FEDERAL LABOR RELATIONS AUTHORITY OALJ 12-11
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547, AFL-CIO CHARGING PARTY	Case No. DE-CA-11-0185

Katie Smith, Esq.
For the General Counsel

Phillip G. Tidmore, Esq.
For the Respondent

Harley Hembd
For the Charging Party

Before: SUSAN E. JELEN
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 United States Code, 5 U.S.C. §§ 7101-7135 (the Statute) and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Chapter XIV, part 2423.

On February 24, 2011, the American Federation of Government Employees, Local 1547, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge against the Department of the Air Force, Luke Air Force Base Arizona (Respondent/Agency).[1] On June 7, 2011, the Regional Director of the Chicago Region issued a Complaint and Notice of Hearing in the consolidated case. As amended at the hearing, the complaint alleged that the Respondent unilaterally changed conditions of employment by requiring that Harley Hembd report to his workplace to request official time and thereby, violated section 7116(a)(1) and (5) of the Statute.

On or about June 28, 2011, the Respondent filed its Answer to the complaint in which it admitted certain allegations, but denied the substantive allegations of the complaint.

A hearing in this case was conducted on August 4, 2011, at which time all parties were represented and afforded an opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. The General Counsel and the Respondent filed timely post-hearing briefs.

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

FINDINGS OF FACT

The Respondent is an agency or a subordinate activity within an agency under §7103(a)(3) of the Statute. (G.C. Exs. 1b & 1c). The Union is a labor organization under §7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit consisting of employees located at the Respondent. (G.C. Exs. 1b, 1c & 2). There are four bargaining units that are represented by the Union. (G.C. Ex. 3).

In 1996, the Respondent and Union executed a collective bargaining agreement (CBA) that applied to the bargaining unit represented by the Union that consisted of eligible non-professional "Air Force employees paid from nonappropriated funds and serviced by the Luke Air Force Base Civilian Personnel Flight…." (G.C. Ex. 2). The CBA had a term of three years and provided for renewals of one year duration unless either party gave notice of the desire to terminate or modify the agreement. (G.C. Ex. 2). The CBA expired several years ago and although renegotiations began, they were never completed and at the time of the hearing in this case were on hold. (Tr. 17-19, 145). Despite its expiration, the parties continue to abide by the CBA with the exception of provisions that concern some non-mandatory subjects of bargaining. (Tr. 19-20, 145; G.C. Exs. 3 & 6). Article V of the CBA

[1] As originally issued, the complaint is this case included two unfair labor practice charges that had been consolidated in Case Nos. DE-CA-11-0184 and DE-CA-11-0185. The charge in Case No. DE-CA-11-0184 was subsequently withdrawn. At the hearing, the General Counsel made an unopposed motion to amend the complaint to effectively delete the allegations made in the charge in that case, and I granted the motion.

addresses official time for union representatives and is attached as an Appendix. As written, Article V of the CBA authorizes the Union president 50 percent official time during any pay period and identifies various activities that either will not count against the 50 percent allowance or for which additional official time is authorized. (G.C. Ex. 2). Article V also states that denial of official time must be based on mission requirements or be in accordance with applicable law. (G.C. Ex. 2).

Harley Hembd is employed at the Respondent as an aircraft mechanic in the 56th Equipment Maintenance Squadron. (Tr. 16). The primary job of the metals technology section ("the shop"), to which Hembd is assigned, is inspecting and maintaining aircraft landing gear. (Tr. 99-100). Hembd's work schedule is 6:30 a.m. to 4:30 p.m., Monday through Thursday. (Tr. 16). The workload of the section is not predictable and is dependent on what jobs have come in, what has been accomplished in previous shifts, and what personnel are available. (Tr. 102-05, 117-18, 121-22). Each day the supervisor of the section, upon arrival at the shop in the morning, routinely reviews information such as print-outs and production sheets and determines what work needs to be done that particular day. (Tr. 102-04, 117-18, 121-22).

Hembd serves as the President of the Union and has held that position since 2006. (Tr. 16-17). At the hearing in this case, Hembd asserted that the president of the Union was on 100 percent official time, had been so for approximately 10 years, and was not required to request official time.[2] (Tr. 21). According to Hembd, once he became president he informed his supervisor that he wasn't going to be able to come to the shop anymore and his then-supervisor, Sgt. Barger, who has since retired, told Hembd that was fine and all he wanted Hembd to do was report his leave usage via e-mail and telephone. (Tr. 22-23). Hembd stated that he and Barger never talked about official time and Barger never required him to request official time. (Tr. 23). Barger was Hembd's supervisor until about July 2008 and was succeeded by Sgt. Russell who was Hembd's supervisor for about one year. (Tr. 23-24). When Sgt. Russell left, Sgt. Peterson became Hembd's supervisor but left after about seven months. (Tr. 25, 29-30). According to Hembd, he advised Russell and Peterson of his practices with respect to his time and attendance and reporting to the union office rather than the shop and they allowed things to continue as Hembd described them. (Tr. 24-29). The practice Hembd described was that after he became union president he went directly to the union office in the morning and only went to the shop on occasion so that he could check his government e-mail account, which he couldn't access from the computer in the Union office, for the purpose of retrieving e-mails that bargaining unit employees mistakenly sent to that e-mail address rather than his union address and do training that could only be done on the

[2] A previous decision in an unfair labor practice case, *Dep't of the Air Force, Luke AFB, Ariz.*, Case Nos. DE-CA-00721 & DE-CA-00767 (2003), ALJDR No. 175 (Mar. 31, 2003), addressed the matter of official time use by Hembd's predecessor as Union president. In that decision, the Administrative Law Judge rejected a claim that an established past practice existed of permitting the Union president to use nearly 100 percent official time and come and go at will from his workplace in the course of using official time.

computer in the shop.[3] (Tr. 23, 25, 29, 36). Although Hembd acknowledged that the parties continued to follow the contract despite its expiration, it was his view that as a consequence of past practice the official time provisions in Article V had changed so that the Union president was on 100 percent official time. (Tr. 58, 63). According to Hembd, the only occasions when he was not engaged in union activity during his duty day were those when he was either taking training or doing a minimal amount of work in order to receive a performance appraisal so that he could be considered for awards and maintain his seniority for purposes such as reduction-in-force or to accommodate Barger's need for someone to "sign off on red X's[,]" which involved a "certified person" verifying that work on an aircraft was done properly. (Tr. 27, 71-75). Hembd estimated that he actually spent about ninety-seven (97) percent of his time on official time. (Tr. 75).

Hembd testified that at one point during Peterson's tenure as his supervisor, Peterson came to the union office to verify his leave usage in conjunction with submitting Hembd's time and attendance report. (Tr. 27-28). To facilitate Peterson's preparation of his time and attendance report, Hembd offered to send Peterson the relevant portion of an Excel spread sheet that he had on his computer and used to keep a record of his leave and official time use. (Tr. 28). According to Hembd, Peterson liked that suggestion and Hembd began sending the spread sheet to Peterson every other Wednesday by e-mail. (Tr. 28; G.C. Ex. 4). The spread sheet showed Hembd's leave and official time for each day in the pay period. (G.C. Ex. 4).

Around November or December 2009, Peterson left and Sgt. Wright became Hembd's supervisor. (Tr. 30, 116). According to Hembd, he continued his practices with respect to using official time and reporting directly to the Union office without objection from Wright. (Tr. 31). At the hearing, Wright testified that he had never supervised civilians before and was advised by the Civilian Personnel Office to familiarize himself with the CBA. (Tr. 116-17). In response to a question from Respondent's counsel during the hearing as to how often Wright considered Hembd's official time request, Wright stated that Hembd communicated with him nearly everyday by e-mail and he (Wright) considered Hembd's official time "about every day." (Tr. 117). Wright went on to testify that he had sufficient personnel to cover work needs and believed that under that circumstance, it would have been impossible not to allow Hembd to use official time. (Tr. 115, 117-18). Feeding Wright's impression that realistically he could not curtail Hembd's use of official time was his belief, which Hembd reinforced, that Hembd had to be allowed to use official time unless it would have "a mission impact" or there was a job that only Hembd could do. (Tr. 115, 118, 120). Wright's testimony about his daily consideration of Hembd's official time was confusing and could be taken as an assertion that Hembd was making a request for official time almost every day and Wright was granting it. I find a more reasonable interpretation of what Wright was referring to was that although Wright may have been in regular communication with Hembd, it was not for the purpose of seeking permission to use official time. It is clear that Hembd was

[3] Barger, Russell, and Peterson did not testify at the hearing in this case. Thus, the only evidence of the practices that existed while they were Hembd's supervisors comes from Hembd.

operating as if he was on 100 percent official time and consistent with his stratagem of expanding his official time allowance to 100 percent would not have requested official time on a routine basis but, instead would simply have used official time. As for Wright's reference to daily consideration of Hembd's official time use, what was likely happening was that Wright in the course of his daily exercise of determining what work had to be done and who he needed to do it, made a decision not to direct Hembd to come into the shop and help with the work without having received any request for official time from Hembd or having imposed any requirement that Hembd actually request official time.

Both Hembd and Wright testified that at one point, Wright expressed reservations to Hembd about his use of official time. According to Hembd, this was couched in terms of it not being fair that the other civilians in the shop were doing all the work. (Tr. 32-33). Wright described it as being framed in terms of Hembd not following the CBA and there being a need to bring official time practices back into line with the CBA. (Tr. 120). Significantly, nothing came of Wright's concern in the form of him placing any restraints on Hembd's official time use practices. Wright asserted that he believed he had the right to call Hembd in to the shop if he needed him but rarely did so. (Tr. 120-21). Wright further stated that although he believed he had the right to require Hembd to report to the shop every day, he chose not do so because he knew most likely Hembd would drive to the shop only to go back to the Union office, and he felt that e-mail and telephone communications afforded sufficient means of contact with Hembd when needed for work purposes. (Tr. 125). The record shows that during the period Wright was Hembd's supervisor, Hembd's practice of reporting to the Union office rather than the shop and using official time virtually all the time and generally at will, went unchecked. It is undisputed that Hembd continued the practice he began under Peterson of e-mailing the spreadsheet that showed his leave and official time use for the pay period to Wright or his designee every two weeks. (Tr. 30-31, 126-27; G.C. Ex. 5).

Sgt. Wright was succeeded by MSgt. Mangrum who became Hembd's supervisor starting in August 2010. (Tr. 94). Mangrum initially conveyed to Hembd that things would remain the same as they had been under Wright. (Tr. 34, 100). At the hearing in this case, Mangrum testified that Wright had informed him that if he needed Hembd to come to work, Mangrum could call Hembd, e-mail him, or see him in person. (Tr. 100-01). Mangrum acknowledged that for the first few months Hembd was under his supervision, Hembd never requested official time and was on official time approximately 100 percent of the time. (Tr. 97, 109). Hembd continued his practice of e-mailing his time and attendance information, which included his use of official time for the pay period, to Mangrum every two weeks. (Tr. 35-36, 96; G.C. Exs. 6 & 7).

Hembd testified that on or about February 1, 2011, Mangrum informed him that "they" were going to change his official time. (Tr. 40). By e-mail dated February 2, 2011, to Bryan Evans, the Agency's Civilian Personnel Officer, Hembd requested clarification of the Agency's intentions with respect to his official time. In that e-mail, Hembd also demanded notice and an opportunity to bargain any changes as well as that the status quo be maintained

pending completion of bargaining. Evans responded via e-mail dated February 4, 2011, stating essentially that Hembd needed to take the matter of his official time up with his immediate supervisor. (G.C. Ex. 8). On or about February 23, 2011, Mangrum met with Hembd and told him that he was to report to the shop at 6:30 am every workday for the purpose of requesting official time and enabling Mangrum to consider his request in conjunction with workload needs . (Tr. 49, 97; G.C. Ex. 10). On those days that Mangrum's arrival was delayed as a result of fulfilling his military PT (Physical Training) requirement, Hembd was to help check tools, check e-mails, do training, answer the telephone and conduct machine maintenance until Mangrum arrived. (Tr. 50, 52, 82, 107).

At the hearing, Mangrum testified that after he became supervisor, the shop experienced manpower issues as a result of leave and other absences, rotations, and departures of personnel. (Tr. 102-03). Mangrum stated that he needs Hembd to be present at the shop at the start of the workday so that Mangrum can determine the work needs of the day before releasing him. (Tr. 104-05). Hembd testified that Mangrum told him there was a desire to "wean" him off official time and that he worked for and was paid by the Equipment Maintenance Squadron and "they" wanted to see something for their money. (Tr. 40-41, 49-50).

Hembd asserted that Evans never responded to his request for notice and an opportunity to bargain and there is no evidence that Evans or any other Agency representative did. (Tr. 49).

Subsequent to Mangrum's instruction that he report to the shop at 6:30 am, Hembd began doing so. (Tr. 51). Hembd testified that on the days he has PT, Mangrum gets to the shop anywhere between 7:15 a.m. and 8:00 a.m. (Tr. 50-51). Three of the days that Mangrum has PT overlap with Hembd's workweek. (Tr. 51, 104). By Hembd's account, although Mangrum initially sought an explanation of what Hembd was going to be using official time for, that happened only a couple of times and Mangrum never required him to make a request for official time. (Tr. 53). Hembd stated that sometimes Mangrum has released him within a few minutes and sometimes they engaged in small talk and that Mangrum has never required that he remain in the shop beyond their morning meeting. (Tr. 53, 83, 88). According to Hembd, the requirement that he report to the shop has cut into his official time and he has compensated by staying after his working hours and coming in on Fridays, when he is normally off, to catch up on his Union activities. (Tr. 54). Although asked during the hearing how many hours he was required to be in the shop after the alleged change, Hembd did not provide a number.[4] (Tr. 54). Hembd asserted that reporting to the

[4] Although it would seem that the number easily could have been ascertained from either Hembd's spreadsheets or his time and attendance records, nothing was entered into evidence that would establish with any degree of accuracy how much Hembd's official time was decreased as a consequence of having to report to the shop in the morning.

shop on a daily basis and being dependent on Mangrum to release him on official time also hampers his flexibility in scheduling activities that he performs on official time such as meetings and teleconferences. (Tr. 55-57).

DISCUSSION AND ANALYSIS

Position of the Parties

A. General Counsel

The General Counsel (GC) alleges the Respondent violated section 7116(a)(1) and (5) of the Statute by making changes in a condition of employment without affording the Union notice and an opportunity to bargain. The GC asserts that the established past practice was that Hembd reported directly to the Union office everyday rather than going to his worksite and did not request official time from his supervisor. The GC contends that Mangrum's action in requiring Hembd to report to his worksite at 6:30 a.m. every workday and to request official time from him (Mangrum) constituted a change in this practice.

The GC maintains that although the CBA between the Respondent and Charging Party in this case contains provisions addressing use of official time by Union representatives, those provisions have been modified by the development of a past practice. The GC argues that consistent with Authority precedent, once a practice relating to a condition of employment has been established with the knowledge and participation of management, it supersedes any contrary collective bargaining agreement provision and cannot be changed unilaterally.

The GC contends the change in Hembd's conditions of employment was more than *de minimis*. In support of this claim, the GC asserts Hembd's official time has been reduced by at least four hours per week and that he must attempt to compensate for the lost of official time by working after his normal duty hours and on his day off. A further effect on Hembd that the GC cites is that he cannot schedule morning appointments, teleconferences, or meetings.

The GC alleges the Respondent implemented the change in Hembd's official time without providing prior notice and an opportunity to bargain to the Union. In support of this allegation, the GC contends the Respondent failed to provide notice prior to the implementation of the change that was sufficiently specific and definitive and it rebuffed the Union's request to bargain over a mandatory subject of bargaining.

The GC argues that the "covered-by" defense is inapplicable in the circumstances of this case.[5] More specifically, the GC asserts the covered-by doctrine doesn't apply when a party to an expired agreement has submitted a demand to negotiate a mandatory

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[5] As will be discussed later herein, I find that the Respondent has not raised the covered-by doctrine as a defense in this case.

subject of bargaining. The GC also contends the covered-by defense is inapplicable in circumstances where an established past practice has superseded a collective bargaining agreement provision. The GC posits that even assuming the covered-by defense is applicable, the official time procedures applying to the Union president were neither expressly contained in Article V of the CBA nor inseparably bound up with a subject covered by the CBA.

As remedy, the GC seeks an order requiring that the Respondent: cease and desist from violating the Statute; return the Union president's official time procedures to the *status quo ante*; bargain with the Union over official time changes; and post a notice to employees. The GC requests that the notice also be distributed by electronic posting.

B. Respondent

The Respondent asserts that there was no change in past practice with respect to the administration of the Union president's official time and denies it violated the Statute as alleged. According to the Respondent, consistent with the authorization of official time for the Union president in Article V of the CBA, the Union president's supervisors have always managed his use of official time including the determination of when it will be taken. Thus, Respondent argues Hembd's supervisors retained the ability to decide where Hembd would report to work; whether he could be released from his duties on official time; and whether they would deal with Hembd in conjunction with his official time use by e-mail, telephone, or in person. The Respondent maintains that Wright, who had enough personnel available that he could be confident of accomplishing the work in his section without Hembd, elected to allow Hembd to report to the Union office rather than the worksite. In contrast, Mangrum, who experienced a reduction in the workforce available to him, opted to have Hembd report to the worksite so Mangrum could evaluate whether Hembd was needed to help accomplish tasks that had to be done that day before he released Hembd on official time.

The Respondent insists that Wright and Mangrum were following the CBA and applying provisions that were followed for years. In an effort to buttress its argument that there was no change in conditions of employment, and, consequently no obligation to bargain, the Respondent cites *U.S. Dep't of the Air Force, 6th Support Group, MacDill AFB, Fla.*, 55 FLRA 146 (1999)(*MacDill*), and asserts that Federal agencies have no obligation to bargain over official time requirements because procedures for use of official time by Union representatives are covered by the collective bargaining agreement.[6]

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[6] Respondent's reliance on *MacDill* is misplaced. In *MacDill*, the Authority adopted the Administrative Law Judge's findings and conclusions that the General Counsel failed to establish the respondent in that case changed a condition of employment by requiring a union representative to request official time and report to his worksite before and after using such time. In footnote 2 of the decision, however, the Authority specifically did not adopt the Judge's further determination that the respondent had no further duty to bargain over an official time requirement because procedures for Union representatives to use official time were covered by the parties' collective bargaining agreement. 55 FLRA at 146.

In sum, the Respondent asserts there was no change in conditions of employment and hence no obligation to bargain.

DISCUSSION

A. The Respondent Did Not Assert A "Covered-By" Defense In This Case

As set forth above, the General Counsel makes arguments to dispute any claim that the matter of official time is "covered by" the CBA. Covered by is an affirmative defense that the Respondent is responsible for timely raising. *See, e.g., U.S. Dep't of HUD*, 56 FLRA 592, 596 (2000). "The fact that a respondent refers to a collective bargaining agreement and states as a theory of the case that it acted 'in accordance with' that agreement is insufficient to raise a 'covered by' defense." *Pension Benefit Guar. Corp.*, 59 FLRA 48, 52 (2003)(*PBGC*).

I find the Respondent has not raised a covered-by defense in this case. Rather, the defense presented by the Respondent in its pleadings and at the hearing was that it had no obligation to bargain because it only acted in accordance with the CBA and there was no change in conditions of employment. I find that the Respondent's statements in its pre-hearing submissions and opening statement at the hearing would not reasonably have anyone on notice that a covered-by defense was being raised. The Respondent did use the phrase "covered by" in its post-hearing brief but only in the following passage, which it repeated virtually verbatim at two different points in its brief:

> "A federal agency has no obligation to bargain over official time requirements because procedures for Union representatives to use official time that [sic] are covered by the collective bargaining agreement. *U.S. Department of the Air Force, 6th Support Group, MacDill Air Force Base, Florida*, 55 FLRA 146 (1999)."

(Resp. Br. at 12, 15-16).

Especially in view of the citation of *MacDill*, this passage is not sufficiently clear to either convert the Respondent's defense from one that there was no obligation to bargain because there was no change in conditions of employment to one that there was no obligation to bargain because of the terms of the CBA or presented covered-by as an alternative defense. Also, it does not rescue the Respondent from the fact that it failed to present a theory that could reasonably be construed as asserting a covered-by defense in either its pre-hearing disclosure submission or its opening statement at the hearing.

I do not construe the GC's arguments in its brief on the applicability of the covered-by doctrine as a concession by the GC that it interpreted Respondent's arguments in this case as presenting a covered-by defense. Rather, I attribute it to a reasonable expectation on the part of the General Counsel that covered-by might be raised in this case and given that possibility,

erring on the side of caution. A contributing factor underlying any tendency toward caution was quite possibly the GC's experience in a past case that involved the same Respondent and Respondent's representative. In that case, the GC asserted that Respondent had not timely raised a covered-by defense in its pre-hearing disclosure; however, the undersigned construed an ambiguous argument in the Respondent's prehearing disclosure as sufficient to raise a covered-by defense. *See Dep't of the Air Force, Luke AFB, Ariz.*, Case Nos. DE-CA-01-0174 & DE-CA-01-0244 (2002), ALJDR No. 169 (Aug. 21, 2002). Although it might be argued that the differences between the framing of Respondent's arguments in this case and those in the earlier case are slight, they are sufficient, in my view, to make a difference between something that could reasonably be construed as presenting a covered-by theory and something that is simply too vague to be so construed. Moreover, finding that Respondent's pleadings in this case fail to adequately articulate a covered-by defense is consistent with the Authority's statement in *PBGC*.[7]

B. A Change in Conditions of Employment Occurred

It is well established that the use of official time by Union officials for representational activities is a condition of employment. *See, e.g., U.S. Patent & Trademark Office*, 39 FLRA 1477, 1482 (1991). Pursuant to section 7131(d), the use of official time to include its amount, allocation and scheduling is subject to negotiation. *See, e.g., Military Entrance Processing Station, Los Angeles, Cal.*, 25 FLRA 685, 688-89 (1987). Included within the duty to bargain are issues such as whether official time may be used without advance scheduling or permission from supervisors. *See Nat'l Treasury Employees Union*, 52 FLRA 1265, 1287 (1997).

It is undisputed that the CBA which contains provisions authorizing use of official time by Union representatives, expired. Despite its expiration, the parties continue to apply the CBA with a few exceptions. The question here, is whether the CBA as written represents the established practice or whether the provisions relating to official time use by the Union president have been modified by past practice of the parties to the CBA.

The Authority has held that the terms of a collective bargaining agreement may be modified by the past practice of the parties. *See, e.g., Nat'l Treasury Employees Union*, 60 FLRA 731, 734 (2005). In order to establish the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time, and followed by both parties or followed by one party and not challenged by the other. *Id.*

Under the terms of the CBA as written, the Union president is not granted 100 percent official time outright. Rather, the CBA only grants the Union president 50 percent official time; however, it allows the Union president to obtain additional official time for a variety of

[7] Under existing Authority case law, it is not clear whether the covered-by defense would apply in circumstances such as present in this case where the parties' collective bargaining agreement has expired. *See U.S. Dep't of the Air Force, Luke AFB, Ariz.*, 66 FLRA 159, 161 n.6 (2011).

activities. Thus, under the terms of the CBA, the potential exists for the Union president to use up to 100 percent official time during any given period by augmenting the 50 percent allowance with grants of additional official time for various activities. At the outset of his presidency, Hembd determined to take advantage of this potential and effectively expand his official time use as a matter of course to virtually 100 percent. As a corollary to adopting a practice of being on 100 percent official time, Hembd began reporting to the Union office rather than his worksite and did not request permission in advance of his use of official time. There is no evidence in the record that rebuts Hembd's claim that he reported directly to the Union office and did not request official time in advance of using it. Although Sgts. Barger, Russell, and Peterson did not testify, the testimony of MSgts. Wright and Mangrum confirmed both Hembd's description of this practice during the period spanning between November or December 2009 to late February 2011, and their knowledge of it. There is no evidence in the record to show that prior to the actions by Mangrum that are the subject of the complaint in this case, any of Hembd's supervisors made any effort to challenge or stop Hembd's practices. Although Wright expressed concern about Hembd's official time use, there is no evidence he took any action to curb it. Both Wright and Mangrum believed they retained the ability to call Hembd in to do shop-related work if the need arose; however, there was no evidence that ever happened. In any event, the issue presented in this case is not whether established practice permitted Hembd's supervisors the option of calling him off of official time to work in the shop, but, rather, it is whether requiring Hembd to report to the shop every morning to ask for official time constituted a change in established practice.

I find Hembd consistently exercised a practice of reporting directly to the Union office, rather than his workplace, and not requesting official time in advance of using it. The record establishes that for a period of a few years, these practices were known by and went unchallenged by his supervisors. I find allowing Hembd to report directly to the Union office and use official time without requesting it constituted a past practice, albeit one that was not necessarily consistent with the CBA. For purposes of deciding this case, it is not necessary to determine the correct interpretation of the contract with respect to whether it did or did not require the Union president to obtain approval of official time prior to using it. What is significant is there was a past practice established that effectively trumps the CBA provisions regardless of whether it did or did not differ from the CBA. I find the requirement placed on Hembd that he report to the worksite every workday and request official time constituted a change in the past practice.

I find the change had more than a *de minimis* effect on Hembd's conditions of employment. In applying the *de minimis* doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change in bargaining unit employees' conditions of employment. *E.g., U.S. Dep't of the Air Force, 355th MSG-CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 89 (2007). Evidence offered by the General Counsel and unrebutted by the Respondent shows the requirement that Hembd report to the shop had the effect of reducing the amount of official time available to Hembd by approximately 4 hours per week. Although Hembd claims the requirement to come to the shop and wait until he was released on official time intruded on his ability to schedule meetings, teleconferences and appointments, I am skeptical that this was as significant as

Hembd would have us believe. In view of the early hour involved, it is likely that fewer meetings, teleconferences and appointments would be occurring in that time period than would happen during "prime" time. Also, the reporting requirement would not prevent Hembd from participating in such activities or using compensated time to do so but only posed some constraints on scheduling. I find the asserted effect on Hembd's ability to schedule activities amounts to little more than a claim of an inconvenience that has no real impact on his ability to use official time for representational activities.

I find a decrease of approximately 10 percent in the amount of compensated time available to Hembd to perform representational activities is more than a trivial reduction in the amount of official time he was in the practice of using for such activities. Hembd could have, and perhaps did, offset this loss by doing some of the activities that occupied the estimated three percent of his time that was not spent on official time activities i.e., required training, doing work so that he could receive a performance rating, and checking his government e-mail account--during the time he spent in the shop each morning. Even if this offset occurred, Hembd would still have experienced a reduction in the neighborhood of seven percent in the amount of official time he was accustomed to using. Even if the reduction was closer to seven than ten percent, I find it was still more than trivial and consequently, more than *de minimis*.

I find that the Respondent implemented a change in past practice by requiring that as a matter of course Hembd report to his worksite, rather than the Union office, and request official time without affording the Union an opportunity to bargain. I further find that by its action Respondent violated section 7116(a)(1) and (5) of the Statute. I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of the Air Force, Luke Air Force Base, Arizona, (the Respondent) shall:

1. Cease and desist from:

(a) Making unilateral changes in the procedures relating to the Union President's use of official time without affording the American Federation of Government Employees, Local 1547, AFL-CIO (the Union), an opportunity to bargain to the extent required by the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit 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) Return the procedures relating to the Union President's use of official time to the *status quo* that existed prior to February 23, 2011.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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 Commander, Luke Air Force Base, 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. The notice will also be disseminated by electronic means.[8]

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 22, 2012.

SUSAN E. JELEN
Administrative Law Judge

[8] In its prehearing disclosure, the General Counsel stated its intent to seek an order that included electronic distribution of the remedial notice and requested such in its post-hearing brief. In the absence of any objection by the Respondent to this form of distribution, it is included in this order.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, Luke Air Force Base, Arizona, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make changes in the procedures relating to the use of official time by the President of American Federation of Government Employees, Local 1547, AFL-CIO (the Union), without affording the Union an opportunity to bargain to the extent required by the Statute.

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

WE WILL return the procedures relating to the Union President's use of official time to the *status quo* that existed prior to February 23, 2011.

____
(Agency/Respondent)

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, Denver Regional Office, Federal Labor Relations Authority, and whose address is: 1391 Speer Boulevard, Suite 300, Denver, CO 80204, and whose telephone number is: (303) 844-5224.

APPENDIX

Article V, Section B2 of the parties CBA provides in relevant part:

Union Representation

2. Union representatives properly designated as such may accompany, represent, and advise an employee in preparing and presenting a grievance to Management. The representative will be excused from normal duties without charge to leave for the time required for such representation. In addition, the representative will be allowed a reasonable amount of official time without charge to leave to prepare for a hearing or inquiry into an appeal or grievance.

3. A Union representative will be permitted to represent employee(s) or the Union on official time unless additional representatives are otherwise authorized by statute, the specific provisions of this Agreement, or mutually agreed upon by the parties. In third party proceedings, the Union shall be entitled to the same number of representatives as the Employer.

4. The Union representative must provide to their supervisor information identifying the purpose of the request (i.e., consultation, grievance, etc.) and location (organization) to be visited and the actual amount of official time spent upon return to their work area. In addition, when a Union representative desires to visit a unit employee or a management official on official Union business, the Union representative must secure advance permission from the employee's immediate supervisor, or arrange a mutually agreeable time to meet with the management official, prior to entering either individual's work area.

5. The time period requested by the employee or the Union representative must not adversely impact the accomplishment of their organization's operations. If the granting of such requests would result in such a situation, the employee and their immediate supervisor will attempt to mutually agree to a time period as close as possible to the one originally requested. Absent mutual agreement, such requests will be granted no later than 24 hours from the time of the original request except when extenuating circumstances would adversely impact the organization's operations and prevent their release.

6. Denial of official time will be based on mission requirements or in accordance with applicable law. Upon request, the Labor Relations Officer or designee will provide the Union the reason for denial in writing.

. . .

8. The Union president and treasurer will be granted official time as follows:

a. The Union president will be allowed 50 percent official time during any pay period; such official time will be used only during the time the employee otherwise would be in a duty status. The following will not be charged toward the president's allotment of official time:

1) Preparation for and participation in negotiations
2) Participation in local wage survey
3) Union-sponsored training
4) Labor-Management training
5) Preparation for third-party proceedings
6) Participation in third-party proceedings
7) Management-sponsored meetings

b. Official time for preparation will be granted in any amount the parties agree to be reasonable, necessary, and in the public interest.

c. The total amount of official time used by the Union treasurer for treasurer duties during any pay period will not exceed 10 hours. The treasurer shall also be allowed an additional 16 hours of official time during the first quarter of each calendar year.

9. Activities for which additional official time is authorized include, but are not limited to, the following: preparing for, investigating or participating in a statutory appeal proceeding, MSPB proceedings, EEOC proceedings, workers compensation proceedings; a proposed adverse or disciplinary action; or any other proceedings as provided by statute.

10. It is agreed that Union representatives will guard against the use of excessive time in performing duties considered proper by this Agreement.