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

MEMORANDUM DATE: September 22, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION
SERVICE, FIELD OPERATIONS,
(CLAXTON, GEORGIA)

Respondent

and Case No. AT-CA-04-0461

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3152, AFL-CIO

Charging Party

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

Enclosures

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U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION
SERVICE, FIELD OPERATIONS,
(CLAXTON, GEORGIA)

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3152, AFL-CIO

Charging Party

Case No. AT-CA-04-0461

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 under-signed herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 24, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: September 22, 2005
Washington, DC

OALJ 05-48

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

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE, FIELD OPERATIONS, (CLAXTON, GEORGIA) Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3152, AFL-CIO Charging Party	Case No. AT-CA-04-0461

Brad A. Stuhler
For the General Counsel

Sandra J. Fortson
For the Respondent

Stan Painter
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On June 28, 2004, the American Federation of Government Employees, Local 3152, AFL-CIO (Union) filed an unfair labor practice charge against the U.S. Department of Agriculture, Food Safety and Inspection Service, Field Operations, Washington, DC (Claxton, Georgia) (Respondent). On November 19, 2004, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which 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 implementing a change in the number of employees who are allowed to be on prescheduled annual leave for each shift for certain of its employees who are members of the collective bargaining unit represented by the National Joint

Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (AFGE). In a timely Answer to the Complaint the Respondent denied that it had committed the alleged violation of the Statute.

A hearing was held in Savannah, Georgia on April 20, 2005. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses.[1/] This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that in February of 2004 the Respondent unilaterally changed a past practice with regard to prescheduled annual leave[1/] for bargaining unit food inspectors who were assigned to the HIMP plant[1/] in Claxton, Georgia.[1/] The Claxton HIMP plant had been in existence since January of 2000 and, according to the General Counsel, had consistently followed a procedure whereby two employees in each of the two shifts were allowed to preschedule leave at the same time. The General Counsel further maintains that the procedure for prescheduled leave was a binding past practice inasmuch as it had been administered with the knowledge of two of the Respondent's senior management representatives.

The General Counsel also argues that the change in the procedure for prescheduled leave had a greater than *de minimis* effect on bargaining unit employees because certain employees had been denied leave because of the change. It was reasonably foreseeable that such denial of leave would have a disruptive

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1/ The Respondent did not cross-examine either of the General Counsel's witnesses.

2/ The term "leave" will henceforth be used to refer to annual leave.

3/ HIMP (HACCP Inspection Model Project) refers to a food processing plant at which the Respondent was operating a pilot system whereby the plant itself was allowed to develop its own inspection system which was monitored by the Respondent's employees. HACCP stands for Hazard Analysis Critical Control Inspection.

4/ The General Counsel acknowledges that the Respondent's prescheduled leave policy involves the exercise of a management right within the meaning of §7106(a)(2)(A) of the Statute.

effect on the personal lives of these employees because of the necessity of rescheduling family vacations and other personal events.

Finally, the General Counsel argues that the Respondent has failed to carry its burden of establishing the affirmative defense that the issue of prescheduled leave was covered by the collective bargaining agreement (CBA) between the parties.

The General Counsel proposes a *status quo ante* (SQA) remedy whereby the Respondent would be ordered to reinstate the procedure for allowing two employees per shift to preschedule leave for the same time period and to maintain that procedure until the completion of impact and implementation bargaining with the Union.

The Respondent maintains that it was not required to provide the Union with notice and an opportunity to bargain over prescheduled leave because the issue of leave is covered by the national CBA. The prior practice at the Claxton plant was not a binding past practice because it was contrary to the CBA. According to the Respondent, the alleged change in the number of employees allowed to be on prescheduled leave was no more than an action to bring the procedure at the Claxton plant in line with the policy set forth in the CBA.

The Respondent further maintains that the General Counsel has failed to establish the alleged unfair labor practice by a preponderance of the evidence inasmuch as the General Counsel did not rebut the Respondent's affirmative defense that prescheduled leave was covered by the CBA.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization as defined in §7104(a)(4) of the Statute and is the exclusive representative of a unit which includes the Respondent's employees and which is appropriate for collective bargaining. The Union is an agent of AFGE for the purpose of representing bargaining unit members who are employed by the Respondent.

The Change in Procedure for Prescheduled Leave

On or about February 15, 2004,[1/] Douglas M. Fulgham, the president of the Union, was informed by John Anderson, who was

5/ All subsequently cited dates are in 2004 unless otherwise indicated.

then the Union representative at Claxton, that the Respondent had changed the past procedure of allowing four employees, or two per shift, to preschedule leave (Tr. 11, 12). Fulgham thereupon contacted Dr. Aguirre, the immediate supervisor of the bargaining unit employees at Claxton. Dr. Aguirre informed him that Dr. William Moore, the circuit supervisor, had directed her to make the change. Fulgham then contacted Dr. Moore who informed him that he had been instructed to make the change while at a meeting in Atlanta, Georgia; according to Fulgham, Dr. Moore did not state the source of the instructions (Tr. 13). On or about February 25 Fulgham spoke with Dr. Larry Smith, the District Manager, and asked if he had initiated the change in the prescheduling procedure. According to Fulgham, Dr. Smith stated that he was unaware of any change. Fulgham told Dr. Smith that the leave schedules for 2003 and 2004 (GC Ex. 2) supported the Union's position that there had been a change. He faxed the documents to Dr. Smith at his request (Tr. 14). Dr. Smith told Fulgham that he would get back to him after he had reviewed the situation (Tr. 15).

On or about March 11, after having verified that the Respondent had not rescinded the recent change, Fulgham again contacted Dr. Smith. Dr. Smith informed Fulgham that, based upon discussions with management personnel in Washington and with labor relations personnel, he would not revoke the decision to limit prescheduled leave to two employees at a time, which is to say one per shift (Tr. 15, 16).

Dr. Smith testified that, as of the time of the hearing, he had been employed by the Respondent for twenty-six years. He became the Deputy District Manager in 2000 and the District Manager in 2003. Dr. Smith further testified that he changed the number of employees in Claxton who could simultaneously take prescheduled leave so as to bring the practice in Claxton in line with what he understood to be agency policy. He took this action after discovering that the agency policy was not being followed (Tr. 28, 29). According to Dr. Smith, he first learned that the agency policy was not being followed in Claxton when the Deputy District Manager, Dr. Nassir, informed him that he (Dr. Nassir) had learned about the situation from a super-visor who was assigned to Claxton. Dr. Smith also testified that he was told by his subordinates at the district level that they had no prior knowledge that the agency policy was not being followed in Claxton (Tr. 34, 35).

The Leave Scheduling Procedure Prior to the Change

It is undisputed that, until February of 2004, the number of employees allowed to preschedule simultaneous leave was not limited to one per shift.[1/] According to Fulgham, at or around

6/ The following language appears at the end of the leave schedule

the time when the Claxton facility became a HIMP plant he met with Dr. Beckman, who was the Inspector in Charge at Claxton, John Anderson, the Union representative at the plant, and Dr. Tom Watson, the Circuit Manager. At that time they agreed that two employees could be on leave at the same time on each shift. The functions of employees on leave would be performed by the relief inspector and by the team leader. Dr. Beckman kept district management personnel informed of the agreement by telephone; this arrangement prevailed until 2004 (Tr. 18-20).

The Respondent's Policy

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for 2003:

> Please note: A maximum of two people can have scheduled A/L per shift. All requests have been listed but, where there are more than two, you work it out and notify your supervisor who will be off. (GC Ex. 2, p. 6).

That language does not appear on the leave schedule for 2004 which immediately follows.

It is significant to note that, although the Respondent purported to rely on a pre-existing policy or contractual provision regarding the prescheduling of leave, it did not introduce either the collective bargaining agreement (CBA) or a written policy (assuming that there was one) into evidence.[1/] However, Dennis E. Greening, the District Manager for the Des Moines, Iowa District and the Respondent's chief negotiator for the most recent CBA, testified that the parties agreed to:

> . . . allow the practices that were in place [for] scheduling annual leave to remain unless there were a problem identified, and then we would deal through those procedures through Article VI of the Agreement, which talks about negotiations (Tr. 51).

There is no evidence that further negotiations occurred with regard to the Claxton HIMP plant.

Greening also testified that:

> Section 4, item 2, or A-2, says, The district manager designee will determine how many employees can be off on annual leave simultaneously within a lead roster. Available relief will be considered in determining the number to be off simultaneously (Tr. 46).[1/]

Greening stated that he did not know whether the manager of an individual HIMP plant could determine how many employees could be on leave at the same time (Tr. 47).

Upon redirect examination Greening stated that:

> . . . different locations had different ways of scheduling leave that the individuals liked doing a certain way. We still - we as management, or the Agency, maintained control of leave approval, and the numbers of people that could be off within that system. The systems are what we said we will maintain, not the

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7/ In its case in chief the Respondent attempted to introduce its "last best offer" on annual leave into evidence. I sustained the General Counsel's objection because the document had not been included in the Respondent's prehearing disclosure and because there was an insufficient basis for an exception to the requirements of §2423.23 of the Rules and Regulations of the Authority (Tr. 42-44).

8/ It is unclear whether this language is alleged to be a direct quote from the CBA or merely a summary of its provisions.

> numbers that could be off because that's determined by the work load and that varies from year to year (Tr. 57).

The Effect of the Change in Leave Scheduling Procedure[1/]

John Anderson testified that he has been denied leave in 2004 because of the change in the scheduling procedure. According to Anderson, he was denied leave during the week of May 16-22 because Tom wanted time off on May 20 and 21 and Linda wanted time off on May 21; he also was denied leave on July 20 and on a number of other occasions. This caused a conflict with a planned family vacation (Tr. 24-26).

Anderson's testimony is corroborated by the leave schedules that Fulgham submitted to Dr. Smith (GC Ex. 2). At the end of each of the schedules is an explanation of various symbols; the meaning of the asterisk is "Exceeds number of relief personnel. Don't anticipate leave being granted." Asterisks appear after "John" for both May 20 and 21. An asterisk also appears after "Tom" for May 21, apparently because Linda also wanted that date. There is also an asterisk after Anderson's name for July 20, apparently because Linda wanted to take leave for the entire week. Similar notations appear at various other dates after the names of other employees.[1/]

9/ Although the Respondent has not pursued the *de minimis* defense which was included in its prehearing disclosure, the effect of the change in procedure is relevant to the availability of the SQA remedy requested by the General Counsel.

10/ The asterisk was given the same meaning in the schedule for 2003. However, the symbol does not appear in the body of the schedule.

There is no evidence as to whether Anderson or any other employee was eventually allowed to take leave that was initially denied.[1/] However, it is more likely than not that a significant number of those employees were not able to take leave on the preferred dates. Furthermore, it is likely that many of the employees who were initially denied leave had to change personal plans because of uncertainty as to whether their leave requests would be granted.

Upon consideration of the evidence, I find as a fact that, from January of 2000 to February of 2004, the Claxton HIMP plant followed a procedure whereby two employees per shift were allowed to preschedule leave on the same dates. I further find that the leave procedure was changed by the Respondent in February of 2004 and that, after the change, only one employee per shift was allowed to preschedule leave on a given day. The Respondent made that change without affording the Union advance notice or an opportunity to bargain.

With regard to the Respondent's policy regarding the prescheduling of leave at HIMP plants, I find that the CBA did not set a limit on the number of employees who could preschedule leave on the same date, but, on the contrary, allowed for the continuation of past procedures in the absence of negotiated changes. This is not to say that local managers were required to allow for prescheduled leave regardless of their relief capability, but only that a specific limit was not set for all HIMP plants. Therefore, the procedure which had been followed at Claxton prior to February of 2004 was not inconsistent with the CBA.

Discussion and Analysis

The Procedure for Prescheduling Leave is a Condition of Employment

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). The procedure for prescheduled leave meets both of those criteria.

11/ Dr. Smith testified that more than one person on each shift would be permitted to take prescheduled leave when the relief capability allowed for a relaxation of the general rule; this would occur "fairly often" (Tr. 31). However, there is no evidence as to how much advance notice was given to employees whose leave requests were eventually granted.

It is undisputed that the procedure affects bargaining unit employees at the Claxton HIMP plant and there can be no valid doubt that the issue of leave affects the work situation of those employees. Such a conclusion has been endorsed by the Authority in *56th Combat Support Group, MacDill Air Force Base, Florida*, 43 FLRA 1565 (1992). Therefore, I conclude that the procedure for prescheduling leave at the Claxton HIMP plant is a condition of employment.

The Authority has also held that, regardless of whether agency action is an exercise of a management right, the agency is not absolved of the duty to notify the appropriate labor organization prior to implementing a change in working conditions and to bargain to the extent required by law, *United States Department of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 855 (2002). Accordingly, the Respondent was not entitled to unilaterally change the procedure for prescheduling leave.

The Procedure Which Existed Prior to February of 2004 Was a Binding Past Practice

The Authority has long held that conditions of employment may arise out of a past practice, *Department of the Treasury, Internal Revenue Service, (Washington, DC), et al.*, 27 FLRA 322, 324 (1987). In order to find 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 followed by one party and not challenged by the other, *U.S. Patent and Trademark Office*, 57 FLRA 185, 191 (2001). The General Counsel has made such a showing.

It is undisputed that the Respondent allowed simultaneous prescheduled leave for two employees per shift from the time of the establishment of the Claxton HIMP plant in January of 2000 until February of 2004 when the procedure was terminated by order of Dr. Smith. Thus, the Respondent followed the procedure in establishing annual leave schedules for the years 2000, 2001, 2002 and 2003; furthermore, the Respondent allowed employees to take their prescheduled leave throughout each of those years. Thus, the procedure was followed consistently over a significant period of time.

The Respondent did not challenge Fulgham's testimony that supervisory personnel at Claxton kept the district office informed of the progress of negotiations over the leave policy. Fulgham's testimony was not effectively rebutted by Dr. Smith's assertion that neither he nor his subordinates at the district level were aware of the procedure at Claxton. Furthermore, the provision of the CBA to allow local procedures to remain in effect put the Respondent on constructive notice that facilities such as the

Claxton HIMP plant might not have been following a uniform procedure with regard to the prescheduling of leave. Therefore, the procedure at Claxton was followed by both parties or, at the very least, followed by the Union and not challenged by the Respondent in spite of the Respondent's actual or constructive knowledge of its existence.

The Remedy

Since, as acknowledged by the General Counsel, the change in conditions of employment involved the exercise of a management right, a SQA remedy may only be applied under the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*). Those criteria will be set forth below and applied to the circumstances of this case.

Whether, and when, notice was given to the Union by the Respondent. It is undisputed that the Respondent provided the Union with no advance notice before changing the procedure for granting prescheduled leave.

Whether, and when, the Union requested bargaining over the change in procedure. This criterion is not applicable since the Union did not receive advance notice of the change. Nevertheless, Fulgham promptly and persistently inquired as to the Respondent's intentions and demonstrated the existence of a past practice to Dr. Smith.

The willfulness of the Respondent's actions in failing to discharge its bargaining obligations under the Statute. Although the Respondent might have believed that it was under no duty to bargain because of a contrary policy or contractual provision, the evidence indicates that the belief was unfounded because no such policy or provision existed. In any event, the Respondent's belief that it had no duty to bargain does not detract from the willful nature of its failure to do so, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000).

The nature and extent of the impact experienced by adversely affected employees. Both Anderson's testimony and a comparison of the leave schedules for 2003 and 2004 demonstrate that the impact of the denial of leave in 2004 was significant and that bargaining unit employees had not experienced such denial prior to 2004.

Whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the Respondent's operations. The Respondent has not addressed the appropriateness of a SQA remedy. Even if this were not so, there is no evidence that the maintenance of the past practice caused

any disruption or loss of efficiency prior to February of 2004 or that there was any change in conditions after that time such as would support a conclusion that future disruptions are likely to occur.

In summary, the General Counsel has satisfied four of the five criteria set forth in *FCI* thereby justifying the imposition of a SQA remedy.

In view of the foregoing factors, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by changing the procedure for the allowance of prescheduled leave at the Claxton HIMP plant without affording the Union advance notice and the opportunity to negotiate. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Agriculture, Food Safety and Inspection Service, Field Operations, Washington, D.C. (Claxton, Georgia), shall:

1. Cease and desist from:

(a) Implementing changes in procedures for the prescheduling of annual leave by bargaining unit employees at the Claxton HIMP plant without providing prior notice to the American Federation of Government Employees, Local 3152, AFL-CIO (Union) and affording the Union the opportunity to bargain over such changes to the extent required by the Statute.

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

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

(a) Restore the *status quo ante* at the Claxton HIMP plant by permitting two employees per shift to preschedule annual leave on the same day.

(b) Post at the Claxton HIMP plant copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the cognizant District Manager and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards

and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Atlanta Region of the Authority, in writing and within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 22, 2005

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Agriculture, Food Safety and Inspection Service, Field Operations, Washington, DC (Claxton, Georgia) 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 implement changes in procedures for the prescheduling of annual leave by bargaining unit employees at the Claxton HIMP plant without providing prior notice to the American Federation of Government Employees, Local 3152, AFL-CIO (Union) and affording the Union the opportunity to bargain over such changes to the extent required by the Statute.

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 restore the *status quo ante* at the Claxton HIMP plant by permitting two employees per shift to preschedule annual leave on the same day.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, whose address is: Federal Labor Relations Authority, Suite 701, Marquis Two Tower, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is: 404-331-5300.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-04-0461, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT — **CERTIFIED NOS:**

Brad A. Stuhler — **7000 1670 0000 1175 0948**
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Dated: September 22, 2005

Washington, DC