Denver, Colo.*, 29 FLRA 566, 570 (1987) (*Lowry*)). In support, the GC relies on testimony of bargaining unit members that employees continuously used the taxis in this manner from the early 1990's to 2007. *Id.* at 11. The GC also asserts that the Judge should have relied on local Union President Little's unrefuted testimony regarding the express agreement made by the Respondent's lead labor representative, Furman, during bargaining. *Id.* at 7. Specifically, the Union contends that Furman and the Union agreed that it did not need reserved parking spaces because employees could use the taxis for travel to and from the Union office. *Id.* The GC argues that, as the Judge found, this testimony indicates that Furman was aware of the practice, as were his successors. *Id.* at 12.

The GC also contends that the Judge applied the wrong acquiescence standard. Specifically, the GC claims that the Judge required that actual knowledge on the part of management be proven to find acquiescence. *Id.* at 6. However, the GC asserts that either actual or imputed knowledge will suffice. *Id.*

Finally, the GC argues that the Judge erred in failing to find that responsible management officials acquiesced to the practice. *Id.* at 10-13. The GC claims that the Respondent acquiesced to the practice by never objecting to the employees' use of the taxis for travel to and from the Union office. *Id.* at 9. Furthermore, the GC asserts that Furman was a responsible management official because the express agreement he made with the Union, as addressed above, bound the Respondent to allow employees to use the taxi service for travel to and from the Union office. *Id.* at 10-12 In addition, the GC claims that,

because Furman's successors had knowledge of this express agreement and the authority to bind the Respondent during bargaining, they also qualify as responsible management officials. *Id.* at 11. Therefore, the GC argues that the Judge should have found that responsible management officials acquiesced to the practice. *Id.* at 10-13.

B. Respondent's Opposition

The Respondent argues that there was no past practice of employees using the taxis for travel to and from the Union office. Opp'n at 14-15. Alternatively, the Respondent claims that, if there ever was such a practice, it was discontinued sometime prior to 2002, when the taxi dispatch logs were created. *Id.* In support, the Respondent notes that the logs reflect only two instances where management approved such taxi use. *Id.* at 7.

The Respondent further argues that it had no knowledge of any employee use of the taxis for travel to and from the Union office because such use was not "open and notorious." *Id.* at 5 (citing *Def. Distrib.*, 43 FLRA at 1560; *Lowry*, 29 FLRA at 566). In this regard, the Respondent asserts that the Union office was not in a location where management would notice taxi use for this purpose because the Respondent's transportation and labor relations offices are both located more than four miles away. *Id.* at 6-7. The Respondent also claims that the dispatchers hid the employees' use of the taxis for travel to and from the Union office, as evidenced by the lack of such requests in the dispatch logs. *Id.* at 7.

In addition, the Respondent claims that, contrary to the GC's assertion, the Judge applied the proper standard in finding that the Respondent did not acquiesce to the disputed practice. *Id.* at 3. The Respondent contends that the Judge properly refused to impute knowledge to the Respondent because the Judge never definitively found that the Respondent's labor representative and his successors knew of the disputed practice. *Id.* at 4.

Finally, the Respondent asserts that its labor representatives are not responsible management officials. Specifically, the Respondent claims that its labor representatives do not exercise any control over the taxi service, which is the responsibility of transportation department supervisors. *Id.* at 10-11. The Respondent further claims that its labor representatives cannot be considered responsible management officials merely because they are involved in collective bargaining negotiations. *Id.* at 11.

IV. Analysis and Conclusions

A. The employees' use of the taxi service for travel to and from the Union office constitutes a past practice.

The Authority recognizes that parties may establish conditions of employment through a past practice. *See Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987). In order for a condition of employment to be established through a past practice, there must be a showing that the practice "has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *Soc. Sec. Admin., Office of Hearings & Appeals, Montgomery, Ala.*, 60 FLRA 549, 554 (2005) (*OHA*); *see U.S. Dep't of Homeland Sec., Border & Transp. Directorate, Bureau of Customs & Border Prot.*, 59 FLRA 910, 914 (2004) (*DHS*). "Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time." *DHS*, 59 FLRA at 914. As with other established conditions of employment, a past practice may not be altered by either party absent agreement or impasse following good faith bargaining. *See id.*

As to the factor that the practice continued for a significant period of time, the Authority has found that a period of "several years" suffices for purposes of establishing a past practice. *See Soc. Sec. Admin.*, 64 FLRA 199, 203 (2009) (*SSA*). Applying this standard, the Judge found, and the record supports, that the practice of providing employees with taxi service for travel to and from the Union office was consistently exercised "for several years at least" until January of 2007. Judge's Decision at 28. We therefore find that this factor is established. We discuss the remaining factors below.

1. Responsible management officials knew about and acquiesced to the practice.

a. The Respondent's lead labor representatives are responsible management officials.

In addition to the factor discussed above, responsible management officials must know about and acquiesce to the practice in order to establish a past practice. *See DHS*, 59 FLRA at 914. Although

the Judge found that the Respondent's lead labor representatives had knowledge of the practice, the Judge declined to impute their knowledge to the Respondent. In this connection, the Judge did not consider the Respondent's lead labor representatives to be responsible management officials. We reach a different conclusion.

Authority case law provides guidance on identifying responsible management officials. For example, in *SSA*, 64 FLRA at 203, the Authority held officials who occupied positions where they had special knowledge of the alleged practice to be responsible management officials. In other cases, the Authority has held that officials who had authority to act as agents for the agency with regard to the practice are responsible management officials. *See OHA*, 60 FLRA at 554; *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin.*, 38 FLRA 193, 197 (1990).

These cases support the conclusion that the Respondent's lead labor representatives are responsible management officials. For example, Furman, the Respondent's lead labor representative in the early 1990's, and his successor lead labor representatives occupied positions in which they had special knowledge of the practice of employees using taxis to travel to and from the Union office. Indeed, the nature of these representatives' positions, as liaisons between the Union and Agency, put these representatives in a unique position to be aware of the customs and practices that existed between the Union and the Agency. Similarly, Furman and his successor lead labor representatives were in overall charge of the Respondent's labor relations with the Union, including being responsible for all matters relating to collective bargaining.

Furthermore, Furman and his successor lead labor representatives had authority to act as agents for the Respondent with regard to the practice. Therefore, as the Respondent's agents, they had the authority to enter into binding agreements on behalf of the Respondent. Furman exercised this authority by expressly agreeing to allow use of the taxi service "to bring employees" to and from the locations of Union representatives, which would include the Union office. Tr. at 159-60. In addition, Furman's successor lead labor representatives exercised their authority by not taking any actions to discontinue the practice.

On this basis, we conclude that Furman and his successors are responsible management officials for purposes of establishing that use of the taxis for travel to and from the Union office was a past practice.

b. Responsible management officials knew about the practice.

We now examine the extent to which responsible management officials knew about the practice. Under Authority precedent, management knowledge may be direct, or imputed in light of convincing circumstantial evidence. Direct knowledge exists where management exhibits actual knowledge of a practice. *See, e.g., Def. Distrib.*, 43 FLRA at 1559-1560 (finding direct management knowledge based on management's written acknowledgment of practice). Imputed knowledge exists where the facts are such that management has reason to know of the existence of a practice. *See, e.g., Lowry*, 29 FLRA at 570-71 (imputing management knowledge of union's practice of using a certain telephone service because management arranged for transfer of service during several office relocations and had access to routinely-maintained telephone records). Convincing circumstantial evidence "must establish that the conclusion sought is the only probable or at least the most reasonable explanation of what happened." *Mason & Hanger-Silas Mason Co.*, 167 NLRB 894, 907 (1967).

The Judge found that the Respondent's lead labor representatives knew about the practice. Judge's Decision at 33. That the Judge declined to "impute the knowledge of Berger, Furman and other of the Respondent's labor relations representatives to the Respondent" is immaterial, given our determination in Section IV.A.1.a. *supra* that the Respondent's lead labor representatives are themselves responsible management officials. *Id.*

The record supports the Judge's finding. For example, the record shows that labor representatives had direct knowledge that since the early 1990s employees were permitted to use the taxis to travel to the locations of the Union representatives. Tr. at 159-60; Judge's Decision at 15. This, by definition, included the Union office. The record also shows that, in return for this use of the taxis, the Union withdrew proposals for a Union office in every base building and reserved parking spaces at those buildings so that Union representatives could have access to unit members. Tr. at 159-60; Judge's Decision at 15.

Similarly, the record shows that Furman and his lead labor representative successor, "Terry Berger, . . . [and] everybody in . . . th[e] employee

relations building, knew that [employees] were using the taxi service" to travel to and from the Union office. Tr. at 163; *see also* Tr. at 167. Little testified that this practice was subsequently authorized "by everybody else, Karen Christianson, Mike Cox, all these head of personnel people and all the personnel people that I dealt with, Terry Berger . . . .They recognized that we used the taxi service all the time." Tr. at 167.[2]

For these reasons, we find that responsible management officials had knowledge of the employees' use of the base taxis for travel to and from the Union office.

c. Responsible management officials acquiesced to the practice.

Finally, we examine whether responsible management officials acquiesced to the practice. Evidence of knowing acquiescence by responsible management officials may be express or implied. *See Def. Distrib.*, 43 FLRA at 1559-60 ("it is sufficient that employees consistently exercised a practice for an extended period of time, with the agency's knowledge and express or implied consent"). The Authority has described express acquiescence as occurring when management gives express consent to a practice. *See id.* Implied acquiescence is characterized as management's consent to a certain practice, given its knowledge of the practice, by failing to challenge it in a significant manner. *See id.* (finding implied acquiescence despite supervisors' occasional protests); *IRS & Brookhaven Serv. Ctr.*, 6 FLRA 713, 726-27 (1981) (finding implied acquiescence when, as a practice, management consistently met with more than one union representative without significant protest).

Here, the Respondent's lead labor representative, Furman, expressly acquiesced to the practice by agreeing to it in return for the Union's withdrawal of certain bargaining proposals. *See Def. Distrib.*, 43 FLRA at 1559-60. Moreover, the Respondent's continued acquiescence for almost twenty years may be implied because, as the Judge found, neither Furman nor his successors objected to the employees' use of the taxis for travel to and from the Union office. Judge's Decision at 29; *Def. Distrib.*, 43 FLRA at 1559-60. In addition, none of the Respondent's other management officials ever objected to this practice until 2007. Judge's Decision at 29.

For these reasons, we find that the Respondent's responsible management officials acquiesced to the employees' use of the base taxis for travel to and from the Union office. Based upon the foregoing, we conclude this use of the taxis constitutes a past practice.[3]

B. The Respondent violated § 7116(a)(1) and (5) of the Statute.

As discussed above, it is undisputed that the Respondent unilaterally discontinued use of the taxis for travel to and from the Union office without satisfying its bargaining obligations under the Statute. Therefore, we find that the Respondent violated § 7116(a)(1) and (5) of the Statute by unilaterally eliminating the past practice of providing base taxi service for travel to and from the Union office without giving the Union prior notice and an opportunity to bargain.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Terminating the taxi service for employees to travel to and from the Union office, without first bargaining with the Union, to the extent required by the Statute.

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

2. Although the GC asserts that the Judge should have imputed knowledge of the practice to the Respondent, *see* Exceptions at 9, we find it unnecessary to resolve this exception because we find that responsible management officials had direct knowledge.

3. The dissent suggests that this case should be remanded. Dissent at 11 & 12. Specifically, the dissent claims that the Judge did not make sufficient factual findings regarding whether the Respondent knowingly acquiesced to the disputed practice and that the record does not permit the Authority to make such an assessment. *Id.* As discussed above, because we find the record is sufficient to make this assessment, a remand is unnecessary.

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

(a) Restore the base taxi service for employees requesting it to go to and from the Union office, a practice terminated on or about January 25, 2007.

(b) Upon the request of the Union, bargain concerning the taxi service for employees going to and from the Union office to the extent required by the Statute.

(c) Post at its facilities copies of the Notice to All Employees on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander of the U.S. Air Force Academy, 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 placed. 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 Regulations, within 30 days from the date of this Order, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, 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 the Air Force, U.S. Air Force Academy, Colorado, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally terminate the practice of providing taxi service for employees to and from the Union office without first bargaining with the American Federation of Government Employees, Local 1867 (the Union), to the extent required by the Federal Service Labor-Management Relations Statute (the Statute).

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

WE WILL, at the request of the Union, restore the practice of providing base taxi service for employees requesting it to go to and from the Union office.

WE WILL, at the request of the Union, bargain concerning the taxi service for employees going to and from the Union office to the extent required by the Statute.

_____
Signature

Date: _____ By: _____
Commander

This Notice must remain posted for 60 consecutive days from the date of this 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 for the Denver Regional Office of the Federal Labor Relations Authority, whose address is: 1391 Speer Boulevard, Suite 300, Denver, Colorado, 80204-3581, and whose telephone number is: (303) 844-5224.

Chairman Pope, dissenting in part:

I agree with the majority that the Judge erred in refusing to find that the Respondent's lead labor representatives (the labor representatives) are responsible management officials for purposes of determining whether the Respondent knowingly acquiesced in a practice of unit employees using taxis to travel to and from the Union office. However, for the following reasons, I cannot join the majority in finding that the Respondent's labor (or any other) representatives knew about the disputed practice. Instead, I believe that it is appropriate to remand the complaint to the Office of Administrative Law Judges[1] for further action. Accordingly, I dissent in part.

The Judge found that a finding that the Respondent knew of the alleged past practice "could only be based on conjecture" and concluded that "the Respondent had no actual knowledge of" the disputed practice. Judge's Decision at 34. Elsewhere in his recommended decision, the Judge rejected the claim that management officials other than the labor representatives knew about the disputed practice. *Id.* at 32. Thus, the dispositive factual question is whether the labor representatives knew about the practice.

The Judge did not answer this question and, in my view, his findings do not permit the Authority to do so. For example, in finding (erroneously) that the labor representatives are not responsible management officials, the Judge stated that he did not "impute *the knowledge*" of those representatives to the Respondent. *Id.* at 33 (emphasis added). However, the Judge does not specify "the knowledge" to which he refers; the closest he comes is his statement that although Respondent's representatives "*might* have seen Union representatives and other bargaining unit members entering and leaving taxis, *such incidents would almost certainly have occurred other than at the Union office.*" *Id.* at 32 (emphasis added). Similarly, in addressing the alleged oral agreement between the parties permitting the disputed practice (in exchange for the Union withdrawing proposals for office space and reserved parking at various buildings), the Judge stated that "a logical quid pro quo" for the alleged Union concessions "could just as easily have been the use of the taxi service between locations where bargaining unit members were employed[,]" rather than between those locations and the Union office. *Id.* at 33-34.

The majority states that "[t]he Judge found that the . . . [labor] representatives knew about the practice." Majority Op. at 7 (citing Judge's Decision at 33). However, as stated above, the Judge did not do so. Similarly, the majority states, as fact, that the Respondent's labor representative agreed "to allow use of the taxi service 'to bring employees' to and from the locations of Union representatives, *which would include the Union office.*"[2] *Id.* at 6 (emphasis added) (quoting Tr. at 159-60). However, the witness whose testimony the majority cites does not refer to the Union office. *See* Tr. at 165 ("[A labor representative] told me we could use the taxi service[]"); *id.* at 167 ("they authorized the use of the taxi service[]").

The majority acts at the Authority's peril in creating a complete record where only an incomplete record exists because it is well established that, for purposes of judicial review, the Judge's recommended decision is part of the record in this case. *See* 5 U.S.C. § 557(c) ("All decisions, including initial, recommended, and tentative decisions, are a part of the record."). More to the point, when assessing whether an agency's decision is based on substantial evidence, reviewing courts view such decisions in a less favorable light when the agency reaches a conclusion different from that of a judge. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) ("[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [reviewing agency's] than when he has reached the same conclusion."). *See also NLRB v. Pinkston-Hollar Constr. Servs., Inc.*, 954 F.2d 306, 309-10 (5th Cir. 1992); *NLRB v. First Nat'l Bank of Pueblo*, 623 F.2d 686, 691-92 (10th Cir. 1980); *NLRB v. Fla. Med. Ctr., Inc.*, 576 F.2d 666, 674 (5th Cir. 1978); *Penasquitos Village, Inc.*, 565 F.2d 1074, 1077-78 (9th Cir. 1977); *NLRB v. Mid State Sportswear, Inc.*, 412 F.2d 537, 539 (5th Cir. 1969); *NLRB v. Ark. Grain Corp.*, 392 F.2d 161, 164-66 (8th Cir. 1968).

1. The Judge who issued the recommended decision in this case is no longer with the Authority.

2. The majority also states that the labor representatives knew that, "since the early 1990s employees were permitted to use the taxis to travel to the locations of the Union representatives[]" and that "[t]his, by definition, included the Union office." Majority Op. at 7. However, that Union representatives are likely to be found at the Union office is not enough. The issue here is whether the Respondent had knowledge that taxis were used by employees to visit the Union office, not whether taxis were used to visit Union representatives at other locations. A "definitional" finding cannot resolve this issue, in my view.

In sum, the Judge did not make sufficient factual findings for an assessment of whether the Respondent knowingly acquiesced in the disputed practice and the record does not otherwise permit that assessment. In these circumstances, the Authority's general practice is to remand. *See SSA*, 64 FLRA 199, 204-05 (2009) (Member Beck dissenting in part); *SSA, Balt., Md. & SSA, Office of Hearings & Appeals, Kan. City, Mo. & SSA, Office of Hearings & Appeals, St. Louis, Mo.*, 60 FLRA 674, 680-81 (2005). Of course, "the Authority's normal function requires it to examine the entire record of a proceeding and make de novo findings of fact." *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 171 (2009) (Member Beck concurring in part) (emphasis omitted). In my view, however, the sorry state of the record counsels against the Authority doing so in this case. Accordingly, I would remand.

Office of Administrative Law Judges

DEPARTMENT OF THE AIR FORCE
U.S. AIR FORCE ACADEMY, COLORADO
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1867
Charging Party

Hazel E. Hanley
For the General Counsel

Maj. Timothy J. Tuttle
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge (GC Ex. 1(a)) which was filed on March 13, 2007, by the American Federation of Government Employees (AFGE), Local 1867 (Union) against the U.S. Air Force Academy. On January 24, 2008, the Regional Director of the Denver Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) against the Department of the Air Force, U.S. Air Force Academy, Colorado (Respondent or Academy). In the Complaint it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute), by changing a past practice of providing base taxi service to and from the Union office for Union representatives and members of the bargaining unit represented by the Union. It was further alleged that the change was implemented without prior notice to the Union and without providing the Union with an opportunity to bargain
over the change. On February 15, 2008, the Respondent filed a timely Answer (GC Ex. 1(e)) in which it denied that it had committed an unfair labor practice.

A hearing was held in Colorado Springs, Colorado on March 20, 2008. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that, on or before January 25, 2007, there was a past practice whereby the Respondent's employees were allowed to use the base taxi service for trips to and from the Union office. The use of the taxi service was necessary because the Union office is approximately five miles from the work stations of bargaining unit members. It is not feasible for employees to use their own automobiles because employee parking is at a premium and the Respondent has encouraged the formation of car pools. Employees using their own automobiles to go to and from the Union office would lose their parking places. During the course of contract negotiations the Union dropped the subject of special parking spaces for Union representatives upon assurance by Respondent's representatives that they could use the taxi service.

According to the General Counsel the Respondent terminated the past practice on or about January 25, 2007, when a Union steward was refused taxi service from the Union office to his work station. Since that time, the Respondent has refused repeated requests for taxi service to and from the Union office. The Respondent did not provide the Union with advance notice of the change in conditions of employment and did not answer a request by the Union for bargaining over the termination of the past practice. By the Respondent's actions it has violated its statutory duty to negotiate in good faith.

The Respondent denies that the alleged past practice ever existed. The Respondent further maintains that the General Counsel has failed to support her burden of proof that taxi service to and from the Union office was provided other than in isolated incidents. Such incidents were neither authorized by nor known to responsible management representatives of the Respondent. Accordingly, the Respondent has no duty to bargain over the alleged change.

Summary of the Evidence

The nature of a past practice is such that the evidence of its existence is often anecdotal. The General Counsel submitted the following testimony on that issue:

Sterling Hiibschman. Hiibschman became an employee of the Respondent in 1994. He has been the President of the Union since March 3, 2005, and prior to that time, he was a steward and the First and Second Vice President. As President Hiibschman is on 100% official time (Tr. 12). Hiibschman identified a map of the Academy which is on its website (GC Ex. 4). According to Hiibschman the Union office[1] is located on the east side of the Academy grounds about a quarter of a mile from the intersection of Stadium Boulevard and Academy Drive and near the notation "Sand Barn" on the map. The Union office is four or five miles from the Cadet Area and approximately the same distance from the Civilian Personnel Office which is in the Community Center located in the central portion of the Academy grounds (Tr. 14).

Hiibschman testified that he used the taxi service extensively before he went on 100% official time and was working in Mitchell Hall.[2] He used the taxi service whenever he was on official time, which, between 1997 and 2005, was between two and three times a week (Tr. 15, 16). He knows that management officials were aware that he was using the taxi service since he often told them that he was late returning to work because he had to wait for a taxi. He has seen taxis dropping off employees at the Union office (Tr. 17). In preparation for the hearing, Hiibschman reviewed his appointment calendars (they were not offered in evidence) and found that he used the taxi service to travel to and from the Union office on January 10, 2005, and February 16, 2005. In both instances he requested official time from his supervisor (Tr. 18). Neither of those trips is shown in the records provided by the Respondent as part of its prehearing disclosure (Tr. 18, 19).[3]

In further preparation for the hearing, Hiibschman reviewed a memorandum from Major John C. Tobin, Acting Chief, Manpower, Organization and Quality for the Respondent, (Resp. Ex. 9) which was included with the Respondent's pre-hearing disclosure. In this memorandum, the Respondent sought the Union's agreement to the cancellation of a number of memoranda of understanding (MOUs) pursuant to the implementation of the Most Efficient Organization (MEO) program.[4] The Union agreed to the cancellation of the listed MOUs, none of which pertained to taxi service (Tr. 19, 20).

Hiibschman knows of no MOU between the Union and the Respondent concerning taxi service because it was never considered a problem. It was always assumed that a taxi would be available for "official business", which included Union business. Hiibschman cited Article 20, Section C of the collective bargaining agreement (CBA) (GC Ex. 2, p. 39) which states that, "Past practices remain in effect unless and until notice and bargaining obligations have been completed." (Tr. 20).

Hiibschman never received notice that the taxi service to the Union office was going to be terminated. He first learned of the change on January 25, 2007, when Roland Gallegos, a Union steward, got a taxi ride from Mitchell Hall to the Union office; when Gallegos called for a ride back he was told that he had the wrong number. Willy Rosaya, the Second Vice President, then called the dispatch office and was told that they "no longer" provided rides to and from the Union office (Tr. 20, 21).

After speaking with Gallegos and Rosaya, Hiibschman called Dwayne Clewell, the dispatchers' first line supervisor. Clewell informed him that Bobby Speights, the second line supervisor, had stated that activities carried out on official time were considered to be personal business for which the use of the taxi service was not permitted (Tr. 22).

On February 6, 2007, Hiibschman sent an e-mail to Clewell, Speights, Terence Berger, Eddie Queen, Charlie Dye and Larry Moore, as well as to Rosaya and Gallegos (GC Ex. 3)[5] in which he stated:

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[1]/ The terms "Union office" and "Union hall" were used interchangeably throughout the hearing.

[2]/ Mitchell Hall is the cadet dining hall which is in the Cadet Area. Hiibschman is a food service worker.

[3]/ The records were eventually entered into evidence over the General Counsel's objection as Respondent's Exhibits 1 through 8.

[4]/ Moore testified that the MEO represented a joint, and ultimately successful, effort by the Union and the Respondent to preserve a number of civilian positions which, presumably, would otherwise have been assigned to contractors or eliminated entirely (Tr. 239). According to Tobin's memorandum the MEO was to go into effect on or around October of 2000.

[5]/ According to Rosaya's unchallenged testimony, the chain of command above the dispatchers is: Clewell, Vehicle Operations Supervisor; Speights, Vehicle Manager; Moore, Deputy Logistics Supervisor; and Dye, Chief of Logistics and Readiness (Tr. 65, 66). Berger is a labor relations representative for the Respondent (Tr. 90). Queen is a coach operator and the First Vice President of the Union (Tr. 87, 89).

> On January 25, 2007[,] Mr. Gallegos requested a taxi from the union hall back to his work area as he had been doing official business at the union. Mr. Gallegos was denied access to the taxi services by Dwayne Clewell who stated to me later in a telephone conversation that when stewards are on official time at the union that is different than official business but instead is personal business. I then asked Mr. Clewell who made this determination and definition of official time. I also articulated that official time is only given in the connection with official business. One must be on official time to do official business. Mr. Clewell said that Mr. Speights had made this determination and that is how it is. I indicated that this is a change in conditions of employment and that I personally took the taxi service to and from my workplace many times before becoming the President of the local. Please see that this matter is corrected immediately or we will pursue relief through FLRA. Thanks in advance!

Hiibschman received no response to his message (Tr. 22-24).

On cross-examination Hiibschman acknowledged that his statement about using the taxi service twice a week was a "guesstimate". He also admitted that there are no written records of his requests for taxi service. He explained this by stating that he did not have access to e-mail at Mitchell Hall, but acknowledged that he had such access at the Union office. However, he did not generate a paper trail because he did not anticipate that the use of taxi service would become an issue (Tr. 26-28).

Roseanne Pedrosa. Pedrosa has been employed by the Respondent since 1998. In 2000 she injured her hand and used the taxi service to take her to the hospital and to the Civilian Personnel Office where she filed a workers' compensation claim (Tr. 30, 31).

The next time Pedrosa needed a taxi was in midsummer of 2007. She had filed a grievance and had an appointment to discuss it at the Union office. When she called for the taxi she was told, "No, ma'am, we don't go down there anymore." Pedrosa described her experience to Les Clayter, a co-worker; Clayter called for a taxi and was told the same thing (Tr. 32-34).

On cross-examination Pedrosa testified that she had no documentation regarding her taxi ride in 2000 (Tr. 35).

Leslie Clayter. Clayter is a member of the bargaining unit but is not a Union member. He verified that he called for a taxi at Pedrosa's behest and that he was told that the policy had changed (Tr. 37, 38).

Clayter has never used a taxi to get to the Union office. He did use a taxi about two years ago to go to the base hospital for a hearing test. He did not find a notation of his taxi ride on the records provided by the Respondent, but acknowledged that the log entries do not include the names of passengers (Tr. 38-41).

Tammy Howard. Howard has been employed by the Respondent since 1995 as an accounting technician. She has on several occasions requested taxi service to the Union office and was told that the taxi service was for official business only. After arguing with the dispatcher, she would request an e-mail documenting the refusal so that she could claim reimbursement. At that point she would be provided with taxi service. Howard checked the dispatch logs for 2007 and could find no record of any taxis picking up passengers at Harmon Hall (where she worked) for trips to any destination (Tr. 47, 48).

On April 24, 2007, Howard called for a taxi to the Union office. It was sleeting and snowing at the time and she was told that she could only get a taxi if she walked across an area known as the Terrazo to the Cadet Clinic. According to Howard the Terrazo is slightly longer than a football field. When she arrived at the Cadet Clinic she could not find a taxi stand, but noticed a taxi. The driver asked her what she was doing there and when she said that she was told that this was the only place where she could get a taxi, he told her that they would have picked her up. Howard was under the impression that the taxi did not come in answer to her call, but just happened to be there (Tr. 49-51).

On July 6, 2007, Howard obtained a taxi to take her to an appointment at the Union office. After the meeting she called to get a taxi back to her work station and was told that they did not provide service to the Union office. Howard told Queen about the problem. Queen spoke with several different people on the telephone and eventually got a taxi for her. Howard checked the dispatch log and found nothing to show that she had taken a taxi on that date (Tr. 51, 52).

On March 5, 2007, Howard called for a taxi to take her to an appointment at the Civilian Personnel Office in order to discuss a grievance and an EEO complaint. She had to argue with the dispatcher over the definition of official business, but eventually got taxis to and from her destination. Again, she did not see any record of those trips in the dispatch log (Tr. 52).

On August 16, 2007, Howard's supervisor informed her that Berger indicated that she had an appointment at the Union office. When she called for a taxi the dispatcher told her that they no longer serviced the Union office. She then spoke to someone named Tyrone who told her that the policy had changed about a month before. When she asked for an e-mail to that effect she was given an address to send an e-mail. She did so, but never received a reply. Several days later she spoke to Speights who told her that they no longer serviced the Union office and that he was not going to send her an e-mail. He also told her that she would have to speak to Mr. Berger if she wanted taxi service to the Union office (Tr. 52-54). Howard did not say whether she ever spoke with Berger.

Howard identified an e-mail that she sent to Queen on August 22, 2007, in which she described her interaction with Speights (Tr. 54; GC Ex. 5). In the e-mail Howard wrote:

> . . . He [Speights] told me "We do not service the union office and never should have, and if I ever got a base taxi to the union office it was against his orders." . . . .

Howard's e-mail message directly contradicts her testimony that Speights implied a change in policy with regard to the use of taxi service by the Union. Consequently, I do not credit her testimony that Speights implicitly acknowledged the existence of the alleged past practice.

Howard further testified that she had a grievance in 2006 and took the base taxi to the Union office "all the time" (Tr. 55). In response to my question, Howard stated that she took a taxi between 15 and 20 times in 2007 and that 15 of those trips were to and from the Union office (Tr. 62). She gave no dates for those trips.

On cross-examination Howard acknowledged that none of her taxi rides were on the dispatching log and that, in the majority of cases, she was told that she could not use the taxi on Union business (Tr. 56). She also acknowledged that she usually spoke with someone named Walt. Her drivers were Mr. Gonzalez, Mr. Torrell and, on one or two occasions, someone with an English accent. Of the 15 trips that she remembered taking in 2007, Gonzalez drove on about 10, Torrell on three or more and the "British gentleman" on about 2 (Tr. 57-59).

Willy Rosaya, Jr. Rosaya is the Second Vice President of the Union and has worked for the Respondent since 1985 as a coach driver (Tr. 65). He is assigned as a taxi driver every day or every other day when he is not driving a bus or between bus runs. There are currently four regular taxi drivers, down from five. The numbers of taxis and drivers are not such as to keep the drivers and vehicles busy at all times (Tr. 67, 68).

According to Rosaya, he receives a trip ticket in the morning by which he is informed if he is to make taxi runs. After he makes each run he records the number of passengers on the trip ticket and, at the end of the day, deposits the trip ticket in a locked box in the break room. The next morning one of the dispatchers, usually Mr. Johnson, takes the tickets and enters the information into the computer. This procedure is only used for taxi runs that have been scheduled in advance. It does not apply to cases when the driver is assigned to a run that was not previously scheduled. He does not know if all of the information is sometimes not entered in the computer. That might occur when a taxi run which has not been previously scheduled is dispatched over the radio. He does not complete any paperwork for such runs (Tr. 68-71).

In January of 2006, Rosaya requested official time from his first line supervisor and had Timothy Stuehmeyer (presumably a driver) take him to and from the Union office. Rosaya verified his recollection with Stuehmeyer but did not see those rides recorded on the log for 2006 (Tr. 70, 71).

Rosaya also testified concerning an incident in January of 2007 involving Roland Gallegos, a Union steward. Rosaya was working in the Union office when Gallegos was present. He gave Gallegos the telephone number of the dispatch office; Gallegos dialed the number and was told that it was the wrong number. He then dialed again and was told by Russ Johnson that they no longer provided taxi service to the Union office. Rosaya got on the telephone and was told the same thing by Johnson. Rosaya then spoke to Clewell who also told him that they did not provide service to the Union office. Apparently Clewell did not imply that this was a change in past practice (Tr. 71, 72).

Later that month Clewell told Rosaya that he did not have a driver to take him to the Union office. Since that time Rosaya has used his personal vehicle so as to avoid a confrontation with Clewell; this amounts to one or two round trips each week (Tr. 72, 73).

When challenged on cross-examination as to why the purported lack of a driver for a previously requested run would provoke a confrontation if he requested a subsequent run, Rosaya would only say that, "you have to know Mr. Clewell" (Tr. 78). I do not credit this testimony since it makes no sense. Instead, I assume that Rosaya knew that Clewell would not authorize a taxi run to or from the Union office.

Rosaya stated that, in reviewing the dispatch logs, he did not find any notations of the identities of taxi passengers. He did, however, find a notation showing that a passenger had been delivered to the Union office (Tr. 74).

On cross-examination Rosaya admitted that he has never taken a passenger to the Union office. He has heard taxi drivers being dispatched over the two way radio but does not know whether the request for the taxi came in by telephone or by e-mail. When questioned as to whether Clewell or Speights ever authorized taxi service to the Union office, Rosaya answered that they would have because the dispatchers "represent management" and Clewell and Speights would know about such trips. Rosaya further stated that he knew that the dispatchers were in the bargaining unit, but that Speights and Clewell had stated that the drivers had to do what the dispatchers told them because they represent management (Tr. 75-78).

In response to my question Rosaya stated that he could not have driven himself to the Union office with a spare vehicle because his supervisor had said that they were not allowed to do so (Tr. 83).

On redirect examination Rosaya testified that Clewell and Speights had two way radios which they would keep on and that Moore and Dye also had radios. Consequently, Rosaya assumed that the supervisors would have heard taxis being dispatched to the Union office (Tr. 84).

Eddie Queen. Queen has been employed by the Respondent since 1974 and is currently a coach operator and the First Vice President of the Union (Tr. 87, 89). Since becoming a Union steward in 1975 Queen has used the taxi service to conduct Union business and has done so with the knowledge of management representatives. All of the waiter supervisors at Mitchell Hall were aware of this practice because he would use their telephones to call for taxis. Steve Furman, who preceded Berger as Labor Relations Officer, would see him getting out of a taxi at the Union office. Karen Christianson, the EEO manager, has seen him getting in and out of taxis.[6] Berger has seen him getting out of a taxi at Mitchell Hall. He would use the taxi service on an average of three times a week[7] (Tr. 90, 91).

Queen testified that he has been assigned as a taxi driver. The dispatcher would call him to the office and assign him to a run. He would receive his assignments from Phillip Patterson, Tyrone Smith and Russ Johnson. He does not give a passenger any type of paperwork, nor does he record the nature of the trip, the name of the passenger or the destination. The coach operators only log their bus runs on the trip tickets. Under a prior system the taxi drivers would record their runs on a form 868 (Tr. 91-93).

In May of 2007, a computer changeover was taking place at the Union office which involved government computers. Queen called the dispatch office and spoke to Johnson regarding a taxi ride to the computer center and back to the Union office so that he could pick up some equipment. Johnson told him that they did not support the Union anymore. Queen then called Dye who arranged for a taxi. That run does not appear in the dispatch log (Tr. 94-96). In early July of 2007 he became aware of Howard's problem obtaining a taxi. He spoke to Moore who arranged for a taxi; that run was not recorded in the dispatch log. Queen spoke with Moore after the incident with Howard, at which time Moore told him that it was illegal to provide taxi service to the Union and that he never would have authorized it (Tr. 96-98).

Queen testified that the transportation supervisors monitor the dispatch radio frequency virtually all of the time. He based that assertion on the fact that they could be reached on the radio (Tr. 98, 99).

Queen also testified that between 25 and 30 percent of his average of three weekly taxi runs on

[6]/ It is unclear whether this occurred at the EEO office or elsewhere.

[7]/ Queen's taxi trips were presumably on Union business, but it is unclear how many of them were to and from the Union office.

Union business were to the Union office. The dispatchers never questioned him as to the purpose of a trip when he called for a taxi to some place other than the Union office (Tr. 101, 103).

On cross-examination Queen acknowledged that he never took anyone to the Union office. He also maintained that Patterson, Smith and Johnson had dispatched drivers to the Union office and that, until the early part of 2007, such service had not been denied (Tr. 109). He also admitted that, other than on one occasion involving Howard, Moore had never approved taxi service to the Union office and that Berger had seen him getting out of a taxi in the late 1990's (Tr. 111).

Phillip Patterson. Patterson has been employed by the Respondent since 1994. He has been on a detail as a warehouseman since December of 2006, and before that he was the lead dispatcher, reporting to Clewell, Speights, Moore and Dye (Tr. 115-117). When he was lead dispatcher a person wanting a taxi would call the dispatch office. At one time, a representative of the dispatch office would complete a form 868 with the name of the person calling, that person's unit, the pickup location, time of pick up and destination. The form 868 was eventually replaced by OVIM, the Online Vehicle Management System. Patterson entered pertinent data in OVIM. Every taxi dispatch was recorded to the extent possible, but it depended on whether the drivers turned in their trip tickets. The purpose of the system is to keep track of the drivers' time and of the vehicles. The system is not designed to determine who was using the taxi service or where the taxis were going. Taxi runs might not be entered into the system if a driver was late in turning in a trip ticket or if dispatch office personnel were busy with other activities (Tr. 117-19).

Patterson testified that he would enter the data into the system and would run tallies of mileage at the end of each day and each week. The tallies were needed for the "war report" which enabled management to determine which vehicles needed maintenance. He acknowledged that he had been counseled by Clewell for not properly entering data, but denied that he was at fault because he was the only one entering data and would sometimes become overwhelmed. According to Patterson, OVIM entries could be changed and deleted (Tr. 119-21).

Patterson further testified that, as a Union steward, he used the taxi service on Union business; this included trips to various locations including the Union office. He dispatched taxis to the Union office "all the time". Management representatives could hear the dispatching to the Union office on their radios, but he was never told that trips to and from the Union office were unauthorized. Clewell usually carried his radio with him and could have heard the dispatches if it was turned on. Speights kept a radio on his desk which was usually turned on (Tr. 123-25).

According to Patterson, he first encountered a problem with taxi service in January of 2007. He was at the Union office with Gallegos, Queen and others when "Roland" (presumably Gallegos) stated that he needed a taxi to get back to his work station at Mitchell Hall. Patterson told him to call the dispatch office and, when he did so, he was advised that they no longer provided service to the Union office (Tr. 125).

Patterson also described an occasion when he was helping Howard with an EEO complaint. Howard had arrived at the Union office by taxi and they then took a taxi to the EEO office. After their business had been concluded, Patterson called for a taxi back to the Union office. After waiting for about 45 minutes he called the dispatch office to ask when the taxi was coming. Eventually, Patterson spoke to Clewell and, he thinks, to Speights after which he got a taxi to the Union office (Tr. 125-27). Patterson has not used the taxi service since that time, but has used the UDI service. This is a program by which a "you drive it" government vehicle is issued to an employee after his or her request has gone up the chain of command for approval and upon presentation of a civilian driver's license. The assignment of UDI vehicles is entered in the dispatch log, but not as a taxi run (Tr. 127-30). Patterson did not state whether he had been authorized to use a UDI vehicle for trips to and from the Union office.

On cross-examination[8] Patterson stated that he entered all taxi runs into the OVIM system and that he has no knowledge of any of the runs having been deleted from the system. He also testified that he dispatched all of the runs to the Union office over the radio. He never asked Speights for permission to do so and acknowledged that Speights never approved taxi runs to the Union office (Tr. 132-35).

[8]/ The transcript indicates that the cross-examination was conducted by Counsel for the General Counsel. This is an error; Patterson was a witness for the General Counsel and was cross-examined by Counsel for the Respondent.

On redirect examination Patterson testified that he did not have the discretion of denying anyone a taxi ride. He was once told this by Moore when he questioned whether he should dispatch a taxi to take someone to the base golf course (Tr. 135-37).

Barry Jencson. At the time of the hearing Jencson was a food service worker for the Respondent but, before that, was employed as a taxi driver. At various times Speights and Clewell were his first line supervisors, although Speights later became his second line supervisor. Moore and Dye were, respectively, his third and fourth line supervisors. Jencson stated that he would make from 5 to 15 taxi runs per day. He was sometimes dispatched to take employees to the Union office. His radio communications were mainly with the dispatchers; Clewell and Speights were "very seldom" on the radio (Tr. 141-43).[9]

In preparation for the hearing Jencson reviewed the taxi dispatch records provided by the Respondent for 2002 through 2006, the period during which he was a taxi driver. According to those records, he made about 100 runs in each of those years in spite of the fact that he did not work much in the last year. In reviewing the dispatch records, Jencson noted that the driver's name does not appear for all of the taxi runs and it is possible that some of those runs were made by him. Jencson was not concerned about accounting to his supervisor for his time and noted that on some days they did not use dispatch slips (Tr. 143-45).

On cross-examination Jencson acknowledged that, although some of his dispatches to the Union office came over the radio, for some "we had slips". He also admitted the possibility that Patterson sometimes merely told him to make a pickup at the Union office although his memory was hazy as to this point. He did state that, in general, "A lot of times I was just told to go make a run." Jencson dealt with his dispatcher and, to the best of Jencson's knowledge, Speights did not authorize any of his trips to the Union office (Tr. 146-48).

Richard DiBiasio. DiBiasio has been employed by the Respondent since 1988 as a food service worker in Mitchell Hall and has been a Union steward since around 1990. DiBiasio receives official time upon request. In counseling employees he tries to hold initial meetings in an informal dining room in Mitchell Hall, but about 55% of his meetings are in the Union office where he has access to a computer and records. DiBiasio travels to the Union office either in his own vehicle or by taxi. In the past three or four years he would use the taxi service if he were released to do Union business in the middle of the day and had to return to work. This is so because he did not want to lose his parking space and also wanted to save money (Tr. 151-53).

DiBiasio stated that he knew that his first line supervisor was aware that he was taking the base taxi because he had an arrangement with him whereby he (DiBiasio) would take his official time toward the end of his shift, thus avoiding the delay associated with the use of the taxi service.[10] DiBiasio's last use of a taxi on Union business was about a year prior to the hearing. The trip was to the Oracle Building rather than to the Union office. That trip does not appear in the dispatch log. He has used the taxi service for trips to the Union office about 20 times over the years (Tr. 153-56).

Michael Little. Little began work for the Respondent as a temporary employee in late 1976 or early 1977. He attained permanent status in or around March of 1977. He left the Respondent's employment in 1997 at which time he had the title of Master Gardener. He was the President of the Union from April 1, 1989, to December 8, 1997, when he became a national representative for AFGE. Prior to serving as President, Little was First Vice President and, before that, a steward (Tr. 158, 159).

Little testified that, although convenient parking was not available at all of the buildings where bargaining unit members worked, it was not a serious concern for him because Steve Furman, the head of Human Relations or Employee Relations for the Respondent, said that the Union could use the taxi service (Tr. 159, 160).

Little further testified that, when he became President of the Union, there was no Union office on the Academy grounds. After about three years Little and Furman negotiated the establishment of a Union office on base. At that time the Union office was on the flight line. Little often looked through his office window and saw employees arriving and leaving by

[9]/ I have construed Jencson's testimony to mean that Clewell and Speights seldom spoke over the radio since Jencson would have no way of knowing whether they were monitoring transmissions.

[10]/ It does not follow, and I do not conclude, that the supervisor's knowledge that DiBiasio was using the taxi could be inferred from his having allowed DiBiasio to take official time on occasions when he, according to his own testimony, might have used his personal vehicle.

taxi. He also saw Joseph Becker, the previous President, leave the area where they were both working and take a taxi to the Union office. According to Little, a number of management representatives in Employee Relations knew that Becker often took taxis. Little saw various Union stewards taking taxis to the Union office. In addition, a number of Union stewards would use the taxi service to take them from Jack's Valley[11] to and from the Union office (Tr. 161-64).

Little also testified that when he participated in negotiations with the Respondent over a collective bargaining agreement (CBA), the Union's proposals did not address the use of the taxi service. However, according to Little, all of the people he dealt with in the Respondent's personnel department knew that the taxi service was being used for trips to and from the Union office and for other Union business. Little did not press his proposals for reserved parking spaces because Furman assured him of the availability of the taxi service. Furthermore, R. Steven Boothee, a dispatch supervisor, was aware that the taxi service was frequently used for trips to and from the Union office. Boothee had formerly been a taxi driver and a Union steward (Tr. 166, 167).

On cross-examination Little acknowledged that his testimony was based upon events which occurred prior to 2002 (Tr. 168).

The Respondent presented the following witnesses:

Bobby Earl Speights. Speights became the Dispatch Supervisor around April of 2004 and Vehicle Operations Manager in June of 2005. As such, he is responsible for all ground transportation services. According to Speights, the Union is not allowed to use the base taxi service since the service is only for official government business. The policy was in effect when he became Vehicle Operations Manager. Speights further stated that he had been involved in vehicle operations for 34 years, including his military service, and that during that time Union use of official vehicles was not allowed (Tr. 173-75).

Speights testified that he was aware of an incident in 2007 in which someone wanted (and presumably obtained) taxi service for Union business and two incidents in 2006 in which the Union obtained taxi service; those incidents did not occur with his knowledge or authorization. He suspects that dispatchers sent taxi drivers to provide such service. Those taxi runs should have been logged into the OVIM system. Speights identified taxi dispatch logs (Resp. Ex. 1-8) which he personally printed out from the OVIM system. He found only two entries of trips to the Union office, both of which occurred in February of 2006 (Tr. 175-77).

Speights explained the meaning of each of the headings in the OVIM logs as follows:

> CAT - the category of the run (01 denotes taxi runs, which are the only ones shown on the printouts in this case)
>
> CON NUMBER - the confirmation number which is automatically assigned to each run
>
> OFFICE SYMBOL - the office symbol of the requester's workplace
>
> STAT CODE - a code showing that it is a vehicle run
>
> PICKUP LOCATION - where the passenger is to be picked up
>
> DEST - where the passenger is going
>
> TIME REQ - when the passenger wants to be picked up
>
> PAX - the number of passengers
>
> TIME DSP - the time when the taxi was dispatched
>
> TIME ARV - the time of arrival at the pickup point
>
> TIME PU - the time of the actual pickup of the passenger(s)
>
> TIME REL - the time of release, *i.e.*, arrival at the destination
>
> RESP TIME - the time span between the call to the dispatch office and the pickup
>
> TIME SRV - the total time of service from dispatch to the end of the run
>
> REG NBR - the vehicle registration number
>
> OPER - the name of the driver

[11]/ Jack's Valley is an area outside of the North Gate of the Academy where new cadets go through a boot camp.

OVIM is used throughout the Air Force for the management of all types of vehicles (Tr. 180-82).

Speights further testified that he created the computer run so that it would reflect only the taxi service for the relevant time periods and that he did not remove any data from the system. Most of the data as to the taxi runs is entered by dispatchers who are members of the bargaining unit. However, data is sometimes entered by Clewell, who is the supervisor (Tr. 183, 184). Customers have been asked to request taxi service by e-mail, but requests are also accepted by telephone. All requests should be entered into the OVIM system. The taxi drivers receive their instructions from the dispatchers, sometimes over the radio, but often in person when the drivers are sitting in the break area (Tr. 184, 185).

Speights stated that he knows that certain types of runs were not entered into OVIM. Those were trips in which a driver was taken by another driver in connection with the movement of a government vehicle to or from a repair shop outside of the base. When Speights was a Dispatch Supervisor he instructed the drivers to record the pertinent information on the form 868 if they were too busy to enter the data into OVIM. In this way the dispatchers could later log in the information on the runs. Speights also stated that he suspected that there had been trips to the Union office that had been dispatched in the break room and had not been logged in. The only way that he would know of such runs would be over the radio if a driver reported his location at the end of a run or if he overheard a radio conversation about a run to or from the Union office. He does not monitor every taxi run. He has a radio in his office which he neither carries with him nor keeps on all of the time.

Speights further stated that he is aware of only one trip to and from the Union office. That was an instance in which the hospital shuttle was diverted to transport Howard; it was not considered to be a taxi run. Speights has never authorized a taxi run to or from the Union office, although he has allowed vehicles to stop at the Union office while proceeding to or coming back from previously scheduled trips to other locations. There were no passengers involved in such occasions, and the drivers themselves wanted to stop at the Union office. Speights mentioned one occasion when he granted such a request by a bus driver. According to Speights, he allowed the stop because he was told that there was a controlling memorandum of understanding. Later, when no memorandum of understanding was produced, he stated that there would be no such permission in the future (Tr. 185-90).

In response to my question, Speights stated that the recorded runs of individual vehicles are not regularly checked against odometer readings to determine if the mileage is inconsistent with the recorded runs (Tr. 192-94).

On cross-examination Counsel for the General Counsel directed Speights' attention to various log entries in which the number of passengers was obviously excessive: for example, 48 passengers in one run (Resp. Ex. 3, p.17, second entry)[12], 26 in two others (Resp. Ex. 5, p.23 under October 15, 2004)[13] and 1500 in a third (Resp. Ex. 6, p. 21).[14] In one entry for September 28, 2004, there is no entry showing the number of passengers for a taxi run that apparently lasted for more than ten hours (Resp. Ex. 5, p.22, top entry)[15] (Tr. 198-204). Speights was also directed to numerous examples of incomplete entries.

Upon further cross-examination Speights stated that management officials in the transportation department do not monitor the radio throughout the day (Tr. 204, 205). He also acknowledged that a great deal of information was missing from the records, such as vehicle registration numbers and names of drivers, but that he depends on the dispatchers to log data into the system. According to Speights, he has counseled two dispatchers for failure to put all of the correct data into the OVIM system. When challenged as to the accuracy of the OVIM report that reflected only 102 taxi runs by Jencson in 2006, Speights opined that the figure could be accurate since Jencson and other drivers are assigned to clean vehicles, sometimes for an entire day, when they are not driving (Tr. 205, 206).

Counsel for the General Counsel confronted Speights with two entries showing that Richard

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[12]/ This was a 4 hour run; the office symbol is shown as "VEHICLE OPERATIONS", the pickup location is "BMP", which stands for base motor pool (Tr. 207), and the destination is "LOCAL".

[13]/ One taxi run is recorded as being from "PREP SCHOOL" to "HOSPITAL/CADET CLINI", the other from "PREP SCHOOL" to "EEO".

[14]/ There are a number of other runs on the same page which show unrealistically high numbers of passengers.

[15]/ The entry shows "PREP SCHOOL" for the pickup location and "HOSPITAL/CADET CLINI" for the destination.

Gonzales, one of the taxi drivers, made two trips to the Union office on February 6 and 13, 2006 (Resp. Ex. 7, pp.4 and 5). Speights acknowledged that he took no action against Gonzales when he learned of the taxi runs (Tr. 207, 208).

On redirect examination Speights testified that the OVIM system is used primarily for manpower and budgetary purposes. He does not review the records every day because he does not have time and relies upon the dispatchers to "QC" (presumably, quality control) the data that goes into the system. In 2006 Patterson, as the dispatcher, was primarily responsible for logging data into OVIM. Speights stated that he had conversations with Patterson about Patterson's failure to properly log in data and also sent him a note on the subject. Speights denied having advance knowledge of Gonzalez' trips to the Union office. Any disciplinary action would have been directed to Patterson, since the drivers follow the dispatchers' instructions (Tr. 209, 210).

With regard to the obvious errors in numbers of passengers that were pointed out during cross-examination, Speights stated that they were the result of "fat fingering", or typing errors. Speights further stated that, when he noticed such errors, he mentioned them to the dispatchers. Speights explained one of the entries which showed 26 passengers (see *supra* note 13) as representing multiple trips to the Cadet Clinic (Tr. 210-12).

Dewayne Clewell. Clewell has been employed by the Respondent since 2002. He is now the Vehicle Dispatch Supervisor and has been involved with the taxi service since 2006. As Vehicle Dispatch Supervisor, Clewell oversees day-to-day operations, including the dispatching of drivers and the entry of data into OVIM. According to Clewell, the Union's use of the taxi service is unauthorized since activities on official time are considered personal business that does not support the mission of the Air Force. He bases this assertion on AFI.[16] This has been the policy since Clewell arrived at the Academy. He knows of no incidents involving taxi service to the Union office other than the runs which appear in the dispatch logs and the incident involving Howard. He has no knowledge of Patterson's purported use of the radio to dispatch runs to the Union office although he keeps his radio on most of the time (Tr. 215-17).

Clewell further testified that he has never authorized the Union to use the base taxi service and does not feel that there is a practice of allowing such use. However, he acknowledged that Patterson might not have been aware of the difference between official use and official time. Clewell was not at the Academy when Patterson was originally assigned to his position, although Patterson does have an understanding of AFI and the procedures for assigning and dispatching vehicles (Tr. 217).

On cross-examination Clewell was shown an entry for January 3, 2007 (Resp. Ex. 8, p.1), for which there is no vehicle registration number. When asked if he would request a dispatcher or vehicle scheduler to correct such omissions, Clewell stated that he does not review the logs on a daily basis. Counsel for the General Counsel then directed Clewell's attention to an entry for March 23, 2007 (Resp. Ex. 8, p.9), in which both the vehicle registration number and the name of the driver are missing. When Clewell sees such entries, he speaks to the dispatchers; however, an entry cannot be changed after it is closed (Tr. 218-20).

On redirect examination Clewell stated that the OVIM system does not allow a change in information after it has been entered. If such a change is attempted the system will generate an additional line indicating an amendment (Tr. 221).

Tyrone Smith. Smith has been a vehicle dispatcher for about three years. He described the procedure for dispatching taxis as follows:

1. Requests for taxis generally come in by e-mail. If a request is received by telephone, they usually tell the requester to also submit it by e-mail.

2. Information regarding the request is entered into OVIM, usually by Smith or by Russell Johnson. However, data is also entered by Walter Fedorczuk and Clewell. In addition, information is entered into a separate system that produces trip tickets. Occasionally a taxi run is not entered into the system because of the workload. However, Smith has never intentionally failed to enter such information.

3. Each morning the drivers go to the mailbox (presumably an electronic mailbox) and get trip tickets with the taxi runs for that day (Tr. 221-24).

According to Smith it is the Respondent's policy that the Union may not use the taxi service and he has never understood the policy to be otherwise. Smith acknowledged that the Union probably used the taxi

[16]/ Presumably AFI is an official Air Force publication. The Respondent did not offer it in evidence.

service on occasion, but he never knew about it. When Smith first assumed his duties he asked Patterson whether they were picking up Union personnel and Patterson responded that they were.

Smith further testified that he could not remember dispatching Queen to pick up Howard. When asked whether he had ever dispatched a taxi to the Union office, Smith responded that it was "hard to say" (Tr. 224, 225). I take that to mean that Smith has dispatched taxis to and from the Union office, but that he knew that he was not authorized to do so.

On cross-examination, Smith was shown a log entry for April 4, 2005 (Resp. Ex. 6, p.14). The run was from the base motor pool to Greeley, Colorado. The name of the driver was omitted and the run lasted for 70 hours and 60 minutes. Smith stated that the run had been incorrectly coded as a taxi run and that the category in the first column should have been 05, which is the code for a "u-drive". The entry for a u-drive run does not include the name of the driver.

Counsel for the General Counsel also directed Smith's attention to the second entry for May 25, 2005 (Resp. Ex. 6, p.20). That run was from "PREP SCHOOL" to "HOSPITAL/CADET CLINI" with 15 passengers over a period of two hours, and the driver's name does not appear. Smith stated that he thought that the entry was for the hospital shuttle and that he did not know why the driver was not identified. Smith acknowledged that missing information could be entered later after referring to the trip ticket. However, the omission would only be noticed when the weekly report was printed out. There would be no need to make a correction at that time since the information is already on the trip ticket (Tr. 225-28).

Counsel for the General Counsel then pointed out to Smith a number of entries for 2007 (Resp. Ex. 7) in which the names of drivers and/or vehicle registration numbers do not appear. Smith stated that those omissions were not crucial since the necessary information was available from other sources (Tr. 228-31).

Alfred Larry Moore. Moore has been Chief of Logistics Operations in charge of the Most Efficient Organization (MEO) for the past six years. According to Moore, the Respondent's position that the Union is not authorized to use the base taxi service is based upon Air Force and Department of Defense guidelines.[17] He further stated that the penalty for unauthorized use of government vehicles is severe and, in the case of civilians, includes suspension (Tr. 237).

Moore testified that the MEO is administered by the 10th Mission Support Group. Prior to the implementation of the MEO, the Union and the Respondent entered into an agreement to cancel a number of MOUs (Resp. Ex. 9).[18] Moore testified that, although the MEO does not address taxi service, that service has been substantially reduced due to a reduction in manning. Since the implementation of the MEO the Respondent no longer assigns taxi drivers to various locations on the Academy grounds in an attempt to reduce waiting time. Had there not been a reduction in manning, the Respondent would have lost the bid, thus necessitating a reduction in force. Moore could not state the number of available taxis prior to the implementation of the MEO, but estimated that there was a reduction of fifty percent (Tr. 237-39, 245-47).

Moore stated that he occasionally monitors the dispatch radio network, but has never heard about a run to the Union office. He further stated that the Union has not been permitted to use the taxi service since he has been in charge and, to the extent that it has occurred, it was without his knowledge or that of his managers (Tr. 247, 248).

On cross-examination Moore testified that the implementation of the MEO resulted in the elimination of taxi trips to the airport for temporary duty as well as intra-base trips for military personnel. They also stopped picking up certain commanders from their quarters and stopped transporting certain individuals to the airport (Tr. 248-51).

Walter Fedorczuk. Fedorczuk is currently a motor vehicle operator with additional duties involving scheduling and dispatching. According to Fedorczuk, although he is neither a manager nor a supervisor, he is not a member of the bargaining unit and is not represented by the Union. (The General Counsel did not challenge that assertion.) He was

[17]/ Moore did not elaborate on the alleged guidelines, nor did the Respondent cite them in its post-hearing brief.

[18]/ Counsel for the Respondent acknowledged that there was no MOU regarding the use of taxis by the Union and that there was no language in the MEO concerning past practices (Tr. 240, 243, 244).

originally hired by the Respondent in August of 2002, but was subsequently separated by a reduction-in-force and rehired in his present position on May 31, 2007 (Tr. 253, 254).

Fedorczuk enters UDI and bus requests into OVIM, but he does not recall having entered taxi requests and assumes that Johnson or Smith has done so. He dispatches taxis in response to telephone requests, but does not remember sending one to the Union office. Fedorczuk further stated that he might have denied such a request, but does not remember a specific instance. He denied any knowledge of the Union's use of the base taxi service other than having been told by his supervisors that they do not honor requests by the Union. The statements by his supervisors occurred some time between May 31, 2007 and January of 2008 (Tr. 254-56).

On cross-examination, Fedorczuk testified that it was possible to correct OVIM entries. On redirect examination, he stated that he did not know whether corrections could be made for taxi runs that had already occurred (Tr. 257-59).

Russell Johnson. Johnson has been a driver/scheduler for the Respondent for the past five years. He has been involved with the taxi service for something more than two years. Johnson described his duties as receiving requests for vehicles, entering the requests into the vehicle scheduling system and OVIM and assigning the runs to drivers. Entries into OVIM are made by him as well as by Smith and Fedorczuk. They receive vehicle requests from the secretary, Josephine Gallegos, who, in turn, receives them from the Logistics Department electronic mailbox. Drivers are normally informed of their runs by means of a daily trip sheet, but runs which are requested on short notice are dispatched by radio (Tr. 260, 261).

According to Johnson, data for every vehicle run is entered into the OVIM system except for unscheduled runs for purposes such as urgent vehicle maintenance or medical emergencies. Even in those cases, there is always "backup" so that the data can be entered after the run. Johnson stated that, other than because of short notice, he has never intentionally failed to enter information into the OVIM system. He knows that he is supposed to enter information into OVIM because he was trained that way "from day 1". (Tr. 261).

Johnson further stated that his understanding of the Respondent's policy is that the Union should not be using the base taxi service because such use does not support the mission of the Air Force. He has never dispatched a taxi to the Union office and, to the best of his knowledge, management has never authorized such a taxi run (Tr. 261, 262).

On cross-examination Johnson testified that the name of the driver who is assigned to a taxi run is normally not put into OVIM until the run has been completed. There is another system for vehicle scheduling which has the assignments of drivers to specific runs. OVIM can be corrected so as to reflect changes in the assignments of drivers (Tr. 264-66).

On redirect examination Johnson briefly scanned the dispatch sheets and indicated that pickup and destination data was shown for all of the runs. (The General Counsel has not alleged that this is not so.) Johnson testified that this information is necessary for the run to take place. If pickup and destination points are not entered, the system will not assign a number to the run (Tr. 267, 268).

Findings and Conclusions

Undisputed Facts

The Respondent is a unit of the United States Air Force which is an agency within the meaning of §7103(a)(3) of the Statute. The Union is a labor organization as defined by §7103(a)(4) of the Statute. At all times relevant to this case the Union was the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining (GC Exs. 1(b) and 1(e), ¶¶2-4).

The following facts are also undisputed, as shown by the aforementioned testimony:

1. The Respondent maintains a base taxi service which is available, upon request, to take military personnel and civilian employees to and from locations both on and off of the Academy grounds. (The scope of the taxi service will be discussed below.) The Respondent also maintains other vehicles, such as buses and ambulances.

2. Requests for taxi service are submitted to the dispatch office by telephone or e-mail. Requests which are received prior to the day when the taxis are required are, or should be, entered into the OVIM system.[19] Drivers access an electronic mailbox to

[19]/ The Respondent maintains another computer system which is used to assign drivers to taxi runs which have been requested prior to the day of service.

obtain daily trip tickets listing their assignments to pre-scheduled runs.

3. In the case of taxi runs which are requested on the date of service, dispatchers make assignments to drivers either by radio or personally by going to the drivers' break room. Same-day runs should also be entered into OVIM even in the case of urgent requests which are to be recorded and entered later.

4. The Union has an office on the Academy grounds which is beyond normal walking distance from the work stations of members of the bargaining unit. The Union maintains certain records in its office and uses the facility for meetings between Union representatives, bargaining unit employees and representatives of the Respondent.[20] The Union office is between four and five miles from the Cadet Area where most bargaining unit employees work.

5. Parking space for civilian employees is at a premium. Employees are encouraged by the Respondent to form carpools. Employees who move their vehicles during the day are at risk of losing their parking spaces.

The Legal Framework

The law pertinent to this case is well settled. In *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999) the Authority held that, prior to implementing a change in conditions of employment, an agency must provide the union with notice of the proposed change as well as an opportunity to negotiate over those aspects of the change that are within the duty to bargain. In determining whether a matter involves a condition of employment the Authority will consider (a) whether it pertains to bargaining unit employees, and (b) whether there is a direct connection between the matter and the work situation of bargaining unit employees, *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*).

A condition of employment may arise out of a past practice. Consequently, a unilateral change in a past practice may trigger an obligation to bargain, *Dep't of the Treasury, Internal Revenue Service (Washington, DC), et al.*, 27 FLRA 322, 324 (1987). In order to establish the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties or that the practice has been followed by one party and not challenged by the other, *U.S. Patent and Trademark Office*, 57 FLRA 185, 191 (2001) (*Patent Office*).

The Significance of the Taxi Service

When measured according to the two-pronged test of *Antilles*, it is clear that the availability of the base taxi service is a condition of employment. As to the first prong, the use of taxis for transportation to and from the Union office is significant only to members of the bargaining unit. As to the second prong, the use of taxis affects the work situation of those employees since, in the absence of taxi service, an employee is faced with the choice of borrowing a vehicle, which may not be possible, rescheduling an appointment at the Union office, or using his or her own vehicle with the resulting inconvenience of a possible loss of a parking space or the disruption of a carpool schedule. Parenthetically, the denial of taxi service may delay an employee's return to work, thus adversely affecting the Respondent as well as the employee.

While the lack of taxi service to the Union office does not pose an insurmountable obstacle to the effective representation of bargaining unit employees by the Union, it undoubtedly makes such representation more difficult, both for Union officers and stewards and for the employees whom they serve. In *AFGE and Social Security Administration, et al.*, 25 FLRA 622, 625 (1987) the Authority held that, "Representation of employees in matters concerning their employment clearly affects the working conditions of those employees."

The Consistency and Duration of the Alleged Past Practice

The testimony as to the consistency and duration of the Union's use of the taxi service is far from definitive. I am skeptical of the assertions of certain of the General Counsel's witnesses as to the frequency of the trips. Hiibschman, for example, kept a diary of his appointments but had entries for only two rides to the Union office on January 10 and February 16 of 2005 (Tr. 18). Patterson's assertion that he dispatched taxis to the Union office "all the time" (Tr. 123) is not credible because he did not cite specific instances. The credibility of Patterson's testimony is further eroded by his assertion that he entered all of the taxi runs that he dispatched into OVIM, but did not explain the absence of entries of

[20]/ While there is no evidence on this point, it is logical to assume that the office is also used to conduct internal Union business.

all but two of the taxi runs to and from the Union office in the dispatch logs which are a product of OVIM.

Much of the testimony offered by the General Counsel's witnesses described the Union's use of taxis for trips between locations other than the Union office. Although the distinction between such trips and trips to and from the Union office may be arbitrary, the General Counsel has not alleged that the Union has been deprived of taxi service other than with regard to the Union office. I can only surmise that the Respondent was reluctant to order bargaining unit dispatchers to question other bargaining unit employees, much less Union representatives, as to whether they intended to use taxis on Union business. Such inquiries would be unnecessary for trips to and from the Union office which could only be for Union business.

In spite of the shortcomings of the testimony of the General Counsel's witnesses, it is sufficient to establish, by a preponderance of the evidence,[21] that, for several years at least, Union representatives and other bargaining unit employees were given taxi rides to and from the Union office whenever they wanted them. The Respondent has not challenged testimony as to the distance of the Union office from the work stations of bargaining unit employees, the scarcity of parking places and the encouragement of carpools by the Respondent. That testimony corroborates the proposition that employees would seek to use the taxi service to get to the Union office. Regardless of the frequency of such trips, there is no evidence or allegation of the refusal of taxi service prior to January of 2007. In *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809, 822 (2000), the Authority held that even an annual practice which has existed over a significant period of time can give rise to a bargaining obligation. While taxi trips to and from the Union office might not have been as frequent as suggested by the General Counsel's witnesses, taxi service was available when needed up until January of 2007.

The position of the Respondent as to this issue is not improved by the fact that the dispatch logs (Resp. Exs. 1-8) show only two trips to the Union office. There is ample testimony to the effect that all taxi runs were not entered into OVIM and that requests received on the day of the desired taxi service did not appear on the daily trip tickets. While all of the taxi runs that were entered into the OVIM system showed the pickup and destination points, the wide-spread omission of other data, such as the names of drivers and the number of passengers, shows that the dispatch logs are not a reliable record of the actual use of the base taxi service.

The Respondent's reliance on the MEO is similarly misplaced. The fact that the Union agreed to the cancellation of certain MOUs is of no consequence in view of the fact that none of the MOUs dealt with the availability of the taxi service. The argument that the intent of the MEO was to eliminate past practice is belied by the absence of any reference to past practice as well as by the language in the CBA (GC Ex. 2, p.39) to the effect that past practices remain in effect pending the completion of collective bargaining.

I have assigned no weight to the conclusory and unsupported testimony that the Union's use of the taxi service would be contrary to Air Force or Department of Defense regulations in view of the fact that the Respondent has neither cited such regulations nor offered them in evidence. It is safe to assume that there are regulatory as well as statutory prohibitions against the use of government property other than for official business.[22] However, the use of the taxi service by Union representatives on official time or by bargaining unit employees in connection with contractual grievances are not so obviously beyond the scope of official business as to justify my reaching such a conclusion in the absence of specific authority to that effect. There is, perhaps, an argument to be made as to a distinction between Union activities on behalf of bargaining unit members and activities related to internal Union business. However, the Respondent apparently has never drawn such a distinction and I will not do so now.

The Respondent's Knowledge or Acquiescence

There is no evidence that the Respondent specifically acquiesced to the Union's use of the base taxi service. To the contrary, Howard testified that she only received taxi service after initial refusals and was informed by Speights that such taxi runs were contrary to his orders (Tr. 48-52, 60; GC Ex. 5).

[21]/ This is the standard of proof required of the General Counsel pursuant to §2423.32 of the Rules and Regulations of the Authority.

[22]/ Several of the Respondent's witnesses testified that the Union's use of the taxi service did not "support the mission of the Air Force". This implies a somewhat broader definition of the circumstances under which such use would be permitted and supports my conclusion that the Union's use of the taxi service was not obviously improper.

Rosaya testified that he was told by Clewell that such service was not authorized (Tr. 72). Queen testified that he was told by Moore that the use of taxi service by the Union was illegal (Tr. 98).

In view of the fact that the Respondent did not acquiesce in the Union's use of the taxi service, it can only be charged with a duty to bargain under cases such as *Patent Office* if it knew of the alleged past practice and took no action to stop it. The Authority has made it clear that actual, rather than constructive, knowledge is required, *Dept. of Health and Human Services, Social Security Administration*, 17 FLRA 126, 139 (1985)(*HHS*). It is of no consequence that management representatives were lax in monitoring the use of the taxi service or that they could have learned of the Union's use of the service with only a slight effort.

As stated above, the absence of all but two taxi runs to the Union office from the OVIM dispatch logs does not prove that no such runs were made. However, the dispatch logs do support the proposition that responsible representatives of the Respondent were not aware of them. The overwhelming weight of the testimony of the General Counsel's and the Respondent's witnesses is that virtually all of the dispatching of taxis as well as the entry of the related data into the OVIM system was performed by dispatchers who are members of the bargaining unit. Consequently, the omission of such data from the dispatch logs means that the dispatching of taxis to and from the Union office was accomplished "off the books".

The absence of the records of all but two such taxi runs from June 11, 2001 to December 19, 2007, cannot rationally be considered as coincidental. Rather, it is the result of the efforts of certain dispatchers to accommodate the Union without the knowledge of the Respondent's responsible management representatives.[23] In any event, there is no written record of other than two taxi runs to and from the Union office. Therefore, if the Respondent is to be charged with knowledge of the practice, that knowledge must be found to have been attained by other means.

The position of the General Counsel is not enhanced by the fact that several employees were told that the Respondent would "no longer" provide taxi service to the Union. Those statements were made by dispatchers rather than by management officials and are not binding on the Respondent. In view of the fact that none of the dispatchers claimed to have been authorized to provide taxi service to the Union,[24] such statements by the dispatchers meant only that they no longer felt comfortable sending taxis to or from the Union office. The reluctance on the part of the dispatchers, as well as their selective lapses of memory, leads me to conclude that the dispatchers knew that the taxi runs to the Union office, as well as the other uses of the service by the Union, were unauthorized.

According to the evidence, management representatives only approved taxi rides to the Union office for Howard, after she argued about it (Tr. 48-52), and for Queen when he needed a ride between the Union office and the computer center in connection with a mandated change to government computers (Tr. 94, 95). Such *ad hoc* and atypical decisions by management representatives are insufficient to prove the existence of a binding past practice, *U.S. Dep't of Labor, Office of Workers' Compensation Programs, Boston, Massachusetts*, 56 FLRA 598, 603 (2000). In addition, Queen's reason for needing a taxi could logically have been considered to have fallen within even a narrow definition of official business.

The weight of the evidence is that some of the taxi runs to and from the Union office were dispatched by radio and it is undisputed that all of the supervisors in the dispatchers' chain of command had radios. However, it is also true that some taxi runs, to whatever destination, were dispatched on a face-to-face basis. I credit the testimony of the supervisors that they did not hear the dispatching of the taxi runs to and from the Union office because, to conclude otherwise, I would have to assume that the supervisors had nothing else to do but to monitor the dispatching of most, if not all, taxi and other vehicle runs. As previously stated, I have concluded that the taxi runs to and from the Union office were not as frequent as suggested by certain of the General

[23]/ The inability of Union representatives to find records of their taxi rides to other locations might have been due to sloppy record keeping or to the fact that the dispatch logs, even when completed properly, list only the number, but not the names, of passengers.

[24]/ Patterson testified that he was told by Moore that he (Patterson) did not have the authority to deny taxi service to anyone (Tr. 136). Patterson did not describe the context in which Moore made the statement. Furthermore, there is no evidence that Moore knew that the dispatch office was receiving requests for taxi service to and from the Union office.

Counsel's witnesses. Moreover, the failure of the dispatchers to log in the runs to and from the Union office suggests that, whenever possible, they would have avoided using the radio to dispatch the runs so as to avoid the attention of their supervisors.

While certain management representatives, including those involved in labor relations, might have seen Union representatives and other bargaining unit members entering and leaving taxis, such incidents would almost certainly have occurred other than at the Union office.[25] The Respondent apparently did not attempt to curtail trips to locations other than the Union office. Significantly, Hiibschman testified that he has not used the taxi service since he went on 100% official time and was acting only on behalf of the Union (Tr. 25).

In order for the General Counsel to meet her burden of proving the existence of a past practice, she must show that the practice occurred with the knowledge and acquiescence, direct or implied, of *responsible* management officials, *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987). Although the term "responsible management official" is not specifically defined in Authority precedent, I feel confident in construing it in this case as denoting a management representative with knowledge of and responsibility for the implementation of the Respondent's transportation policies. Even though Queen's supervisor at Mitchell Hall allowed Queen to use his office telephone to request taxi rides to the Union office (Tr. 90), the knowledge of unidentified waiter supervisors is not binding on the Respondent since the nature of their positions does not, in the absence of additional evidence, suggest that they are responsible management officials in the context of this case.

DiBiasio, a food service worker, testified that his first line supervisor approved his use of official time and supposedly knew that he sometimes met with employees at the Union office. DiBiasio's supervisor, like Queen's, was not a responsible management official within the meaning of *Norfolk Naval Shipyard, supra*. Furthermore, the supervisor's knowledge of DiBiasio's use of official time does not translate into knowledge that he used the base taxi service, let alone that he was going to the Union office on a specific occasion. DiBiasio himself acknowledged that he sometimes used his own vehicle on Union business and that, at other times, he would meet with employees in Mitchell Hall (Tr. 152-54).

I do not impute the knowledge of Berger, Furman and other of the Respondent's labor relations representatives to the Respondent. It is undisputed that neither the CBA nor any MOU authorizes or prohibits the Union's use of the taxi service. Consequently, the Respondent's labor relations and personnel representatives were not involved in matters related to the taxi service.

The General Counsel maintains that the Respondent's knowledge of the alleged past practice is shown by Little's testimony to the effect that, some time around the early 1990's, Union representatives withdrew bargaining proposals For reserved parking spaces and office space in every building upon receipt of the Respondent's assurances that they could use the base taxi service (Tr. 160, 167). Curiously, that alleged understanding was never reduced to writing.[26] It is unclear whether the incidents described by Little occurred before or after the opening of the first Union office on Academy grounds. In any event, a logical *quid pro quo* for offices and parking spaces could just as easily have been the use of the taxi service between locations where bargaining unit members were employed. The Respondent apparently made good on its assurances to the Union since it has not been alleged that taxi service has been denied for trips other than to the Union office.

My review of the evidence leads me to conclude that, while it is possible that the Respondent knew of the alleged past practice, a finding to that effect could only be based on conjecture. Such conjecture is no substitute for direct or circumstantial evidence of the Respondent's actual, rather than constructive, knowledge of the Union's use of the base taxi service for trips to and from the Union office, *HHS*.

[25]/ Hiibschman testified that meetings with management representatives were sometimes held at the Union office and that bargaining unit employees could be seen through the window as they arrived in taxis (Tr. 17). I do not credit that testimony in the absence of further detail as to the identities of the management representatives or of verification of Hiibschman's suggestion that they were looking out of the window in the first place.

[26]/ According to Hiibschman, there is no MOU regarding taxi service because it had not been a problem (Tr. 20). Hiibschman's testimony does not adequately explain the failure of the Union to press for written language regarding what logically should have been considered as an important issue. The Union's inaction suggests that its representatives wanted to let sleeping dogs lie.

The evidence also leads me to the conclusion that the Respondent's oversight of the base taxi service was sporadic at best and that responsible management officials could have learned of the Union's use of the taxi service with a minimum of effort. However, the Authority has made it clear that it is of no consequence that the Respondent should have known of the alleged past practice, *HHS*. The fact remains that the Respondent had no actual knowledge of the alleged past practice and that the Respondent's ignorance was caused, in the first instance, by the failure of bargaining unit dispatchers to record the disputed taxi runs in the OVIMS system or in any other way so as to bring the runs to the attention of responsible management representatives.

It is unclear why the issue of taxi service to and from the Union office came to a head in January of 2007. If the curtailment of taxi service was caused by the implementation of the MEO, it would have occurred about six years earlier. Fortunately, I am not required to solve that mystery.

For the reasons stated above, I find that the General Counsel has not met her burden of proof as to the Respondent's knowledge of or acquiescence in the Union's use of the base taxi service for transportation to and from the Union office. Accordingly, I have concluded that no past practice existed such as to give rise to a bargaining obligation on the part of the Respondent. The Respondent did not commit an unfair labor practice by unilaterally denying such taxi service to the Union.[27]

In view of the above conclusion, I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, June 11, 2008.

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Paul B. Lang
Administrative Law Judge

[27]/ This Decision should not be construed as a determination as to whether the Respondent would be required to give the Union notice and an opportunity to bargain over the cessation of all taxi service to the Union.