FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF JUSTICEFEDERAL BUREAU OF PRISONSFEDERAL CORRECTIONAL INSTITUTIONOAKDALE, LOUISIANA Respondent
and
DEPARTMENT OF JUSTICEFEDERAL BUREAU OF PRISONSFEDERAL DETENTION CENTEROAKDALE, LOUISIANA RespondentandAMERICAN FEDERATION OF GOVERNMENTEMPLOYEES, LOCAL 3957Charging Party

Case Nos. DA-CA-00303 DA-CA-00397

Case No. DA-CA-00281

Steven R. Simon, EsquireTyrone ClementsFor the Respondents
Tiffany A. Foreman, EsquireJohn M. Bates, EsquireFor the General Counsel Before:
RICHARD A. PEARSONAdministrative Law Judge

DECISION

Statement of the Case

On April 27, 2000, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of the Dallas Region, issued an unfair labor practice complaint, alleging that the Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Oakdale, Louisiana (the FDC), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by implementing a change in reporting requirements without providing the American Federation of Government Employees (AFGE) Local 3957 (Charging Party/Local 3957) with adequate notice and an opportunity to negotiate. On May 31, 2000, the Regional Director issued a second unfair labor practice complaint, alleging that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Oakdale, Louisiana (the FCI) violated section 7116(a)(1) and (5) by repudiating a grievance settlement agreement as well as its collective bargaining agreement with regard to leave year scheduling. On June 30, 2000, the Regional Director issued a third unfair labor practice complaint, alleging that the FCI violated section 7116(a)(1) and (4) of the Statute by discriminating against employee Fredrick Gilley because of his protected union activity. The FCI and FDC (jointly referred to as the Respondents) filed answers to the complaints, denying that they had committed any unfair labor practices.

A hearing on these cases was held in Alexandria, Louisiana, on December 14 and 15, 2000, and January 24, 2001, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. At the outset of the hearing, I consolidated the hearing on the three complaints, over the objection of the General Counsel.[(1)] Because the parties are identical in these

three cases and many of the same witnesses would be testifying, a single hearing constituted the most efficient method of conducting the hearing. Subsequently, the General Counsel and the Respondents filed post-hearing briefs, which I have fully considered.

Based on the entire record,[(2)] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Federal Bureau of Prisons (the BOP) maintains two correctional facilities in Oakdale, Louisiana, the FDC and the FCI. AFGE's Council of Prison Locals is the exclusive representative of a nationwide unit of BOP employees, and the parties have executed a Master Agreement for that unit. Locals 3957 and 1007 each serve as agents of the Council of Prison Locals to represent employees at the Oakdale facilities, with Local 3957 primarily servicing employees at the FCI and Local 1007 primarily servicing employees at the FDC.

Case No. DA-CA-00281: The Chit Board and the Key Line

The front entrance building serves as the main entry area for all FDC employees. This building is situated at the perimeter of the secured area of the institution; upon entry into this building, an employee can be allowed passage into the secure facility by a guard controlling an electronic door. Once an employee is allowed to enter the secure facility, he can then walk in one of several directions to different areas of the FDC. In order to reach their work areas, most employees walk through a series of electronically controlled doors to the control center, where they are issued their equipment, such as keys, radios and alarms. The area at the control center where employees wait to be issued their equipment is called the key line.[(3)] Once they receive their keys, employees walk to their assigned work areas in the FDC.

In December of 1997,[(4)] the FDC established a new procedure for keeping track of which employees are in the institution at any given time. A "chit board" was placed in the lobby of the front entrance building, and each employee is assigned a numbered, plastic rectangular "chit" that sits on a hook on the board and identifies him. One side of the chit is white, and the other side is blue; as the employee enters the FDC, he turns over his chit so that the white side is showing, and when he leaves the FDC he turns it again so that the blue side shows.[(5)] The implementation of this procedure was negotiated with Local 3957 in 1997 and has continued essentially unchanged ever since.

The BOP personnel manual, applicable to employees nationwide, sets forth a policy for the starting and stopping times of employees' shifts. Respondent's Exhibit 4, an excerpt from that manual, states in pertinent part:

Each institution shall have approved work schedules **with shift starting and stopping times . . . to begin and end at the point employees pick-up and drop-off equipment (keys, radios, body alarms, work detail pouches, etc.) at the control center.** Therefore, employees who pick-up equipment at the control center, shall have their shifts scheduled to include reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift). If an employee arrives at the key line in a reasonable time to get equipment by the beginning of the shift, this employee is not to be considered late. [emphasis added.]

Although the above-quoted document clearly requires employees to report to the "control center" (or the "key line," which is synonymous in this context) by the starting time of their shift, to avoid being considered late, employees testifying for the General Counsel stated that they were unaware of this rule. Rather, they testified that it was their understanding that employees were simply required to turn over their chit in the front entrance building by the start of their shift. While most of these employees couldn't explain the basis for their understanding of the rule, one witness, Alen Arnold, testified that in early 1998, then-Warden Robert Miles

had told employees at a staff meeting that they would not be considered late as long as they turned over their chit before the starting time of their shift. Warden Miles, however, testified that he never made such a statement to employees. Both he and current-Warden Jordan, as well as other FDC officials, testified that at all relevant times, employees have been required to be in the key line by the start of their shift, and that they have not told employees anything to the contrary.

In the context of these differing understandings, Mr. Arnold reported for work on December 14, 1999. His shift started at 7:30 a.m. and ended at 4:00 p.m. According to his testimony, he arrived at the front entry building at approximately 7:25 a.m. and immediately turned over his chit to indicate he was present. Then, rather than walking to the key line, he "stepped into Personnel for just a second and then proceeded on to the key line." (Tr. at 110). He arrived at the key line at 7:40 a.m., which prompted his supervisor, Jimmy Patton, to issue him a letter of counseling for reporting late (Respondent's Exhibit 3).(6) The letter of counseling quoted to Mr. Arnold the above-cited rule from the personnel manual, requiring employees to arrive at the key line at the starting time for their shift.

Another employee, Kerry Fusalier, confirmed that he and Arnold turned their chits at about the same time, 7:25 or 7:26 a.m. Fusalier then headed directly toward the key line, while Arnold headed in a different direction. Fusalier testified that it took him 6 or 7 minutes to get to the key line (which in his estimation, resulted in his arriving at the key line a minute or two after 7:30), and it took another several minutes until he was given his keys and radio. A few days later, Mr. Patton approached him and said that because he had reported to work late on the 14th, he would need to use 15 minutes of leave for that time.(7)

Case No. DA-CA-00303: Leave-Year Scheduling

In March of 1998, the BOP and the AFGE Council of Prison Locals entered into a nationwide Master Agreement. Article 19 of that agreement covers Annual Leave and provides, among other things, that "[a]ll departments will use total-leave year scheduling." That is, employees are given the opportunity prior to January 1 to request and schedule their vacations for the entire year; conflicts are resolved by seniority. Article 19, Section 1 further provides:

Total leave-year scheduling procedures may be negotiated locally provided that:

1. a leave committee of at least one (1) supervisor and at least one (1) Union representative, the number to be negotiated locally, will be responsible for implementing the seniority requirements of this article regarding total leave-year scheduling; and

2. after considering the views and input of the Union, the Employer will determine the maximum number of employees that may be on scheduled annual leave during each one (1) week [seven (7) consecutive days] period . . . .

According to witnesses, the above-cited paragraph 2 was new in the 1998 Master Agreement, in that it allowed the Union to provide "input" to local management concerning the maximum number of employees who could be on annual leave at the same time, where previously the Union had no say whatever. At the FCI, the leave committee consisted of the union president and the facility manager.

Historically, the FCI and Local 3957 maintained one seniority list for facility department employees (also called foremen), while the FDC and Local 1007 maintained another seniority list. Pursuant to the annual leave provisions of the Master Agreement, management of the two institutions would determine the maximum number of employees who could schedule annual leave in a given week and announce this to the staff in the late fall of the year; employees would then select weeks for vacation. If more than the maximum number of employees selected the same week, the junior employees would be notified and would make alternate

selections. In most years, the maximum number was three facility department employees per week, except during two holiday weeks, when five employees could schedule vacation. In practice, this meant that three FCI employees and three FDC employees in the facility department could take vacation per week, for a total of six.

In the fall of 1998, after FCI management began the process of soliciting employee requests for annual leave for the 1999 year, Local 3957 filed a grievance protesting the Respondent's failure to properly notify and consult with the Union on this issue. (See Respondent's Exhibit 2). The records of that grievance also indicate that the parties had gone to arbitration on a related issue in 1998, concerning the scheduling of leave for the 1998 year.) That grievance was ultimately resolved in a settlement agreement dated October 22, 1999, in which both parties denied any wrongdoing and FCI management agreed to "consider the views and input of the Union before determining the maximum number of employees that may be on scheduled annual leave during each one week period." (The full text of the settlement agreement is in the General Counsel's Exhibit 2(c)).

Five days after executing the grievance settlement for the 1999 leave year, FCI management sent a memo to Dale Deshotel, president of Local 3957, advising him of the proposed procedures for scheduling annual leave for 2000. In an e-mail cover letter, General Foreman Kim Hebert asked Deshotel to review the memo and contact Hebert for discussion. Deshotel responded on November 4, 1999, by sending a memo to Human Resource Manager Dwight Greene "requesting negotiation on the annual leave scheduling" for the facility department (sometimes referred to as the CMS department). Four days later, Deshotel circulated an agenda of items he wished to discuss at the regular labor-management relations meeting. One of these items concerned leave scheduling: "There are new circumstances involving CMS annual Leave scheduling which I would like to address or negotiate through. I believe this is due to consolidation." The issue was discussed briefly at the LMR meeting (which occurred on approximately November 15, 1999), but there was no actual negotiation at that time. HR Manager Greene testified that he told Deshotel to discuss any issues regarding the facility department with Rick Batten, the department manager.

Starting in 1998 and continuing into 1999, the FCI and FDC began consolidating different staff and management functions at the two institutions. The human resource departments merged in 1998, and in approximately May of 1999 the two facility departments merged. Rick Batten, who had previously managed the facility department at the FCI, became facility manager at both the FCI and FDC. Although the institutions themselves remained separate, and Local 3957 continued to represent primarily employees of the FCI, while Local 1007 represented primarily employees of the FDC, some staff functions were combined and there was some overlap of the unions and employees.

With the consolidation of the facility departments in mid-1999, Mr. Deshotel of Local 3957 saw a variety of issues relating to the scheduling of leave that required negotiation and clarification. He felt that the increased size of the consolidated department (from 15-17 in each institution to over 30) gave management greater flexibility to accommodate more employees on leave at a time, and that procedures could be negotiated to help both employees and management. Nonetheless, the two unions remained separate, and Local 1007 had already approved the procedures for scheduling leave for the 2000 calendar year, while Local 3957 was requesting negotiations.

On November 16, 1999, after the LMR meeting failed to produce any negotiations over consolidated leave scheduling procedures, Mr. Deshotel sent another memo, this time to Mr. Batten (Respondent's Exhibit 11 at 5). It began: "Due to the consolidation of the two facility departments I would like to propose that your memo dated October 27, 1999 be negotiated to include the following changes . . . ." The memo then proposed to increase the maximum number of employees on scheduled leave from three to five, and that during four weeks per year (rather than two) the maximum would be six employees (rather than five).[(8)] The proposals did not cover any issues except for the maximum number of employees on leave per week. Unlike Mr. Deshotel's

memos of November 4 and 8, which were sent on behalf of Local 3957 only, the November 16 memo was signed by Donald Turner, President of Local 1007, as well as by Mr. Deshotel. On November 19, HR Manager Greene responded to Mr. Deshotel's "request to negotiate a consolidated annual leave procedure for Facilities." Mr. Greene stated that such procedures "can be negotiated if both parties agree[,]" but that management would not agree to negotiate; he insisted that "the well established past practice" be continued on this issue (General Counsel's Exhibit 6(c)).

On November 29, 1999, Facility Manager Batten tried to obtain Mr. Deshotel's signature on the leave scheduling memo that was to be sent to employees, but Mr. Deshotel refused. Batten said he had reviewed Deshotel's proposals seeking to modify the management-proposed procedures, but that he disagreed with the union's reasoning and that he had decided to continue the three-man rule for most weeks. On December 1, FCI management announced to facility department employees that leave selection would begin immediately.

Case No. DA-CA-00397: Gilley's PIP

Fredrick Gilley, Jr., has been a plumbing foreman[(9)] at the FCI for approximately fifteen years, and since 1990 he has served first as the vice president and then as the chief steward for Local 3957. It is clear from the record that in his union capacities, Mr. Gilley has engaged in considerable protected activity over the years, including the filing of grievances and unfair labor practice (ULP) charges on his own behalf and on behalf of other employees. He filed five ULP charges in 1999 and 2000 alone. In early June of 1999, Kim Hebert was made General Foreman at the FCI and became Gilley's immediate supervisor.

Within a week or two after becoming General Foreman, Mr. Hebert and Mr. Gilley got into a dispute. After assigning Gilley to investigate the cause of a water leak, Hebert told him to prepare a written plan of how he proposed to fix the problem. Gilley objected to being required to document his work, felt that Hebert was treating him differently than other employees, and suspected that Hebert was setting him up for disciplinary action. On June 10, 1999, Gilley sent Hebert a memo saying that Hebert "must be blind" and indicating his intent to file a grievance and a ULP charge against Hebert (Respondent's Exhibit 5). According to Mr. Gilley, Hebert then issued him a counseling letter for threatening to file a ULP charge; as a result, Gilley did indeed file a ULP charge on June 28, and the FLRA's Dallas Regional Director issued a complaint on September 30, 1999, alleging that Hebert's action violated section 7116(a)(1) and (2) of the Statute. On July 21, 1999, Hebert put a "minimally satisfactory" entry into Gilley's performance log regarding the same water leak problem that had prompted Gilley's memo of June 10; this action caused Gilley to file a second ULP charge on August 9, and the Regional Director issued a complaint regarding this incident on March 29, 2000. Both complaints were ultimately settled, with the Respondent posting a notice concerning the first in December 1999 and the second in June 2000.[(10)]

On January 11, 2000, Mr. Hebert called Mr. Gilley and told him to investigate and repair a problem with hot water in the shower room of the Evangeline II unit of the prison. The next day, a work request was prepared, reflecting that Gilley had been assigned this task. Mr. Gilley spoke to some Evangeline inmates who worked for him, and they confirmed that the showers there were running out of hot water very quickly. Gilley didn't go to the shower room himself, but instead he went to the mechanical room, where the hot water heaters serving Evangeline II were located. In the mechanical room, he noted that the circulating pump, which was supposed to keep a constant supply of hot water for the Evangeline II shower room, was cold, and he suspected that this was the cause of the problem. He advised Hebert that the circulating pump needed to be replaced, and Hebert approved the purchase of a new pump. Because the supplier also had to order the part, it took several days for a new circulating pump to arrive. Hebert asked Gilley about the status of the problem on January 18, and when Gilley said the part was not due to arrive until the 20th, Hebert directed him to find another supplier. Gilley then found a dealer who could deliver a pump on the 19th, and Hebert approved a second purchase order.

Around noon on January 19th, Hebert contacted Gilley and asked whether the circulating pump had arrived. The pump hadn't yet arrived, but was due any minute, and Mr. Gilley was in the mechanical room investigating the hot water problem further. According to Gilley, the circulating pump there was still cold, but he had begun to suspect that the problem was not with the circulating pump but with the thermostat regulating the hot water temperature. He recalled a similar problem that had occurred several years ago, in which a contractor had been hired by the FCI and had fixed the problem by raising the temperature on the water heaters themselves. When Hebert called him around noon, Gilley advised him of his changed view of the problem. This alarmed Hebert, who immediately went down to the mechanical room and listened to Gilley explain the situation further. As Hebert investigated, however, it appeared to him that the hot water heaters in the mechanical room were working properly. He checked the temperature gauges on the two heaters and they both read over 100 degrees, which indicated to him that they were heating properly, and he then examined the mixing valves, which also read above 100 degrees. Hebert therefore doubted the accuracy of either of Gilley's diagnoses, because neither the circulating pump nor the heaters seemed to Hebert to be malfunctioning. So Hebert left the mechanical room and went up to the Evangeline II shower room to investigate further.

When Mr. Hebert arrived at the shower room, he first turned on the water in a mop sink; the water was hot immediately and stayed hot as he ran it for a minute or so. He went to the individual showers, turned on the water at each, and found that while some of the showers received a continuous flow of hot water, two of the them did not receive hot water. Hebert then concluded that the source of the problem was in the showers themselves. It was then agreed that the balancing cartridges in the heads of the two defective showers would be replaced, and this work was completed the next day.

Apparently during the time that Mr. Hebert was in the Evangeline shower room on the 19th, however, Mr. Gilley continued working on his own diagnosis of the problem in the mechanical room. According to his testimony, Gilley adjusted the temperatures on the thermostats on the two water heaters, a gradual process that ultimately succeeded in raising the water temperature to about 118 degrees. In Gilley's view, it was his adjustment of the water heater temperature that fixed the problem with the showers; in Hebert's view, there was no problem with the heater temperature, and it was the replacement of the two balancing cartridges that fixed the problem. Concerning the water heaters, the testimony of Gilley and Hebert differed on one main fact: Hebert said that the thermostats in the mechanical room read over 100 degrees, while Gilley said that this was impossible; he believed they couldn't have read higher than 80 degrees when Hebert was there.

Based on what Hebert perceived to be Mr. Gilley's unsatisfactory handling of this problem, Hebert discussed the situation with Gilley on January 28, 2000, and put an unsatisfactory work entry into Gilley's performance log for Element #2 of Gilley's performance standards on February 18. According to BOP policy, if an employee receives an unsatisfactory performance citation, he must be placed on a performance improvement plan (PIP), and Mr. Gilley was placed on such a plan on March 13. According to Hebert, Gilley's performance has improved since that time, and in Gilley's annual performance appraisal for the year ending March 31, 2000, Hebert rated Gilley's performance on Element #2 as "Fully Satisfactory."

DISCUSSION AND CONCLUSIONS

Case No. DA-CA-00281

In the complaint, the General Counsel alleges that the Respondent FDC, through supervisor Patton, unilaterally changed working conditions "by requiring bargaining unit employees to 'chit' in before their regular duty hours, prior to clocking in for their regular tour of duty." In its prehearing disclosure, the General Counsel stated the theory of its case slightly differently, alleging that the Respondent "unilaterally changed the portal entrance

. . . ." The Respondent objects that the General Counsel has changed the alleged unfair labor practice, and the Respondent also denies that it changed employees' working conditions in any way. Rather, the Respondent insists that at all relevant times, the key line at the control center has been the "portal" for employees to start their shift; in other words, they have always been required to arrive at the key line, not the chit board, by the starting time of their shift.

I do not agree with the Respondent's first argument, namely that the General Counsel changed the theory of its case so significantly that it denied the Respondent due process. Instead, I find that any discrepancy between the General Counsel's theory of its case in the complaint and at the hearing was insignificant, because the underlying nature of the alleged unfair labor practice remained essentially the same. Although the complaint focused on the time of employees "chitting in" for work, and the General Counsel's evidence focused on the location of the "portal," the gist of the allegation is the same: a unilateral change in the place for employees to report for work. That is, if the key line is the "portal" demarcating the start of an employee's work day, the employees and the General Counsel allege that in December 1999 the Respondent either changed the portal or began requiring employees to perform work (by chitting in) before the start of their work day. These are really two ways of arguing the same point, and I don't believe that the Respondent was misled or prejudiced in any way by the General Counsel's case. *See, American Federation of Government Employees, Local 2501, Memphis, Tennessee*, 51 FLRA 1657, 1660-64 (1996).

Moving to the merits of the complaint, there is no dispute as to the applicable law. The Authority has held since its earliest days that "the duty to negotiate in good faith under the Statute requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment[.]" *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981). Although the Statute does not explicitly include such unilateral actions among the unfair labor practices listed in section 7116(a), the Authority has made it clear that an agency's unilateral change in a condition of employment violates section 7116(a)(1) and (5).

Additionally, it has long been held that terms and conditions of employment may be established not only by a collective bargaining agreement, but also by the parties' practice or other form of informal or tacit agreement. *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987). In order to find that a condition of employment has become established by a past practice, the General Counsel must show that the practice was "consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent." *U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky*, 42 FLRA 137, 142 (1991).

The Respondent does not dispute that the alleged change related to a condition of employment. Although the decision to use a chit board to account for employees in a prison may be reserved to management as an internal security practice, the determination of where an employee must report at the start of work is not directly related to that internal security decision. Rather, it is a personnel policy affecting working conditions of unit employees, and any change in such a policy (as well as the effects of the change) should be negotiated. *See, Planners, Estimators and Progressmen Association, Local No. 8 and Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina*, 13 FLRA 455 (1983).

However, the General Counsel has failed to prove that the FDC changed its policy or practice relating to the chit board and the key line in December 1999. Although the General Counsel's witnesses testified that they understood the Respondent's policy as requiring them to turn their chit by 7:30 a.m., I do not find their testimony persuasive. First, these witnesses were simply testifying as to their understanding of the Respondent's policy, and such testimony is by its nature hearsay: while it may be admissible evidence, it is inherently subjective and prone to misunderstandings, the existence of which cannot be evaluated or cross-examined. If these employees' subjective testimony were the only evidence concerning the Respondent's policy, it might carry more weight, but in this case the best evidence of the Respondent's policy is the written policy itself. Program Statement 3000.02 of the Respondent's nationwide personnel manual (Respondent's

Exhibit 4) is quite clear in this regard: an employee's shift begins at the place where he picks up his equipment, and it specifies that place as the control center. The Respondent's witnesses were just as emphatic in testifying that the "portal" at the FDC was the control center or key line as the General Counsel's witnesses were in testifying that it was the chit board, but the Respondent's witnesses were corroborated by the written policy itself, and that is a crucial difference.

One of the General Counsel's witnesses, Alen Arnold, also testified that in 1998, then-Warden Miles told employees they simply needed to report to the key line by the start of their shifts, but his testimony was directly refuted by Warden Miles himself. The other General Counsel witnesses could not even specify how they came to their understanding of the FDC policy on this issue. In light of the conflicting testimony, I give stronger probative value to the testimony that is supported by the Respondent's written policy, which also appears to me to represent the most reasonable interpretation of the facts.(11)

The Respondent's policy of requiring employees to report to the control center by the start of their shifts pre-dated the implementation of the chit board at the FDC. The introduction of the chit board, with the requirement that employees turn their chits when they first enter the FDC and before they go to the control center, may plausibly have given employees the mistaken impression that the chit board constituted the new "portal" for reporting purposes. But in the face of the Respondent's longstanding official policy and the testimony of FDC officials that the control center has always been the "portal" and that they didn't tell employees it was the chit board, I cannot accept that the subjective impression of some employees demonstrates the establishment of a past practice to the contrary.

The General Counsel argues that by requiring employees to "chit in" at the front entrance, the Respondent was requiring employees to perform "work," which is consistent with a finding that the chit board was the official "portal" marking the start of a shift. To consider the control center as the "portal" would, in the General Counsel's view, conflict with "other Federal law which is not the subject of this proceeding." (G.C. Post-Hearing Brief at 11). This is apparently a reference to the Portal-to-Portal Act, 29 U.S.C. §§ 251 *et seq.* It would indeed be improper to apply that statute here, but the General Counsel's oblique reference appears to seek to do just that. As evidenced by court cases such as *Steiner v. Mitchell*, 350 U.S. 247 (1956), a complex body of law is devoted to identifying what types of "preliminary" and "postliminary" activities are such "an integral part of and indispensable to" an employee's "principal activities" as to entitle the employee to compensation. *Id.* at 255. I would not presume to resolve whether the simple requirement of turning over a plastic chit prior to reaching the official "portal" constitutes a violation of that law, but the Respondent's location of the chit board separate from and prior to the "portal" does not strike me as unreasonable on its face.

There was considerable and varying testimony at the hearing concerning the time it takes employees to travel from the chit board to the control center. If the Respondent had indeed changed the "portal" from the chit board to the control center, as alleged, then it might be necessary to determine whether that change was *de minimis*. In light of my finding that there was no change in conditions of employment, however, that question is immaterial.

I therefore conclude that the Respondent did not violate the Statute as alleged in Case No. DA-CA-00281.

Case No. DA-CA-00303

This complaint alleges that the Respondent has refused to comply with Article 19, Section l of the Master Agreement and with the terms of the October 1999 settlement agreement by refusing to negotiate over the scheduling of leave for calendar year 2000. More specifically, the General Counsel argues that the Respondent's actions constitute a repudiation of essential provisions of these two agreements: management refused to negotiate locally over leave-year scheduling procedures, and it refused to consider Local 3957's

views prior to setting the maximum number of foremen on scheduled leave per week. The Respondent asserts that it complied with the requirements of the Master Agreement and the settlement agreement: on the issue of how many employees could schedule leave per week, management asked for, received and considered the union's input, precisely as required by the agreements; on other issues relating to leave scheduling, the Respondent says it "may," but is not required, to negotiate locally. On this latter point, the Respondent argues that the Master Agreement uses the word "will" when something is mandatory and "may" when it is optional; thus the phrase in Article 19, Section l that "[t]otal leave-year scheduling procedures may be negotiated locally" must be interpreted to allow either party to decline such negotiation. The Respondent finally notes that only Local 3957 requested to negotiate a consolidated leave procedure, putting FCI management into a potential conflict with Local 1007, which had already approved the leave procedures for calendar year 2000.

Both parties agree, and the law is clear, that not every violation of a collective bargaining agreement is an unfair labor practice. But when "the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms," a violation of the Statute will be found. *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1219 (1991). In *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858, 862 (1996)(*Scott AFB*), the Authority further explained its analysis:

[T]wo elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?).

In evaluating these two elements, it may be necessary to ascertain the meaning of the contract provision allegedly breached, but in some cases that may not be needed. *Id.* at 862.

While the General Counsel has alleged that the Respondent repudiated both the Master Agreement and the settlement agreement, the latter allegation is totally unsupported by the evidence. Although Article 19, Section l of the Master Agreement addresses the larger subject of local negotiations concerning leave-year scheduling, the settlement agreement is very narrowly focused on "the maximum number of employees that may be on scheduled annual leave during each one week period." Moreover, the settlement agreement obligates the Respondent simply to "consider the views and input of the Union before determining" that number. The meaning of the settlement agreement is quite clear that the Respondent's obligation is not to "bargain" in the fullest sense, but merely to "consider" the views of the Union.(12) The evidence submitted at the hearing leaves no doubt that Facility Manager Batten fulfilled his limited duty on this score. The Union was sent a copy of the proposed procedures on October 27, 1999, in advance of employees receiving notice, and Mr. Deshotel's input was requested.(13) Mr. Deshotel brought up the issue at the November LMR meeting, and when he was instructed by HR Manager Greene to discuss the topic with Facility Manager Batten, Deshotel sent detailed proposals to Mr. Batten. On November 29, Batten advised Deshotel that he had considered those proposals but did not find them persuasive. Mr. Batten's testimony at the hearing also reflects that he understood Mr. Deshotel's reasons for wanting a higher number of employees to be allowed to schedule leave per week, but that he disagreed with those reasons. Under the settlement agreement, that was all the Respondent was required to do.

The General Counsel argues that "any attempt to offer the Union's input . . . would be futile", based on the Respondent's October 27 memo announcing the new year's leave procedures. (G.C. Post-Hearing Brief at 11). But the evidence contradicts this argument. Even if Mr. Deshotel didn't receive the e-mail cover letter soliciting his response (an assertion I cannot accept, in light of the e-mail receipt documented by Respondent's Exhibit 11 at 2 and 4, and in light of Mr. Deshotel's own statement in his November 4 memo that he had "received a Memo from Kim Hebert on 10-27-99"), the October 27 memo itself is addressed "THRU: Dale Deshotel, Union Representative". This indicates that Local 3957 was being notified of the proposed

procedures prior to their distribution to employees. Local 3957 did submit its views and input to Mr. Batten, and the record reflects that Mr. Batten considered and rejected them. Thus, the General Counsel has failed to prove that the Respondent committed a "clear and patent" breach of the settlement agreement; on the contrary, the General Counsel has proved no violation whatever of the settlement agreement.

On the question of whether the Respondent repudiated the Master Agreement, the matter is subject to greater dispute, but the ultimate resolution is the same. The complaint alleges that FCI management refused to comply with the Master Agreement's requirements to negotiate locally over total leave-year scheduling procedures and to consider Local 3957's views and input before determining the maximum number of employees on scheduled leave. I have already explained that the Respondent complied with its obligation under the settlement agreement to consider the union's views and input on the latter issue, and that rationale applies equally to the Master Agreement. The Master Agreement imposes the same minimal obligation on the Respondent before it determines the maximum number of employees who can schedule leave per week, and FCI management fulfilled that obligation. The only remaining question, therefore, is whether FCI's refusal to negotiate local leave scheduling procedures constituted a clear and patent breach, going to the heart of the Master Agreement.

The first problem that arises in answering this question is that the precise nature of Local 3957's bargaining request is unclear. The union's initial request on November 4 stated that it was "requesting negotiation on the annual leave scheduling . . . ." On the LMR agenda dated November 8, Mr. Deshotel stated, "There are new circumstances involving CMS annual Leave scheduling which I would like to address or negotiate through. I believe this is due to consolidation." These statements suggest that Local 3957 was making a broad request to negotiate a variety of issues relating to the scheduling of leave. Consistent with this interpretation, Mr. Deshotel explained in his testimony at the hearing (see, e.g. Tr. at 47-50, 484-86) that he wanted "to look at all of the angles" related to the department's consolidation "and see how it would affect everyone involved." According to Mr. Deshotel, he wanted to deal with consolidation-related questions such as how to afford the FCI and FDC adequate coverage when foremen with the same specialty at the two institutions request leave for the same week. But when Mr. Deshotel submitted actual proposals to management on November 16, they only concerned the maximum number of employees who could schedule leave per week (Respondent's Exhibit 11 at 5). It was to these proposals that Facility Department Manager Batten responded when he discussed the proposed leave procedures with Deshotel on November 29 and expressed management's intent to implement them (see Respondent's Exhibit 11 at 6). In contrast, HR Manager Greene's memo of November 19 doesn't refer to the union's proposed increase in the number of employees on leave per week, but responds instead to Deshotel's "request to negotiate a consolidated annual leave procedure for Facilities."

It appears from the record that the Respondent understood Local 3957 to be making two basic requests: to increase the total number of employees who could schedule leave each week, and to combine Local 3957 and Local 1007 seniority lists and leave scheduling procedures. Moreover, the Respondent's understanding of Local 3957's bargaining requests was a reasonable one, in view of the differing language used by the union at different times. Mr. Batten responded to the first request on its merits, and Mr. Greene responded to the second request by stating that negotiations were optional, not mandatory, and that FCI declined to enter into such negotiations. For the following reasons, I cannot conclude that the Respondent's action was a clear and patent breach of the Master Agreement.

The Master Agreement is nationwide in scope and addresses subjects on both a national and local scale. It sets out a framework in which nationwide bargaining will occur, and it further permits local bargaining under certain circumstances. In this context, Article 19 establishes a national policy of "[t]otal leave-year scheduling" and of using seniority to resolve scheduling conflicts between employees; Section l further provides that total leave-year scheduling procedures "may be negotiated locally". It was this language that formed the basis of Mr. Greene's November 19 memo asserting that "the procedures can be negotiated if both parties agree." A review of the Master Agreement certainly reflects a pattern of language, in which "will" is

used to denote a mandatory obligation and "may" is used to denote a conditional obligation or an optional choice. For instance, Section f of Article 19 provides that "the Employer may grant administrative leave . . . during emergency situations". This clearly allows management to exercise its discretion (subject to applicable law) in choosing whether to grant administrative leave. Similarly, in Article 2, Section f, a procedure for joint labor management relations meetings is established at both the nationwide and the local level, and it further states that "The actual procedures for local labor management meetings will be negotiated locally." The use of "will" constitutes an obligation on both unions and management to negotiate such procedures. Given this contractual context, the meaning of Article 19, Section l is far from clear. Where the word "may" is placed after "the union" or "the employer," it would logically indicate that a party has the choice of acting or not acting; but where, as here, the word "may" could relate to either or both parties, it can be argued that either party is free to exercise its choice unilaterally, or that mutual consent is required. Both arguments can be supported from the language of the Master Agreement as a whole, but neither argument is "clear and patent." Especially in contrast to the above-cited language of Article 2, Section f (requiring local negotiation of LMR procedures by the use of "will"), the Respondent has a strong argument that the use of "may" in regard to local leave-scheduling negotiations allows it to decline such negotiations. The General Counsel did not offer evidence of the parties' intent or bargaining history that would negate such an interpretation.

In light of these factors, I do not find it necessary to determine the precise meaning of Article 19, Section l of the Master Agreement. *See*, *Scott AFB*, 51 FLRA at 862-63. Rather, it is sufficient that FCI management acted in accordance with a reasonable interpretation of that provision, for me to conclude that it did not clearly and patently breach the contract.

It is also significant that Local 3957's request to negotiate a consolidated seniority list and leave procedure improperly exceeded the scope of Local 3957's representation and placed FCI management in a potential conflict with Local 1007. While Local 1007 apparently joined with Local 3957 in requesting that a higher number of employees be permitted to schedule leave, Local 1007 did not join in the request for a combined seniority list or schedule.(14) The parties had a longstanding practice of separate seniority lists and leave scheduling, and the consolidation requested by Local 3957 might have adversely affected employees represented by Local 1007. Absent a joint request by the two unions for a consolidated procedure, I find that the Respondent had legitimate reasons for refusing Local 3957's request.(15)

Accordingly, I conclude that the Respondent did not violate the Statute as alleged in Case No. DA-CA-00303.

Case No. DA-CA-00397

This complaint alleges that the FCI violated section 7116(a)(1) and (4) by placing Fred Gilley on a Performance Improvement Plan (PIP) because of his protected activity.

The Authority explained the analytical framework for evaluating alleged violations of section 7116(a)(2) of the Statute in *Letterkenny Army Depot*, 35 FLRA 113, 118-19 (1990)(*Letterkenny*).(16) The General Counsel bears the burden in all such cases of establishing by a preponderance of the evidence that an unfair labor practice has been committed. The General Counsel must demonstrate (1) that the employee against whom allegedly discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion or other conditions of employment. If the General Counsel does so, it has established a *prima facie* case of unlawful discrimination. The Respondent can, in turn, rebut the *prima facie* case by establishing, by a preponderance of the evidence, the affirmative defense that (1) there was a legitimate justification for its actions; and (2) the same action would have been taken in the absence of protected activity. Citing a Supreme Court decision approving the NLRB practice on which *Letterkenny* is based, the Authority explained that the General Counsel must first persuade it that "antiunion sentiment contributed to the employer's decision[]"; if that is done, the employer then has the burden of persuasion as to its affirmative defense. *Federal Emergency*

Management Agency, 52 FLRA 486, 490-91 n. 2 (1996), *citing Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994).

The parties agree that Mr. Gilley has engaged in considerable protected activity and that the Respondent in general, and Mr. Hebert in particular, were aware of that activity. In Hebert's view, Gilley files many more grievances than Hebert had experienced in other BOP facilities (Tr. at 321-22). Mr. Hebert and the Respondent deny, however, that Gilley's protected activity was a factor in the decision to issue an unsatisfactory performance log entry in January 2000; they further insist that Mr. Gilley's misdiagnosis and delayed treatment of the Evangeline plumbing problem was a valid basis for the entry, and that it would have warranted such action regardless of Gilley's protected activity.

In support of the complaint, the General Counsel points to Mr. Gilley's filing of five ULP charges and nine grievances in 1999 and 2000, in addition to his prior years as a union official. Most significant, in the General Counsel's view, are the two ULP charges Gilley filed against Hebert prior to the instant charge: these two charges both originated in a dispute in June 1999, shortly after Hebert took over as General Foreman and as Gilley's supervisor, in which Hebert instructed Gilley to document his plan for treating a water leak. Gilley protested the requested documentation and threatened to file a grievance and/or ULP; Hebert took offense at Gilley's threat, issued a counseling letter, and documented Gilley's minimally satisfactory handling of the water leak. As a result, ULP complaints were issued by the General Counsel in 1999, and although both complaints were ultimately settled, those cases were still pending and were prominent in Hebert's mind in January 2000.

The General Counsel also takes issue with Mr. Hebert's evaluation of how Mr. Gilley handled the Evangeline plumbing problem and with the Respondent's lack of tangible guidelines for putting employees on a PIP. The General Counsel argues that Gilley acted diligently and exercised good professional judgment in treating the hot water problem - at worst, it is argued, Gilley may possibly have misdiagnosed the problem initially on January 12, but the Respondent never demonstrated conclusively that Gilley's second diagnosis (i.e., that the heater temperatures needed adjusting) was wrong. Moreover, the General Counsel argues that Hebert's bias is evidenced by his precipitous action in putting Gilley, a longstanding employee with a history of good appraisals, on a PIP for this single incident. Mr. Hebert had not given any other employees an unsatisfactory log entry in eighteen months as General Foreman; thus he appears to be judging Mr. Gilley's work in a different light than that of other employees.

I find, however, that the General Counsel's case is fatally flawed in two respects. First, I conclude that it has failed to establish, by a preponderance of the evidence, that Gilley's protected activity was a motivating factor in Hebert's putting him on a PIP; thus, it has failed to make a *prima facie* case against the Respondent. Second, the Respondent has established that it had a legitimate justification for its action against Gilley and that it would have taken this action regardless of Gilley's protected activity. In many respects, the evidence for these two conclusions is the same or overlapping, because even if the General Counsel has produced enough evidence to survive a motion to dismiss, it has not offered persuasive evidence that the Respondent's explanation for its action against Gilley was pretextual. *See, Letterkenny*, 35 FLRA at 119.

As noted above, I fully accept the threshold premise that Gilley's protected activity was well known both to the Respondent and to his supervisor, Hebert. Gilley made it quite clear to Hebert, practically from the first day Hebert became General Foreman, that Gilley would vigorously assert his rights under the contract and under the law. I also accept the fact that the work incident which resulted in Gilley being placed on a PIP occurred at a time when Gilley's two prior ULP charges against Hebert were still pending and fresh in everyone's minds. In January and February of 2000, the Respondent had just settled the first charge and had

posted a notice to employees concerning the settlement; the second charge was being investigated and Gilley was giving evidence to the General Counsel. While this evidence may support an inference that Hebert was acting in retaliation in January 2000 for Gilley's earlier ULP charges, or that Hebert was at least partially motivated by Gilley's protected activity, I am not persuaded to draw either of those inferences.

First, the General Counsel's finding of merit in the two 1999 ULP charges against Hebert is not proof that Hebert acted improperly. Those two cases were settled short of hearing, and most of the evidence regarding those two charges is not before me in this record. While the evidence of record here does suggest the potential for Hebert to harbor animosity to Gilley's protected activity, the evidence does not cross the threshold from potential to actual. On the contrary, Gilley's letter to Hebert of June 10, 1999 (Respondent's Exhibit 5), corroborated by Gilley's testimony, suggests to me that Gilley has a hair-trigger temper and may be overly hasty in attributing ulterior motives to every supervisory action.(17) In light of the fact that Hebert had just become Gilley's supervisor at the time of the June 10 letter, Hebert's request that Gilley provide a written plan of what he proposed to do to fix a water leak appears entirely reasonable to me, and Gilley's accusation that Hebert intended to "manipulate and misconstrue" Gilley's words against him appears totally without factual support. While this event, and the ULP charges that arose out of it, certainly got the Gilley-Hebert relationship off to a bad start, and those emotions were still fresh in January 2000, I do not infer unlawful animus on Hebert's part, absent some more direct evidence of such in the incident of January 11-19 itself.

Notwithstanding the pending ULP charges against Hebert in January 2000, the evidence regarding Hebert's evaluation of Gilley's attempts to repair the hot water problem in Evangeline II does not reflect hostility or impropriety on Hebert's part. In responding to the situation in the Evangeline unit on January 19 and thereafter, Hebert did not refer to Gilley's union or other protected activity; rather, his words and actions appear to be directly related to his view of the plumbing problem itself. The General Counsel portrays Mr. Gilley's work performance on this problem as "conscientious" and "tenacious" and argues that Gilley "did everything he could" to fix the problem as soon as possible. But this is inaccurate, even viewing Gilley's actions in the best light. The fact is, by Gilley's own testimony, that he had been assigned to fix the hot water problem on January 11; on January 12 he diagnosed the problem as a broken circulating pump; he did nothing further to resolve the problem until January 19, and his efforts then occurred mainly at Hebert's prodding. Gilley admitted he made his initial diagnosis without personally inspecting the plumbing in the shower room, based on conversations with Evangeline inmates and his own inspection of the equipment in the mechanical room. On the 19th, Gilley changed his diagnosis, based on further investigation, and suggested a different solution that required only adjusting some water heater settings. If this were the true cause of the problem, as Gilley now insists, Gilley could have tried this solution at any time between the 12th and the 19th, without waiting for a new part to arrive. With an entire unit of federal prisoners lacking adequate hot water, Gilley simply waited for a part to arrive that was not actually needed. Whatever troubleshooting Gilley did on the 19th to reach his new diagnosis, he could have done in the intervening week. Moreover, it was at Hebert's prodding on the 18th that Gilley found a dealer who could deliver the "needed" circulating pump in one day rather than nine. If Gilley had demonstrated more sensitivity to the urgency of the plumbing problem, he might have remembered the contractor's solution several days sooner.

Hebert was justly alarmed on January 19, when he asked Gilley whether the circulating pump had arrived and was told that Gilley no longer believed the circulating pump needed replacement. Hebert's own supervisor was then aware of the situation, and Hebert went to the Evangeline unit personally to investigate. The testimony of Hebert and Gilley differed as to whether Gilley then suggested calling in a contractor to fix the problem, but it is not necessary to resolve that discrepancy here. According to Hebert, Gilley thought the problem was in the water heaters and not the circulating pump, but when Hebert checked the gauges on the two heaters, the temperatures both read over 100 degrees. Gilley testified, however, that the water heater temperatures were no higher than 80 degrees, but he also testified that the hot water line feeding water to the Evangeline unit was 120 degrees (Tr. at 248-55). Whatever explanation of the problem Gilley gave to Hebert, it is clear that it was not satisfactory to Hebert, and Hebert walked from the mechanical room to the shower

room to investigate further. I cannot accept Gilley's testimony concerning the temperature of the water heater settings. If the water there were indeed cold, there would have been no reason for Hebert to go to the shower room, even assuming Hebert was "out to get" Gilley. Gilley's testimony is not internally consistent, and it requires an assumption not only that Hebert was willing to lie to punish Gilley, but that Hebert would engage in illogical and unnecessary work to do so. I therefore accept Hebert's testimony that the water heaters were producing hot water, and that Gilley's revised plan for fixing the problem was inaccurate. This finding is corroborated by the fact that when Hebert went to the shower room, he found that a mop sink and some of the showers did have hot water, and that only two showers were cold.

Therefore, a review of the record demonstrates to me that Hebert's actions, upon learning of the unresolved plumbing problem on January 19, were reasonable and do not suggest that he was motivated by antiunion animus. Although it is still unclear whether the true cause of the hot water problem was faulty water heater settings (as Gilley insists) or faulty cartridges in the shower heads (as Hebert insists), it is clear that the problem was not in the circulating pump, as Gilley originally believed.(18) Thus a problem persisted for nine days (and two circulating pumps were ordered) based on Gilley's initial, faulty diagnosis. The information which led Gilley to change his diagnosis on the 19th was available to him on the 12th, and thus the delay is at least partly attributable to him. Moreover, if Gilley discovered on the 18th that a new pump could be obtained in one day rather than nine, the initial delay in obtaining the part also is partly attributable to him. And while neither the Respondent nor I can conclusively determine whether Hebert or Gilley finally fixed the problem, the evidence appears more credible to me that the source of the hot water problem was in the shower room, not in the mechanical room. Most significantly, whether Hebert was right or wrong about the actual cause of the problem, I find that Hebert acted reasonably and without unlawful malice in evaluating the situation. Accordingly, the General Counsel has not established a *prima facie* violation, by a preponderance of the evidence.

For similar reasons, I accept the Respondent's justification for placing Gilley on a PIP and find that this action would have been taken even in the absence of any protected activity. I have already explained why I believe that Gilley's response to the hot water problem was less than acceptable for a journeyman plumber. The General Counsel argues that the "punishment" - placing Gilley on a PIP - was disproportionate to the "crime" - a single instance of misdiagnosing a plumbing problem. I initially questioned this as well, but the Respondent's explanation is appropriate, in the facts of this case. BOP policy, evidenced by Program Statement 3000.02 (Respondent's Exhibit 12), requires that supervisors document employees' good and bad work performance as they occur in the employee's performance log; when "an instance of unacceptable performance in one or more elements of the performance standards" occurs, section 22 of that policy requires the supervisor to issue the employee a warning letter and place him on a PIP. There is no policy requiring progressively more severe action in advance of placing an employee on a PIP. While the Respondent had and exercised discretion in determining that Mr. Gilley's performance in this instance was "unacceptable" rather than "minimally successful," there is no credible evidence that Hebert exercised that discretion inappropriately here. Although Hebert had not placed any other employees on a PIP in his 18 months as General Foreman, he had previously given Gilley a "minimally satisfactory" entry for a different element of his standards, and he had given a different employee a "minimally satisfactory" entry as well. I do not find that the General Counsel has established any sort of disparate treatment by Hebert or the Respondent, and the Respondent has carried the burden of persuasion on its affirmative defense.

Accordingly, I conclude that the Respondent did not commit an unfair labor practice by placing Mr. Gilley on a PIP.

Based on the foregoing, I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the Complaints in Case Nos. DA-CA-00281, DA-CA-00303, and DA-CA-00397 be, and hereby are, dismissed.

Issued, Washington, DC, February 13, 2002.

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RICHARD A. PEARSON

Administrative Law Judge

1. I did not consolidate a fourth complaint, Case No. DA-CA-00621, which was issued against the FDC based on a charge filed by a different union, AFGE Local 1007. The hearing on that case was also scheduled for, and was completed on, December 14, 2000, immediately before the start of the instant hearing, and a separate decision on that complaint has already been issued. OALJ Decision No. 01-54.

2. The Index of Exhibits in volume 1 of the transcript incorrectly fails to reflect that Respondent's Exhibits 1 (the parties' collective bargaining agreement) and 2 (seven pages of documents relating to a grievance and its settlement) were admitted into evidence. The record is hereby corrected to reflect the admission of these exhibits.

3. Witnesses estimated the distance from the chit board to the control center is anywhere from 30 yards to 250 feet, although I do not consider this to be a material fact. Witnesses also disagreed as to how long it takes to travel this distance: management witnesses generally minimized the time required and the frequency of security delays, while union witnesses stated that security guards frequently made them wait to proceed through each secured door and to receive their keys. For reasons I will explain later, I do not consider this disputed fact material either.

4. Witnesses variously estimated that the chit board was implemented in 1997 or 1998; General Counsel's Exhibit 5(b), a memorandum dated December 10, 1997, setting forth the rules for use of the chit board, appears to reflect the most likely date on which the chit board and its rules were implemented.

5. When Warden Martha Jordan testified, she showed a sample chit (Tr. at 433-34), which had a blue side and a white side, as described above. General Counsel's Exhibit 5(b), the December 1997 memorandum describing the new chit board procedures, indicates that the chits were red and blue. This discrepancy was not explained at the hearing, but I will accept Warden Jordan's testimony as reflecting the current practice.

6. The letter of counseling issued to Mr. Arnold specifies that he reported for work late on December 15, 1999; Mr. Arnold and his fellow employee, Mr. Fusalier, insist that the incident in question occurred on December 14, not 15. While the discrepancy is not material to the alleged unfair labor practice, I credit the testimony of the witnesses that the incident occurred on December 14.

7. Mr. Patton explained that he issued a counseling letter to Mr. Arnold because Arnold had previously been verbally counseled for lateness; since this was Mr. Fusalier's first such offense, however, he was simply counseled verbally and required to use 15 minutes of leave.

8. Although no witness explicitly testified as to the meaning of this proposal, it is clear that these numbers were for each institution and that the maximum total number of employees on leave was meant to be twice these amounts. Otherwise, the union proposal would have represented a decrease in the numbers allowed to be

on vacation.

9. The term "supervisor" is sometimes used to describe the positions of employees overseeing work details of prison inmates, and sometimes the term "foreman" is used. Since it is agreed that these employees are not supervisors within the meaning of the Statute, I will use the term "foreman."

10. Although the second complaint was settled with the posting of a notice, the record does not indicate that the "minimally satisfactory" performance entry was rescinded.

11. In making this credibility determination, I have not considered the evidence offered by the Respondent to impeach Mr. Arnold's truthfulness.

12. With regard to "the maximum number of employees that may be on scheduled annual leave", the language of the Master Agreement is nearly identical to the settlement agreement, and the Respondent's bargaining obligation is equally limited in both documents.

13. While Mr. Deshotel denied receiving Mr. Hebert's e-mail cover letter to the October 27 memo, he does not deny receiving the memo itself or having an opportunity to respond prior to implementation. Indeed, Mr. Deshotel did respond and offer his input on at least two occasions prior to implementation on December 1.

14. I say "apparently" because Mr. Turner's signature at the bottom of Mr. Deshotel's November 16 proposals (Respondent's Exhibit 11 at 5) was never explained by anyone from Local 1007. That exhibit proposed only to increase the maximum number of employees on leave per week. Nobody from Local 1007 signed or indicated any agreement with Local 3957's memos requesting consolidated leave scheduling, and I cannot accept Mr. Deshotel's assertion that the two unions were making a joint request for negotiations.

15. I make no finding as to whether the Respondents would have been obligated to negotiate if the two unions had jointly requested a consolidated procedure, as that issue is not presented in this case.

16. The Authority applies the same analysis in resolving section 7116(a)(4) allegations. *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780, 781 (1991).

17. In saying this, I am not making any comment or conclusion as to the merits of the underlying charge in that case which was settled by the parties.

18. The circulating pump was never replaced, but the problem disappeared after January 20.