FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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FEDERAL BUREAU OF PRISONS METROPOLITAN DENTENTION CENTER GUAYNABO CATANO, PUERTO RICO RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AFL-CIO, LOCAL 4052 CHARGING PARTY	Case No. BN-CA-12-0021

Gerard M. Greene
For the General Counsel

Meryl A. White
For the Respondent

Jorge Rivera
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), Part 2423.

On October 27, 2011, the American Federation of Government Employees, AFL-CIO, Local 4052 (Charging Party/Union), filed an unfair labor practice (ULP) charge against the Federal Bureau of Prisons, Metropolitan Detention Center Guaynabo, Catano, Puerto Rico (Respondent/Agency). On August 30, 2012, the Charging Party amended the charge. After conducting an investigation, the Regional Director of the Boston Region issued a

complaint and notice of hearing on August 31, 2012, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to negotiate in good faith with the Union and unilaterally implementing changes in overtime procedures on or about December 18, 2011 before negotiations were completed or at impasse.

A hearing upon the matter was conducted on November 15, 2012, in Hato Rey, Puerto Rico. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses.

In making this decision I have fully considered the briefs filed by the General Counsel and Respondent. Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent unilaterally implemented changes in overtime procedures without bargaining in good faith with the Union regarding the impact and implementation of those changes. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. (G.C. Ex. 1(e)). The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Federal Bureau of Prisons. (G.C. Ex.1 (e)). The American Federation of Government Employees, Local 4052 (Local 4052), is an agent of the Union for the purpose of representing employees at the Metropolitan Detention Center Guaynabo (MDC). (*Id.*).

The MDC maintains care, custody, and control of inmates who are detained pending sentencing or transfer to another institution. (Tr. 25). There are between 185 and 210 bargaining unit employees at the MDC. (Tr. 25). The majority of the bargaining unit employees work in the Correctional Services Department. (Tr. 26, 27). In 2012, the Respondent employed approximately 130 correctional officers. (G.C. Ex. 2). Of these, approximately 97 were available to fill posts over three shifts; the remaining employees included seven on active duty with the military, two on worker's compensation, eleven who cover for the average number of officers on sick leave, ten who cover for an average number of officers on annual leave, and five whose attendance was otherwise unreliable. (G.C. Ex. 2; Tr. 27). All bargaining unit employees are required to have the qualifications to perform custody work in Correctional Services within the institution. (Tr. 26). Non-Correctional Services employees may also perform custody work outside the institution, such as maintaining control over inmate detainees at community hospitals, if they are qualified in Basic Prisoner Transportation. (Tr. 26-27).

The MDC, which began operating in the early 1990s, was designed to house 900 to 1,000 inmates. (Tr. 26). Since the early 2000s, the number of inmates has exceeded the designed capacity and has fluctuated between 1,300 and 1,700. (Tr. 26). A majority of the inmate housing units, which were designed to house 140 inmates, have been overcrowded for years. (Tr. 53, 159). The Union president, Jorge Rivera, testified that he represented the Union in arbitration proceeding FMCS-09-02417 (Tr. 27), in which AFGE Local 4052 took

the position that increased overtime opportunities also increased the number of Custody staff performing security duties, cell searches, pat downs, and lockdowns at MDC Guaynabo. (Tr. 105-06). The arbitrator ordered the Agency to comply with a 2001 settlement whereby a second officer would be assigned and paid overtime when housing unit populations exceeded 150 inmates. (G.C. Ex. 2).

Prior to 2011, the overtime procedures at MDC Guaynabo were administered on an ad hoc basis and were not established in writing. (Tr. 36). Union President Rivera testified that a practice regarding overtime procedures existed from the end of 1994 until 2011. (Tr. 36). During this time, employees volunteered for overtime by phone or in person by means of sign-up sheets in the Correctional Services Department. (Tr. 38-39). There were separate sign-up sheets for hospital escort, outside hospital, suicide watch in the MDC's clinic, and airlift. (Tr. 39-40). The sign-up sheets showed the overtime assignments that were available, including the location of the hospital, the shift, and the day(s). (Tr. 39-42, 151, 154). This pen and paper manual system did not differentiate between Correction Services employees and non-Correctional Services employees; nor did it give preference to one type of employee over the other. (Tr. 121).

When there were no volunteers for an overtime assignment, the administrative lieutenant was provided a list of all staff working the previous shift in order of reverse seniority. (Tr. 129, 263). The employee with the least seniority was on top of the list and was the first person to work overtime. The employee with the most seniority was the last person assigned to work overtime. (Tr. 263). Once assigned overtime, the employee's name moved to the bottom of the list if the assignment exceeded 15 minutes in duration. (Tr. 46). Therefore if a correctional officer had to remain on duty for 15 minutes after his shift ended because he was being relieved by someone who arrived late, the correctional officer was rotated to the bottom of the mandatory overtime list. (Tr. 46). The only employees who were mandated overtime under the old overtime procedures were Correctional Services staff. However, under limited conditions such as annual refresher and firearms training, non-Correctional Services employees were assigned to work overtime. (Tr. 262).

On November 9, 2010, a monthly labor management relations meeting between the Agency and the Union was held. The meeting minutes indicate that the Agency wanted to implement a new computerized overtime roster program. (R. Ex. 2). The minutes further indicate that the Union had spoken to the Computer Services Manager, who stated that a Memorandum of Understanding (MOU) between the Union and Agency was needed before he could request access to program. (R. Ex. 2). The Agency responded that they would write up the MOU to be signed by all parties for the installation of the computerized roster program. (R. Ex. 2). The Union concluded by stating that after they had received training, the computerized program would be implemented. (R. Ex. 2).

On November 22, 2010, an MOU was agreed upon by Ed Serrano, Chief Correctional Services Supervisor, on behalf of MDC Guaynabo, and Mercedes Garcia-Ayala, president of AFGE Local 4052. (Tr. 197; G.C. Ex. 8). The MOU provides in part: "It is mutually agreed that the latest version of the Bureau of Prisons roster program will be installed at MDC Guaynabo. It is further agreed that the American Federation of Government Employees (AFGE) Local 4052 (Union) will receive local training in the use of the program." (G.C. Ex. 8).

In a December 14, 2010, memorandum from Garcia-Ayala to the Warden of MDC Guaynabo, she stated that "future negotiations would be scheduled in order to implement the roster program." (G.C. Ex. 13). The memorandum goes on to declare that "the Union hereby invokes negotiations in the above mentioned issue. The Union also expects Management to hold its proposed issuance of the Overtime Roster Program in abeyance until the completion of such bargaining negotiations sessions until all issues have been approved by both parties in an amicable manner." (G.C. Ex. 13). Two days later in a December 16, 2010, memorandum to the Warden, Garcia-Ayala requested that the training session for the Overtime Roster Program be removed from the schedule until negotiations over implementation were completed. (G.C. Ex. 14).

On September 14, 2011, Associate Warden Angel Motta, the LMR chair, sent a memorandum to new Union president Estevan Lopez asking the Union to submit impact and implementation "affects" for six proposals relating to overtime procedures using the computerized overtime roster program. (G.C. Ex. 5; Tr. 35). The first proposal from management gave Correctional Services employees priority for overtime assignments over non-Correctional Services employees. (G.C. Ex. 5). The second proposal stated that overtime assignments would be rotated and distributed equitably among bargaining unit employees and would be accomplished through the use of the computerized overtime roster program. There would be two separate lists, one for correctional services staff and one for non-correctional services staff. (G.C. Ex. 5). The other proposals mandated each department using overtime to maintain a roster, required employees to provide telephonic contact information, and lastly established that only assignments of overtime lasting two or more hours would result in an employee being moved to the bottom of the mandatory overtime roster. (G.C. Ex. 5).

On September 30, 2011, the Union submitted seven counter proposals to the Agency. (G.C. Ex. 6). The union's first counter proposal called for no differentiation between correctional services and non-correctional services staff. (G.C. Ex. 6). The second counterproposal required the maintenance of two sign-up lists, one using the computerized roster program and one using a pen and paper sign-up sheet located in the administrative Lieutenant's office. (G.C. Ex. 6; Tr. 55). The Union also suggested posting voluntary overtime assignments in 4 and 8 hour intervals so employees could volunteer for shorter or longer shifts. (G.C. Ex. 6; Tr. 51). Finally, the Union counter proposed that 15 minutes increments be used to determine when an overtime assignment resulted in the employee being moved to the bottom of the mandatory overtime roster. (G.C. Ex. 6).

On October 18, 2011, the parties started negotiations regarding "overtime procedures." On or about that date, the Respondent and the Union signed a Purpose and Scope, "[t]o incorporate the electronic Overtime Sign-Up Program among bargaining unit employees, while reducing mandatory overtime in the Correctional Services Department. The [p]rogram along with the mutually established procedures shall facilitate overtime opportunities to both correctional and non-correctional staff by expanding the volunteer sign-up system." (G.C. Ex. 7).

After signing the Purpose and Scope agreement, the parties began discussing their respective proposals. (Tr. 49). During bargaining, the Union desired to incorporate the electronic program with the manual pen and paper sign-up so both methods would be

utilized. (Tr. 55, 226). Associate Warden Motta indicated that management wanted to do away with the pen and paper sign-up and use only the computerized roster program. (Tr. 55-56, 227-28). Union and Management also disagreed over whether 15 minutes or 2 hours would count as "overtime worked," for the purpose of rotating an employee to the bottom of the mandatory overtime roster. (Tr. 46, 58-60).

On October 26, 2011, in a memorandum to the Warden, the Union declared: "The Union informed the Agency that Article 18 Section (P) permits collective bargaining over the subject and the parties past practice of utilizing an announcement of overtime by the employer, the reverse seniority overtime list and sign-up sheets have been in place for the last fifteen (15) years; therefore establishing a past practice as defined by the statute." Adding, "As a result, the Union declared Overtime Procedures 'Covered By' under 5 U.S.C. 7116 (b)(5) of the Federal Labor Relations Statute." (G.C. Ex. 9).

The October 26, 2011, memorandum further asserted that the Agency was not bargaining, was not abiding by the ground rules, and planned to unilaterally implement the proposed overtime procedures. (G.C. Ex. 9). The Union requested that the Agency return to the bargaining table and participate in mediation and impasse procedures . . . . (G.C. Ex. 9).

On that same date, the Agency obtained from former Union president Garcia-Ayala a memorandum stating that her intention upon signing the November 22, 2010, MOU was "to implement a program which is fair and equitable for all bargaining unit employees to sign-up for overtime because the current method that is being utilized is not fair and equitable." (R. Ex. 9). The memorandum also stated: "With the implementation of the current Correctional Services Roster Program the old method . . . would be eliminated." (R. Ex. 9).

The Union filed its first charge on October 27, 2011, alleging that the Respondent had engaged in bad faith bargaining, rejected mutually agreed upon ground rules, and had repudiated a September 8, 2011, ULP settlement agreement. (G.C. Ex. 1(a)).

On November 2, 2011, Associate Warden Motta replied via memorandum and advised the Union that in its view, the November 22, 2010, MOU dictated how local overtime would be assigned and rotated and that any overtime procedures which predated the MOU were replaced by that agreement. (G.C. Ex. 10). Motta asserted that the intent of the MOU was to "eliminate all current overtime procedures and use the electronic overtime sign-up computer program." (G.C. Ex. 10).

On November 9, 2011, the Union responded and asserted that the Union's counterproposals were negotiable as procedures and appropriate arrangements. It again requested that the parties return to bargaining. (G.C. Ex. 11). There was no further written communication between the Union and the Respondent regarding the negotiations. (Tr. 72). The Respondent provided training on the computerized overtime roster program to lieutenants and employees between January and the beginning of March 2012. (Tr. 168, 253-54). As of March 2012, employees exclusively used the computerized overtime roster program to volunteer for overtime and the manual pen and paper sign-up system was eliminated. (Tr. 169-70, 229, 275-76; G.C. Ex. 17).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent violated 5 U.S.C. § 7116(a)(1) and (5) by implementing changes in overtime procedures after the Respondent ended bargaining without reaching an impasse or an agreement with the Union, and after refusing the Union's request to resume bargaining. The General Counsel notes that where an agency exercises a reserved management right, it still has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by the decision if the effect is more than de minimis. *Pension Benefit, Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*) (citing *Dep't of HHS, Soc. Sec. Admin.*, 24 FLRA 403, 405-06 (1986)). The General Counsel asserts that the Respondent's proposals delivered on September 14, 2011, changed overtime procedures in effect for 15 years and had reasonably foreseeable adverse effects on employees' conditions of employment. Since employees could not see that overtime was available on a designated post at a specific date and time, they refrained from volunteering. The General Counsel contends that employees could no longer see which posts, shifts, and dates were available for overtime, making it less likely than an overtime assignment would be deemed scheduled and thus entitled to premium pay. Further, by increasing the length of time overtime had to be performed from 15 minutes to 2 hours before an employee moved to the bottom of the mandatory roster, correctional officers were mandated overtime more frequently until they received an assignment of sufficient duration to remove them from the top of the roster. Additionally, the General Counsel asserts that under the Respondent's proposal, non-correctional services employees received lower priority for overtime assignments and thus received less overtime pay than under the previous system where they had equal access to the pen and paper rosters.

The General Counsel cites *PBGC* to state that an agency may not refuse to bargain if any of the proposals submitted by the union are negotiable and the agency will be found to have violated the Statute by implementing a change without satisfying its obligation to bargain over the negotiable proposals and either reaching agreement or declaring impasse. *Id.* The General Counsel asserts that the Respondent did not allege before unilaterally implementing the changes to overtime procedures that the Union's proposals were non-negotiable. The General Counsel refutes the Respondent's assertion that it had no duty to bargain because overtime procedures were "covered by" Article 18, pointing out that Article 18 allows for local bargaining on overtime procedures. The General Counsel contends that the Respondent did not establish that the Union's proposals were non-negotiable.

The General Counsel maintains that the Respondent ceased communications following the Union's request to return to bargaining on November 9, 2011, and that it started using the overtime roster program in March 2012, without further notice to the Union. The General Counsel argues that even though the Respondent did not give first consideration to correctional services employees in assigning overtime, that modification to their initial proposal does not mitigate the unlawful implementation of the roster program because the Respondent did so while denying the Union an opportunity to bargain.

The General Counsel rejects the Respondent's "covered by" defense and argues the November 22, 2010 MOU did not foreclose negotiations on procedures related to the use of the overtime roster program. The General Counsel asserts that the MOU only covered installation of the new computer program and did not establish procedures to be used when employees sign up for overtime. The General Counsel contends that the MOU did not contain procedures like those proposed by the Respondent on September 14, 2011. The General Counsel refers to the following evidence to show that the overtime procedures were not "covered by" the MOU: (1) former Union president Garcia-Ayala requested to bargain on implementation of the computerized roster program after signing the MOU; (2) the Respondent did not reject the Union's request to bargain; and (3) the Respondent offered to bargain over overtime procedures using the overtime roster program in September 2011. The General Counsel also submits that the October 26, 2011, memorandum from Garcia-Ayala was procured only after the Respondent failed to reach an agreement with the Union during October negotiations.

The General Counsel rejects the Respondent's argument that the November 22, 2010, MOU allowed it to unilaterally implement overtime procedures and the overtime roster program because there are no provisions in the MOU that permit the Respondent to act unilaterally when implementing procedures to be used with the overtime roster program.

The General Counsel also contends that the Respondent's reliance on *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) (*BOP*), *reh'g en banc denied* (D.C. Cir. 2011), is misplaced because that case involved whether implementation of the Bureau's "mission critical" standard was covered by Article 18, section d and section g. The General Counsel points out that neither of those sections are at issue in the present case and that there is no evidence that Respondent's proposal to implement new overtime procedures was related to the Bureau's "mission critical" standard.

The General Counsel argues that Article 18 (p) of the Master Agreement reserved for the Union an opportunity to bargain specific procedures regarding overtime assignments and therefore the Respondent's exercise of its right to assign overtime was subject to implementation bargaining. The General Counsel cites (p) and (q) of Article 18 and interprets these sections to allow the Union to bargain "specific procedures regarding overtime assignments," whether the assignments were made on a mandatory or voluntary basis. The General Counsel quotes the language in Article 18 of the Master Agreement that "[s]pecific procedures regarding overtime assignments may be negotiated locally[,]" to assert that this issue was reserved for local bargaining.

The General Counsel rejects Respondent's argument that Program Statement 5500.13, Correctional Services Procedures Manual, required the Respondent to use only the computerized overtime roster program. The General Counsel reasons that if the Respondent is claiming that the Program Statement overrides Article 18 (p) its claim must fail because collective bargaining agreements and not agency regulations govern when both apply. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 51 FLRA 1210, 1216 (1996) (citing *U.S. Dep't of the Army, Fort Campbell Dist., Third*

Region, Fort Campbell, Ky., 37 FLRA 186, 195 (1990)). The General Counsel also asserts that there is no evidence to support the Respondent's contention that the Program Statement was negotiated and approved by the Federal Bureau of Prisons and the Council of Prison Locals, American Federation of Government Employees.

The General Counsel requests a status quo ante remedy for the Respondent's alleged violation. The General Counsel asserts that the Respondent ended the negotiations while the Union's proposals were still on the table and the Respondent's reasons for doing so were not supported by Authority precedent. The General Counsel states that there is an adverse impact on employees because correctional officers are working more mandatory overtime as there are fewer employees volunteering for overtime, and that it is less likely that employees who accept voluntary overtime will receive premium pay. The General Counsel contends that since the pen and paper overtime procedures were in place for 15 years, there would not be a disruption to the efficiency of Respondent's operations to reinstate those procedures until the bargaining obligation was fulfilled. Lastly, the General Counsel asserts that the Respondent has not presented any evidence to show that a status quo ante remedy would create a significant security risk at MDC Guaynabo.

Respondent

The Respondent maintains that the Union intended to eliminate the pen and paper method of overtime sign-up when the Union signed the MOU on November 22, 2010. The Respondent cites statements made by former Union president Garcia-Ayala that the purpose of the signed MOU was to "implement a program which is fair and equitable for all bargaining unit employees to sign-up for overtime." (R. Ex. 9). The Respondent also points to Garcia-Ayala's testimony that there were a lot of complaints about the unfairness of the pen and paper system. (Tr. 96). According to Garcia-Ayala's October 26, 2011, memorandum and her subsequent testimony, the purpose of the MOU was to eliminate the pen and paper overtime procedure. (R. Ex. 9).

The Respondent asserts that it was the Union that ended impact and implementation negotiations in October 2011 when it declared overtime procedures to be a "past practice" and "covered by" Article 18 of the parties' Master Agreement. The Respondent contends that the negotiations broke down when the Union wanted to maintain the pen and paper sign-up system in addition to the computerized overtime roster system, while Respondent only wanted the latter. The Respondent maintains that the Union informed Associate Warden Motta during negotiations that the pen and paper sign-up system was a past practice and that the Union had no duty to bargain over overtime procedures. The Respondent points to statements made in the Union's first charge of October 27, 2011, where it said the parties have been following the same overtime procedures for the past fifteen years, establishing a past practice and declaring overtime procedures "covered by" 7116(b)(5) of the Federal Labor Relations Statute. The Respondent also refers to statements in a November 2, 2011, memorandum from Associate Warden Motta to the Union where the Respondent memorialized the Union's position was that it had no duty to bargain over elimination of the pen and paper overtime procedures because they were covered by Article 18 in the Master Agreement.

The Respondent contends that the implementation of the computerized overtime roster program did not unilaterally change overtime procedures at MDC Guaynabo. The Respondent argues that the computerized program distributes overtime assignments equally amongst all qualified bargaining staff, in compliance with Article 18(p) of the Master Agreement. The Respondent asserts that it and the Union retain the ability to monitor overtime assignments under the computerized system. In support of this, Respondent cites testimony from Union president Rivera that Union board members have read-only access to the system. The Respondent lists the following features of the computerized system which made it equivalent to the old pen and paper system: the computerized system did not change starting or quitting times for shifts, the computerized system is, like the old system, "first come, first serve[.]" In addition, the computerized system provides different lists including Hospital, Airlift, and Institutional, as well as allowing the staff to sign up, edit, and delete overtime sign-ups without restrictions. The Respondent contends that employees have always been required to maintain a telephone and that only employees qualified in Basic Prison Transportation can transport inmates outside the institution. The Respondent asserts that mandatory overtime at MDC Guaynabo was a problem before the implementation of the computerized overtime roster system as indicated by testimony from the Union and Respondent witnesses. Respondent lastly contends that just like the manual pen and paper program, Lieutenants look for overtime volunteers on the electronic program, then go to the radio and announce the availability of voluntary overtime before using the mandatory roster as a last resort and that the mandatory roster is still compiled by reverse seniority of Correctional Services staff from the previous shift.

The Respondent asserts that it had no duty to bargain over additional overtime procedures because the covered by doctrine excused the parties from bargaining on the ground that they have already reached an agreement. The Respondent cites *BOP*, 654 F.3d at 95, where in reviewing Article 18 of the parties' Master Agreement, the D.C. Circuit held that "the procedures prescribed in Article 18 cover the substance of all decisions reached by following those decisions." The D.C. Circuit also held that sections (d) and (g) of Article 18 reflects the parties' earlier bargaining over the impact and implementation of the Bureau's statutory right to assign work. The Respondent maintains that pursuant to the D.C. Circuit's reasoning, the Respondent's right to formulate "shifts and assignments" in the Correctional Services Department is "covered by" Article 18.

Finally, the Respondent argues that a status quo ante (SQA) remedy is inappropriate in this case. The Respondent contends that an SQA remedy would conflict with the national Program Statement, Correctional Services Procedures Manual because replacing the computerized system with a pen and paper system would contradict the national policy as well as the purpose of the MOU negotiated on November 22, 2010.

ANALYSIS AND CONCLUSIONS

The Respondent Unilaterally Implemented Changes to Overtime Procedures

Before implementing a change in conditions of employment of bargaining unit employees, 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. *Fed. Bureau of Prisons, FCI, Bastrop, Tex.*, 55 FLRA 848, 852 (1999)

(*FCI, Bastrop*). Where an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the effect or the reasonably foreseeable effect of the change in conditions of employment is more than de minimis. *PBGC*, 59 FLRA at 50. Analysis of whether a change is de minimis requires assessment of the actual effects and those that are reasonably foreseeable. *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 49 (2012). Even if the effect or reasonably foreseeable effect of a change is more than de minimis, an agency does not have an obligation to bargain before making the change if the subject matter of the change is "covered by" the parties' collective bargaining agreement. *PBGC*, 59 FLRA at 50 (citing *U.S. Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1017-19 (1993)).

The Respondent's proposals of September 14, 2011, changed the existing pen and paper overtime system. The Respondent's brief discusses the many ways in which the proposed computerized overtime system it unilaterally implemented was similar to the existing system, but it fails to acknowledge the differences. The Respondent's initial proposals gave first consideration to Correctional Services employees for overtime whereas the prior procedures did not differentiate between Correctional Services employees and non-Correctional Services employees. (Tr. 38, 237). Under the pen and paper system, there were separate sign-up sheets for hospital escort, outside hospital, suicide watch, and airlift. (Tr. 39-40). The pen and paper system also allowed employees to know what overtime assignments were available, including the location of the hospital, the shift, and the days. (Tr. 39-42, 151-54). The Respondent's proposed system differed in that it only let employees indicate their availability for certain shifts without knowing when they signed up if overtime was actually available at that time. (Tr. 43). Under the pen and paper system, correctional officers mandated to work overtime were rotated to the bottom of the mandatory overtime roster if the assigned overtime was of more than 15 minutes duration. (Tr. 46). The Respondent's proposal changed the rotation period to 2 hours, which meant that a correctional services officer could be mandated to stay less than 2 hours on multiple occasions before getting a mandated involuntary assignment that rotated the employee to the bottom of the roster. (Tr. 46). Further, any changes that adversely affect an employee's ability to earn overtime and differential pay is more than de minimis and this change reduced the potential for premium overtime pay. *U.S. Dep't of VA Med. Ctr., Leavenworth, Kan.*, 60 FLRA 318 (2004); *PBGC* supra; *U.S. Customs Serv., Sw. Region, El Paso, Tex.*, 44 FLRA 1128, 1129 (1992); *Dep't of the Treasury, U.S. Customs Serv.*, 19 FLRA 1155 (1985). When considered in total, the reasonably foreseeable effects of the proposed changes to the overtime roster system were more than de minimis in this case.

Even though the Respondent claims that the overtime procedures ultimately implemented, were equivalent to the previous overtime procedures, this after-the-fact unilateral change does not cure the failure to complete bargaining with the Union. In fact, the Union did not discover until late in 2012 that the Respondent had implemented something other than the procedures the Respondent proposed in September 2011. (Tr. 131). Not only were the actual changes never communicated to the Union, there is evidence that the computerized overtime roster system, as implemented, had a negative effect on bargaining unit employees despite the modifications the Respondent made to its own proposals. Union president Jorge Rivera and Union secretary Jorge Fermin testified without contradiction that

employees did not volunteer for overtime as frequently after the overtime roster program was unilaterally implemented by the Respondent. As a result, Correctional Services employees are required to work mandatory overtime more frequently. (Tr. 72-74, Tr. 78-79, 156-58). Union secretary Fermin also testified that the increased frequency of mandatory overtime caused correctional officers to get "burned out" and request sick leave. (Tr. 159, 161). Also, under the pen and paper system, employees could volunteer for overtime on an escort post knowing the date and shift; but in the computerized overtime roster system, employees cannot select escort duty as a category of post for which they can volunteer. (Tr. 143; G.C. Ex. 17). Thus, the modifications unilaterally adopted by the Respondent did not fully alleviate the adverse impact the change had upon bargaining unit employees' conditions of employment.

When an agency has an obligation to bargain, it can satisfy that obligation by reaching agreement with the union or by bargaining in good faith to impasse over negotiable proposals submitted by the union. *PBGC*, 59 FLRA at 50. An agency may refuse to bargain where it contends that the proposals submitted by the union are non-negotiable. *Id.* If *any* pending union proposals are negotiable, then the agency will be found to have violated the statute by implementing the change without satisfying its obligation to bargain over the negotiable proposals and either reaching agreement or declaring impasse. *Id.* In an unfair labor practice case, the respondent has the burden of demonstrating that all possible proposals on the table were non-negotiable; the General Counsel does not have the burden to establish their negotiability. *Id.* (citing *U.S. Dep't of Justice, INS, Wash., D.C.*, 56 FLRA 351, 356 (2000) (*INS*)).

The Respondent did not allege that the Union's counter proposals were non-negotiable before unilaterally changing the overtime roster system. When asked at the bargaining table, the Respondent did not assert that the Union's proposals were non-negotiable. (Tr. 66). Although the Respondent claimed during negotiations that the Union's proposals interfered with its management rights under 5 U.S.C. § 7106 (G.C. Ex. 10; Tr. 52, 60-61), it never declared that *all* of the Union's proposals were non-negotiable, nor has it established that all of the Union's proposals were non-negotiable.

Further, I reject the Respondent's argument that the Union terminated impact and implementation bargaining in its October 26, 2011, memorandum in which it stated that the previous overtime procedures were a "past practice" and "covered by" Article 18 of the parties Master Agreement. The Respondent misinterprets the Union's memorandum and fails to recognize the posturing it represented as part of the negotiation process. Most importantly, it ignores the Union's declaration that it was "willing to continue collective bargaining" and the request that the parties return to the bargaining table. (G.C. Ex. 9). While unartful in its posturing, there is no evidence that the Union intended the October 26, 2011, memorandum to foreclose further bargaining regarding the proposed changes to overtime procedures. Quite the contrary, it was an attempt to get the Respondent to return to negotiations, preferably with more consideration towards the Union's position. While the Union's invocation of the "covered by" doctrine demonstrated a woeful misunderstanding of the doctrine given its acknowledgement that the previous overtime procedures were developed as a past practice and not through a negotiated mutual agreement, the Respondent's interpretation of the memorandum as a refusal to engage in further negotiation was equally ludicrous.

The bargaining process requires on-going communication so that the parties may avail themselves of appropriate options, including a request for assistance from the Federal Mediation and Conciliation Service or the Federal Service Impasses Panel, ultimately leading to lawful implementation. *INS*, 56 FLRA at 357. The evidence shows that the Respondent ended the negotiations in late October 2011. The Respondent then unilaterally changed the overtime roster system in March 2012, asserting that the entire matter was "covered by" the November 22, 2010, MOU. (Tr. 71-72; G.C. Ex. 11). It did so without any further communication with the Union, and with complete disregard of the Union's clearly stated request that it return to the bargaining table. (Tr. 169-70, 229, 275-76; G.C. Ex. 17).

The Changes to Overtime Procedures Were Not Covered by the November 22, 2010, MOU or the Master Agreement

A party may refuse to bargain where the matter is expressly contained in a negotiated agreement or is inseparably bound up with, and thus an aspect of, a subject covered by the agreement. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000) (*Customs*). If the matter is not expressly contained in the agreement, the Authority may consider evidence of bargaining history or intent "to determine whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining . . . ." *Id.* The evidence here indicates that neither Article 18 of the Master Agreement nor the November 22, 2010, MOU, covered the Respondent's September 12, 2011, proposals.

The purpose of the November 22, 2010, MOU was to have the program for a computerize overtime roster system installed on the computer at MDC Guaynabo and to establish the training to be provided to bargaining unit employees on use of the computerized system. (G.C. Ex. 8). The MOU did not address overtime sign-up procedures such as those proposed by the Respondent on September 14, 2011, and such procedures are neither expressly set forth therein nor inseparably bound up with the terms of the MOU. The evidence indicates that the parties did not intend to foreclose bargaining on specific proposals for assigning overtime when they signed the MOU. In fact, former Union president Garcia-Ayala requested to bargain over actual implementation of the computerized overtime roster system after signing the MOU. (G.C. Ex. 13, 14). The Respondent did not reject the request to bargain at the time based upon the covered by doctrine and agreed to bargain over the overtime procedures to be utilized by employees when accessing the computerized overtime roster system. (G.C. Ex. 5).

With respect to Garcia-Ayala's memorandum of October 26, 2011, and her testimony that the purpose of the November 22, 2010, MOU was to fully implement the computerized overtime roster system and eliminate the previous pen and paper process, I do not find her testimony credible. The October 26, 2011, memorandum was procured by the Respondent only after it failed to reach an agreement with the Union during earlier negotiations, thus exhibiting a clear belief that all was not resolved by the prior MOU. Ms. Garcia-Ayala testified that the purpose of the November 22, 2010, MOU was to get the required software installed on the Respondent's system as the computer services manager insisted upon a Union agreement prior to installation. (Tr. 191-92, 204-05). During her testimony she conceded that the November 22, 2010, MOU did not foreclose further negotiation prior to use of the computerized overtime roster system and that the Master Agreement allowed for bargaining after installation, training, implementation, or at any time in the future. (Tr. 215,

217). Given her request for bargaining issued after the computer program was installed but before its use was implemented, the totality of the evidence supports a finding that the Respondent's unilateral implementation of the computerized overtime roster system was not covered by the November 22, 2010, MOU. Further, Garcia-Ayala's testimony is not only inconsistent with the facts, it must also be considered within the context of her transition from Union officer to a management position by the time she testified at the hearing. While it was clear that Garcia-Ayala was highly motivated to fix the inequity facilitated by the prior pen and paper overtime sign-up system, it was equally clear that the deal was not completed when the November 22, 2010, MOU was executed and that additional terms related to implementation would be negotiated later.

The Respondent's argument that unilateral implementation of the computerized overtime roster system was covered by Article 18 of the parties' Master Agreement is also without merit. The case relied on by the Respondent, *BOP*, 654 F.3d at 91, is inapplicable as the matter in that case involved whether implementation of the Bureau's "mission critical" standard was covered by Article 18, paragraphs (d) and (g), and neither of those sections are at issue in the present case. Further, there is no contention that the Respondent's proposal to implement the new overtime procedures with the adoption of the computerized overtime roster system was related to the Bureau's "mission critical" standard.

Article 18 (p) of the Master Agreement permits the Union to bargain specific procedures regarding overtime assignments at each location, and (p)(1) states that, "when Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees[.]" Under Article 18, Section (q), the Respondent retains "the right to order a qualified bargaining unit employee to work overtime after making a reasonable effort to obtain a volunteer, in accordance with section (p)." Sections (q) and (p) represent areas where "[s]pecific procedures regarding overtime assignments" may be negotiated on a localized basis under Article 18. Because the previously negotiated agreement between the parties contemplates additional negotiations at the local level, such local negotiations, like those present in this case are not "covered by" Article 18 of the Master Agreement. If anything, the Master Agreement calls for them to take place rather than precluding them from occurring.

REMEDY

The General Counsel requests a status quo ante remedy, which would require the Respondent to revert back to using the pen and paper system to assign overtime. Where an agency has changed a condition of employment without fulfilling its obligation to bargain over the impact and implementation of that decision, the Authority applies the criteria set forth in *FCI, Bastrop* to determine whether a status quo ante remedy is appropriate. The purpose of a status quo ante remedy is to place parties, including employees, in the positions they would have been in had there been no unlawful conduct. *Dep't of VA Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1580 (1996). Other "traditional" remedies, including retroactive bargaining orders, cease and desist orders, and the posting of a notice to employees. *See F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 161 (1996). In determining whether a status quo ante remedy would be appropriate, the Authority considers, among

other things: (1) whether and when notice was given to the union by the agency; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. *Fed. Corr. Inst.*, 8 FLRA 606 (1982).

The first of these factors does not weigh in favor of awarding an SQA remedy as the Respondent gave the Union notice prior to implementing the computerized overtime roster system. However, the second and third factors weigh in favor of awarding an SQA remedy. The Union submitted counter proposals and requested bargaining a week after receiving the Respondent's notice and initial proposals regarding the implementation of the computerized system. Further, unilateral implementation of the computerized overtime roster system was an intentional action and when an agency's failure to discharge its bargaining obligation under the Statute is intentional, the agency's failure to bargain is willful, even if based upon an erroneous conclusion that there was no bargaining obligation. *U.S. Dep't of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky.*, 38 FLRA 647, 649 (1990).

Although the Union testified that correctional officers have been required to work more mandatory overtime since the implementation of the computerized system, this was little more than anecdotal observation and speculative at best as it is undisputed that mandatory overtime was a problem at MDC Guaynabo prior to the implementation of the computerized overtime roster system. (Tr. 104-05). There was also evidence that the system ultimately implemented used procedures similar to those present under pen and paper system. The computerized overtime roster system is "first come, first serve[.]" (Tr. 125). It also includes lists for different posts including hospital, airlift, and institutional posts. (Tr. 141-42). The procedures for assigning mandatory overtime under the computerized overtime roster system are the same as under the pen and paper system. (Tr. 129, 264-65). The computerized system as implemented does not distinguish between correctional services and non-correctional services employees. (Tr. 200-01, 255).

There was evidence presented related to problems under the pen and paper system, that were remedied by the computerized overtime roster system. In particular, there was testimony that certain employees benefited more than other bargaining unit employees from the pen and paper system because they had earlier access and could sign up for their preferred overtime shifts before their fellow employees. (Tr. 196, 223-24). Associate Warden Motta testified that under the pen and paper system, each lieutenant had a different system for managing overtime sign up, which created numerous errors and a lack of accountability. (Tr. 222-23). Further, when bargaining unit employees complained about inequitable overtime allotments, management could not properly investigate because the paper records were lost or incomplete. (Tr. 223). The computerized system allows management to recognize errors such as an employee being skipped over for mandatory overtime or not being offered overtime when they were available, but not scheduled. (Tr. 227). The computerized system also allows management to hold supervisors accountable for mistakes because the system creates a log of the supervisors' actions in assigning overtime. (Tr. 260).

Lieutenant Ortiz testified that under the pen and paper system, employees interested in volunteering for overtime would give a piece of paper with the employee's telephone number to the lieutenants, but they had trouble keeping track of all the different pieces of paper provided by each employee. (Tr. 265). The computerized overtime roster system makes it easier for the lieutenants to determine which employees are volunteering for overtime. (Tr. 265). Former Union president Garcia-Ayala also testified that there were issues with keeping track of the mandatory overtime roster under the old pen and paper system. (Tr. 196). In the computerized system, the mandatory overtime roster is automatically generated resulting in fewer errors. (Tr. 264).

In short, imposition of a status quo ante remedy would reinstate more problems than it would solve. The issues raised by the Union regarding overtime procedures, such as the 2 hour "overtime worked" standard and the addition of an escort post can be remedied with a prospective bargaining order while avoiding disruption to the efficiency and effectiveness of the Respondent's operations that would result from terminating use of the computerized overtime roster system. It is undisputed that since 2002, the Bureau of Prisons has been implementing versions of the computerized overtime roster system at various institutions across the country. (Tr. 117). Despite the willfulness of the Respondent's violation, I conclude that the disruption to the efficiency and effectiveness of the Respondent's operations, outweighs the adverse impact that would result from reverting back to the pen and paper system for bargaining unit employees during the course of impact and implementation bargaining over additional post availability and determining the duration of overtime needed to constitute a mandatory assignment of overtime. Therefore, a status quo ante order is not an appropriate remedy under the facts of this case. However, the Respondent must still bargain with the Union over the impact and implementation of those issues that remain in dispute and post a notice informing employees of their violation and intent to comply with the requirements of the Statute.

In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, such postings are ordered. *See U.S. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

CONCLUSION

I find that the Respondent violated § 7116 (a)(1) and (5) of the Statute when it unilaterally implemented new overtime procedures at MDC Guaynabo and failed to bargain with the Union to agreement or impasse before implementing new overtime procedures. Therefore, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Federal Bureau of Prisons, Metropolitan Detention Center Guaynabo, Catano, Puerto Rico, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes to the conditions of employment of bargaining unit employees, including changes in overtime procedures without fulfilling its bargaining obligations under 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 actions in order to effectuate the purposes and policies of the Statute:

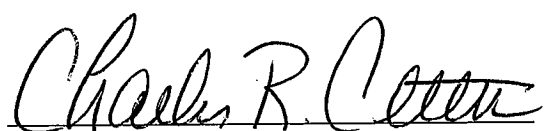
(a) Upon request, bargain with the Union concerning the impact and implementation of the changes to overtime procedures implemented in March 2012, as part of converting to a computerized overtime roster system.

(b) Post at the Metropolitan Detention Center Guaynabo facility 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 Warden, Metropolitan Detention Center Guaynabo, Catano, Puerto Rico, and shall be posted and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) On the same date the Notice is posted, it must be disseminated to all bargaining unit employees by e-mail or other electronic media customarily used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston 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.

Issued, Washington, D.C., August 26, 2014



CHARLES R. CENTER
Chief 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 Federal Bureau of Prisons, Metropolitan Detention Center Guaynabo, Catano, Puerto Rico, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the conditions of employment of bargaining unit employees without providing the American Federation of Government Employees, AFL-CIO, Local 4052, AFL-CIO (the Union) with adequate notice and 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, upon request, bargain with the Union concerning the impact and implementation of the changes to overtime procedures implemented in March 2012, as part of converting to a computerized overtime roster system.

_____
(Agency/Activity)

Date:_____ By:_____
(Signature) (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone is: 617-565-5100.