BLUE GRASS ARMY DEPOT, RICHMOND, KENTUCKY Respondent	
and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 859 Charging Party	Case No. AT-CA-40192

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MAY 22, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: April 21, 1995

Washington, DC

MEMORANDUM DATE: April 21, 1995

TO: The Federal Labor Relations Authority

FROM: SALVATORE J. ARRIGO
Administrative Law Judge

SUBJECT: BLUE GRASS ARMY DEPOT,
RICHMOND, KENTUCKY

Respondent

and Case No. AT-CA-40192

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, LOCAL LODGE 859

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

BLUE GRASS ARMY DEPOT, RICHMOND, KENTUCKY Respondent	
and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 859 Charging Party	Case No. AT-CA-40192

Leslie E. Renkey, Esq.
For the Respondent

James W. Ballinger, Sr.
For the Charging Party

John F. Gallagher, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Atlanta Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by implementing a staffing change of security guards without bargaining with the Union on the impact and implementation of the change.

A hearing on the Complaint was conducted in Lexington, Kentucky at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees, including between 60 and 70 security guards. On November 9, 1993 Respondent sent the Union a copy of a memorandum given to security personnel which announced that effective November 16 it would change shift staffing of security guards. The memorandum stated:

> DAY SHIFT: Radio operator is discontinued.
> R-1 will be reduced to one person.
> Post 7 will be reduced to one person.
>
> SWING SHIFT: Radio operator is discontinued.
> Post 7 is discontinued after 1700 hours.
> Post 2 discontinued.
>
> OWL SHIFT: Radio operator is discontinued.
> Post 7 is discontinued.
> R-1 is discontinued.
>
> 2. Supervisors must be flexible when assigning tasks to ensure maximum coverage of available patrols. Example: Special checks now required of Swing Shift Post 2 must be assigned other units. Post currently manned will pickup functions of discontinued patrols/post.
>
> 3. The adjustments required in this directive will change the composition of our 15 man response force. It is imperative that supervisors effectively use the 10 person call back roster to meet regulatory guidance outlined in AR 190-59.

By letter dated November 10, 1993 the Union requested that Respondent negotiate regarding the impact of the change and, in the meantime, shift staffing remain at the status quo. Implementation of the change was withheld and the parties met in a bargaining session on November 30. During the meeting Respondent explained that it concluded guards were working excessive overtime which had produced a

decrease in efficiency. The staffing change would produce less opportunity for overtime work and, Respondent reasoned, more rest for guards between shifts. The Union had no proposals at this time and another meeting was scheduled.

The parties met again on December 8, 1993 to discuss the change. The Union submitted the following proposal:

> In response to Ref (d), the Union submitted Ref (e), and the parties met on 11-30-93 to discuss the above named subject. At this meeting, the Employer requested any Impact proposals the Union may wish to submit. Therefore, in accordance with the terms and conditions of Ref (a), Ref (b), and Ref (c), the Union hereby tenders the following proposal.
>
> 1. The Union is not convinced that the Depot has received the authority, or any mandate, from higher Headquarters to make changes in the structure of the Shifts, as outlined by Ref (d).
>
> Since there is no such mandate, or authority from higher Headquarters, there does not appear to be a compelling need to implement such a proposal as per Ref (d).
>
> Therefore, the Union proposes that the Shifts remain status-quo, i.e., absent a compelling need to change them, no changes to the current operating procedure of nineteen (19) man Shifts, with an intact fifteen (15) man Response Force.

At the December 8 meeting the Union was represented by Jimmy Bowling, President of Local 859, and three others. Management was represented by Captain Michael Bean, Director of Law Enforcement and Security/Provost Marshall, Labor Relations Specialist Phillis Thomas and another officer. The Union contended that the guard force could not be reduced without authorization of higher headquarters, and therefore the Union would not discuss the reduction. The Union also took the position, in support of its proposal, that reducing the number of guards required for availability for the Response Force was contrary to Army regulations AR 190-50 and had adverse safety consequences for guards.[1] Respondent took the position that Colonel McCormick, the Commanding Officer, was responsible for security at the installation and his approval was all that was required to

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[1] The Response Force is a complement of guards that could be quickly assembled to respond to an emergency situation such as a terrorist attack.

proceed with a reduction in overtime, and no further approval would be sought before the reduction would be effectuated. The Union refused to discuss the reductions further without higher approval and management indicated it had all the authorization it required. The meeting concluded with Captain Bean remarking, "We'll get back to you."

On December 13, 1993 Captain Bean issued a memorandum addressed to all security personnel announcing that in order to "reduce excessive overtime" a new shift manning schedule would be effective on December 15. That schedule was different from the one proposed on November 9, 1993, above, and substantially increased the staffing reductions contained in the November 9 notice and also had an effect on the composition of the Response Force. Although the memorandum indicated that the Union President was to have been sent a copy of the new reduction notice, Union President Bowling,
the Union representative who was the point of contact for such notice, testified that he never received a copy of Respondent's December 13 notification. Rather, on December 13 a Union steward provided Bowling with a copy of the document and Bowling immediately telephoned Labor Relations Specialist Phyllis Thomas, the management representative Bowling normally contacted for such matters. Bowling, whose testimony I credit, testified that he told Thomas that the change was different than the proposed November 9 change and suggested to Thomas that she should inform Captain Bean ". . . he needs to come to the table and negotiate this." Bowling also asked Thomas to delay implementation of the change and Bowling credibly testified Thomas replied ". . . it was out of her hands and she could do no more."

Without further contact between the parties, the change was implemented on December 15, 1993. The change resulted in guards working less overtime. With less posts required to be staffed, overtime work was reduced since rather than provide a guard for a post, the post could simply go unattended when sufficient guards were not available at straight-time pay. On February 1, 1994, the change was rescinded after Union President Bowling complained to Respondent's Inspector General that Respondent was not complying with its own regulations.

Additional Findings, Discussion and Conclusions

The General Counsel contends Respondent implemented the staffing change on December 15, 1993 without bargaining with the Union on the impact and implementation of the change in violation of section 7116(a)(1) and (5) of the Statute.

Respondent essentially takes the position that the Union received notice of the change and by its inaction waived its right to bargain on the impact and implementation of the change.

To begin, it is clear, and indeed uncontested, that the change in staffing ultimately at issue herein gave rise to a duty to bargain on the impact and implementation of the change. See United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 47 FLRA 225 (1993). Respondent recognized the existence of that duty when on November 9, 1993, it sent the Union a copy of its announcement that shift staffing would be changed. Upon the Union notifying Respondent that it wished to negotiate the impact of the change, the parties met on December 8 to discuss the matter. The Union submitted a proposal that "(s)hifts remain status quo" due to lack of higher authority the Union contended was needed before management could implement the change. Respondent declined to accept the Union's proposal or go to higher headquarters and took the position it had sufficient authorization to act. In these circumstances the Union refused to discuss the change any further. Captain Bean concluded the meeting with the comment "We'll get back to you."[2]

On December 13, 1993 the Union received notification that on December 15 Respondent would effectuate shift changes which were substantially more extensive than the changes previously announced. While I find on the state of the record that Respondent had not established that the Union was sent a copy of the new staffing changes and conclude the Union did not receive a copy, Union President Bowling was shown, on December 13, by a Union steward, a copy of the changes proposed to be implemented on December 15. The receipt of notice by Bowling in this fashion was sufficient to satisfy the requirement that the Union receive adequate notice with regard to the nature of the change, per se, without regard to the timeliness of the notice, considering the implementation date. See United States Department of Health and Human Services, Region II, New York, New York, 26 FLRA 814, 826 (1987). However, the only notice the Union received was less than two days before the shift staffing change would be implemented. As stated

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I do not interpret this ambiguous remark by Bean to have conveyed the notion that subsequent contact involving negotiation between the parties was envisioned, by either party, before implementation of the staffing change that had been communicated to employees and the Union at that time. Union President Bowling's reaction to being told on December 13 of the more extensive changes to be implemented supports this conclusion, infra.

above, I find the change was substantially more extensive than that proposed on November 9, so much so that I concluded the December 13 staffing proposal constituted a new and different change from the change the Union confronted during its December 8 discussion with Respondent. Bowling's response to this notice was to call Respondent's representative, Labor Relations Specialist Thomas, complain that the staffing change was different than the one proposed on November 9, and request delay of implementation and negotiations on this new change.[3] The reply from Thomas, Respondent's contact person for receiving requests for negotiation, was that the matter was out of her hands and she could do no more, and the staffing schedule change was implemented as announced.

In these circumstances I reject Respondent's contention that the Union waived its right to bargain on the change through "inaction." However the contacts between the parties regarding the change proposed on November 9, 1993 might be construed, the December 13 announced change constituted a separate and distinct situation to be judged independently from what transpired previously. In my view two days notice of this change was insufficient time to expect the Union to formulate and present proposals to management on the impact and implementation of the new change. See Long Beach Naval Shipyard, Long Beach, California, 17 FLRA 511, 526 (1985). The record does not disclose any exigency compelling Respondent to act so hastily. Id. Nor can it be assumed, as Respondent seems to assert, that the Union would have made the same proposal to the change announced on December 13 as it did to the change proposed on November 9. Proposals vary depending upon the change envisioned and indeed proposals frequently change during the bargaining process itself, but since no bargaining commenced, it is impossible to ascertain what the Union's bargaining proposal would have been. See Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 25 FLRA 541, 545, 555 (1987).

Moreover, the reply Labor Relations Specialist Thomas made to Union President Bowling gave no indication to him that any Union proposal would receive serious consideration. Rather, Thomas' reply that the matter was out of her hands

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[3] I note that Bowling did not indicate surprise or objection that a change was announced, only that a change different from that previously announced and negotiated on, and expected, was to be implemented. Thus it is apparent that Captain Bean's December 8 remark "We'll get back to you" did not signify in the circumstances herein a further opportunity to negotiate on the earlier proposed changes.

and she could do no more indicates that no Union proposal, however valid, would be entertained. Thus submission of proposals by the Union in such circumstances would be futile and such a futile act to support a violation of the Statute is not required. Cf. United States Environmental Protection Agency, Washington, D.C. and United States Environmental Protection Agency, Region IV, Atlanta, Georgia, 10 FLRA 151, n.1, (1982). See Department of the Air Force, Nellis Air Force Base, Nevada, 41 FLRA 1011, 1015, 1028 (1991).

In view of the foregoing and the entire record herein I reject Respondent's defenses and conclude that Respondent implemented the shift staffing change on December 15, 1993 without complying with its Statutory obligation to provide the Union with appropriate notice and a reasonable opportunity to bargain on the impact and implementation of the change in violation of section 7116(a)(1) and (5) of the Statute. The record reveals that Respondent's change in staffing of security guards resulted in guards incurring a substantial loss of overtime pay. In these circumstances, I find that a backpay order is appropriate. See United States Customs Service, Southwest Region, El Paso, Texas, 44 FLRA 1128 (1992). Accordingly, I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, Blue Grass Army Depot, Richmond, Kentucky, shall:

1. Cease and desist from:

(a) Instituting any change in shift staffing of security guards without first notifying the International Association of Machinists and Aerospace Workers, Local Lodge 859, the exclusive collective bargaining representative of its employees, and affording such bargaining representative the opportunity to negotiate the impact and implementation of such change.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Compensate those bargaining unit security guards who are entitled to backpay with appropriate premium pay for the period during which shift staffing was changed.

(b) Post at its facilities in the Blue Grass Army Depot, Richmond, Kentucky, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Region, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, April 21, 1995

SALVATORE J. ARRIGO
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in shift staffing of security guards without first notifying the International Association of Machinists and Aerospace Workers, Local Lodge 859, the exclusive collective bargaining representative of our employees, and affording such bargaining representative the opportunity to negotiate the impact and implementation of such change.

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

WE WILL compensate those bargaining unit security guards who are entitled to backpay with appropriate premium pay for the period during which shift staffing was changed.

(Activity)

Date: By:
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Region, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, and whose telephone number is: (404) 347-2324.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SALVATORE J. ARRIGO, Administrative Law Judge, in Case No. AT-CA-40192, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: April 21, 1995
Washington, DC