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

MEMORANDUM DATE: September 20, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
325TH MISSION SUPPORT GROUP SQUADRON
TYNDALL AIR FORCE BASE, FLORIDA

Respondent

and Case No. AT-CA-05-0287

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3240, 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 THE AIR FORCE 325TH MISSION SUPPORT GROUP SQUADRON TYNDALL AIR FORCE BASE, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3240, AFL-CIO Charging Party	Case No. AT-CA-05-0287

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. §2423.34(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 23, 2006**, and addressed to:

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

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PAUL B. LANG
Administrative Law Judge

Dated: September 20, 2006
Washington, DC

OALJ 06-34

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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U.S. DEPARTMENT OF THE AIR FORCE 325TH MISSION SUPPORT GROUP SQUADRON TYNDALL AIR FORCE BASE, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3240, AFL-CIO Charging Party	Case No. AT-CA-05-0287

Brent S. Hudspeth, Esquire
For the General Counsel

Major Lawrence E. Lynch
Major Robert M. Gerleman
For the Respondent

George White, President
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On May 23, 2005,[1] the American Federation of Government Employees, Local 3240, AFL-CIO (Union) filed an unfair labor practice charge against the U.S. Department of the Air Force, 325th Mission Support Group Squadron, Tyndall Air Force Base, Florida (Respondent) (GC Ex. 1(a)). On February 28, 2006, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) 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)

[1] All subsequently cited dates are in 2005 unless otherwise indicated.

on May 20 by implementing a change in the working conditions of bargaining unit employees, *i.e.*, closing the visitors' housing facilities at Buildings 1615 and 1617 and reassigning bargaining unit employees to a new facility at Wood Manor, without giving the Union notice and an opportunity to negotiate to the extent required by the Statute. The Respondent filed a timely Answer[2] (GC Ex. 1(h)) in which it denied the alleged violation of the Statute.

A hearing was held in Panama City, Florida on May 25, 2006, at which the parties were present with counsel and were afforded the opportunity to present evidence and cross-examine witnesses. This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Findings of Fact

The Respondent is an "agency" within the meaning of §7103(a)(3) of the Statute. The Union is a "labor organization" as defined by §7103(a)(3) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining.

Lodging Facilities Maintained by Bargaining Unit Employees

The bargaining unit includes about 66 Housekeepers who are assigned to clean and maintain lodging facilities, collectively called the Sand Dollar Inn, which are located on the base for the purpose of accommodating students and other visitors. The Sand Dollar Inn consists of Visiting Airmen's Quarters (VAQs), Senior Noncommissioned Officers' Quarters (SNCOs), Visiting Officers' Quarters (VOQs), Distinguished Visitors' Suites (DVs) and Visiting Quarters (VQs). The VQs were called TLFs[3] (Temporary Lodging Facilities) before the opening of Wood Manor. VAQs are located on the south side of the base in three story buildings; they are single rooms with shared bathrooms. The SNCOs are suites which are located in two single story buildings. VOQs are located in five buildings. There are now 52 TLFs in Wood Manor; these are two, three and four

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[2] According to the Answer, the correct name of the Respondent is 325th Mission Support Group.

[3] To avoid confusion I will refer to the units in Wood Manor as TLFs.

bedroom family units (Tr. 116-118). Before the opening of Wood Manor the TLFs were one bedroom efficiency apartments with a full kitchen, full bath, bedroom and living room (Tr. 119).

The Housekeepers report to the areas to which they have been assigned and are then informed by their supervisors as to which units they are to clean that day. Daily work assignments are based on "demand", which reflects factors such as occupancy of the units and availability of the Housekeepers. Housekeepers are sometimes reassigned to different areas and to different types of lodging. This practice has been in effect for many years (Tr. 118, 119).

Contractual Provisions

On October 29, 2003, the Respondent and the Union entered into a Memorandum of Agreement (MOA) in connection with the settlement of Case Number AT-CA-03-0679 (Resp. Ex. 4).[4] Among the provisions of the MOA is a listing of the maximum number of lodging units of various types that Housekeepers may be required to clean each day; in the case of TLFs the maximum number is 10 units per day.

At all times pertinent to this case a collective bargaining agreement (CBA) was in effect between the parties (Resp. Ex. 3). ARTICLE 7 of the CBA, entitled "MUTUAL OBLIGATIONS", states:

> **Section 1.** The Employer and the Union recognize that the National interest requires uninterrupted, orderly and efficient accomplishment of the mission of the Air Force, and agree that the accomplishment of such mission will be a major consideration in any agreement, consultation, or day-to-day association.
>
> **Section 2.** It is also mutually agreed that the relationship between the Employer and the Union in all conferences, negotiations or any other matter is and will remain, based upon mutual respect of the privileges and rights of each party, with the paramount objective of serving the best needs of the Employer, the Union, and all employees.
>
> **Section 3.** The Union and Management are obligated to make a good faith attempt to resolve problems

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4 Neither the unfair labor practice charge nor the Complaint in that case are in evidence.

> informally prior to initiating formal action involving third parties.
>
> **Section 4.** The Employer and the Union shall meet the first Monday of each month at 1000 hours in a mutually acceptable location provided by the Employer. The purpose of the meeting will be to discuss matters of mutual interest relating to personnel policy and matters affecting working conditions. Each party shall notify the other party of its agenda items in advance of the meeting. If neither party submits an agenda the meeting will not be held. **Individual complaints or grievances will not be discussed.**

(Emphasis in original.)

The Opening of Wood Manor

On April 8 Alan Tremaine, the Lodging Manager of the Sand Dollar Inn, sent a memorandum to the Union (Jt. Ex. 1) in which he stated, "Bldgs 1615 and 1617 are scheduled for closure in the near future. As soon as we formulate a plan, you'll be informed prior to any action taken." The memorandum was endorsed by Captain Charleen Barlow, the Commander of the Combat Support Flight. In her endorsement Barlow invited the Union to call her with any questions or concerns. By memorandum of April 20 or 21[5] (Jt. Ex. 2) the Union was informed that:

> 1. We're projecting to close subject facilities [Buildings 1615 and 1617] by 16 May 05 and we'll begin relocating our long term guests on 6 May 05. The facilities will then be used to house participates (*sic*) arriving for the air show from 12-16 May 05. Therefore, lodging is planning to move the below housekeepers, who are currently assigned to 1615 & 1617, and reassign them to Wood Manor TLFs beginning on 25 April 05. This would be a permanent move since we are closing down these two facilities. Once assigned, employees will report directly to building 3113A on Apollo Circle, Wood Manor, in lieu of reporting to building 1060.

A list of the names of the Housekeepers follows as well as other details including the name of the Laborer to be reassigned to Wood Manor, the name of the recommended

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5 The first date is typed and the second stamped.

Housekeeping Leader and instructions as to the location and procedures for reporting in. The final paragraph states:

> 7. Some of the units in Wood Manor will also become "pet friendly", that is, 12 family units will be allowed to have pets. Lodging is trying to make this transition as painless as possible for everyone. The addition of the Wood Manor units will greatly benefit our guests.

The memorandum was signed by Tremaine and by other cognizant supervisors. Barlow added an endorsement which was identical to that on the prior memorandum.[6]

By memorandum of April 22 from George White, the President of the Union, to Barlow (Jt. Ex. 3) the Union demanded bargaining on the impact and implementation of the changes described in the memorandum of April 21 and further stated that the changes should be delayed pending the completion of bargaining. On the same date White sent another memorandum to Barlow (Jt. Ex. 4) requesting information concerning the proposed change. The stated purpose for the information request was to allow the Union to formulate its proposals. The Union again requested that the proposed change be delayed until the completion of bargaining.

By memorandum of April 26 from Tremaine (Jt. Ex. 5), the Respondent answered the Union's information request. He indicated that the following changes would result from the opening of Wood Manor:

a. In response to the inquiry regarding the "Specific impact on working conditions" (¶1) Tremaine indicated that employees would clock in and out at Building 3133-A instead of Building 1060. There would be a manual clock because of a lack of network availability.

b. In response to the inquiry regarding "Changes in duties and responsibilities" (¶2) Tremaine indicated that:

> Duties will change slightly since they will be working family housing units located in Wood Manor. These units comprise of (*sic*) two, three, and four bedroom units. Their responsibility to lodging does not change.

6
All of the subsequent memoranda from the Respondent to the Union end with identical endorsements inviting questions or comments.

c. Tremaine indicated that the change would not affect leave schedules that had already been approved (¶6) and that future leave requests would have to be coordinated with supervisors as was previously the case.

d. In response to the inquiry as to the future impact of the change (¶8) Tremaine stated:

> . . . We know also, that at times, employees working in this area will have to work in other areas due to low occupancy or other employees will have to be assigned to work in Wood Manor on occasions when employees call in sick or [are] scheduled for leave. This will be no different than the way lodging is operating now with moving personnel around to meet daily manning requirements. . . .

On May 3 the Respondent supplemented its answer in a memorandum from Tremaine (Jt. Ex. 6). According to Tremaine, the conditions of employment which would be impacted by the closure of Buildings 1615 and 1617 included the following:

a. Delivery and pickup of linen supplies to Wood Manor would be at Building 3133. The Laborer[7] assigned to Wood Manor would distribute clean linens to each housing unit using the lodging vehicle.

b. The Laborer assigned to Wood Manor would distribute supplies to each housing unit using the lodging vehicle.

c. Each Housekeeper would be assigned 10 units. This could change after management completed a time study of the various units.

d. Personnel would be issued rain suits. The carports were expected to afford employees some protection while they moved between units.

e. Wood Manor would have a manual key system until the receipt of funding for a keyless entry system. It was expected that, if such funding were received, it would be for the front door only, thereby necessitating both a manual and a keyless system.

f. Lodging had purchased a Club Cart which would remain in the Wood Manor area and would be used to move supplies to the various buildings.

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7 Laborers are also included in the bargaining unit.

On May 9 the Union, through White, submitted a document entitled "Union Proposals Closure of Building 1615 & 1617" (Jt. Ex. 7). The document is organized as a series of responses to the Respondent's memoranda of April 21, April 26 and May 3 respectively. Many of the Union's responses are not substantive proposals but are either statements of agreement with the Respondent's proposed changes, statements that the Respondent is to comply with the CBA or questions as to the delivery of linens and supplies to Buildings 1615 and 1617 prior to May 16. Some of the Union's proposals are of questionable negotiability, such as the proposals that a certain named employee be assigned as a Laborer for Wood Manor and that another employee be assigned as VAQ supervisor; another such proposal is that all Laborers be upgraded to the NA-4 classification. However, other proposals, while perhaps vague or inartfully stated, are not clearly non-negotiable. Such proposals include the requirement that no bargaining unit employees will lose work because of Molly Maids, that no pets be allowed in Wood Manor, that the Respondent make "reasonable accommodation" for employees in inclement weather and that the Respondent purchase a Housekeepers' cart.[8]

Tremaine responded to the Union's proposals by memorandum of May 13 (Jt. Ex. 8)in which he stated:

> 1. There is some concern among base agencies on the conversion of Wood Manor that were discussed and must be settle[d] prior to the conversion taking place. Until these issues are settled, management cannot give you a reply of (*sic*) you[r] letter dated 9 May 05. We believe, but are not certain, that these issues will be settled in two weeks.
>
> 2. Therefore, we're requesting an extension until 26 May 05. Lodging personnel will not be working in Wood Manor beginning on 16 May 05 until conversion issues have been settled.

White testified that he did not respond to the request for an extension of time (Tr. 32, 33). There is no evidence of further communications between the parties on the subject of Wood Manor until May 19 when David Harp, the Assistant

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[8] As will be shown, a determination of the negotiability of the Union's proposals is not essential to the disposition of this case.

Lodging Manager, sent a memorandum to the Union (Jt. Ex. 9) in which he stated that:

> 1. The conversion issues with the base agencies have been resolved as of this time. Management will be sending employees out to complete the set up of Wood Manor starting 20 May 05.
>
> 2. With Mr. Tremaine on leave, I am requesting to maintain the 26 May 05 extension to reply to your letter dated 9 May 05.

White testified without challenge that bargaining unit members began working at Wood Manor on May 20, which was a Friday, at which time they were performing set up work such as cleaning and stocking supplies (Tr. 33). White also testified that, to the best of his recollection, he saw guests in one of the Wood Manor units on May 23 (Tr. 35). In any event, the computer occupancy records for Wood Manor (GC Ex. 3) indicate that guests began arriving on or before May 27. According to White, he received no notice that Housekeepers would begin working at Wood Manor on May 27 (Tr. 39).

By memorandum of May 26 (Jt. Ex. 10) from Tremaine and other management representatives the Respondent answered the Union's memorandum of May 9. The memorandum included an endorsement from Barlow stating:

> Lodging Management and I wish to sit down and discuss closure of bldg 1615/1617 and opening of Wood Manor TLFs. Please choose from the below dates/times.
>
> June 7, 2005 - 0900hrs
> June 8, 2005 - 0900hrs
> June 9, 2005 - 0900hrs
>
> If these are not convenient for you, please provide us with a date/time before 02 June 05.

In the memorandum, the Respondent indicated its agreement with a number of the Union's proposals. Others were rejected as concerning management's right to assign work. The Respondent agreed to allow employees to clock in and out at the previously designated location until the issue was settled. In response to the Union's proposal that pets not be allowed in Wood Manor, the Respondent stated that:

> The Air Force has changed their perspective concerning pets in lodging facilities.[9] Therefore, pets are now allowed in TLF, which have been converted as "Pet Friendly TLFs". Lodging will provide kennels/cages for the units and will instruct lodging employees not [to] enter any of these units unless the pets are in their kennels.[10]

The Respondent rejected the Union's proposal to reduce the quota of units to be cleaned each day to 3 pending the completion of a time study. The Respondent did agree to reduce the quota to 8 units per day.

In a memorandum dated May 31 (Jt. Ex. 11) to Barlow, White stated:

> In reference to your letter dated May 26, 2005, covering the above subject matter, the agency implement[ed] the change. The union will wait until the Atlanta Region rule[s] on [the] case.
>
> Please respond by June 7, 2005.

Copies of the memorandum were addressed to Mary D. Jenkins, a management representative of the Respondent, and to the Regional Director of the Atlanta Region of the Authority.

Tremaine responded to White's memorandum on June 1 (Jt. Ex. 12) stating that:

> In reference to subject letter, please provide an explanation of clarity. The agency believes we are acting in good faith and do not understand subject letter.

Barlow restated her endorsement of the memorandum of May 26 with proposed meeting dates and an invitation to provide an alternate date.

White responded by a memorandum to Barlow dated June 3 (Jt. Ex. 13), stating that:

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[9] The change in Air Force policy was that pets were no longer prohibited in lodging units, but would be allowed at the discretion of the base commander.

[10] It is unclear how the employees were supposed to know which units contain pets or whether the pets were in their kennels until it was too late to avoid contact with them.

> In reference to your letter dated June 1, 2005, covering the subject matter, I advise you to contact your Central Labor Law Office, Maj. Robert Rushakoff. The Atlanta Region has served [a] copy of [the] charge to Maj. Rushakoff CASE no: AT-CA-05-0287. In 2001 the Atlanta Region issued a complaint against the Lodging Office for the same issue arising in the Charge that was filed on
>
> May 20, 2005. The Union position was stated in [a] letter dated May 31, 2005.

As before, copies were addressed to Jenkins and the Regional Director.

The Effect of the Change

There is no dispute as to the location and configuration of the Wood Manor units. All or some of the units are located along Fighter, Tiger and Guardian Streets.[11] Barbara Renshaw has been a Housekeeper Leader since September of 2005 and, at the time of the hearing, was assigned to the Wood Manor TLF. Prior to September Renshaw was a Housekeeper and worked on the first floor of Building 1615 for about two years (Tr. 76, 77). According to Renshaw, the units in Buildings 1615 and 1617 resembled dormitories. They had one bedroom with a television, dresser and similar furniture and a vanity area; the bathroom was shared with the room next door. There was a small refrigerator, a microwave oven and a coffee pot; there were no individual laundry facilities and pets were not allowed (Tr. 78).

Renshaw described the Wood Manor units as two, three and four bedroom houses with full kitchens, normal size refrigerators and gas stoves that are not self-cleaning. The three bedroom units have dishwashers; all of the units have washers and driers. The units have large living rooms; the two bedroom units have one bathroom while the three bedroom units have one and a half baths and the four bedroom units have two full bathrooms (Tr. 78).

Renshaw also described the differences in accessing the units. For Buildings 1615 and 1617 the Housekeepers would push their carts along the sidewalks for the first floor rooms. The carts carry cleaning materials such as towels

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[11] A chart showing the location of all or some of the Wood Manor units was introduced without challenge as GC Ex. 2.

and pillowcases[12] as well as vacuum cleaners, mops and other items that would be used to clean typical hotel rooms. The carts could not be pulled up to the front door for the first floor units, but could be for the units on the second and third floors. She estimated that, for Buildings 1615 and 1617, a Housekeeper would not be required to push a cart for more than 200 feet each day (Tr. 78, 79).

Renshaw testified that, in order to service the Wood Manor units, Housekeepers have to push the carts to the individual carports, but often have to leave the carts at the end of the driveways or attempt to maneuver them around parked cars (Tr. 79, 80). There is a sidewalk on Tiger Street which is on only one side of the road and which Renshaw characterized as unsafe because it is uneven and causes the carts to start to tip over. Accordingly, most of the Housekeepers push their carts along the street. The same applies to units on Fighter Street which has no sidewalks. Both streets are open to automobile traffic (Tr. 80, 81). During off hours the carts are kept in unit 3133B on Apollo Circle which is the location of a washer and dryer for laundering cleaning rags and a distribution point for linens and cleaning supplies (Tr. 81, 82).

Renshaw also described the obvious differences in cleaning the single rooms in Buildings 1615 and 1617 as compared to the multi-bedroom units at Wood Manor. She acknowledged, however, that every unit is not cleaned every day because the occupants do not always want the service (Tr. 84, 85). She estimated that, on other than a "linen day" when beds might be changed, it would take from 45 minutes to an hour to clean a unit at Wood Manor while a unit in Buildings 1615 or 1617 could be cleaned in no more than a half hour if it were especially dirty (Tr. 84-86).

On cross-examination, Renshaw acknowledged that, prior to the opening of Wood Manor, Housekeepers had to clean family lodging and to perform the same functions. However, she also stated that the old TLFs were considerably smaller (Tr. 93). She also acknowledged that, at least until recently, Housekeepers rotated between various types of housing units and that the daily quota for cleaning larger units was less than the quota for the smaller units (Tr. 94).

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[12] It is unclear to what extent Housekeepers are required to have fresh bed linens with them each day. Fresh linen is provided on a weekly basis for long term occupants and whenever someone checks out (Tr. 85).

There was additional testimony regarding the differences and similarities between conditions at Wood Manor and at other lodging units. I do not deem it necessary to delve further into such details because they are not crucial to this Decision.

Positions of the Parties

The General Counsel

The General Counsel contends that on May 20 the Respondent violated §7116(a)(1) and (5) of the Statute by assigning employees to Wood Manor prior to the completion of bargaining. The Respondent knew that negotiations were not at an impasse as shown by the fact that it subsequently responded to the Union's proposals and requested the scheduling of further bargaining.

The General Counsel further maintains that the Respondent's violation of the Statute is not excused by its good faith bargaining prior to May 20, by its subsequent response to certain of the Union's proposals or by the non-negotiability of the Union's other proposals. Nor is the Respondent's violation of the Statute excused by its subsequent willingness to bargain or by the Union's refusal to resume bargaining after the Respondent's unilateral implementation of the changes to conditions of employment of bargaining unit members.

Finally, the General Counsel also asserts that the reassignment of Housekeepers to Wood Manor represented more than a *de minimis* change in conditions of employment and that the language of the CBA does not provide the Respondent with an affirmative defense. As a remedy, the General Counsel proposes an order whereby, in addition to the customary posting of a notice, the Respondent is required to cease the reassignment of Housekeepers to Wood Manor without giving the Union notice and an opportunity to bargain to the extent required by the Statute.

The Respondent

The Respondent argues that, prior to May 20, the parties had reached agreement on all but one issue that was within the duty to bargain. The only outstanding issue, other than those that fell under the definition of management rights pursuant to §7106 of the Statute, involved the location where Housekeepers assigned to Wood Manor were to clock in and out. The Respondent had delayed implementation of the proposed change in location and maintained the *status quo* for nine months after the Union

refused the Respondent's invitation to resume bargaining. The Union never submitted proposals on this issue subsequent to its refusal to bargain.

The Respondent also maintains that the reassignment of Housekeepers to Wood Manor from Buildings 1615 and 1617 had only a *de minimis* effect on the working conditions of bargaining unit members because they were not required to perform any duties other than those that they had performed prior to the implementation of the change. Furthermore, the Respondent had no duty to bargain over the number of units to be cleaned each day by individual Housekeepers because that quota had been established in the MOA. Finally, the Respondent contends that the filing of the underlying unfair labor practice was in violation of the CBA which obligated the Union to attempt informal resolution of the dispute before involving a third party, *i.e.*, the Authority.

Discussion and Analysis

The Respondent's Duty to Bargain

The rights and duties of each of the parties is well established and undisputed. Prior to implementing changes in conditions of employment an agency must provide the union with notice of the proposed change as well as the opportunity to bargain to the extent required by the Statute, *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999). The agency is not absolved of this duty by the fact that the proposed changes are an exercise of management rights under §7106 of the Statute, *United States Department of the Air Force, 913th Air Wing, Willow Grove Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 855 (2002) (*Willow Grove*). The union's receipt of adequate notice of a proposed change in working conditions triggers its responsibility to request bargaining. Its failure to do so may be construed as a waiver of the right to bargain. In order for a notice to be deemed adequate it must give the union information as to the scope and nature of the proposed changes, the certainty of the changes and the planned timing, *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997).

There are limits to an agency's duty to give notice and to bargain. There is no duty to bargain over *de minimis* changes to conditions of employment regardless of whether the changes represent the exercise of management rights, *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646 (2004). Furthermore, under the so-called "covered by" doctrine a party is relieved of the obligation to engage in mid-term

bargaining if the matter at issue is either specifically addressed in a collective bargaining agreement or is inextricably bound up with a subject covered by the agreement, *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809, 813 (2000).

The *De Minimis* Issue

A determination as to whether a change in conditions of employment is more than *de minimis* is not a mechanical process, but is a result of an examination of the totality of the evidence. As stated by the Authority in *United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998) (*Materiel Command*), a determination as to whether a change has more than a *de minimis* effect on conditions of employment requires an examination of the nature and extent of either the effect, or the reasonably foreseeable effect, of the change. There is no evidence as to the number of employees who will typically be assigned to Wood Manor at any single time. However, in *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407 (1986) the Authority held that, in applying the *de minimis* test, the number of employees involved will not be a controlling factor. Rather, the number of employees affected by the change will be applied to expand rather than limit the number of situations where bargaining will be required.

The Respondent's *de minimis* argument is somewhat related to its contention that the reassignment of employees to Wood Manor was covered by the CBA and therefore did not amount to a change in conditions of employment. Putting aside the contractual issue, my analysis of the pertinent facts indicates that the reassignment had more than a *de minimis* effect on the employees involved. The General Counsel has not contested the Respondent's assertion that employees could be rotated from one type of lodging unit to another based upon such factors as occupancy rate and leave schedules. However, it is not the process of rotation or reassignment that is at issue, but the nature of the units to which employees may be rotated or reassigned. The evidence supports the Respondent's contention that the process of actually cleaning Wood Manor units does not differ substantially from the process of cleaning other lodging units. Nevertheless, Housekeepers assigned to Wood Manor must push their carts over longer distances than before and, for the first time, over uneven ground and through automobile traffic. Furthermore, Housekeepers at Wood Manor, unlike those assigned to other units, are exposed to the elements as they move between lodging units, a factor which was tacitly acknowledged by the Respondent's

offer to provide them with rain gear. The total distance over which they must push the carts between units is substantially greater[13] than before and may be farther from the unit entrance. There are also differences in the location of cleaning supplies which may be of significance.[14] The precise extent of the changes caused by the reassignment of employees to Wood Manor is unclear. However, the evidence, taken as a whole, supports the conclusion that the effect or the reasonably foreseeable effect of the reassignment is greater than *de minimis* within the context of the holding of the Authority in *Materiel Command*.

The Timing of the Reassignment

The Respondent has emphasized that it was the Union rather than the Respondent which refused to bargain. That argument misses the point. A violation of the bargaining obligation under §7116(a)(1) and (5) of the Statute occurs, not when bargaining ceases or when an agency refuses to negotiate, but when an agency implements a change in conditions of employment without having fulfilled its bargaining obligation, *United States Department of Housing and Urban Development*, 58 FLRA 33, 34 (2002) (*HUD*). Under the circumstances of this case, it is not necessary to determine whether any of the proposals set forth in White's memorandum of May 9 were negotiable because the Respondent implemented the change in working conditions on May 20 when it reassigned bargaining unit employees to Wood Manor without having answered the Union's proposals. The Respondent was not obligated to acquiesce to the proposals or to accept the proposition that they were negotiable. It was, however, required, at the very least, to respond to the Union's proposals and to explain why it was disclaiming any duty to negotiate, *Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California*, 35 FLRA 764, 769 (1990). Had the Respondent done so, the Union would have been in a position to modify its proposals or to commence a negotiability appeal pursuant to Part 2424 of the Rules and Regulations of the Authority.

[13] The total distance over which Housekeepers must push their carts between units each day is also a product of the number of units they are assigned to clean. That number was the subject of a proposal by the Union.

[14] I will not delve into the issue of whether the occasional necessity of cleaning up pet feces is offset by the pre-existing necessity of sometimes cleaning what the Respondent has characterized as "foul matter" left behind by departed guests (Respondent's Brief, p.10).

The Respondent has cited no authority for the proposition that its subsequent invitation to the Union to resume bargaining retroactively cured its premature implementation of the reassignment process. Similarly, there is no valid basis for considering the Union's refusal to resume bargaining, whether or not well-advised, as a retroactive waiver of its right to complete pre-implementation bargaining.

Even if the Respondent were correct in asserting that the Union was initially on notice that the reassignment of employees to Wood Manor was scheduled to occur on May 16, that notice was rescinded by Tremaine's memorandum of May 13 (Jt. Ex. 8) in which he stated, in effect, that the reassignment was postponed pending the resolution of certain unspecified issues with agencies on the base. Although the Union did not object to the requested extension of the time for the Respondent to answer its proposals, it did not specifically agree. More significantly, the Union did nothing that would have given the Respondent reason to assume that it was withdrawing its bargaining request or its demand that the change not be implemented until the completion of bargaining. While it was possible for the Union to waive its statutory right to complete bargaining prior to the implementation of the proposed change, the Union's response, or lack of response, to communications from the Respondent fell far short of either expressing or implying a clear and unmistakable waiver as is required by the Authority under such holdings as in *Social Security Administration and American Federation of Government Employees, AFL-CIO*, 31 FLRA 1277, 1279 (1988) (*SSA*).

The Respondent's contention that there are no unresolved bargaining issues between the parties is refuted, at the very least, by the fact that there had been no resolution of the dispute as to the number of TLFs to be cleaned each day.

The "Covered By" Defense

The Respondent's affirmative defense is based upon the MOA of October 29, 2003 (Resp. Ex. 4), which establishes maximum daily requirements for cleaning various types of lodging units including TLFs. The Authority was held that, in ascertaining the meaning of contract language, a judge is to follow the standards and principles applied by arbitrators and by federal courts, *Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina*, 57 FLRA 495, 498 (2001) (*VA Charleston*). A fundamental tenet of contractual interpretation is the effectuation of the intent of the parties; see, for example,

United States Department of Transportation, Federal Aviation Administration and Professional Airway Systems Specialists, 60 FLRA 159 (2004).

Paragraph 1 of the MOA states that the Respondent will not require Housekeepers to clean "more than" a specific number of rooms of various types. Paragraph 5 provides for the withdrawal of an unfair labor practice charge which apparently arose out of a controversy regarding the numbers of lodging units to be cleaned. There is no language in the MOA which states or implies that it established a minimum number of units to be cleaned. More significantly, nothing in the MOA suggests that it was intended to allow the Respondent free rein to increase the workload of bargaining unit employees merely by redesignating larger units as TLFs. The Respondent's stated intention of conducting a time study to determine a suitable quota for cleaning the Wood Manor units and its reduction of the initially stated quota in response to a proposal by the Union, while perhaps intended as an voluntary gesture, could also be construed as a tacit admission that there was to be a sufficient change in conditions of employment so as to require notice and bargaining. Finally, there is no evidence to show that the Respondent's interpretation of the MOA was applied to a prior change of the size or accessibility of lodging units. Accordingly, I have concluded that the reassignment of employees to Wood Manor was not covered by the MOA.

The Union's Alleged Failure to Seek an Informal Resolution

The Respondent contends that the Union failed to satisfy what amounts to a contractual condition precedent to its right to file an unfair labor practice charge because it did not make, in the words of the CBA, a "good faith attempt to resolve problems informally" before seeking the assistance of the Authority. The Union's obligation to attempt an informal resolution of the underlying dispute arises, if at all, out of the language of Article 7, Section 3 of the CBA (Resp. Ex. 3). That language must be construed according to the standards set forth in *VA Charleston*.

Article 7 of the CBA is largely a statement of general principles such as the "orderly and efficient accomplishment of the mission of the Air Force" and "mutual respect of the privileges and rights of each party".[15] Taken in that context, contractual language requiring a good faith attempt

[15] The sole exception is in Section 4 which requires the parties to hold monthly meetings to "discuss matters of mutual interest".

to achieve an informal resolution of problems, while a laudable goal, cannot reasonably be construed as requiring any specific action prior to the initiation of formal legal proceedings. As stated in *American Federation of Government Employees, Local 2145 and U.S. Department of Veterans Affairs Medical Center, Richmond, Virginia*, 44 FLRA 1055, 1061 (1992) the Authority encourages the amicable resolution of disputes. However, the Union's refusal of the Respondent's invitation to resume bargaining, while arguably inconsistent with the spirit of Article 7, did not amount to a clear and unmistakable waiver of its right to file an unfair labor practice charge within the meaning of *SSA*.

Even if the language of the CBA were construed as creating a legally enforceable obligation, the Union sought to avoid the necessity of filing an unfair labor practice charge by requesting that the reassignment not take place until the completion of bargaining.

The Remedy

The General Counsel's proposed remedy is somewhat puzzling. She makes no mention of a *status quo ante* (SQA) remedy in her brief, yet, seemingly as an afterthought, includes a proposed order and notice which would prohibit the Respondent from reassigning Housekeepers[16] to Wood Manor until the Union has been given notice and the opportunity to bargain. The practical effect of such a prohibition would be to force the Respondent to (a) close Wood Manor and to either provide its occupants with alternative lodging or to require them to find their own, or (b) find non-bargaining unit personnel to maintain the units. The General Counsel has not stated what it would have the Respondent do with the bargaining unit employees who were transferred from Buildings 1615 and 1617 which it has now closed with no apparent plans for reopening. Presumably neither the General Counsel nor the Union would welcome the obvious alternative of a reduction in force, a measure which the Respondent was able to avoid by virtue of the reassignment.

Taking the General Counsel at her word, I will assume that she is proposing an SQA remedy. Since the reassignment of personnel to Wood Manor was an exercise of the Respondent's management right to assign and direct employees pursuant to §7106(a)(2) of the Statute, I will apply the following standards as set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982):

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There is no mention of Laborers in spite of the evidence that at least one of them was also reassigned to Wood Manor.

1. Whether, and when, notice was given to the Union of the proposed change. It is undisputed that the Respondent gave the Union tentative notice of the closure of Buildings 1615 and 1617 on April 8 (Jt. Ex. 1) and specific notice on April 20 of the projected closing date and the transfer of employees to Wood Manor on May 16 (Jt. Ex. 2). While ideally the Union would have received more notice, it was afforded sufficient time to request information and to present its initial proposals. This factor does not support the granting of an SQA remedy.

2. Whether, and when, the Union requested bargaining. The Union requested bargaining on April 22, which was two days after its receipt of notice of the proposed change. This factor supports the granting of an SQA remedy.

3. The wilfulness of the Respondent's failure to discharge its bargaining obligations. The Respondent fully addressed the Union's proposals, however inartfully expressed, and, in fact, agreed to some of them. Although the Respondent did not answer the Union's proposals until after the reassignment had been implemented, it tried to resume negotiations shortly thereafter. The evidence, taken as a whole, suggests that the Respondent attempted to bargain in good faith and that it was prepared to bargain to conclusion if the Union had been willing to do so. This factor does not support the granting of an SQA remedy.

4. The Nature and extent of the impact on employees adversely affected by the reassignment. The effect of the reassignment, while greater than *de minimis*, does not appear to have been severe. The greatest impact seems to have been in moving the cleaning carts through traffic and over uneven ground. There was anecdotal evidence that one of the Housekeepers had suffered a minor injury while pushing her cart, but nothing to indicate any significant danger or hardship. Furthermore, there is no evidence that the necessity of cleaning up after pets occurred with any appreciable frequency, if at all. This factor does not support the granting of an SQA remedy.

5. Whether, and to what extent, the granting of an SQA remedy would disrupt or impair the efficiency and effectiveness of the Respondent's operations. As stated above, the cessation of the reassignment of bargaining unit employees to Wood Manor might not force the facility to shut down, but it would, at the very least, significantly affect its operation. While there is no evidence as to the effect that even the closure of Wood Manor would have on the ability of the Respondent to provide lodging services to visiting personnel, it can logically be assumed that the

effect would be significant and that the closure would subject the Respondent to more than mere annoyance and inconvenience. This factor does not support the granting of an SQA remedy.

The appropriateness of a *SQA* remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy, *Willow Grove*. The nature of the Respondent's actions, while in violation of the Statute, were not egregious or in bad faith. After fully considering all of the circumstances and the above factors, I have determined that a SQA remedy is not warranted. However, it is appropriate for the Respondent to engage in retroactive bargaining, to the extent applicable, in accordance with *Federal Aviation Administration, Northwest Mountain Region, Renton, Washington*, 51 FLRA 35, 37 (1995).

This Decision should not be construed as a determination of the merits of the bargaining positions of either of the parties, nor is it intended to require concessions from either party or a retreat from its position as to the negotiability of any proposal. Rather, it is intended to enforce the Respondent's obligation to return to the bargaining table as it should have done prior to the implementation of the reassignment of employees to Wood Manor.

In view of the foregoing, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by implementing the reassignment of bargaining unit employees to Wood Manor without having fulfilled its obligation to bargain with the Union to the extent required by the Statute. 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, it is hereby ordered that the U.S. Department of the Air Force, 325th Mission Support Group, Tyndall Air Force Base, Florida shall:

1. Cease and desist from:

(a) Failing or refusing to negotiate with the American Federation of Government Employees, Local 3240,

AFL-CIO (Union) concerning the reassignment of Housekeepers to Wood Manor.

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

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

(a) Resume negotiations with the Union over the reassignment of Housekeepers to Wood Manor and put all provisions resulting from such negotiations into retroactive effect, to the extent possible, from May 20, 2005.

(b) Post at its facilities and Tyndall Air Force Base copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Group Commander 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 care 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, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 20, 2006.

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 the Air Force, 325th Mission Support Group, Tyndall Air Force Base, Florida 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 fail or refuse to negotiate with the American Federation of Government Employees, Local 3240, AFL-CIO (Union) concerning the reassignment of Housekeepers to Wood Manor.

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 Labor-Management Relations Statute (Statute).

WE WILL Resume negotiations with the Union over the reassignment of Housekeepers to Wood Manor and put all provisions resulting from such negotiations into retroactive effect, to the extent possible, from May 20, 2005.

_____
(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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Region, Two Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270 and whose telephone number is: 404-331-5212.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-05-0287 were sent to the following parties:

_____

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

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President
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Dated: September 20, 2006
Washington, DC