FEDERAL LABOR RELATIONS AUTHORITY OALJ 14-01
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
MARTINSBURG, WEST VIRGINIA

RESPONDENT

AND

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-78, AFL-CIO

CHARGING PARTY

Case No. WA-CA-10-0463

June M. Marshall
For the General Counsel

Diane M. Duhig
Rodger Withrow
For the Respondent

Andrea M. Bentley
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Dale Mills started working as a Health Technician at the Richmond VA Medical Center in 1999, and in 2003 she became First Vice-President of NAGE Local R4-78. According to a local agreement between Local R4-78 and the Medical Center, the Union's First Vice-President is entitled to two hours of official time per day. Starting in 2003, Ms. Mills was allowed to use an average of three hours a day of official time, and almost every year thereafter, she used more and more official time. By 2010, she was reporting directly to the Union office every day and almost never did any work as a Health Technician. In 2010, Medical Center management determined that Mills should return to her Health Technician job on a full-time basis and only use two hours a day of official time, prompting her to file both a grievance and an unfair labor practice charge against management.

The primary question for me is: did the actions of the parties between 2003 and 2010 establish a binding practice (amounting to a condition of employment) in which Mills worked nearly full-time as a Union representative, or are Mills and the Union unfairly claiming a benefit that they could not legally negotiate? For the reasons set forth below, I conclude that the parties mutually adopted a practice of allowing Mills vastly more official time than the written agreements recognized. This practice continued for a significant period (exceeding four years), so that reporting every morning to the Union office and working nearly full-time as a Union representative became conditions of Mills's employment. Even though the parties never expressly negotiated a written change to their contract, they mutually and consensually changed Mills's conditions of employment by their practice. Therefore, the Respondent could not re-impose the conditions specified in the contract without negotiating with the Union.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On June 24, 2010, the National Association of Government Employees, Local R4-78, AFL-CIO (the Union) filed with the Washington Region of the Authority an unfair labor practice charge against the U.S. Department of Veterans Affairs Medical Center, Martinsburg, West Virginia (the Agency or Respondent); the charge was later transferred to the Chicago Region of the Authority. After investigating the charge, the Chicago Regional Director issued a Complaint and Notice of Hearing on February 28, 2011, alleging that the Agency changed Ms. Mills's conditions of employment without bargaining with the Union to the extent required by law, in violation of § 7116(a)(1) and (5) of the Statute. The Respondent filed an answer to the complaint, denying that it was required to bargain over the change in Mills's duties and setting forth several affirmative defenses.

A hearing was held in this matter on June 14 and 15, 2011, in Martinsburg, West Virginia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

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 within the meaning of section 7103(a)(3) of the Statute. GC Exs. 1(c), 1(d). The National Association of Government Employees, AFL-CIO (NAGE) is a labor organization within the meaning of section 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of employees that is appropriate for

collective bargaining at the Department of Veterans Affairs (VA). *Id.* The VA and NAGE are parties to a national collective bargaining agreement (the Master Agreement or CBA). Jt. Ex. 1. The Union is the agent of NAGE for the purpose of representing bargaining unit employees at the VA Medical Center in Martinsburg, WV (the Medical Center). GC Exs. 1(c), 1(d).

Susan Anderson has been the President of the Union since 1999, and Dale Mills its First Vice-President since 2003. Tr. 17-18, 204. In 1997, the Union and the Respondent negotiated a memorandum of understanding (MOU), which stipulated that the Union President "is entitled to eight (8) hours of official time per day. . . The 1st Vice-President . . . is entitled to two hours of official time per day. . . All other recognized union officials not identified above will be granted reasonable time as defined by the NAGE Master Agreement for representational functions." Jt. Ex. 2. In 2001, the Union and Respondent settled an unfair labor practice charge by agreeing that the Union President could appoint an Acting President for periods that she is absent or unavailable, and that during such periods the Acting President is entitled to the same amount of official time as the President. Jt. Ex. 3.

In 1999, after suffering an injury while working as an LPN, Ms. Mills was reassigned to a job as a Health Technician, making appointments for patients in a variety of clinics and performing administrative work for the inpatient physicians (hospitalists). Tr. 16, 34-35, 66-67. Due to her physical limitations, she was not required to perform some of the patient care duties of a Health Technician. Tr. 126-28. Even before becoming an officer of the Union, she began performing representational duties for the Union and using official time for that work. *See* GC Exs. 2 and 3, which show that she used 232 hours of official time in 2002.[1] In 2003, she assumed her position as First Vice-President of the Union, and she used 796.5 hours of official time that year. Her official time increased each year thereafter, to 939 hours in 2004, 1002.75 hours in 2005, and 1464 hours in 2006. GC Ex. 3. Mills suffered another work injury in early 2007, which caused her to undergo back surgery and miss considerable time; as a result, her official time decreased to 857.25 hours for 2007. Tr. 26; GC Ex. 3. After returning full-time in February 2008, she used 1378 hours of official time in 2008 and 1228.75 hours in 2009. *Id.*

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[1] GC Ex. 2 is the Leave Used Summary for Ms. Mills for the years 2000 through 2010, an excerpt from the Agency's computerized time and attendance system, which lists and itemizes the type of leave Mills used, on an hour-by-hour and day-by-day basis, for these eleven years. At the end of each year, the document shows totals for each type of leave or absence (authorized absence, annual, sick, etc.). GC Ex. 3 was prepared by Mills and shows only the total number of hours of official time that she used in each of these years. Tr. 21-25. In the time and attendance system, official time is shown as "authorized absence," but administrative leave and training are also categorized as authorized absence. Tr. 22-24. Thus Mills's total amount of official time each year (as shown in GC Ex. 3) is somewhat less than her hours of authorized absence (as shown in GC Ex. 2). Tr. 24. Although the parties disagree as to what inferences can be drawn from these exhibits, Respondent did not dispute the accuracy of either GC Ex. 2 or 3, and my review of the evidence confirms that the documents are essentially accurate. While neither Mills's personal notes nor the "remarks" section of the VA's computerized T&A system were made a part of the record, and Mills testified that she used those records to identify those portions of her "authorized absences" that constituted work for the Union, the underlying accuracy of GC Exs. 2 and 3 is undiminished.

Since Ms. Anderson, as Union President, is on 100% official time, she is not required to fill out time and attendance reports, and she does not need to obtain permission to work in the Union office; instead, her timekeeper automatically enters all her hours as official time . Tr. 277-78. Ms. Mills, however, must enter her hours, authorized absence, and leave in the Respondent's computerized system, usually on a daily basis but at least once every pay period. Tr. 55-57, 146-48; *see also* GC Ex. 2, which illustrates how Mills's time was recorded and categorized whenever she used leave or authorized absence, often several times in a single day. From 1999 to 2007, Mills would report in the morning to her office on the fourth floor, adjacent to the inpatient clinic; there, she would obtain reports listing the patients who had been admitted overnight and identifying which patients were assigned to which doctor, and she would advise the doctors what had happened to their patients overnight. Tr. 66-67. Her work for the Union was performed in the Union's office in the basement and in other areas of the Medical Center, but she carried a pager in order to stay in contact with the doctors and nurses when she was away from her floor. Tr. 68. When she returned from her 2007 injury late that year, she initially performed her Health Technician duties for part of the day, obtaining the records and papers that the doctors needed at the start of the day and then working the remainder of the day in the Union office. Tr. 26-27, 68-70. She maintained this routine until approximately February 2008, after which time she began working full-time in the Union office. *Id.*; *see also* 137-38. From February 2008 to May 2010, Mills testified that she began reporting directly to the Union office in the morning and doing Union work the entire time, except for occasionally notarizing documents for staff and patients. Tr. 26-27, 70-71. Sometime in 2008, Dr. Murray, the head of the medical service and Mills's supervisor, told her to take her personal belongings out of her desk on the fourth floor, as it wasn't her office anymore; she complied and moved her belongings to the Union office. Tr. 144-45. After Mills stopped working regularly in the inpatient clinic, another Health Technician took her place full-time. Tr. 35-36.

In October 2009, the Respondent began a restructuring of its workers' compensation program, because it was performing poorly in measures of responding to and following up on claims. Tr. 163. In the course of gathering all of the appropriate documents for each employee's OWCP (Office of Workers' Compensation Programs of the U.S. Department of Labor) files, Respondent's human resources department determined that Mills's physical limitations could be accommodated in her Health Technician job. Tr. 157, 163-64, 193.[2] Accordingly, in a letter dated April 26, 2010,[3] the Respondent ordered Mills "to return to your official position of record" (i.e. as a Health Technician) starting May 3, 2010. Jt. Ex. 4.

Although this letter made no mention of the time Mills spent on official time, she

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[2] As Medical Center Director Ann Brown testified, her staff believed that Mills had been allowed to work in the Union office because Mills was physically unable to perform patient care duties. Tr. 164. But when HR staff evaluated the documents in Mills's OWCP file, they determined that her limitations could be accommodated as a Health Technician. Tr. 163. Mills, however, disputed this account of why she stopped working as a Health Technician: she said it had nothing to do with the physical demands of Union work and Health Technician work, as they were both sedentary and required similar skills. Tr. 134-39.

[3] Mills testified that she was handed the letter on April 21, and Jt. Ex. 4 has a handwritten entry -- "4/21 DM" -- but the discrepancy in dates is not material.

immediately found that the Agency no longer allowed her to perform Union representational functions except for two hours a day. Tr. 39, 54.

In response to the Agency's letter to Mills, Union President Anderson contacted Agency representatives, and as a result of those discussions the Agency agreed to delay Mills's return to her Health Technician job from May 3 to May 17. Tr. 82-83; Jt. Ex. 5. Anderson also submitted two bargaining requests. First, she demanded that the Agency bargain over the change in "the practice of Ms. Mills being granted up to 40 hours per week of official time since 2008[,]" which Anderson argued had become a condition of Mills's employment. Jt. Ex. 5. Second, since the Agency was allowing Mills to work only two hours a day of official time, Anderson demanded bargaining over which two-hour period Mills would perform her official time. GC Exs. 5, 6. Mills requested that her official time be scheduled from 2 to 4 p.m., while her supervisor initially scheduled it from 10 a.m. to noon. Tr. 90-91, 175-76, 209-13; GC Exs. 5, 6. The parties ultimately agreed that Mills could perform her official time from 2 to 4 p.m. Tr. 91, 176, 211.

The Agency and the Union could not reach agreement, however, on the underlying decision to reduce Mills's official time to two hours a day and to require her to work the rest of the day as a Health Technician. When the Agency failed to respond in writing to the Union's May 14, 2010, bargaining request on this matter, the Union notified the Agency on May 21 that it would file an unfair labor practice charge in 15 days, unless the Agency agreed to bargain over the changes to Mills's working conditions. Jt. Ex. 6. The Union also filed a grievance on June 1, 2010, alleging that by ordering Mills to return to her position of record, the Agency violated Article 5 of the Master Agreement,[4] in that it changed the parties' longstanding practice of allowing Mills to work on 100% official time. Jt. Exs. 7, 8. The Agency denied the grievance on September 17, 2010. The Union filed its unfair labor practice charge on June 24, 2010.

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[4] Section 8 of Article 5 of the Master Agreement (executed in 2003) reads as follows:

A. Each VHA local is entitled to at least one Union official with no less than 40% official time. Each VBA and NCS local is entitled to at least one Union official with no less than 25% official time. Where a local represents more than one administration or facility, a Union representative at each administration or facility is entitled to the designated minimum amount of official time. In the case of integrated facilities, a Union representative at each pre-integration facility is also entitled to at least the designated minimum amount of official time.

B. For locals already above the minimum amount of official time described in Paragraph A. in this Section, existing local agreements and past practices regarding official time on the effective date of this Agreement shall continue in full force and effect unless and until the local parties negotiate a change.

C. The minimum amounts of official time described in Paragraph A. in this Section are not intended to limit the amount of official time that can be negotiated by the parties locally.

Jt. Ex. 1 at 11.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel argues that the Agency unilaterally changed Mills's official-time status when it demanded that she return to her Health Technician job on a full-time basis and limited her official time to two hours a day. While the GC recognizes that the 1997 MOU (Jt. Ex. 2) entitles the Local Union's 1st Vice-President to only two hours of official time per day, she submits that the longstanding mutual practice of the parties, allowing Mills to work full-time in the Union office, performing representational duties, established this as a condition of Mills's employment, which could only be changed through negotiations. The GC cites *Dep't of Veterans Affairs Med. Ctr., Muskogee, Okla.*, 53 FLRA 1228, 1240 (1998), and *U.S. Dep't of Labor, Wash., D.C.*, 38 FLRA 899, 908 (1990) (*Labor I*), in support of this argument.

The General Counsel argues that the facts of this case meet the Authority's criteria for a past practice that is binding on the parties. *See, e.g., Dep't of Health & Human Serv., Social Sec. Admin.*, 17 FLRA 126 (1985). Thus, Mills had been working all, or nearly all, of her time since at least 2008 on Union representational duties, with her supervisor's and management's full consent, and she had not performed any Health Technician duties during that time. Not only did Dr. Murray, her supervisor, expressly permit her to report directly to the Union office every day, but she approved Mills's time sheets every pay period and instructed Mills to move her personal things out of the inpatient clinic and down to the Union office. Moreover, Dr. Murray listed Mills as a full-time Union representative on the department's 2007 organizational chart (GC Ex. 4), and Dr. Murray was advised by Kevin Little (who was the hospital's Assistant Chief of Human Resources for several years) that if she continued to allow Mills to work on 100% official time, it would set a precedent and enable it to become a past practice. Tr. 314-24; GC Exs. 7, 8. According to the GC, Article 5 of the Master Agreement permits the parties on a local level to negotiate higher amounts of official time than that which is spelled out in the Master Agreement. This is precisely what happened here at Martinsburg, as local management permitted Mills to work more and more official time between 2003 and 2007, until by 2008 Mills was indeed working full-time as a Union representative. Therefore, if the Agency wished to reduce Mills's official time in 2010 to two hours a day, it needed to negotiate such a reduction with the Union. The GC asserts that the Respondent refused to negotiate over this issue; indeed, the Respondent never even responded to the Union's May 14, 2010, request to bargain – a failure that the GC asserts was a separate and independent unfair labor practice. *See Army & Air Force Exch. Serv., McClellan Base Exch., McClellan AFB, Cal.*, 35 FLRA 764, 769 (1990) (*McClellan AFB*).

Finally, the General Counsel argues that section 7116(d) of the Statute does not bar the Union from pursuing an unfair labor practice charge in this case. Although the Union had previously filed a grievance protesting the reduction in Mills's official time (Jt. Ex. 7), and

that grievance arose from the same set of facts as the ULP charge, the GC asserts that the issues in the two cases were different: in the grievance, the Union claimed that the Agency's action violated Article 5 of the Master Agreement, but in the ULP charge it argues that the Agency violated its duty to bargain under section 7116(a)(5) of the Statute. Since the legal theories of the two matters are different, the ULP charge is not barred by section 7116(d). *See, e.g., U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677, 680-81 (2009) *(McChord AFB)*; *U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 112, 115 (2003) (*Labor II*).

To remedy the unfair labor practices, the GC seeks an order requiring the Agency to return Mills to full-time official time status and to restore any leave that Mills used to perform Union representational matters. It also requests that a notice of the unfair labor practice be posted on bulletin boards at the facility and sent by email to all bargaining unit employees. The GC justifies the use of electronic mail for the notice, because that is the method that the Agency most commonly uses to communicate with its employees.

Respondent

The Respondent asserts that Ms. Mills was entitled to two hours of official time per day, plus any additional "reasonable time . . . for representational functions[,]" as spelled out in Joint Exhibit 2, and that this is what Mills was, in fact, given. The Agency denies that there was a past practice of permitting Mills to work full-time on official time, but more fundamentally, the Agency argues that the parties' written agreements do not permit the establishment of such past practices on the subject of official time.

On this latter point, the Respondent notes that there are three documents addressing the subject of official time for Union representatives: Joint Exhibits 1, 2 and 3. Joint Exhibit 1, the nationwide Master Agreement, provides for official time in Article 5, Section 8 (as described in note 4, *supra*). Although acknowledging that Section 8(C) permits the parties to negotiate higher amounts of official time on a local basis, the Respondent argues that Section 8(B) gives binding effect only to past practices that were in existence on November 28, 2003. Therefore, the Agency recognizes that it is obligated to honor the official time agreements negotiated locally in 1997 and 2001 (Joint Exhibits 2 and 3, respectively), but it interprets Section 8 as implicitly prohibiting the parties from creating any *future* past practices regarding official time. Instead, it insists that binding official time practices after 2003 could only be created by negotiations and written agreement. Thus the increase in Mills's official time after 2003, which was never sanctioned by any written agreement between the parties, cannot override the express language of the contract. The Agency invokes the "covered by" doctrine as well as the contractual language of Article 5, Section 8 to justify its refusal to negotiate with the Union regarding Mills's official time.

The Agency also denies that a practice was ever established in which Mills was permitted to work full-time as a Union representative. Citing the definition in *Labor I* of a past practice, 38 FLRA at 908, the Agency argues that the evidence does not support the Union's claim that Mills had been working all of her hours as a Union representative for

several years. Rather, Mills's Leave Used Summary (GC Ex. 2) for 2009 and 2010 demonstrate that Mills must have worked in her Health Technician job at least 140 hours between January and May of 2010, and at least 300 hours in 2009. Since GC Ex. 2 lists every day, or portion of a day, that Mills was on official time (reflected as "Authorized Absence") and leave, counsel for the Agency infers that any hours not so attributed must have been hours that Mills worked as a Health Technician. Those hours worked as a Health Technician demonstrate, in the Agency's view, that there was no consistent practice over a significant period of time of Mills working entirely as a Union representative. Moreover, Respondent argues that Union President Anderson's testimony on the issue of past practice was not credible.

In its Answer to the Complaint in this case, the Respondent also asserted that the grievances filed by the Union on the same issues as the ULP charge barred the pursuit of the charge. GC Ex. 1(d). Although the Respondent did not cite this defense in its opening statement at the hearing, or in its post-hearing brief, I will consider it as a preliminary issue in my analysis below.

Analysis

Section 7116(d) of the Statute Does Not Bar the Unfair Labor Practice Charge

Section 7116(d) of the Statute provides that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures." Citing the legal standard that has long been applied, the authority stated in *McChord AFB*, 63 FLRA at 679:

> In order for a ULP charge to be barred under § 7116(d) by an earlier-filed grievance: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the ULP; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same. [citation omitted].

See also Fed. Bureau of Prisons, 18 FLRA 314, 315 (1985). Each prong of the test must be met for the ULP to be barred. *Olam Southwest Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 802 (1996) (*Olam*). The most commonly litigated prong is the first one, and in such cases, it must be determined whether "'the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar.'" *Id.* at 801-02.

In this case, the Union filed a grievance at the Step 2 level on June 1, 2010.[5] Jt. Ex. 7. The grievance protested the memo given to Mills "instructing her that she was to return to her position of record on May 3, 2010. . . . NAGE grieves this action was a

[5] It is not clear whether this grievance was previously filed at the Step 1 level, but that is not material to the resolution of this case.

violation of the Master Agreement Article 5. Ms. Mills had been using 100% of official time for over 2 years." *Id.* The Union's unfair labor practice charge, filed on June 24, 2010, alleged (among other things) that the Agency violated section 7116(a)(1) of the Statute "by interfering with and restraining the rights of [Anderson and Mills] with respect to working conditions, official time, and travel time." GC Ex. 1(a) at 2. The charge further alleged that the Agency violated section 7116(a)(5) "by failing to consult in good faith with the local union" before changing Mills's working conditions regarding official time, and it cited the same memo[6] to Mills that it had cited in the grievance. *Id.* It is clear, therefore, that the grievance was filed before the ULP charge, and that both the grievance and the charge arose from the same set of factual circumstances (i.e., the Agency's instruction to Mills that she resume working as a Health Technician and reduce her amount of official time). The crucial issue is whether the theories advanced by the Union in the grievance and the ULP were substantially the same.

On their face, the two allegations are distinct and different, and closer analysis supports that impression. As noted above, the grievance focused on an alleged violation of Article 5 of the Master Agreement, while the ULP charge focused on alleged violations of the Statute, most particularly the Agency's refusal to "consult in good faith with the local union." *Compare* Jt. Ex. 7 *and* GC Ex. 1(a) at 2. The portion of Article 5 relevant to our case is Section 8, whose text was quoted in note 4, *supra*. In the "Resolution Desired" portion of the grievance, the Union asked that the Agency "[r]eturn Ms. Mills to the past practice and agreement of her using 100% of official time for representational purposes for the bargaining unit." Jt. Ex. 7. In light of Section 8(C)'s language permitting the parties locally to negotiate higher amounts of official time than the minimums set in the Master Agreement, and requiring the continuation of such locally-negotiated official time practices in certain circumstances, it is clear that the Union believed (correctly or not) that the Master Agreement required the Agency to continue Mills on 100% official time. Union President Anderson confirmed this in her testimony, saying "the grievance was based – I based it on that Article 5 of the contract. The unfair labor practice I based on the fact that I requested to bargain and they didn't come back and bargain with me." Tr. 292. When asked what aspect of Article 5 was violated, Anderson said, "Article 5, Section B[ ]" (*Id.*), and she then went on to read the portion of Section 8(B) requiring the continuation of existing past practices regarding official time. Tr. 292-93.

When asked why she filed the ULP charge, Anderson testified, "Because the unfair labor was about the moving her back up there and not negotiating it. They have the right to assign work but if they change their working conditions, they have an obligation to negotiate the change and the impact it would have." Tr. 296.

The Union's theories in pursuing the grievance and the ULP do share some common themes: the Union contends in both that there was a binding past practice of allowing Mills to work on 100% official time, and that this practice could not be changed without

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[6] As discussed in note 3, *supra*, the parties sometimes refer to the date of Loy's letter to Mills as April 21, 2010, and sometimes as April 26.

negotiating. But the grievance contends that the Agency's actions violated Article 5 of the Master Agreement, while the ULP contends that the same actions violated the Agency's duty to bargain under section 7116(a)(5) of the Statute. This is not simply a case of putting a different label on the same package: the merits of the grievance will depend on the meaning of Article 5, an issue that is separate and distinct from the Agency's statutory duty to bargain. Conversely, when the Authority and an ALJ are asked, in the ULP proceeding, to determine whether the Agency violated the Statute by changing Mills's official time status, they do not need to interpret Article 5 of the Master Agreement. Thus the theories advanced by the Union in the two cases are different.

In *McChord AFB*, the Authority held that while the ULP charge (alleging that a supervisor made anti-union comments during a meeting discussing an employee's proposed suspension) stemmed from the same factual circumstances as an earlier grievance (alleging that the suspension violated a contractual provision prohibiting coercion of employees), they rested on different legal theories for purposes of section 7116(d). The Authority noted that it "has held, in a variety of circumstances, that a ULP alleging a violation of the Statute raises a sufficiently distinct theory from a grievance alleging a violation of a contract even when both matters arise from the same facts." 63 FLRA at 680 (citation omitted). It cited, in this regard, its decisions in *Labor II, supra*, 59 FLRA at 115; *U.S. Dep't of Veterans Affairs Med. Ctr., N. Chicago, Ill.*, 52 FLRA 387, 392 (1996)(*VA Chicago*); *Olam*, 51 FLRA at 803; and *AFGE, Nat'l Council of EEOC Locals No. 216*, 49 FLRA 906, 914 (1994).

The *VA Chicago* decision is particularly applicable to our case. There, the union first filed a ULP charge alleging that the agency had changed the criteria for issuing performance awards to a group of employees without notifying the union or giving it a chance to bargain; a grievance was later filed, alleging that the denial of awards to these employees violated a contractual requirement that awards be distributed in a fair and equitable manner. Thus, in both the *VA Chicago* case and ours, the alleged violation of the Statute involved a refusal to bargain over a change in conditions of employment – a change which, in both cases, also arguably violated the CBA. *See also Ass'n of Civilian Technicians*, 55 FLRA 474 (1999), where both the ULP charge and the grievance alleged a failure to bargain over a change in employee duties, but the Authority held that the grievance involved only a contractual duty to bargain and the ULP asserted a statutory duty to bargain. *Id.* at 475. These cases stand in contrast to *AFGE, Local 1917*, 52 FLRA 658 (1996), where the Authority held that section 7116(d) barred a grievance because both the grievance and the ULP alleged that the agency's unilateral change in the employees' dress code violated the agency's duty to bargain under Article 9 of the CBA. Thus, while the ULP further alleged that the agency's refusal to bargain violated the Statute, it had expressly raised the very same contractual provision as the grievance; therefore, relitigation of the same issue was improper. *Id.* at 663-64. In our case, as in *VA Chicago*, and unlike the facts of *AFGE, Local 1917*, the grievance asserted a contractual violation that was not asserted in the ULP charge. While the grievance and the ULP both claimed that there was a binding practice of allowing Mills to work on 100% official time, the grievance was based on the language and meaning of Article 5 of the contract, an issue the Union did not raise in its ULP charge. Accordingly, we can proceed to a consideration of the merits of the complaint.

The Respondent Unlawfully Changed Mills's Conditions of Employment

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a *de minimis* effect on conditions of employment. *See, e.g., U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009). The extent to which an agency is required to bargain depends on the nature of the change. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (*Bastrop*). For instance, a union may be entitled to negotiate over the actual decision, in other words the substance of the change; *see, e.g., Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 35 FLRA 153, 155 (1990). If, on the other hand, an agency's decision constitutes an exercise of a management right under section 7106(a), the decision itself may not be negotiable, but the agency may nonetheless be required to negotiate over the impact and implementation of that decision; *see, e.g., Bastrop*, 55 FLRA at 854-55.

In this case, Ms. Mills was ordered to return to her "official position of record" as a Health Technician. Jt. Ex. 4. This changed her conditions of employment in two principal ways: it changed her job from providing Union representation most (or all) of the day to working as a Health Technician most of the day, and it significantly reduced the amount of official time she worked. Insofar as the Agency sought to reassign Mills to her prior job as a Health Technician, it was exercising its right, pursuant to section 7106(a)(2), to assign and direct its employees. If this were the extent of the Agency's decision, the Union would simply have the right to negotiate over the impact and implementation of the decision. But the most contentious aspect of the change, and the one that was the focus of the hearing, was to the amount of official time that Mills performed, and the manner and procedures for her use of official time. Although the April 26 letter did not mention anything about Mills's official time, it became immediately evident when Mills reported to her supervisor that the Agency was permitting her to work on official time only two hours a day. Tr. 39, 54.

The Authority has long held that the use of official time is a fully negotiable condition of employment. *Nat'l Treasury Employees Union*, 52 FLRA 1265, 1282-87 (1997). Although an employee's use of official time necessarily limits management's right under section 7106(a) to assign work (which is precisely what the Respondent was doing in ordering Mills to return to her position of record), the Authority has long held that the official time provisions of section 7131 carve out an exception to management's rights. Accordingly, "'the use of official time under section 7131(d) – that is, its amount, allocation and scheduling – is negotiable absent an emergency or other special circumstances . . . .'" *Nat'l Treasury Employees Union*, 45 FLRA 339, 347 (1992), quoting *Military Entrance Processing Station, L.A., Cal.*, 25 FLRA 685, 689 (1987); *see also AFGE, Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1530-31 (D.C. Cir. 1986). In the context of unfair labor practice proceedings, the Authority has applied this principle to prohibit an agency from changing practices or conditions relating to official time, unless the agency first notifies the union and negotiates the change, as well as its impact and implementation. *U.S. Patent & Trademark Office*, 39 FLRA 1477 (1991) (*PTO*); *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.*, 36 FLRA 567 (1990).

The Respondent contends that it did not change anything regarding Mills's conditions of employment, but this idea cannot be seriously entertained. An examination of the evidence regarding Mills's job before and after May 2010 reveals a stark contrast. Since as early as 2006, Mills had been working the vast proportion of her time as a Union representative, not as a Health Technician. Starting in February 2008, she stopped reporting to the inpatient clinic and began reporting every morning directly to the Union office, where she spent the rest of the day. At the Medical Director's request, she moved her personal belongings from the inpatient clinic to the Union office in 2008. Starting in May 2010, however, that all changed. From then on, she was required to work the entire day as a Health Technician, except for a two-hour period for her Union work, or unless she was otherwise excused to perform representational duties. She needed to read policy manuals for a week, just to reacquaint herself with the duties and procedures of the job, which had changed since she had last performed them. Tr. 121-23. She was also expected to rotate among the various departments where Health Technicians worked, rather than working entirely with the hospitalists as before. Tr. 122. In other words, the nature of the work she performed after May 2010 was radically different from what she had been doing for at least four years leading up to May 2010. The very language of the Agency's April 26, 2010, letter to Mills is the best evidence that it was effectuating a change: by ordering Mills to "return to your official position of record[,]" the Agency signified that Mills would be performing a different job than she had been performing. Jt. Ex. 4. Ordering an employee to perform a different job is, by all measures, a significant change to her conditions of employment. *See, e.g., U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 89-90 (2009).

While the Agency may be correct that Mills's official time had not been changed (from the two hours a day she was permitted by Joint Exhibit 2) "by any written agreement or other document" (Resp. Brief at 10-11), it ignores the extensive testimony that Mills had been working all, or nearly all, her time as a Union official, and that managers understood she was a full-time Union representative. It also ignores the time and attendance records corroborating this testimony. Perhaps most significant is that the Respondent chose not to call any management witnesses (such as Dr. Murray) who were familiar with Mills's work patterns between 2003 and 2010, and who could have disputed the testimony of Mills and Anderson. I must infer that if Dr. Murray had testified, she would have corroborated those witnesses. The evidence compels me to accept the factual premise that between 2006 and 2010, Mills worked primarily as a Union representative and that this was accepted and approved by management at the Medical Center.

Let us examine the evidence regarding the amount of official time Mills performed between 2003 and 2010. As noted above, the MOU negotiated in 1997 between officials of the Medical Center and the local Union entitles the First Vice-President to two hours a day (that is, 25%) of official time. Jt. Ex. 2. As early as 2003, the year Mills became First Vice-President, she had 796.5 hours of official time. GC Ex. 3. Since a full-time employee can normally work a maximum of 2080 hours in a year, this represented 38% of her time. However, she also had 32 hours of other authorized absences, 150 hours of annual leave,

94.5 hours of sick and family leave, and .5 hours of leave without pay. GC Ex. 2.[7] When these non-working hours are subtracted from 2080, we can see that Mills was on official time 44% of the time she was at the hospital in 2003. In 2004, her 939 hours of official time constituted 45% of her total hours, but when her sick, family, and annual leave are subtracted, she was on official time 55% of her hours at the hospital. In 2005, these two totals were 48% and 66%; in 2006, 70% and 83%; in 2007 (when she was injured for much of the year), 41% and 73%; in 2008, 66% and 81%; and in 2009, 59% and 71%. For the first four months of 2010, we do not have a breakdown of each type of leave, but GC Ex. 3 indicates that she was on official time for 441.5 out of 693 possible hours, or 64%.

In order to understand Ms. Mills's official time status during these years, it makes no sense to consider the hours that she was not at the hospital – whether her absence was due to sick leave, annual leave, or other types of authorized absence. Thus, it is the latter number in the sets of figures I quoted above that most accurately reflects what portion of Mills's available work day was devoted to Union-related work: 44% in 2003, 55% in 2004, 66% in 2005, 83% in 2006, 73% in 2007, 81% in 2008, and 71% in 2009. These figures generally confirm the testimony of Mills and Anderson -- that Mills gradually worked more and more official time in the years after she became First Vice-President, until she was working close to full-time as a Union representative and very little as a Health Technician. Although the contract entitled her only to two hours a day of official time, she was working six or more hours a day, on average, from 2006 through 2009.

Throughout its history, the Authority has recognized that "parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining." *Dep't of the Navy, Naval Underwater Sys. Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980) (citing "well established" precedent under Executive Order 11491). An agency may not unilaterally change a condition of employment established through past practice, even if the practice differs from the express terms of the parties' collective bargaining agreement; *see Def. Distrib., Region West, Lathrop, Cal.*, 47 FLRA 1131, 1133-34 (1993). Where a past practice establishes a condition of employment, that condition is incorporated into the parties' collective bargaining agreement. *NTEU, Chapter 297*, 60 FLRA 731, 734 n.4 (2005). For this reason, the Respondent's reliance on the Master Agreement and the 1997 MOU does not advance its argument that it could unilaterally return Mills to a two-hour-a-day official time schedule, or that the written agreements "cover" the subject of official time.

In order for a condition of employment to become established through past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 48 (2012); *DOL I*, 38 FLRA at 909. I conclude, from the evidence in the record, that a practice

[7] In GC Ex. 2, Ms. Mills's annual totals for each type of leave are shown at the end of each year.

had become established in which the Agency permitted Mills to spend nearly all of her working time as a Union representative, on official time. Mills reported to the Union office each day and primarily worked there, going to the inpatient clinic occasionally to provide administrative support to the hospitalists or to notarize documents. Tr. 66-71, 137-39. This practice had been followed consistently since early 2008, and to a large extent for the two years prior thereto (although prior to 2008, Mills did report to the inpatient clinic every morning and perform some work as a Health Technician). Moreover, the practice was endorsed by management at the Medical Center, since Dr. Murray approved Mills's official time requests and time-attendance sheets every pay period.[8] The evidence proves that Mills was permitted, over a long period of time, to work on official time for roughly 75% of her working hours, but it does not establish that Mills was permitted to spend 100% of her time on official time.

Since I will be ordering the Agency to return to the *status quo ante* in regard to Mills's duties and official time, I want to be as precise as I can in identifying those working conditions that must be reinstated. Both the General Counsel and its Union witnesses were inconsistent at the hearing in identifying Mills's status: at times they would refer to Mills as working 100% official time, and at other times they would say that she worked nearly full-time on official time. This ambiguity is at least partly a reflection of the less-than-complete precision of the time and attendance records and of witnesses' memory. But just as the time and attendance records (GC Ex. 2) show that Mills was spending approximately 75% of her working hours on official time, they also leave a gaping hole in establishing what Mills did during the other 25% of her time. Counsel for the Respondent questioned Mills as to what she did in the hours that were not listed as "authorized absence" or any type of leave, but Mills could not say with any certainty. Tr. 57-65. She suggested that she might have accidentally failed to submit a leave or official time request for those time periods (Tr. 59), but it is implausible that she would have made such mistakes for 300 or more hours per year, especially since she was submitting such otherwise-detailed records. Some of these hours may also have been for holidays or continuation of pay from a work injury, or for time she served on hospital committees or while attending training. Tr. 41-45, 49-51, 114-20. Respondent argues that all hours that are not attributed to a specific use in GC Ex. 2 must be presumed to be hours Mills was performing her duties as a Health Technician, but that is not at all clear either. Ms. Mills repeatedly testified that she does not believe she performed **any** Health Technician work after February of 2008 (Tr. 26-27, 64, 69), but she could not explain what she did in the 322 hours in 2008 or the 373 hours in 2009 that are not attributed to leave or authorized absence. The Respondent could have more convincingly rebutted Mills's testimony by having Dr. Murray, Ms. Pardo, or some other supervisor testify that they observed Mills in the inpatient clinic performing Health Technician duties during this time, but no such testimony was forthcoming. In light of the gaps in proof from both sides on this point, my best conclusion is that Mills did not perform Health Technician work with any

[8] The facts and the outcome of our case are strikingly similar to those presented in *Dep't of the Air Force, Luke AFB, Ariz.*, DE-CA-11-0185 (OALJ 12-11, March 22, 2012) (no exceptions filed). Although such Administrative Law Judge decisions have no precedential significance, Judge Jelen's reasoning in that case is equally applicable here. *See* 5 C.F.R. § 2423.41(a).

regularity, but that she did occasionally assist the hospitalists when requested to do so, and that she also notarized documents as needed throughout the hospital, attended training, and served on committees in both her Union capacity and as an employee in the Medical Service of the hospital. Thus I do not believe that she can be characterized as a full-time Union representative, or that there was a past practice of her working on 100% official time.[9]

This leaves Mills, the Union, and the Respondent with a very ambiguous set of working conditions, but this ambiguity is a function of their own choice, actions and inaction. The record reflects that Ms. Mills steadily worked more and more official time over the years, and that Medical Center management approved her official time requests and attendance reports throughout this period. Furthermore, it appears that the efforts by Mills's supervisor, Dr. Murray, to work out a more specific arrangement with the Union regarding Mills's official time were resisted by higher management at the Medical Center. The testimony of Kevin Little, who currently works for a different division of the Department of Veterans Affairs in Martinsburg, but who previously served first as Union President[10] and then as Assistant Chief of Human Resources for the Respondent, is significant in describing the environment in which Mills gradually worked more and more official time. Tr. 307-30. While Little was working in the Human Resources office, Dr. Murray had spoken with him several times about her dissatisfaction with Mills working nearly full-time doing Union work while occupying an FTEE as a Health Technician. Tr. 313-15, 319-22. During that period between roughly 2005 and 2007, the Union took the position that Mills needed more official time in order to perform her representational duties, and management advised Murray that it was unwilling to confront the Union on the issue or to negotiate a resolution of the problem. Tr. 321, 322, 329. To make up for the time Mills was working for the Union, Murray wanted to get hospital management to approve another FTEE for a Health Technician, but management refused to approve the additional position and advised Murray that she would have to deal with the official time issue on her own. Tr. 314, 320, 329. Little advised Murray that the extent of Mills's official time was establishing a precedent that could bind the Agency. Tr. 323-24.

While I recognize that much of Mr. Little's testimony regarding Murray's comments to him and her interactions with upper management are hearsay, I accept it for the limited purpose of corroborating, and providing context for, other evidence that shows the extent of the past practice concerning Mills's official time. Even without Little's testimony, it is quite clear that one of the conditions of Mills's employment was that she was allowed to spend more than 75% of her time at the hospital working, on official time, as a Union representative, and that she rarely, if ever, was required to work as a Health Technician

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[9] I do not attach any probative value to GC Ex. 4, an unsigned 2007 organizational chart of the Medical Service, which lists "1.0 FTEE" (full-time employee equivalent) to a "Union Representative" who is also listed as a Health Technician. Clearly, this was a reference to Ms. Mills, but because it was unsigned and not properly authenticated, it does not appear to have been officially approved, and its meaning cannot reliably be ascertained

[10] He negotiated the 1997 memorandum of understanding (Jt. Ex. 2) that entitles the First Vice-President to work two hours a day on official time.

between February 2008 and May 2010. Little's testimony suggests that management recognized, as early as 2005-2007, that these facts were creating a past practice that could become binding, and that the Agency consciously chose not to negotiate a different arrangement with the Union.

Thus, when I order the Agency to return Ms. Mills to the *status quo* which existed in early 2010, the parties will be returning to a situation in which Mills was working predominantly as a Union representative, on official time, but in which she had no specific allotment of official time. The historical pattern of Mills working between 71% and 83% of her working time on Union work between 2006 and 2009 will serve as a baseline for the parties going forward, but because the parties had not established any fixed or predictable amount of official time (other than the two hours a day that had long become obsolete), they cannot expect me to provide one. They can, of course, choose to negotiate a better solution to the official time situation, but that is a decision for the parties to make.

After the Respondent gave Ms. Mills the April 26 letter, which changed her working conditions as outlined above, the Union twice requested that the Agency bargain over the changes. Jt. Exs. 5, 6. According to Union President Anderson, the Agency never responded to the Union's request, and there is no evidence in the record reflecting that the Agency responded to either request. Tr. 208-09, 271. The Agency did agree to delay the starting date of Mills's new position from May 3 to May 17 (Tr. 87-88, 271-73), and at some time after May 17, Agency officials discussed and worked out an agreement with Anderson as to the precise two hours a day that Mills would use her official time. Tr. 39, 89-91, 175-76, 209, 211-13; *see also* GC Exs. 5, 6. Thus, the evidence indicates that while the Agency engaged in limited discussions over at least some aspects of the impact and implementation of the April 26 letter, it neither responded to the Union's requests to bargain over the substance of the letter nor engaged in any such bargaining. As I have already stated, the changes to the amount of official time Mills was permitted were substantively negotiable; accordingly, the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing those changes without appropriate negotiation. Moreover, the Respondent's failure to even respond to the Union's written demands to bargain constitute an independent violation of section 7116(a)(1) and (5). *U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 55 FLRA 892, 900-01 (1999); *McClellan AFB*, 35 FLRA at 769.

Remedy

As I indicated earlier, the Respondent's refusal to bargain before changing Mills's official time arrangements requires that the Agency reinstate the conditions that existed before April of 2010. When an agency has an obligation to bargain over the substance of a matter, and fails to meet that obligation, the Authority orders a *status quo ante* remedy in the absence of special circumstances. *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 53 FLRA 1664, 1671 (1998). The Respondent does not cite any special circumstances in this case that would support the denial of *status quo ante* relief, nor does the record otherwise reveal any special circumstances. Among other things, I will require the Respondent to reinstate the official time arrangements for Ms. Mills that were in

effect on and before April 1, 2010, which permitted Mills to perform Union representational duties, on official time, for most of her working hours. Any modification of the amount or arrangements for the use official time must be preceded by notification to the Union and bargaining, if the Union so requests.

Ms. Mills may also be entitled to make-whole relief, in the form of restoration of leave, if she used leave after May 17, 2010, to perform duties that otherwise would have been performed on official time. *See PTO*, 39 FLRA at 1483. In that same decision, the Authority further stated: "We have specifically acknowledged that when official time authorized consistent with section 7131(d) is wrongfully denied and the covered activities are thereafter performed on nonduty time, section 7131(d) of the Statute entitles the employee to be paid at the appropriate straight-time rate for the amount of time that should have been official time." *Id.*; *see also U.S. Dep't of Commerce, NOAA, Nat'l Weather Serv.*, 36 FLRA 352, 358 (1990). The Respondent objects to the restoration of leave here, because there has been no proof that Mills used leave for Union work, but the Authority has made it clear that factual issues such as these should be resolved during compliance proceedings, rather than at the hearing. *U.S. Dep't of Justice, Immigration & Naturalization Serv., L.A., Cal.*, 59 FLRA 387, 389 (2003) (*INS LA*).

It is customary that when an agency has been found to have committed an unfair labor practice, the agency is required to post a notice to employees regarding its past and future conduct. But in addition to the traditional posting of such a notice on bulletin boards around the Medical Center, the General Counsel argues that the Respondent should also be ordered to electronically distribute a copy of the notice to all bargaining unit employees. Citing an exchange between Respondent's counsel and Union President Anderson at the hearing regarding the Agency's use of email,[11] the GC asserts that email should similarly be used to disseminate the ULP notice to employees.

The short answer to the GC's request is that it has not met its burden of demonstrating that posting a notice in the traditional manner would be inadequate to accomplish the purposes of a notice posting, or that email dissemination will better serve those purposes. The long answer is that while the time and conditions may be ripe for reviewing the "tradition" of using bulletin boards as the method for disseminating ULP notices, that is a policy decision for the Authority to make. While the Authority has at least suggested that it might reconsider its notice-posting policy, it has not yet done so.

In *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Florence, Colo.*, 59 FLRA 165, 173 (2003) (*FCI Florence*), the Authority stated that disseminating a notice through the agency's email system was a "nontraditional remedy" and found that such an action was "not necessary to serve the goals of the notice remedy." It reaffirmed the standard for crafting nontraditional remedies:

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[11] Anderson acknowledged that while "a large proportion of communication within the VA is done through e-mail[,]" she preferred to receive written notification of certain actions. Tr. 274. Respondent's counsel suggested that Anderson was "creating a major burden for the medical center by saying that you will not communicate with them through e-mail[.]" *Id.*

> [A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. These questions are essentially factual. As such, they should be argued and resolved in essentially the same fashion as other factual questions brought before us. As with other factual questions, the General Counsel bears the burden of persuasion, and the Judge is responsible for initially determining whether the remedy is warranted.

F.E. Warren AFB, Cheyenne, Wyo., 52 FLRA 149, 161 (1996) (*Warren AFB*) (citation and internal quotations omitted). The Authority has also explained that the posting of a notice after a ULP violation serves the dual purposes of demonstrating to bargaining unit employees that the respondent recognizes and intends to fulfill its statutory obligations, and that the Authority will vigorously enforce those statutory rights. *Nat'l Guard Bureau*, 57 FLRA 240, 245 (2001). The burden, therefore, is on the GC here to show, on the record, that posting the notice only on bulletin boards will not adequately communicate those dual messages to employees, and that combining a bulletin board posting with email dissemination will better accomplish those purposes.

It might be reasonable to stop here momentarily and ask why the GC should even need to bother proving that disseminating the notice in two ways is likely to be more effective than disseminating it in only one way. That is essentially what the GC seeks: not to displace the "traditional" bulletin board posting, but to supplement it with an email sent by the Respondent (who has been found to have violated the Statute) to all employees in the bargaining unit. Is it, after all, a question open to reasonable dispute that using two means of communicating a message will be more effective than using one means? Or is the use of email to express this message such a significant break with the past, or so unduly burdensome, that it requires extraordinary justification? I am tempted to answer both of these questions in the negative, but the case law seems to suggest the opposite.

In *FCI Florence*, the GC sought an order directing the agency to post notices on its bulletin boards, as well as on "the television monitors and electronic mail system normally used to disseminate information to employees[.]" 59 FLRA at 169. Without distinguishing one of these supplemental forms of posting from the other, the Authority held that they "constitute a non-traditional remedy." *Id.* at 174. It found that they were "not necessary to serve the goals of the notice remedy [ ]" and that the "traditional posting" (i.e. on bulletin boards) "will serve the stated goals." *Id.* at 173. While the Judge described in some detail the evidence regarding the agency's methods of communicating with employees (*id.* at 182), neither the Judge nor the Authority engaged in any lengthy analysis explaining why they believed the additional posting methods were necessary or not. It might be expedient to distinguish our case from *FCI Florence* by noting that in the latter case the GC sought to disseminate the notice **both** by email and on the television monitors, but I cannot see how the

use of the monitors is significantly different from email. Rather, the determinative factor for the Authority in *FCI Florence* was its finding that the use of email to disseminate a ULP notice was a non-traditional remedy. Because the Authority interpreted *Warren AFB* to require special factual justification for any non-traditional remedy, it required such proof to justify email dissemination.

It is worth noting here that the General Counsel has been seeking to establish email notice posting as part of the arsenal of "traditional" ULP remedies now for more than four years. I held a hearing in late 2009 in which this identical issue was litigated, and at that hearing, the GC offered extensive evidentiary proof as to how that respondent communicated with its employees, and how the employees received work-related news and other information. The GC demonstrated to my satisfaction that employees rarely used, or even saw, the information posted on bulletin boards, and that both the agency and employees used email as their main source of important information. As a result, I found in that case that the GC had met its burden of persuasion on the points set forth in *Warren AFB* and *FCI Florence*: that a bulletin board posting alone would not accomplish the purposes of a notice posting and that email dissemination was necessary to effectuate those purposes. *DHS, U.S. Customs & Border Prot., El Paso, Tex.*, DA-CA-08-0179 & DA-CA-08-0180 (OALJ 10-03, Jan. 27, 2010) (no exceptions filed).

I also noted in my 2010 decision that while the Authority still considered email notice posting to be a nontraditional remedy, the National Labor Relations Board was in the process of rethinking its stance on the same issue. Incorporating email posting as part of the standard process of posting notices was first advocated in a dissenting opinion in *Int'l Business Machines Corp.*, 339 NLRB 966, 967 (2003) (dissenting opinion of Member Walsh). The position drew additional (but still not definitive) support in *Nordstrom, Inc.*, 347 NLRB 294, 294-95 n.5 (2006); and *Valley Hospital Med. Ctr., Inc.*, 351 NLRB 1250, 1250 n.1 (2007).

Subsequently, the Board's evolution on the issue of electronic notice posting culminated in its adoption of a new policy in *J. Picini Flooring*, 356 NLRB No. 9 (2010). After issuing a notice inviting interested parties to submit briefs on the issue, the Board modified its policy and held that respondents who have been found to have committed a ULP "should be required to distribute remedial notices electronically when that is a customary means of communicating with employees or members." *Id.* at 1. Such electronic distribution should be effectuated on the respondent's intranet or internet site and by email, depending on what electronic means of communication are customarily used by the respondent. The Board further ruled that these latter questions should be resolved at the compliance stage of the case, not by the ALJ or the Board. *Id.* at 3-4.

Since its *FCI Florence* decision, the Authority has ordered email dissemination of a ULP notice in one case, but it limited its holding to the "facts and circumstances" of that case. *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 50 n.4 (2012) (*DHS El Paso*).[12] After noting the parties' positions regarding traditional and non-traditional

[12] This is not the same case that I decided in 2010 and discussed above, although the parties are the same.

remedies, the Authority stated, "[a]ssuming without deciding that e-mail dissemination of the notice is a non-traditional remedy, we find that the present facts and circumstances demonstrate that it is appropriate here." *Id.* The Authority found not only that the respondent agency used its computer system as the primary means of communicating with employees, but also that the statutory violation being remedied was the agency's refusal to bargain over computer and email access for employees. *Id.* Accordingly, email dissemination of the notice was "reasonably necessary and would be effective to recreate the conditions and relationships with which the [ULP] interfered," and would "effectuate the policies of the Statute, including the deterrence of future violative conduct." *Id., quoting Warren AFB*, 52 FLRA at 161.

It appears, therefore, that while the Authority may be open to a re-thinking of its policy regarding the posting of notices, it has not yet done so. And while there is much to be said for deferring resolution of the mechanics of notice-posting to the compliance process,[13] the current case law requires the GC to demonstrate at the hearing that posting on bulletin boards alone is inadequate to accomplish the purposes of a ULP notice and that electronic dissemination of the notice is also necessary to accomplish those purposes. In my view, the key factor in determining whether a notice serves the dual purposes identified in *National Guard Bureau* is whether the message is effectively communicated to the maximum possible number of bargaining unit employees.[14] Thus, if the GC is to demonstrate that a "traditional" bulletin-board posting is less effective than dissemination of the notice by email, it should offer evidence, for example, that a significant number of employees do not see or read information placed on the bulletin board, and/or that significantly more employees will read the notice if it is sent by email.

The GC has not met its burden on this issue. On the contrary, I have spent far more time and effort in my decision, weighing the issues involved in fashioning an appropriate remedy, than the GC did during or after the hearing. The hearing transcript is almost totally devoid of any testimony regarding how the Respondent's bulletin boards are used by employees, or how the Respondent's email system is used by the employees. The only reference to this point in the record is the brief acknowledgement by Ms. Anderson that the Agency uses email for "[a] lot of communication". Tr. 274. This does not show the extent to which email is used, nor does it show the relative effectiveness of email and bulletin board notices in communicating with the entire bargaining unit. (Ironically, the Union President herself does not like to use email for official notices.) If the GC seeks to convince me or the Authority that ULP notices should be disseminated electronically – either in one case or in all future cases – it must actually offer persuasive evidence (as it did in the 2009 *DHS El Paso* hearing), and not simply ask for the remedy as an afterthought.

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[13] See the Authority's discussion of this very point in *INS, L.A.*, 59 FLRA at 389.

[14] Unlike the situation in *DHS El Paso*, 67 FLRA at 50 n.4, the Respondent's unfair labor practice in our case (unilaterally changing an employee's official time) is not directly related to the Respondent's methods of communicating with employees. Thus there is no special reason here to relate the remedy for the ULP to the Respondent's email system.

I am sympathetic to the notion that requiring electronic dissemination of these notices does not require a major leap in federal administrative jurisprudence. The NLRB's words in *J. Picini Flooring* seem equally applicable to FLRA cases:

> [T]he Board's current notice posting language, which requires posting in "conspicuous" places, including *all* places where notices to employees or members are customarily posted, is sufficiently broad to encompass new communication formats, including electronic distribution of remedial notices by email and/or posting on an intranet or the internet if a respondent customarily communicates with its employees or members by any of those means.

356 NLRB No. 9 at 3. The Authority's "traditional" remedial notices have the identical language as NLRB notices, and the Authority has explicitly stated that the legal standard for evaluating ULP remedies under the Statute is the same as that for NRLB remedies. *See Warren AFB*, 52 FLRA at 161; *U.S. Dep't of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 444-45 (1990). The Authority, like the Board, "has a duty to adapt its rules and policies to the demands of changing circumstances." *J. Picini Flooring* at 1 (citation omitted). Communications technology is changing at a far faster pace than federal labor policy, and at the rate we are moving in regard to ULP notices, a change in FLRA policy may not occur until email has (like paper notices and wall-mounted bulletin boards) "gone the way of the telephone message pad and the interoffice envelope." *Id.* at 2. Notwithstanding my personal sympathies, this is a policy decision that must be made by the Authority, not by me. My duty is to evaluate whether the GC has met its burden of persuasion that: (1) a bulletin board posting alone is inadequate to accomplish the purposes of a remedial notice; and (2) email dissemination of the notice is also necessary to accomplish those purposes. Since the GC has offered next to nothing on these points, I cannot recommend such a remedy.

Accordingly, I recommend that the Authority adopt 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 U.S. Department of Veterans Affairs Medical Center, Martinsburg, West Virginia, shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment of bargaining unit employees by reducing the amount of official time of representatives of the National Association of Government Employees, Local R4-78 (the Union), the exclusive representative of certain of its employees, and by changing the procedures for the use of official time by Union representatives, without first notifying the Union and providing it an opportunity to bargain over the decision to change such conditions of employment.

(b) Refusing to respond to requests by the Union to bargain.

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

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

(a) Rescind any changes made in April and May of 2010 which changed the amount of official time that Dale Mills could perform or the procedures for Mills to use official time.

(b) Make Mills whole for the improper reduction of her official time by restoring any leave she used to perform representational activities on or after May 17, 2010, if those activities would otherwise have been performed on official time, but for the changes in official time practices.

(c) Compensate Mills at the appropriate straight-time rate for any representational activities she performed on nonduty time on or after May 17, 2010, if those activities would otherwise have been performed on official time, but for the changes in official time practices.

(d) 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 Medical Center Director, 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.

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

Issued Washington, D.C., January 30, 2014

RICHARD A. PEARSON
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 Veterans Affairs Medical Center, Martinsburg, West Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT unilaterally change conditions of employment of bargaining unit employees by reducing the amount of official time of representatives of National Association of Government Employees, Local R4-78 (the Union), the exclusive representative of certain of our employees, or by changing the procedures for the use of official time by Union representatives, without first notifying the Union and providing it an opportunity to bargain over the decision to change such conditions of employment.

WE WILL NOT refuse to respond to requests by the Union to bargain.

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

WE WILL rescind any changes made in April and May of 2010 which changed the amount of official time that Dale Mills could perform or the procedures for Mills to use official time.

WE WILL make Mills whole for the improper reduction of her official time by restoring any leave she used to perform representational activities on or after May 17, 2010, if those activities would otherwise have been performed on official time, but for the changes in official time practices.

WE WILL compensate Mills at the appropriate straight-time rate for any representational activities she performed on nonduty time on or after May 17, 2010, if those activities would otherwise have been performed on official time, but for the changes in official time practices.

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature) (Medical Center Director)

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, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW, 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.