

69 FLRA No. 65

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 506
(Charging Party/Union)

AT-CA-12-0579

DECISION AND ORDER

June 30, 2016

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (Judge) found that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)¹ by refusing to bargain in good faith with the Union over sick and annual relief roster assignments for correctional officers whom the Union represents (employees). Employees on a relief roster fill in for other employees who are on sick or annual leave. The question before us is whether the Judge erred because the “covered-by” doctrine excused the Respondent from its obligation to bargain. Because the Respondent has not established that the requirements of the “covered-by” doctrine are met, the answer is no.

II. Background and Judge’s Decision

A. Background

As the Judge’s decision sets forth the facts in detail, we will only briefly summarize them here.

The Respondent is a prison complex consisting of four separate institutions: one housing low-security inmates; one housing medium-security inmates; and two housing high-security inmates. Before the actions that gave rise to this case, the Respondent’s four institutions each maintained their own sick and annual relief rosters (relief rosters). Employees on an institution’s relief roster filled in for other employees who were on sick or annual leave at that same institution. Employees on one institution’s relief roster were not assigned to fill in for another institution’s employees who were on leave.

The Respondent notified the Union that it intended to consolidate the relief rosters at its four institutions and to assign employees from one institution to relieve employees at other institutions (inter-institutional assignments). At the Union’s request, the parties began bargaining over the inter-institutional assignments. Before the parties completed bargaining, the Respondent unilaterally implemented its inter-institutional assignment policy.

Following the Respondent’s unilateral implementation of its inter-institutional assignment policy, the Union filed an unfair-labor-practice (ULP) charge alleging that the Respondent failed to bargain before implementing the policy. Resolving that ULP charge, the parties entered into a settlement agreement requiring further bargaining. As relevant here, the settlement agreement required the parties to bargain over the inter-institutional assignments until “otherwise complete pursuant to the . . . Statute.”²

The parties intermittently bargained over the policy until the Respondent ended bargaining. Subsequently, the Union filed the ULP charge at issue here, again alleging that the Respondent failed to bargain in good faith over the inter-institutional assignments. After investigating the charge, the Regional Director of the FLRA’s Atlanta Regional Office issued a complaint asserting that the Respondent had violated § 7116(a)(1) and (5) of the Statute by refusing to bargain in good faith over the inter-institutional assignments.

¹ 5 U.S.C. § 7116(a)(1), (5).

² Judge’s Decision at 21.

B. Judge's Decision

Before the Judge, the Respondent asserted that it had no duty to bargain over the inter-institutional assignments because they are “covered by” Article 18, Section (d) (Article 18(d)) and Article 18, Section (g) (Article 18(g)) of the master labor agreement (master agreement) between the Federal Bureau of Prisons and the American Federation of Government Employees, Council of Prison Locals (the national parties).³ Conversely, the General Counsel (GC) argued that these assignments are not “covered by” Article 18 of the master agreement.⁴ Article 18 – the pertinent wording of which is set forth in the appendix to this decision – is titled “Hours of Work.”⁵ Article 18(d) sets forth procedures for preparing quarterly rosters and for filling positions on those rosters. And Article 18(g) concerns procedures for assigning officers to sick and annual relief roster positions.

Addressing the Respondent’s “covered-by” assertion, the Judge examined Article 18 under the Authority’s two-pronged “covered-by” doctrine,⁶ described further below. Applying prong one of the “covered-by” doctrine, the Judge found that inter-institutional assignments are not “expressly contained in” the language of Articles 18(d) or 18(g).⁷ The Judge found that Article 18(d) “sets forth specific, detailed procedures for developing, bidding, and implementing quarterly rosters to fill . . . posts.”⁸ And the Judge found that Article 18(g) “establishes the procedures for assigning employees to the sick and annual relief rosters.”⁹ Based on these findings, he determined that neither section references employees’ assignments “on sick and annual relief, or for any other reason – to other institutions” or “how [employees] on the relief roster of one institution can be assigned to fill in for [employees] at other institutions.”¹⁰ In its exceptions, the Respondent does not dispute the Judge’s prong-one findings.

Applying prong two of the “covered-by” doctrine, the Judge found that inter-institutional assignments are not “inseparably bound up with the language of Article 18[(d) or 18(g)].”¹¹ The Judge found, in this regard, that the bargaining history of Article 18 demonstrated that the national parties did not contemplate “issues relating to multiple relief rosters

at multi-institution complexes” because “there were few, if any, large federal correctional complexes” at the time.¹² The Judge also relied on the parties’ local supplemental agreement (set forth in pertinent part in the appendix to this decision) that included language supplementing Article 18(d) of the master agreement. As the Judge found, when the parties negotiated the local supplemental agreement, no employees on the “relief roster were assigned to fill sick and annual posts at other institutions within the [Respondent’s complex].”¹³ Rather, he found, “[a]n employee could work at a different facility only by requesting a permanent transfer.”¹⁴

Moreover, the Judge found that the parties’ actions, such as bargaining over inter-institutional assignments for several years, indicated a mutual understanding that “they needed to negotiate the impact and implementation of the [inter-institutional] assignment policy.”¹⁵ Further, the Judge found, the Respondent never understood Article 18 as covering inter-institutional assignments because the Respondent first raised its “covered-by” defense upon filing an answer to the complaint in this case – rather than “during the six years in which the subject had been debated.”¹⁶

Additionally, the Judge addressed the Respondent’s reliance on the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *Federal BOP v. FLRA*,¹⁷ determining that *Federal BOP* “[did] not extend to the present case.”¹⁸ Specifically, he found that *Federal BOP* did not address “questions of how [employees] are assigned to specific posts, on a day-to-day basis, *after* they have already been assigned to the relief shift (the sick and annual relief roster).”¹⁹

The Judge found that inter-institutional assignments are not covered by Articles 18(d) or 18(g). He also made various other findings that the Respondent does not challenge. That is, he found that the Union’s charge was timely filed. He also found that two events triggered the Respondent’s obligation to bargain: (1) implementation of inter-institutional assignments, which he found constituted a more than de minimis change in conditions of employment; and (2) the parties’ signing of the settlement agreement. Finally, he found that the Respondent acted in bad faith by delaying negotiations and ultimately refusing to negotiate with the Union over the inter-institutional

³ *Id.* at 14.

⁴ *Id.* at 12.

⁵ Joint Ex. 2 (Master Agreement) at 42.

⁶ Judge’s Decision at 25.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 26.

¹⁶ *Id.*

¹⁷ 654 F.3d 91 (D.C. Cir. 2011).

¹⁸ Judge’s Decision at 24.

¹⁹ *Id.*

assignments. Making these findings, the Judge concluded that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to bargain in good faith.

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to the Respondent's exceptions.

III. Analysis and Conclusions

The Respondent argues that it did not violate the Statute by refusing to continue bargaining because the inter-institutional assignments at issue are "covered by" Article 18(g).²⁰

Under the Authority's "covered-by" doctrine, a party is not required to bargain over matters that already have been resolved by bargaining.²¹ An argument that a matter is "covered by" an agreement is an affirmative defense that a respondent has the burden of proving.²² The "covered-by" doctrine has two prongs.²³ Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in the agreement.²⁴ The Authority does not require an exact congruence of language.²⁵ Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.²⁶

If the agreement does not expressly contain the matter, then, under the doctrine's second prong, the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement.²⁷ In doing so, the Authority will determine whether the subject matter is so commonly considered to be an aspect of the matter set forth in the agreement that the negotiations are presumed to have foreclosed further bargaining.²⁸ In other words, the test is whether, based on the circumstances of the case, the parties reasonably should have contemplated that their agreement would foreclose further bargaining over the allegedly covered subject.²⁹

Regarding prong one of the "covered-by" doctrine, the Judge found, and the Respondent concedes,³⁰ that inter-institutional assignments are not "expressly contained in" the language of Article 18(g).³¹ As the Respondent does not claim that the Judge misapplied prong one, or that prong one applies, we address only prong two.

Regarding prong two of the "covered-by" doctrine, the Respondent argues that the Judge misapplied the law because, at bargaining, the parties contemplated that Article 18 would cover multi-institutional assignments. The Respondent claims in this regard that "the [national] parties knew correctional complexes [with multiple institutions] existed."³² In support, the Respondent references a provision of the local supplemental agreement addressing multi-institutional overtime assignments.³³

The Judge found,³⁴ and we agree, that the Respondent has failed to establish that the parties, at either the national or local level, intended to foreclose bargaining over inter-institutional assignments. Specifically, the Judge found – and the Respondent does not dispute – that the national parties negotiated Article 18 of the master agreement at a time when multi-institution complexes may have existed, but "were rare."³⁵ Thus, the Judge further found, and the record supports finding, that the national parties did not contemplate inter-institutional assignments when bargaining the master agreement.³⁶

³⁰ Exceptions at 13 ("If [the Judge] were applying part one of the 'covered by' [doctrine] . . . his finding may have been proper. . . . But in this case, the appropriate analysis was under part [two] of the 'covered by' doctrine.").

³¹ Judge's Decision at 25.

³² Exceptions at 14.

³³ Joint Ex. 1 at 6 (Local Supplemental Agreement) ("Each Institution will maintain their own [c]orrectional [s]ervices overtime roster. Management will attempt to afford overtime to personnel at their respective institution prior to utilizing resources at the other institutions.").

³⁴ Judge's Decision at 4, 25; *see also* Tr. at 56-60.

³⁵ Judge's Decision at 4 (emphasis added). *See U.S. Dep't of the A.F., A.F. Materiel Command*, 54 FLRA 914, 921 (1998) (VSIP program not covered by parties' agreement because Congress did not create VSIP program until two years after agreement was in effect); *Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 43, 47 (1998) (video recording of employee interviews not covered by parties' agreement, in part, because agency did not use video to record interviews when parties' negotiated agreement).

³⁶ Judge's Decision at 25; Tr. at 131-32 (Union negotiator of master agreement testified that neither party raised issue of inter-institutional assignments when negotiating Art. 18 of the master agreement because no "large federal prison complexes" existed at time (*Id.* at 132)); Tr. at 136-38 (Union negotiator of master agreement testified that when negotiating master agreement, parties did not contemplate "having multiple rosters

²⁰ Respondent's Exceptions (Exceptions) at 12-13.

²¹ *NTEU*, 68 FLRA 334, 338 (2015).

²² *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 617 n.2 (2009).

²³ *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000).

²⁴ *Id.*

²⁵ *Fed. BOP*, 654 F.3d at 94-95.

²⁶ *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*SSA*) (citing *NLRB v. Honolulu Star-Bulletin, Inc.*, 372 F.2d 691 (9th Cir. 1967)).

²⁷ *Id.*

²⁸ *NTEU*, 66 FLRA 186, 189-90 (2011) (citing *SSA*, 47 FLRA at 1018).

²⁹ *SSA*, 47 FLRA at 1019.

Moreover, although the parties' local supplemental agreement contains a provision recognizing multiple institutions, that provision only addresses inter-institutional *overtime roster* assignments.³⁷ That provision states: "Each institution will maintain their own . . . overtime roster. Management will attempt to afford overtime to personnel at their respective institution prior to utilizing resources at the other institutions."³⁸

Testimony presented by the Union supports the Judge's finding that this provision does not apply to the *sick and annual relief* roster.³⁹ Specifically, as the Judge found, and the Respondent does not dispute, when the local supplemental agreement was negotiated, no employees on the "relief roster were assigned to fill sick and annual posts at *other institutions*."⁴⁰ Rather, as the Judge determined, "[a]n employee could work at a different facility only by requesting a permanent transfer."⁴¹ And the record supports this finding.⁴²

Further, the Authority has also declined to find a matter covered by a collective-bargaining agreement where the agreement specifically contemplates bargaining to resolve the matter.⁴³ The plain language of the parties' settlement agreement satisfies this requirement. As the Judge found, and the Respondent does not dispute, this agreement specifically provides for bargaining over inter-institutional assignments "until . . . otherwise complete pursuant to the . . . Statute."⁴⁴

Although the Respondent relies on *Federal BOP*,⁴⁵ that decision is distinguishable. *Federal BOP* dealt with the Bureau of Prisons' determination of the positions to which employees would be assigned "on a quarterly basis through a bidding system."⁴⁶ As part of the assignment process, "each . . . institution . . . publish[es] a roster listing the positions that will be available to officers in the next quarter[, t]he officers bid for posts and shifts, and assignments are

made according to seniority."⁴⁷ The dispute between the parties arose when the agency determined that "the quarterly roster for each institution should include only those posts deemed 'critical' to the mission of that institution," and should not include positions such as "Medical Escort" and "Chapel Officer."⁴⁸

In *Federal BOP*, relying on bargaining history, the court held that Articles 18(d) and 18(g) "represent the agreement of the [national] parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift."⁴⁹ On that basis, the court found that the agency had no duty to bargain over its decision that "the quarterly roster for each institution should include only those posts deemed 'critical' to the mission of that institution."⁵⁰ But *Federal BOP* did not discuss inter-institutional assignments and did not resolve the issue that this case presents. Moreover, here, the parties' bargaining history (which the Respondent does not challenge) demonstrates that the parties never contemplated inter-institutional assignments. Therefore, the Respondent's claims, based on *Federal BOP*, do not demonstrate that the Judge erred.

As the record supports the Judge's finding that the disputed matter was not covered by the master agreement, and based on the Judge's other findings, that the Respondent does not challenge, we find that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to negotiate with the Union, and we deny the Respondent's exceptions.⁵¹

and different facilities sharing [employees] from" other facilities (*Id.* at 138)).

³⁷ Local Supplemental Agreement at 6.

³⁸ *Id.* (Art. 18(D)) (reproduced in the appendix to this decision).

³⁹ Judge's Decision at 4 n.2; Tr. at 77-79, 91, 123 (Union negotiator to local supplemental agreement testified that Art. 18(D) of the local supplemental agreement addressed overtime assignments, not relief roster assignments).

⁴⁰ Judge's Decision at 25 (emphasis added).

⁴¹ *Id.*

⁴² Tr. at 57-60 (Union negotiator to local supplemental agreement testified that parties did not contemplate transferring employees between institutions when negotiating agreement).

⁴³ *U.S. DOJ, Fed. BOP, Fed Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 582 (2015) (*DOJ*) (Member Pizzella dissenting) (citations omitted).

⁴⁴ Judge's Decision at 21 (quoting Settlement Agreement).

⁴⁵ Exceptions at 11-12 (citing *Fed. BOP*, 654 F.3d 91).

⁴⁶ *Fed. BOP*, 654 F.3d at 93.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 95.

⁵⁰ *Id.* at 93.

⁵¹ Member DuBester notes the following: I agree with the decision to find that the inter-institutional assignments are not "covered by" the parties' agreement, and that the Respondent's reliance on the "covered-by" doctrine is misplaced. In doing so, I note again my reservations concerning the "covered-by" standard, and that "the Authority's use of the covered-by standard warrants a fresh look." *SSA, Balt., Md.*, 66 FLRA 569, 575-76 (2012) (Dissenting Opinion of Member DuBester); *accord DOJ*, 68 FLRA 580, 583 n.38 (2015); *NTEU, Chapter 160*, 67 FLRA 482, 487-88 (2014) (Dissenting Opinion of Member DuBester).

IV. Order

Pursuant to § 2423.41(c) of the Authority’s Regulations⁵² and § 7118 of the Statute,⁵³ we order the Respondent to:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the Union regarding the assignment of employees on the sick and annual relief roster of one institution within the Respondent to another.

(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) Bargain in good faith with the Union regarding the assignment of employees on the sick and annual relief roster of one institution within the Respondent to another.

(b) Post at its facilities where bargaining-unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Complex Warden, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) In addition to the posting of paper notices, the notice shall be distributed to bargaining-unit employees electronically, such as by email, posting on an intranet or internet site, or by other electronic means that the Respondent customarily uses to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Authority’s Regulations,⁵⁴ notify the Regional Director, Atlanta Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

**NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE FEDERAL LABOR
RELATIONS AUTHORITY**

The Federal Labor Relations Authority (FLRA) has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (FCC Coleman), 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 comply with the settlement agreement that we made in Case No. AT-CA-10-0172, requiring us to negotiate over the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another.

WE WILL NOT unreasonably delay or threaten to terminate negotiations over the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another.

WE WILL NOT cancel or place unreasonable conditions on meetings to negotiate over the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another.

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.

(Agency/Activity)

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

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

If employees have any questions concerning this notice or compliance with its provisions, they may be communicate directly with the Regional Director, Atlanta Regional Office, FLRA, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.

⁵² 5 C.F.R. § 2423.41(c).

⁵³ 5 U.S.C. § 7118.

⁵⁴ 5 C.F.R. § 2423.41(e).

APPENDIX

Article 18, Section d of the Master Agreement provides:

Quarterly rosters for Correctional Services employees will be prepared in accordance with the below-listed procedures.

1. a roster committee will be formed which will consist of representative(s) of Management and the Union. The Union will be entitled to two (2) representatives. The Union doesn't care how many managers are attending;
2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally, there will be no changes to the blank roster after it is posted;
 - a. employees may submit preference requests for assignment, shift, and days off, or any combination thereof, up to the day before the roster committee meets. Those who do not submit a preference request will be considered to have no preference. Preference requests will be made on the Employee Preference Request form in Appendix B or in any other manner agreed to by the parties at the local level. The Employer will ensure that sufficient amounts of forms are maintained to meet the needs of the employees;
 - b. employee preference requests will be signed and dated by the employee and submitted to the Captain or designee. Requests that are illegible, incomplete, or incorrect will be returned to the employee. In order to facilitate Union representation on the roster committee, the employee is also encouraged to submit a copy of this request to the local Union President or designee;
 - c. if multiple preference requests are submitted by an employee, the request with the most recent date will be the only request considered; and
 - d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that Management will not arbitrarily deny such requests. (Seniority is defined in Article 19).
3. the roster committee will meet and formulate the roster assignments no later than five (5) weeks prior to the effective date of the quarter change;
4. the committee's roster will be posted and accessible to all Correctional Services employees no later than the Friday following the roster committee meeting;
5. once the completed roster is posted, all Correctional Officers will have one (1) week to submit any complaints or concerns. Correctional Officers will submit their complaints and concerns in writing to the Captain or designee. The employee may also submit a copy to the local President or designee. No later than the following Wednesday, Management and the Union will meet to discuss the complaints or concerns received, and make any adjustments as needed;
6. the roster will be forwarded to the Warden for final approval;
7. the completed roster will be posted three (3) weeks prior to the effective date of the quarter change. Copies of the roster will be given to the local President or designee at the time of posting; and
8. the Employer will make every reasonable effort, at the time of the quarter change, to ensure that no employee is required to work sixteen (16) consecutive hours against the employee's wishes.⁵⁵

⁵⁵ Master Agreement at 43-45.

Article 18, Section g of the Master Agreement provides:

Sick and annual relief procedures will be handled in accordance with the following:

1. when there are insufficient requests by employees for assignment to the sick and annual relief shift, the roster committee will assign employees to this shift by chronological order based upon the last quarter the employee worked the sick and annual relief shift;
2. sick and annual relief shift is a quarterly assignment that will not impact upon the rotation through the three (3) primary shifts;
3. no employee will be assigned to sick and annual relief for subsequent quarters until all employees in the department have been assigned to sick and annual relief unless an employee specifically requests subsequent assignments to sick and annual relief;
4. employees assigned to sick and annual relief will be notified at least eight (8) hours prior to any change in their shift; and
5. reasonable efforts will be made to keep sick and annual relief officers assigned within a single shift during the quarter.⁵⁶

Article 18 of the local supplemental agreement provides:

Section A. All bargaining unit employees will be afforded the opportunity to request shift and post assignments within their respective department as outlined in section D of the Master Agreement, unless mutually waived.

Section B. Ordinarily, employees will be provided sufficient time to complete official reports during their scheduled duty hours. However, if duties warrant work which might exceed the normal duty hours, the employee should notify his/her supervisor requesting relief or overtime to complete work. Employee[s] will be eligible for overtime or compensation time in the event he/she is required to remain after their scheduled duty hours. Employees working two (2) hours in excess of their regular scheduled duty hours will be given the opportunity to:

1. Make a phone call to notify a family member that he/she is working overtime.

2. Acquire a meal or snacks. The employee may have a meal delivered to the institution to be delivered to the employee.

Section C. Employee[s] may request to have a holiday off or work a holiday.

Section D. Each institution will maintain their own Correctional Services overtime roster. Management will attempt to afford overtime to personnel at their respective institution prior to utilizing resources at the other institutions. This will be accomplished in accordance with set procedures.⁵⁷

⁵⁶ *Id.* at 45-46.

⁵⁷ Local Supplemental Agreement at 5-6.

Member Pizzella, dissenting:

In my dissent in *U.S. DHS, U.S. CBP*, I noted that Albert Einstein famously defined insanity as “doing the same thing over and over again and expecting different results.”¹ I believe that even Professor Einstein would have been dumbfounded if confronted with how to define the actions of Council 33 of the American Federation of Government Employees and its various locals.

Council 33 and its locals scattered throughout the country have filed not just six, seven, eight, nine, ten, or eleven variations,² but they are now on their *twelfth* variation, of the same argument which was rejected by U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in 2011.³ The first five attempts preceded the D.C. Circuit’s ruling and might have been attributed to good-faith passion. But those attempts which postdate that ruling border on what might be described as flagrant abuse of the collective-bargaining process. The French philosopher, Michel de Montaigne (whom I referenced in the ninth go-around),⁴ even though not as famous as Albert Einstein, observed that some people are just plain stubborn – “[s]tubborn and ardent clinging to one’s opinion is the best proof of stupidity.”⁵

My assessment may not be as harsh as Montaigne’s, but I have voiced my disagreement with the majority in each of those cases, which have come to the Authority since 2013 (when I became a Member of the Authority). I disagreed because I am unwilling to ignore a clear determination that was made by the D.C. Circuit. In *Federal BOP v. FLRA*, the D.C. Circuit ruled, in no uncertain terms, that Article 18 of the parties’ agreement constituted a “complete rewrite” of BOP’s “assignment process” which “covers and preempts challenges to *all specific outcomes* of the assignment process.”⁶

Just as the Union argues (and the Judge found and the majority agrees) in this case that the “*sick[-]and[-]annual[-]relief* roster” is not the type of roster covered by Article 18,⁷ in *Federal BOP*, Council 33 also argued that a “mission[-]critical” roster

was “not ‘the type of roster[.]’” the parties intended to cover by Article 18.⁸ But, the D.C. Circuit rejected that argument.

It is inexplicable to me, therefore, that the majority ignores entirely the ruling of the D.C. Circuit in this case (and why they have done so every time the same argument has been raised by Council 33 and its locals since 2011).

Contrary to the majority and Authority Administrative Law Judge Richard A. Pearson, I would conclude that “all specific outcomes”⁹ of the sick-and-annual-relief rosters are covered by Article 18.

Thank you.

¹ 67 FLRA 251, 254 (2014) (Dissenting Opinion of Member Pizzella).

² See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 584 (2015) (Dissenting Opinion of Member Pizzella).

³ *Fed. BOP v. FLRA*, 654 F.3d 91, 96 (D.C. Cir. 2011).

⁴ *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 15 (2015) (Dissenting Opinion of Member Pizzella).

⁵ Brainy Quote, http://www.brainyquote.com/quotes/quotes/m/micheldemo384680.html?src=t_stubborn.

⁶ *Fed. BOP*, 654 F.3d at 96 (emphasis added).

⁷ Majority at 6.

⁸ *Fed. BOP*, 654 F.3d at 93-94.

⁹ *Fed. BOP*, 654 F.3d at 96.

Office of Administrative Law Judges

DEPARTMENT OF JUSTICE
 FEDERAL BUREAU OF PRISONS
 FEDERAL CORRECTIONAL COMPLEX
 COLEMAN, FLORIDA
 RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, LOCAL 506
 CHARGING PARTY

Case No. AT-CA-12-0579

Brian R. Locke
 For the General Counsel

Meryl A. White
 For the Respondent

Jose Rojas
 For the Charging Party

Before: RICHARD A. PEARSON
 Administrative Law Judge

DECISION

In late 2009, the management of FCC Coleman notified its union of its intention to consolidate the sick and annual relief rosters at the four institutions within the prison complex and to assign correctional officers on the relief roster of one institution to relieve employees at other institutions. The parties had not finished bargaining when, in January 2010, the Agency terminated bargaining and implemented the new policy. The union filed an unfair labor practice charge, the FLRA Regional Director issued a complaint, and eventually the parties signed a settlement agreement that required the parties again to bargain over the assignment policy. That was the beginning of two and a half years of intermittent bargaining, delays, and unfair labor practice charges. This culminated in August 2012, with the agency's refusal to engage in any further negotiations, and the union's filing of a new unfair labor practice charge.

There are three primary issues to resolve. Was the union's charge timely? Did the agency have an ongoing obligation to bargain with the union in 2012 over the impact and implementation of the relief roster assignment policy? And did the agency violate its duty to bargain in the six months leading up to the charge? Because I find that the answer is yes to all these questions, I conclude that the agency violated section 7116(a)(1) and (5) of the Statute.

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. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or Authority), 5 C.F.R. part 2423.

On August 16, 2012, the American Federation of Government Employees, AFL-CIO, Local 506 (the Union or Local 506) filed an unfair labor practice (ULP) charge against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (the Agency, Respondent, or FCC Coleman). GC Ex. 1(a). On February 28, 2013, after investigating the charge, the Atlanta Regional Director (RD) of the FLRA, on behalf of the General Counsel (GC), issued a Complaint and Notice of Hearing, alleging that the Respondent violated Section 7116(a)(1) and (5) of the Statute by failing to bargain in good faith over the assignment of officers on the sick and annual relief roster to other institutions within FCC Coleman. GC Ex. 1(b). On March 25, 2013, the Respondent filed an Answer to the Complaint, denying that it had violated the Statute. GC Ex. 1(c). The Respondent filed a Motion for Summary Judgment on May 30, 2013, arguing that the Union's charge was untimely filed and that the Agency had no duty to bargain because the issue of sick and annual leave rosters is covered by the parties' collective bargaining agreement. GC Ex. 1(j). The GC filed an Opposition to the Respondent's Motion for Summary Judgment on June 5, 2013. GC Ex. 1(k). The Motion for Summary Judgment was denied. GC Ex. 1(n). A hearing was held in this matter on June 19 and 20, 2013, in Winter Garden, Florida. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record,¹ 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 under Section 7103(a)(3) of the Statute. GC Exs. 1(b) & (c). The Council of Prison Locals, American Federation of Government Employees (AFGE) is a labor organization under section 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit

¹ Page 359, line 24 of the transcript is corrected to read "Section D" instead of "Section G." See GC Br. at 7.

of employees at the U.S. Department of Justice, Federal Bureau of Prisons (BOP). *Id.* The Union is an agent of AFGE for the purpose of representing bargaining unit employees at the Federal Correctional Complex, Coleman, Florida (FCC Coleman). *Id.* The AFGE and the BOP are parties to a nationwide collective bargaining agreement, known as the Master Agreement. Jt. Ex. 2. The Local 506 and the Respondent are parties to a local supplemental agreement. Jt. Ex. 1.

The History of the Sick and Annual Relief Roster at FCC Coleman Prior to 2010

The Respondent was opened in 1995, as a single medium security institution. Tr. 135. Now referred to as FCC Coleman, it is made up of four separate institutions, one that houses low security inmates (Low); one that houses medium security inmates (Medium); and two penitentiaries, containing higher security inmates (USP 1 and USP 2). Tr. 30-31. Each of these institutions has its own warden and administration. Tr. 230-31. A Camp for female inmates is staffed and administered by the Medium institution. Tr. 45. A complex warden oversees all of the operations at FCC Coleman. Tr. 330. Correctional Officers there operate under the same position description and perform similar duties, such as shakedown of cells and pat-downs. Tr. 277-79.

In the mid-1990s the BOP began building prison complexes, such as FCC Coleman, with several types of institutions located together but still operated as separate institutions. Tr. 136-37. An individual hired at that time took a position at a particular institution, rather than being an employee of the complex. Tr. 35-36, 138. In order to move to another institution, the employee would submit a memorandum to the warden requesting a transfer and, if there was an opening, the request would be granted. These were permanent transfers. Tr. 35, 58.

The Council of Prison Locals has organized its locals according to the structures of the facilities in which they are located. Some prison complexes have separate locals for each institution, reflecting the fact that each institution functions independently from the others. Tr. 137. At Coleman, one local represents all of the employees at the complex, because Coleman started as a single institution. Now that the other institutions have been established there, the Union continues to operate with one local, but there is a vice president who represents each institution. Tr. 137, 271-72. Joe Rojas is the president of Local 506. Tr. 328.

The Master Agreement between the BOP and AFGE became effective on March 9, 1998. Jt. Ex. 2. Philip Glover, currently the Northeast Regional Vice President for the Council of Prison Locals, participated in all parts of the negotiations of the 1998 Master

Agreement, both as Northeast Regional Vice President and President of the Council of Prison Locals. Tr. 131-32, 134. Section d of Article 18 sets forth the procedures by which rosters for Correctional Services employees are prepared and bid every ninety days, and by which posts, shifts, and days off are assigned. Tr. 120-21; Jt. Ex. 2 at 43-45. Section g of Article 18 specifies the procedures for assigning officers to the sick and annual relief shift (or roster). Jt. Ex. 2 at 45-46. The sick and annual relief roster is used to fill posts that are temporarily vacant because of illness, vacation, training, or some other short-term absence, by employees who are not assigned to a fixed post. Tr. 112-13, 186, 383-85. Glover testified that Article 18 (Hours of Work), was negotiated between 1995 and 1998, at a time when large federal prison complexes were rare. Thus, the parties did not contemplate the issue of the assignment of correctional staff from one institution to another. Tr. 131-32, 136-38.

In February 2000, management at FCC Coleman and Local 506 negotiated a Local Supplement to the Master Agreement. Jt. Ex. 1. Ken Pike, the Executive Vice President of Local 506, was the chair of the union negotiation team for the Local Supplement. He testified that if employees wished to work at a different facility in the complex, or in a different job, they had to apply for the position, and if they were accepted, they would take the new position permanently. Similarly, employees on the sick and annual relief roster of one facility were assigned to relieve employees only at their own institution within the complex, not at any of the other facilities.² Pike stated that, throughout negotiations, no one raised the issue of assignments of employees between institutions for sick and annual relief, and the Local Supplement is silent on that issue. Tr. 56-60.

Correctional Services rosters, including rosters for sick and annual relief, are developed quarterly at each institution. Tr. 35, 63, 376, 382. Correctional officers bid on post assignments, shifts, and days off, but they do so only within their own institution. They may not bid to work at another facility within the FCC. Tr. 32-35, 63, 144-45, 376, 382, 390. The procedure, as set forth in Article 18, Section d of the Master Agreement, begins with the Agency posting a blank roster showing the available assignments, days off, and shifts, seven weeks before the start of the upcoming quarter. Employees may then submit requests for their preferences of assignments, shifts, and days off for the quarter. A roster committee,

² Article 18, Section D of the Local Supplement provides for overtime assignments at other institutions within the complex, but only after the Agency has attempted to afford overtime at the employees' home institutions. Jt. Ex. 1 at 6. Thus, according to Pike, overtime rosters are covered by the Local Supplement. However, this provision makes no reference to the sick and annual relief roster. Tr. 78-79, 91, 123.

consisting of Union and Agency representatives, meets and formulates the roster, which must be posted at least five weeks before the beginning of the new quarter. Employees may submit complaints or concerns within a week after the roster is posted; the roster committee then meets to address concerns and make adjustments as necessary. The final rosters of each facility in the complex are forwarded to the wardens for approval and posted three weeks before the beginning of the new quarter. Jt. Ex. 2 at 44-45; Tr. 167-68, 376-77.

During the quarterly bidding process, correctional officers may request to be placed on the sick and annual relief roster. Otherwise, once all of the fixed posts are filled, the remaining employees are assigned to sick and annual relief. These employees are not assigned to a fixed post or shift, but instead they are informed that, for the quarter, they will fill in for officers on sick or annual leave or in training. They may be called to work on any shift, at any post, although efforts are made to keep them on the same shift. Tr. 185-87, 381-85; Jt. Ex. 2 at 46. They may receive little or no notice regarding the post they will fill, and they may receive different assignments daily. Tr. 36-37, 182, 394-95. Before February 2006, each institution within FCC Coleman maintained its own separate sick and annual relief roster, and officers on each institution's roster were not assigned to cover vacant posts at other institutions in the complex. Tr. 62-63, 140, 173-74, 328.

Sometime in early 2006, the Agency decided to change this policy and to assign officers on the sick and annual rosters to cover vacant posts at institutions throughout the complex. Tr. 140, 184-85. The Agency entered into negotiations with Local 506, and on February 14, 2006, they executed an agreement that set forth the procedures to be used when assigning employees to other institutions.³ GC Ex. 2; Tr. 140, 174. The agreement reiterated the longstanding policy that each institution in the complex had an independent Custody Department. GC Ex. 2 at 1. It further provided that, when the Agency assigned officers on the sick and annual relief rosters, they would first be assigned to posts at their home institutions, then to "like" institutions (e.g., employees of the Low facility could be assigned to the Medium facility and employees of USP 1 could be assigned to USP 2, or vice versa), and then to any institution, in reverse seniority order. The agreement also provided, among other things, that officers placed on the sick and annual roster would receive training on the operations at all of the institutions. *Id.*; Tr. 143-46. In

³ Although the document entered into evidence by the General Counsel is unsigned, Taronica White, one of the Union's negotiators, testified that she believed this was the document that had been negotiated. Tr. 146. This testimony was not disputed by the Respondent.

2008, the practice of assigning employees from one institution to other institutions to perform sick and annual relief was discontinued by mutual consent of the parties, because it was determined that it increased overtime expenses, and each institution returned to the use of its own separate rosters. Tr. 150-51, 187.

On October 26, 2009, the Respondent sent a memorandum to the President of Local 506, notifying him that the Agency intended to consolidate the sick and annual rosters at all institutions at FCC Coleman into a single complex-wide roster.⁴ Jt. Ex. 4; Tr. 68-69, 152, 187-88. Included with the memorandum was a set of twenty-four proposals and proposed bargaining dates. Among other things, the Agency proposed that, once a home institution's relief roster has been exhausted, the Complex Administrative Roster would be used to fill vacated posts.⁵ There was no proposal to fill vacant posts from "like" institutions first. Jt. Ex. 4 at 2. The proposals did include a provision that the Agency and the Union would meet regularly to review the administration of the new procedures. *Id.* at 4.

The parties entered into negotiations on these proposals for a total of about two weeks in late 2009 and early 2010. The Union countered the Agency's proposals with two alternative sets of proposals. Option 1 contained six proposals that could be adopted on a trial basis. If either party determined that the process was not working, it would be ended. Tr. 309-10. Option 2 contained about 30 proposals that corresponded more closely to the Agency's proposals. Tr. 309. Then, rather abruptly, the Agency representatives declined to negotiate further, saying they had agreed on enough proposals to implement the policy. They offered no other reasons for declining further bargaining, and no written statement of impasse or nonnegotiability was submitted to the Union. Tr. 39, 44, 153, 189-90, 193, 198, 314, 321. The parties had reached agreement on some issues, but a number of matters remained in dispute, and the Union wanted to continue to negotiate. Tr. 155, 193, 247-50, 292-95. For example, the Union was concerned about the safety of officers assigned to institutions with which they were unfamiliar. Tr. 42-43. The Union also wanted to address the use of radio channels, documents containing operational information for each institution, and the possibility of last-minute adjustments in the sick and annual relief roster that might allow some

⁴ The memorandum also included notice that the voluntary and mandatory overtime rosters for the four institutions would be merged. Jt. Ex. 4 at 1. Subsequently, however, the Agency rescinded all changes to overtime practices.

⁵ The Complex Administrative Roster is the document that combines the sick and annual relief rosters for all of the institutions at FCC Coleman. Jt. Ex. 4 at 2, ¶ 9; Tr. 43.

employees to remain in their home institutions. Tr. 247-49, 292-95.

The Sick and Annual Relief Roster since January 2010

Sometime in early 2010, the Agency implemented the new policy relating to the consolidated sick and annual roster, through an announcement it issued on the Sally Port site, the BOP's intranet site. R. Ex. 3; Tr. 39, 188-90, 281, 288-89, 321-22. The document states that the institution rosters at the complex had been combined into a single Correctional Services Roster, which identifies the home institution of each employee. It provides that staff assigned to sick and annual relief will first be used at their home institution, but if no vacant posts at the home institution are available, they will be assigned to like institutions and then to any other institution in the complex. Tr. 285-86; R. Ex. 3. Jim Seidel, who was the Union's Chief Negotiator in the 2009-10 negotiations, testified that the document contained a few, but not all of the proposals over which the parties had negotiated.⁶ Tr. 321-22. According to Seidel, they agreed that in assigning officers from the consolidated sick and annual relief roster, employees would be assigned first to relieve officers at their home institutions, then at like institutions, and then at different institutions. Tr. 284-85, 302. The parties did not bargain between February and September of 2010. Tr. 199.

On August 25 and 26, 2010, the national parties participated in a quarterly Labor Management Relations (LMR) meeting in Washington, DC. Tr. 341, 344. The Union had placed an item on the agenda for that meeting, under the heading of "Mission Critical," about the Agency's failure, on a national basis, to negotiate changes in roster procedures, and cited the example of FCC Coleman regarding the consolidation of the sick and annual rosters at the complex. Jt. Ex. 7. Christopher Wade, a Deputy Chief of Labor Relations for BOP who attended the LMR meeting but who had not participated in any of the local negotiations at FCC Coleman, testified about the LMR meeting. He said that the discussion had been resolved at the August 2010 meeting with a statement by the parties that they "endorse the concept of good Labor Relations at the local level" and "agree that when preparing quarterly rosters for the Correctional Services Department, Article 18, Section D will be consistently followed." *Id.* at 2; Tr. 343-44.

⁶ Respondent's Exhibit 3 is not dated or signed. Seidel testified that the document was posted by the warden on the Sally Port shortly after the negotiations were ended to clarify the new policy that had recently been implemented. Tr. 288-89.

Eric Young, the Southeast Regional Vice President for the Council of Prison Locals, was also present at the meeting and wrote the summary of the "Mission Critical" portion of the minutes. Jt. Ex. 7; Tr. 352-53. He explained that he had cited the negotiations at FCC Coleman in the summary because the labor-management relations at FCC Coleman were not constructive. They, like other facilities, were not engaging in partnership, and he wanted that to change. He was trying to show a similarity in attitudes between national and local Agency leadership with respect to cooperation and bargaining. Tr. 354-56, 369-70. He testified that the "mission critical" issue is related to the preparation of quarterly rosters, rather than the sick and annual relief roster, and emphasized that Article 18, Section d does not concern sick and annual relief rosters. Tr. 359, 361, 373.

Although the sick and annual relief rosters for correctional officers at FCC Coleman have been combined, employees bid on a quarterly basis for regular (fixed) posts at their home institutions. Employees of USP 1, for instance, can only bid for posts at USP 1. This has not changed, either before or after 2010. Tr. 32-33, 63, 144-45, 376, 382, 390. However, since the Agency implemented the consolidated sick and annual relief roster in 2010, officers at USP 1 who are assigned to the sick and annual relief roster are now sent to all facilities within the complex to relieve officers on leave or in training. Approximately three or four employees on sick and annual relief are assigned to other institutions on a daily basis. Tr. 60, 156.

The basic duties of Correctional Officers are the same across the institutions, but there are differences in the ways the units are structured, the levels of security for inmates, and the ways inmates must be dealt with. Tr. 55-56, 277-78. Even when someone on sick and annual relief is assigned to a like institution, such as when an employee of USP 1 is assigned to USP 2, there are differences between the facilities that can cause problems for someone who is unfamiliar with their new environment. Tr. 156-57, 231-32. Going to a different level of facility is even more of a challenge. Tr. 157. Each warden runs his or her institution in a particular way. The facility layouts are different. Parts of the institution are labeled differently, so if a radio call goes out for assistance in a particular area, the relief employee might not know where to go to assist. Shift hours are different, and procedures vary. Emergency equipment may not be in the same location at two facilities. Controlled moves and feeding are conducted differently. In such an unfamiliar environment, an officer may not have the knowledge to respond quickly and assist other staff in an emergency – a problem the officers consider to be a safety and security issue. Tr. 156-57, 231-32. For example, officers carry different sets of keys

at different institutions; this is important because everything is locked and secured. Having an unfamiliar key ring can affect an officer's ability to respond to an emergency or isolate an emergency situation. Tr. 156-57, 231. Seidel explained that, when he worked at USP 2, he was often assigned to the compound. Once, he was assigned to a sick and annual relief post at the compound at the Low. He had been accustomed to the single set of keys at USP 2. At the Low, there were three rings with about 10 keys each. He had no idea which keys went where. He could not locate the other Compound Officer, and no one was able to help him. Under those circumstances, he believed he could not be effective. Tr. 234.

Each institution at FCC Coleman has a post picture file, which was established by the Special Investigative Service. This is a catalog of photos of inmates who are either on two-hour watch, which means they must contact a staff member every two hours, or they are high-profile inmates, who are considered to pose a threat. They may be high escape risks, physically abusive to staff, or sexual predators. There are between 100 and 160 photographs in the post picture file at USP 2 alone. Custody staff must review the post picture file at their institution monthly. Non-custody staff are required to study the file quarterly. The post picture file for a particular institution is available on every computer at that institution, but the file from one institution is not available on the computers at the other institutions. Thus, employees may only view the file in advance for their own institution. Tr. 157-59, 163, 165-66. It can take about 30 minutes to study the post picture file. Relief employees coming into a different institution, however, do not have time to review the file before they start their shifts, because they must begin work immediately when they arrive at their posts. Tr. 172, 246.

The Agency does not furnish any sort of introductory orientation to assist relief employees assigned away from their home institutions. Tr. 156-57. Some training and information on general prison operations are provided. Post orders are kept at every post, and employees review them at the starts of their shifts. Tr. 117, 162-63. General post orders give an overview of what is expected of the officers when they are on duty. Specific post orders describe the particular shift and state the times at which tasks associated with the shift are to be completed. Tr. 117, 164. The employees also receive an introduction to corrections work during a three-week session at a BOP facility in Glynco, Georgia, where they become basically familiar with the books and procedures used in the BOP system and they learn about the levels of inmates at the institutions. The training is very general, however, and does not address the daily operations at individual facilities. Tr. 166, 274, 300. New employees also go through institutional

familiarization training at their own institutions, a three-week program conducted in the local Human Resources office. Taronica White, who has worked at FCC Coleman since 2005, and Seidel, who was transferred there in 2006, did not receive institutional familiarization training when they arrived at FCC Coleman. Tr. 167, 184, 275-76. Finally, all employees at BOP facilities must participate in Annual Refresher Training. The employees receive general information, but do not learn about the specifics of the facilities at their individual institutions or other facilities in the FCC. Tr. 276-77, 300. Employees educate themselves informally when they take sick and annual relief posts, usually by asking questions of co-workers who are on regular assignments at those posts. Tr. 165.

The 2010 Settlement Agreement and Subsequent Negotiations

After FCC Coleman implemented the new relief assignment policy posted on the Sally Port in January 2010, Local 506 filed a ULP charge in Case No. AT-CA-10-0172, protesting that action. Tr. 39. The FLRA's Atlanta Regional Director issued a complaint and, on September 24, 2010, the parties executed an informal settlement agreement, which provided that the Agency would negotiate with Local 506 over appropriate arrangements for employees affected by the Administrative Roster implemented in January 2010. Jt. Ex. 6. The Agency agreed, among other things, to bargain in accordance with the existing ground rules for the negotiation of local issues at FCC Coleman (Jt. Ex. 3), and to negotiate until either: (1) agreement was reached with the Union; (2) the Federal Services Impasses Panel asserted jurisdiction over the matter; or (3) bargaining was otherwise completed pursuant to the Statute. Jt. Ex. 6 at 4; Tr. 41-42, 290.

On or about February 3, 2011, the parties resumed negotiations, pursuant to the Settlement Agreement. GC Ex. 1(a) at 3; Tr. 48. The parties held several negotiating sessions between February 3 and June 17 and met with a mediator on March 28 and April 22, 2011. GC Ex. 1(a) at 4-6; Tr. 108-09. The Agency also suspended negotiations on several occasions in this period, prompting the Union to file several ULP charges, which in turn resulted in the Agency agreeing to resume bargaining and the Union agreeing to withdraw the charges. GC Ex. 1(a) at 4-6; Tr. 49-50. Sometime in June 2011, the Union tabled its Option 1 proposals, because management indicated that it would not agree to them. Tr. 298-300, 310-14. When the Agency terminated bargaining on June 17, the Union filed ULP Charge No. AT-CA-11-0399, alleging that the Agency had bargained in bad faith by suspending negotiations prematurely. R. Ex. 1. The

Regional Director dismissed this charge on October 26, 2011, finding that the parties had met numerous times to negotiate, had reached agreement on several issues, and the Agency's refusal to agree to other proposals did not constitute bad faith. R. Ex. 2. The Union did not appeal the Regional Director's decision, but it continued to pursue negotiations with the Agency, and the parties participated in another mediation session on December 11, 2011. GC Ex. 3; Tr. 52, 197-98. Although the Agency representatives at the mediation session expressed a desire to resolve the ongoing disputes regarding the effects of the relief roster assignment policy, they had not been involved in the negotiations for some time; as a result, much of the mediation session was spent providing them with background information. Tr. 197-98. Agreement was not reached on any proposals on December 11, and management would not set another date to meet. GC Ex. 3; Tr. 52.

During the period after the December 11, 2011 mediation, the Agency underwent a number of management changes, and the Union was unsure who would be representing the Agency in negotiations. Tr. 204-05. On December 19, 2011, Seidel sent a memo, on behalf of the Union, to Associate Warden (AW) Cheatham, who had been the Agency's chief negotiator regarding the sick and annual relief roster issue, asking when they could meet again, and who the Agency's chairperson would be. GC Ex. 3. In December 2011 or January 2012, AW Larri Lee contacted Seidel and informed him that she would be the Agency's negotiator on this issue. She was new to the process, and she told Seidel that she needed to be familiarized with the history of the negotiations, to be given the original proposals exchanged by the parties, as well as those proposals that had been agreed upon. Tr. 204-06, 317. Seidel provided Lee with the information she requested, and they met and spoke several times in or around February 2012. Tr. 211-12. Seidel answered her questions about the proposals, what the parties intended, what had prevented agreement on some issues, and what had happened during negotiations. Seidel told Lee that he was eager to return to negotiations; Lee, in turn, indicated to Seidel that she was now in charge of the relief roster negotiations and that she intended to negotiate. Tr. 206-12, 215. On February 20, 2012, Seidel sent an email message to Lee, asking that they meet to begin bargaining, as soon as possible. Lee responded the next day, stating that she would bring the matter to the next associate wardens' meeting as an urgent issue. She said she would note her concerns and asked that Seidel provide her with a list of Union concerns. GC Ex. 4. She promised that she would then have a better grasp of both sides, and she would let him know when they could begin formal negotiations. *Id.*; Tr. 206-09.

Seidel continued to press Lee for a meeting. During a conversation on or about April 5, 2012, Lee said that she could meet with Seidel the following day, if he would agree to withdraw all of the proposals to which the parties had agreed, and start the process from the beginning. Tr. 210, 318. Seidel estimated that, at the time, the parties had reached agreement on about twelve proposals, and some had been negotiated as long ago as 2010 and 2011. Tr. 318. He told Lee that her offer was unacceptable; the parties had spent nearly two years to achieve partial agreement, and he would not start over. Lee answered that, in that case, she was not prepared to set a date for negotiations. Tr. 210, 318. Following that conversation, Seidel sent a memo dated April 6, 2012, to the four wardens of FCC Coleman, advising them that Lee's refusal to bargain, unless the Union agreed to withdraw all prior agreements in the sick and annual relief roster negotiations, was an unlawful attempt to manipulate the bargaining process. GC Ex. 5. He announced that, until the Agency agreed to work with the Union in good faith, formal Labor-Management Relations at FCC Coleman would be suspended. *Id.* Seidel testified that by the end of the day on April 6, management let him know that Lee would no longer be the Agency's negotiations chair and would be replaced by AW Robert Morris. Tr. 219-20.

Shortly thereafter, Morris informed Seidel that he would be handling the sick and annual relief roster negotiations for the Agency. Tr. 221. Morris had not participated in any of the parties' earlier negotiations and had only been at the complex for a few months. He told Seidel that he needed to familiarize himself about the issues in these negotiations, and he asked Seidel to provide him with everything the Union had. Tr. 221-22. On April 17, 2012, Seidel faxed a number of documents to Morris, including a letter he had previously sent to Lee, describing the Union's suggestions. He stated that he was open to all of Morris's concerns, and that he intended to finish the negotiations over sick and annual assignments. GC Ex. 6.

Morris and Seidel met on May 29, 2012. Also present at the meeting were Taronica White, Gerrod Dixon, and Officer Timmons for the Union, and Assistant Human Resources Manager David Honsted for management. Tr. 225-26. The Union representatives answered Morris's questions about the earlier proposals; Morris then indicated that he had handled roster programs in the past, that he now understood the issues that were still unresolved, and that he wanted to set a date for negotiations to begin. Tr. 226. Morris offered a tentative date of July 23, 2012, and Seidel promised to assemble a negotiating team and to check whether that suggested date was available to his team. *Id.* No proposals were exchanged at the May 29 meeting, but Morris expressed his intent to resume negotiations where they had been

broken off earlier. He did not repeat Lee's demand that the Union withdraw all agreed-upon proposals. Tr. 225-27. On June 7, Seidel sent a memorandum to Morris, asking that the negotiation meeting be rescheduled from July 23 to August 20, 2012; Morris responded by email the same day, saying, "No problem." Tr. 227; GC Ex. 7. However, the parties did not meet to negotiate on August 20. On August 14, while the Union negotiating team was preparing for negotiations, Morris came to the Union office and informed them that "the negotiation is not going to happen." Tr. 228. Morris said that someone at the Agency, "very high above him," "had pulled the rug out from underneath him." *Id.* He offered no further explanation for the cancellation.

When Joe Rojas, the President of Local 506, learned that the Agency had stopped negotiations over the sick and annual relief roster issues, he made an appointment to speak with FCC Warden Tamyra Jarvis. Tr. 329-30. They met on August 15, 2012, and he asked why negotiations over sick and annual relief roster assignments had been stopped. The warden explained that they cancelled the negotiations because the Union had filed a grievance that was pending arbitration. Tr. 330; GC Ex. 8. Rojas was not aware of any arbitration, so he asked Jarvis to call Human Resource Management to confirm this, which she did while Rojas was present. The warden spoke with Kevin Rison of HRM, who told her that no arbitration was pending.⁷ Tr. 331-32. Rojas asked if they could now return to the table, and the warden said she would get back to him. GC Ex. 8; Tr. 330-33. Rojas then sent an email message to Warden Jarvis on August 16, 2012, confirming their conversation of the previous day. He stated that he had made the decision not to invoke arbitration because he believed the Agency wanted to work with the Union on these issues. He asked that she confirm, by the end of the day, whether the Agency would resume negotiations. GC Ex. 8. Neither the warden nor any other representative of the Agency responded, and negotiations have not resumed since then. Tr. 333.

⁷ According to an e-mail message sent by Rojas to Warden Jarvis on August 16, 2012, the Union had filed a grievance, but had withdrawn it based on the Agency's agreement in June 2012 to resume negotiations over sick and annual assignments. GC Ex. 8.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel makes three arguments: (1) that the Complaint was filed timely; (2) that the Respondent had a duty to bargain in good faith; and (3) that the Respondent failed to bargain in good faith. GC Br. at 2.

Regarding timeliness, the GC refers to the Complaint, which alleges that the Respondent violated the Statute by: (1) on April 5, 2012, insisting that the Union agree to rescind the agreements the parties had reached as a condition to negotiations; (2) cancelling a negotiation session on August 14, 2012; (3) refusing to schedule another negotiation session after cancelling the August 20, 2012 meeting; and (4) failing to meet with the Union throughout 2012. GC Ex. 1(b). The GC states that all of the incidents alleged in the Complaint occurred within six months of the filing of the charge. Thus, the charge was timely filed. 5 U.S.C. § 7118(a)(4). GC Br. at 12.

The GC addresses the Respondent's argument that the charge was not timely filed by first referring to the description of the allegation in the charge, which is divided into two sections: "Background," including information about the actions taken by the Agency and the charges filed since AT-CA-12-0172; and "Instant offense giving rise to unfair labor practice[.]" describing the actions taken by AW Morris from May 2012 to August 2012. GC Ex. 1(a). The General Counsel also addresses the Respondent's argument that the change to a consolidated roster was made in 2010 by stating that the charge does not allege a unilateral change, but instead alleges that the Agency failed to negotiate in good faith by abruptly cancelling negotiations on August 14, 2012. GC Ex. 1(a), GC Br. at 12, n.22. All of these actions were taken within six months of the filing of the charge.

In response to the Respondent's argument that it did not have a duty to bargain, the GC contends that the Agency's duty to bargain in good faith is based on the settlement reached by the parties in resolution of AT-CA-10-0172, in which the Agency agreed to continue to negotiate over the assignment of officers to institutions other than their home institutions. Jt. Ex. 6; GC Br. at 13. The General Counsel asserts that the parties intended to negotiate and did resume negotiations shortly after the agreement was executed. Tr. 42-43, 48, 291. The GC further asserts that, when the Agency signed the agreement, it waived any defenses, such as "covered-by." *See e.g., Dep't of the Army, Womack Army Med. Ctr., Ft. Bragg, N.C.*, 63 FLRA 524, 527 (2009); *Soc. Sec. Admin.*, 55 FLRA 374, 377 (1999). Relying on the agreement, the Union withdrew its charge, and its right to

seek a return to the status quo. Thus, the General Counsel submits that the Respondent violated sections 7116(a)(5) and 7114(b)(5) by failing to fulfill its bargaining obligation. GC Br. at 15-16.

In the alternative, the General Counsel argues that the Respondent has a duty to bargain because it made a change in employees' conditions of employment that was greater than de minimis and the subject matter was not covered by Article 18 of the parties' Master Labor Agreement. GC Br. at 16. The GC points to evidence that, with the exception of a two-year period between 2006 and 2008, the Agency did not assign employees on sick and annual rosters to institutions other than their home institutions. Tr. 62-63, 140, 328. In January 2010, without completing bargaining, the Agency began making those assignments. Tr. 140. The GC argues that the effect of this change on employees is not so trivial that bargaining would be a "pointless expenditure of effort." *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) (quoting *Ala. Power Co. v. Castle*, 636 F.3d 323, 360 (D.C. Cir. 1979)). It observes that the four institutions comprising FCC Coleman have different levels of inmates and security, different schedules and layouts, different procedures for feeding and moving inmates, and are organized and run differently. Tr. 43, 55-56, 156-57, 231-32. They also have different keys, and different radio channels, which could have safety implications. Tr. 231, 234, 248. Finally, employees assigned to a different institution do not have time to review the post picture files of high-risk inmates. These files are only available within their home institutions. Tr. 158, 163. The GC asserts that despite these differences, the Agency does not provide training for employees assigned to different institutions. Tr. 156-57. Therefore, these officers are unprepared to work in other institutions and their lack of knowledge could have consequences for their safety, and the safety of other officers and inmates. The GC argues that, because of these differences, assignments of relief officers to other institutions could result in significant adverse impacts. GC Br. at 22-23.

The General Counsel submits that the change to a complex-wide sick and annual roster is not covered by Article 18 of the Master Agreement, and it notes that the Respondent has the burden of proving its covered-by defense. *Nat'l Fed'n of Fed. Employees, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 126 (2011) (*NFFE*). GC Br. at 23. The GC argues that Article 18 does not satisfy the first prong of the covered-by test, because Article 18 does not in any way address the assignment of employees to other institutions, and would not address any problems raised by such assignments. GC Br. at 25. With respect to the second prong, the GC asserts that the Respondent offered no evidence regarding the parties' bargaining history, which reveals that federal correctional

complexes were new at the time the Master Agreement was negotiated, and that institutions within a complex were operated independently. Tr. 132, 137. Thus, the parties did not intend Article 18 to cover assignments of employees to different institutions. GC Br. at 26-27. Likewise, when the parties at FCC Coleman negotiated their Local Supplement, assignments to other institutions were not considered, and the Agency never argued they would be covered by Article 18. GC Br. at 27.

The General Counsel observes that, throughout the history of negotiations over the assignment of officers on the sick and annual rosters at FCC Coleman, the Respondent never argued that Article 18 covered this issue. The Agency did not envision assignments to other institutions when bargaining over the Master Agreement, it did not raise a covered-by defense when it signed the settlement agreement resolving AT-CA-10-0172, and in three years of negotiations, the Agency's negotiators never asserted that they were not obligated to bargain because the issue was covered by Article 18. GC Br. at 28. The GC asserts that the Respondent's reliance on *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91, 95 (D.C. Cir. 2011) (*BOP v. FLRA*), is inappropriate, because the Authority determined that the court's decision was merely the "law of the case"; moreover, that decision concerned the elimination of positions on the quarterly roster, not the assignment of employees to other institutions. GC Br. at 28.

The General Counsel contends that the totality of the circumstances shows that the Agency has bargained in bad faith over the combined sick and annual relief roster at FCC Coleman. *See U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 36 FLRA 524 (1990) (*Wright-Patterson*). In the two years preceding the events alleged in the Complaint, the Respondent had a history of making empty promises and unnecessarily delaying negotiations. GC Br. at 30. With respect to the evidence giving rise to the Complaint, Associate Warden Lee caused delays by requiring the Union to provide her with information and educate her about the issues associated with these negotiations. Tr. 211-12, 216. When the Union requested a meeting to negotiate, she informed them, on April 5, 2012, that she would meet only if the Union agreed to withdraw all proposals the parties had agreed to in their negotiations over the sick and annual roster. GC Ex. 5; Tr. 216. Then, after the Union spent considerable time providing information to Lee's replacement, Associate Warden Morris, he agreed to meet but ultimately cancelled negotiations scheduled for August of 2012. Tr. 219, 222-23, 226, 228-29; GC Ex. 7. Thus, the General Counsel argues that the Agency, through Lee and Morris, caused unnecessary delays, refused to meet, and ultimately demonstrated an

unwillingness to reach agreement, thus bargaining in bad faith. GC Br. at 32.

The Respondent

The Respondent argues first that the Union's charge is untimely under section 7118(a)(4)(A) of the Statute. R. Br. at 17. It notes that the charge, dated August 16, 2012, includes references to the three occasions on which the Agency suspended negotiations, the last being June 2011, and to the Agency's refusal to return to the table since then. GC Ex. 1(a). The Respondent also asserts that at the hearing, the Union admitted that on December 11, 2011, the Agency said it would not restart negotiations. Tr. 257. The Respondent notes that these events took place more than six months before the charge was filed. *Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 43, 46 (1998). Thus, the Respondent contends that the charge was not timely filed, and the Complaint should be dismissed. R. Br. at 18.

Noting that the parties negotiated extensively between February and June of 2011, and met with a mediator on March 28 and April 22, 2011, the Respondent asserts that it bargained in good faith. *Id.* When the Union sought to bargain over seniority and days off, the Agency declined and the Union withdrew that proposal. R. Ex. 2; Tr. 109-10. The parties engaged in a give-and-take process, taking one proposal at a time, until they reached agreement. Tr. 102-03, 254, 319-20; GC Ex. 1(a); R. Ex. 7. *Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 16 FLRA 217, 228 (1984). The Respondent highlights the fact that the Atlanta Regional Director dismissed a Union unfair labor practice charge against the Agency, rejecting the allegation that the Agency had bargained in bad faith. R. Ex. 2 at 2. The Respondent argues that its refusal on some occasions to make a concession or agree with Union proposals is a statutory right and does not demonstrate bad faith.

Relying on the testimony of Seidel and Pike that some of the Union's proposals were incorporated into the implementation notice that was distributed through the Sally Port in 2010, the Respondent further argues that the parties reached agreement and signed proposals in June 2011. Tr. 326; R. Br. at 21. This, the Respondent argues, shows that the Agency implemented the change in compliance with the settlement in AT-CA-10-0172. R. Br. at 23. The Sally Port notice, consistent with the parties' negotiations, provides that officers assigned to the sick and annual roster will first be assigned to posts at their home institution, then at a like institution, then complex-wide, if the need arises. Tr. 285-86; R. Ex. 3.

The Respondent has embraced the decision of the Court of Appeals for the D.C. Circuit in *BOP v. FLRA* to argue that the assignment of sick and annual relief officers to other institutions is covered by Article 18, Sections d and g, of the Master Agreement. R. Br. at 24. Finding that Article 18 establishes "procedures for the scheduling and assignment of work for officers at each of the Bureau's facilities," the D.C. Circuit determined that "Article 18, specifically in Sections (d) and (g), reflects the parties' earlier bargaining over the impact and implementation of the Bureau's statutory right to assign work[.]" specifically the procedures used to formulate a roster, assign officers to posts, and designate officers for the relief shift. *BOP v. FLRA*, 654 F.3d at 93, 95. The court held that, "Article 18 therefore covers and preempts challenges to all specific outcomes of the assignment process." *Id.* at 96. The Respondent seeks to support this decision with the testimony of Wade and Young, who both confirmed that the Agency and the Union agreed at their national LMR meeting in August 2010 that the parties would follow Article 18, Section d of the Master Agreement. Tr. 343-44, 358. Based on this resolution, the Agency concludes that it had no duty to bargain over the sick and annual relief assignments because they are covered by Article 18. R. Br. at 27.

Finally, the Respondent questions the Union's credibility with respect to its evidence of bad faith bargaining from April to August of 2012. R. Br. at 28. The Respondent notes that Lee's name does not even appear in the ULP charge, and it emphasizes several other points: the parties never resumed negotiations after June of 2011; the Union offered no new proposals; the Union suspended LMR meetings in April 2012; there are no meeting minutes to memorialize Seidel's alleged discussions with Lee and Morris in 2012; and the Union withdrew Option 1. The Respondent finds these Union actions to be inconsistent and improbable, and it argues that the General Counsel thus failed to prove that the Agency violated section 7116(a)(1) and (5) of the Statute.

ANALYSIS AND CONCLUSIONS

The Charge in Case No. AT-CA-12-0579 Was Timely Filed

The Respondent argues that the ULP charge in this case, filed on August 16, 2012, was untimely. Under § 7118(a)(4)(A) of the Statute, a charge must be filed within six months of the alleged unfair labor practice. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., El Paso, Tex.*, 65 FLRA 422, 424 (2011). Respondent claims that the Union is using the instant proceeding to prosecute actions the Agency took between 2009 and 2011: the Agency's January 2010 implementation of its decision to consolidate the sick and annual relief rosters and to begin inter-institutional relief assignments, and the Agency's conduct during bargaining that was conducted between January 2010 and June 2011. Respondent further contends that it has refused to bargain over these issues since December 2011 at the latest. Accordingly, it argues that the Union's August 16, 2012, charge was filed too late to consider those events.

There is no question that the history of negotiations at FCC Coleman over the practice of assigning officers from one institution's sick and annual relief rosters to other institutions is long and fraught. The factual statement attached by the Union to its ULP charge covered many events that occurred in 2010 and 2011, but in the section titled "Instant offense giving rise to unfair labor practice," the Union explicitly cited the actions of Associate Warden Morris between May and August of 2012 as constituting bad faith bargaining in violation of the Statute. GC Ex. 1(a) at numbered pages 6-7. The Complaint expanded on these allegations by citing the actions of AW Lee on April 5 and other dates in early 2012, which were alleged to constitute bad faith bargaining. GC Ex. 1(b). These actions fall within the six-month filing period.

The Respondent is correct that its actions committed prior to February 16, 2012, cannot constitute the basis of the unfair labor practice alleged in this case. In order to prove an unfair labor practice, the GC must demonstrate that the Agency bargained in bad faith during the period of February 16 to August 16, 2012. The Complaint, on its face, alleges such conduct, and the GC has introduced evidence regarding the Agency's bargaining conduct during that crucial period. Moreover, as the Authority explained in *U.S. Dep't of the Interior, Lower Colo. Dams Project, Water & Power Res. Serv.*, 14 FLRA 539, 543 (1984):

[W]here the conduct or events complained of occur within the 6-month period preceding the filing of the charge and in and of themselves

may constitute unfair labor practices, evidence of events occurring more than 6 months prior to the filing of the charge may be utilized to explain the conduct or events occurring within the 6-month period.

See also Rolla Research Ctr., U.S. Bureau of Mines, Rolla, Mo., 29 FLRA 107, 124 n.2 (1987).

With these principles in mind, the Union's charge was timely filed, but the GC must prove that the Agency's conduct in the six months prior to August 16, 2012, violated the Statute. In evaluating whether the GC has met its burden, and in order to understand the lawfulness of the Agency's conduct in the crucial six-month period, I will consider evidence of events that occurred earlier than February 2012 (i.e., the implementation of the Agency's policy in January 2010 and the parties' negotiations over that policy in 2010 and 2011). But the Agency's decision in 2010 to begin assigning officers from one institution's relief roster to other institutions at FCC Coleman, and its conduct of negotiations in 2010 and 2011, cannot represent the underlying actions that violate the Statute; rather, the focus of that analysis must center on the Agency's actions between February and August of 2012.

The Agency Bargained in Bad Faith When Its Representatives Delayed Negotiations and Ultimately Refused to Negotiate

Section 7103(a)(12) of the Statute defines collective bargaining as the "performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" Section 7114(b)(1) and (3) states that "[t]he duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation . . . to approach the negotiations with a sincere resolve to reach a collective bargaining agreement . . . [and] . . . to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]" The Authority analyzes the totality of the circumstances in determining whether a party bargained in bad faith. *Wright-Patterson*, 36 FLRA at 531 (finding that the agency bargained in bad faith by unreasonably delaying negotiations and insisting in bargaining over proposals that would severely limit the union's rights before addressing the union's proposals).

The Complaint alleges here that Lee, Morris, and the Agency bargained in bad faith over several months in 2012. In testimony that was undisputed, Seidel

said that Lee contacted him in late 2011 or early 2012 and informed him that she would be the Agency's negotiator regarding the sick and annual roster. She explained that she was unfamiliar with preparing rosters and with the history of these negotiations and would need some background. They met on a couple of occasions and had several phone conversations. He provided her with copies of proposals that had been exchanged and those that had been agreed upon, and he answered her questions about the proposals, the parties' intentions, and other matters. He also expressed his eagerness to bargain, and she indicated that she intended to negotiate. Tr. 206-12, 215. In an e-mail exchange on February 20 and 21, 2012, Seidel stated they had agreed to finish the negotiations regarding the sick and annual rosters, and he believed they could find solutions. GC Ex. 4. Lee responded that she would bring the matter to an upcoming meeting of the associate wardens "as an urgent issue we need to address[.]" and that after she had a better grasp of both sides, she would let him know where they could begin. *Id.* Although no proposals had been exchanged, Seidel was clear about the Union's interest in bargaining, and Lee indicated that she was prepared to start bargaining on the Agency's behalf. Seidel and Lee continued to communicate in preparation for negotiations for several more weeks. On April 5, 2012, Lee told Seidel that she was prepared to begin formal negotiations the following day, if the Union would withdraw all of the proposals to which the parties had agreed and start from the beginning. Tr. 210, 318.

In a memo sent by the Union to all of the wardens at the FCC to protest Lee's demand, Seidel said the Agency's demand was unacceptable, in light of the two years of effort it had taken to reach agreement on those issues. GC Ex. 5 at 1.⁸ By the end of the day on April 6, the Union was notified that Lee had been replaced by Morris as Agency negotiator for the sick and annual roster negotiations. Tr. 219. This started the process all over, as Morris was new to FCC Coleman; Seidel took time to educate him about the many issues on which the parties had negotiated, and about the issues that had been resolved. Tr. 221-22. Seidel and Morris spoke about the issues under negotiation on several occasions, and on May 29, 2012, four Union officials met with Morris and another Agency representative. Tr. 225-26; GC Exs. 6, 7. At that meeting, the Union representatives answered numerous questions from the Agency, and they tentatively agreed to conduct their first formal negotiation session on July 23, and to "pick up the negotiations where we left off." Tr. 225-27. No demand was made to reopen the previously agreed-upon issues. Tr. 227.

⁸ I accept the factual assertions in GC Exhibits 3 through 8, as they are generally corroborated by the testimony of Seidel and other Union witnesses, and because the Respondent made no effort whatsoever to rebut them at the hearing.

About a week after the May 29 meeting, Seidel and Morris changed the date of the negotiation session to August 20. GC Exs. 7, 8. However, on August 14, Morris notified Seidel that the Agency was cancelling the negotiations. Morris didn't give a reason for the decision, or any alternate meeting dates, but he said the decision had been made "very high above him." Tr. 228; GC Ex. 8. The parties have not held any negotiations on this matter since August 2012.

The Agency's response to the General Counsel's allegation of bad faith bargaining is that it terminated negotiations with the Union on December 11, 2011, and no bargaining has occurred since then.⁹ R. Br. at 29 (citing Tr. 257). It argues that Seidel's testimony should not be believed because he admitted that he and AW Lee never set a negotiation date, that there were no LMR minutes to memorialize their discussions, that no new proposals were submitted between April 2012 and August 2012, and that the Union produced no e-mails or memoranda confirming negotiation sessions. These points might have some weight if they were supported by testimony from Agency witnesses disputing Seidel's assertions, but in fact no Agency negotiator testified on these matters. Moreover, Respondent's position misses the point of the GC's case: regardless of whether Lee and Morris engaged in formal negotiations with Seidel in 2012, they led the Union to believe that they and the Agency were negotiating, that they wanted to digest the full history of the prior negotiations and "pick up . . . where we left off and complete the negotiations." Tr. 227. After a short interruption following the December 11, 2011, mediation session, first Lee and then Morris essentially led Seidel and the Union on a wild goose chase: professing interest in negotiating, digesting scores of documents showing the history of the earlier negotiations, and then breaking things off without any rational explanation. While we do not have copies of the proposals the parties agreed upon in earlier bargaining,

⁹ This ties in with Respondent's argument that the ULP charge of August 16, 2012, was untimely: if the Agency firmly and finally declared negotiations over in June of 2011, or at the latest December 2011, then any ULP charge filed after June 11, 2012, would be untimely. If the Agency had indeed declared negotiations over on December 11, 2011, and refused to entertain the idea of negotiations in any manner after that date, I would agree with Respondent that the limitations period began on that date. But as I have indicated in my findings below, the actions of Lee and Morris, supported by Warden Jarvis and the rest of Agency management, constituted a continuation of the bargaining process. Even if the Union's protracted conversations with Lee and Morris through most of 2012 were not "formal" negotiations, they constituted "collective bargaining" within the meaning of section 7103(a)(12), because both Lee and Morris told the Union that they intended to negotiate an agreement concerning the impact and implementation of the change in assignment practices relating to the sick and annual relief rosters.

GC Exhibits 4 through 7 reflect that these proposals and related documents were given by Seidel to Lee and Morris between February and June 2012, and that the Agency's designated negotiators engaged the Union in protracted discussions of the issues in dispute, with a promise to renew formal negotiations, first in April and then in August of 2012.

I find that the Agency's offer on April 5, 2012, to resume negotiations on the sick and annual relief rosters only if the Union dropped all of the previously agreed-upon proposals; the Agency's subsequent offers to renew negotiations unconditionally; and its final cancellation of negotiations on August 14, 2012, were acts of bad faith which sought "to evade or frustrate the bargaining responsibility" outlined in §§ 7103(a)(12) and 7114(b) of the Statute. See *Div. of Military and Naval Affairs, State of N.Y.*, 7 FLRA 321, 338 (1981). Withdrawing previously agreed proposals without good cause may be evidence of bad faith bargaining, but such conduct may be justified, depending on the circumstances. In *Military Affairs*, the judge and the Authority ultimately concluded that reopening the proposals was justified by many factors, including statutory changes resulting from the enactment of the Statute. 7 FLRA at 340-42. But in *Army & Air Force Exch. Serv.*, 52 FLRA 290 (1996), and *Dep't of Treasury, IRS, Memphis Serv. Ctr.*, 15 FLRA 829, 845-46 (1984) (*Exchange Service*), the withdrawal of prior agreements was found to be unjustified. In the *Exchange Service* decision, the judge and the Authority found that the agency's change of bargaining position "placed an unwarranted barrier to agreement by prematurely cutting off negotiations along the path that had produced a partial agreement" and that it "frustrated the negotiating process and the chances of reaching agreement." 52 FLRA at 308-09.

In our case, neither the Respondent nor its negotiators offered any explanation (much less a justification) for Lee's demand that all previously agreed-upon issues be renegotiated. If these proposals had been acceptable to the Agency previously, the evidence offers no indication that they had become obsolete or unworkable, nor any other reason that the Agency would need to revise them. And unlike the situation in *Military Affairs*, management was demanding that all agreed-upon proposals be renegotiated, not simply a few of them. The only explanation for Lee's demand is that she was not prepared to negotiate at all. Nevertheless, she didn't even have the courtesy to advise the Union that negotiations were closed; instead, she simply kept the Union hanging, leading it on with the hope that better days may lay ahead. As in *Exchange Service*, the action "frustrated the negotiating process and the chances of reaching agreement." 52 FLRA at 309. Similarly, Morris's cancellation of the

scheduled bargaining session of August 20, 2012, and Warden Jarvis's ratification of that action, without proposing any alternate dates (GC Ex. 8), further demonstrated the Agency's unwillingness to "meet at reasonable times" and "to avoid unnecessary delays" and its lack of "a sincere resolve to reach a collective bargaining agreement" as required by § 7114(b) of the Statute. The Authority has held that the failure to offer specific dates for bargaining is evidence of bad faith and a violation of section 7114(b). *U.S. Dep't of Justice, Exec. Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 465 (2006). The Respondent's conduct between April and August of 2012 demonstrates that its goal was to frustrate rather than to encourage bargaining, and that it had no desire to reach an agreement with the Union concerning the sick and annual relief rosters and the inter-institutional assignment of correctional officers on the relief rosters, despite its repeated expressions of intent to negotiate.

The Respondent points to the Union's withdrawal of Option 1 from the bargaining table in June 2011 (R. Ex. 7), and the Union's suspension of its participation in Labor Management Relations meetings in April 2012 (GC Ex. 5 at 1-2), as undermining the Union's good faith bargaining, but it fails to explain how those actions demonstrate bad faith or vindicate the Agency's own actions. R. Br. at 29. Seidel explained that when the Union first submitted its bargaining proposals to management in late 2009, it presented two alternative sets of proposals: Option 2 followed closely the Agency's proposals, and Option 1 was entirely different. Tr. 308-10. After negotiating for a time on Option 1, the Agency indicated it would not agree to it, and in order to avoid going to impasse, the Union withdrew those proposals in favor of Option 2. Tr. 298-300, 308-14. There is nothing inappropriate about the Union's actions in this regard, and again it appears that it was doing all it could to keep the negotiations moving forward. It is also apparent from GC Exhibit 5 that the Union's suspension of LMR meetings was done solely to protest the Agency's refusal to bargain in April 2012, rather than to impede bargaining further. LMR meetings are conducted pursuant to Article 2 of the Local Supplemental Agreement. Jt. Ex. 1. Suspension of LMR meetings in no way delayed or interfered with bargaining over the sick and annual relief rosters, as evidenced by the ongoing discussions between Seidel and Morris in April and June 2012. GC Exs. 6, 7.

Having identified the unlawful conduct of the Agency in the six months prior to the filing of the ULP charge, it is relevant and appropriate to consider as well the parties' conduct in the preceding two years in order to properly understand the issues in dispute. I do not look at the earlier events in order to determine whether the Agency committed unfair labor practices

during that time period. As I have already stated, the GC must show that the Agency bargained in bad faith in 2012. But what were the parties bargaining (or trying to bargain) about in 2012? To understand the nature of the Agency's duty to bargain, we must understand the actions of the parties in 2010 and 2011.

The Settlement Agreement Reached in
Resolution of AT-CA-12-0172 Gave Rise
to a Duty to Bargain

The two seminal events leading up to the parties' negotiations in 2012 were the Agency's implementation of a new procedure for assigning officers from the sick and annual relief rosters in January 2010 and the signing of the Settlement Agreement of September 24, 2010. Each of these events triggered an obligation that the Agency negotiate over the impact and implementation of the new procedure, and the Agency's obligation continued into 2012.

The condition of employment that changed in January 2010, and which remained unresolved in August 2012, was the procedure for assigning officers on the four institutions' sick and annual relief rosters. More specifically, FCC Coleman's management decided that officers on one institution's relief roster could be assigned to relieve officers at any of the other three institutions, where previously they could only be assigned to their own institution. The Authority has determined that changes in employees' work environments are changes in their conditions of employment. See *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*); *EPA & EPA Region II*, 25 FLRA 787, 789 (1987). In this case, when the Agency decided to consolidate the sick and annual rosters for each of the institutions at FCC Coleman into a single roster, it changed the conditions of employment of the officers on the sick and annual roster by requiring them to work in areas of the prison they had not otherwise worked.

The change to a consolidated sick and annual roster involved management's right under § 7106(a)(2)(A) and (B) to assign employees and assign work. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Sheridan, Or.*, 58 FLRA 279, 283 (2003); *AFGE, AFL-CIO, Int'l Council of U.S. Marshals Serv. Locals*, 11 FLRA 672, 675 (1983). Nonetheless, the Union still has the right to negotiate over procedures and appropriate arrangements related to the implementation of the complex-wide sick and annual roster, as long as the Agency retains the right to determine who is qualified to perform the work, and as long as the change will have more than a de minimis

effect on conditions of employment. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999); *Nat'l Ass'n of Gov't Emps., Local R14-52*, 44 FLRA 738, 741 (1992); see also *Kirtland AFB*, 64 FLRA at 173. The Authority has found changes in work environments involving effects on employees' ability to do quality work and to work efficiently to be greater than de minimis. *Veterans Admin., W. L.A. Med. Ctr., L.A., Cal.*, 24 FLRA 714, 717 (1986) (finding a change in nurses' work-break room had greater than de minimis impact because, among other things, it affected their ability to provide quality patient care, it disrupted their work routine, and made them less efficient).

In this case, the evidence amply demonstrated that the new relief roster assignment procedures implemented in January 2010 had a greater than de minimis impact on the conditions of employment of correctional officers. For example, USP 1 has approximately 158 correctional officers assigned, but it has 119 fixed posts; accordingly, 39 officers are assigned to USP 1's sick and annual relief roster, which is filled in accordance with Article 18, Sections (d) and (g) of the Master Agreement. Tr. 382-85. The other institutions at the complex fill their relief rosters similarly, with somewhat different numbers. On any given day, three or four of these officers on the relief roster are assigned to institutions other than their home facility. Tr. 60, 156. While the basic duties of a correctional officer are the same, regardless of the facility, each institution also has unique characteristics that affect everyday working conditions and makes working at each facility different. Tr. 55-56, 277-78. Testimony showed that each warden manages his or her institution in a particular way, the structures and layouts of the facilities are different, shift hours vary, and procedures for controlled moves and the feeding of inmates vary. Many of these differences are more than merely inconvenient; they can have an impact on the safety of officers and inmates. Tr. 156-57, 231-32. For example, emergency equipment may not be kept in the same location at each facility, and the labeling of the sections changes from facility to facility. If a call for assistance in a particular area is issued, a relief employee might not know where to go or where to obtain emergency equipment. Each institution has its own post picture file that officers must be familiar with, and those files are not available to them until they go to the particular facility. Tr. 172, 246. Likewise, each facility has different sets of keys. If an officer is not familiar with a key ring at a new institution, he may not be able to respond quickly or isolate a problem.

Although correctional officers receive introductory and ongoing training about prison operations, the witnesses testified that this information, as well as the information taught at Annual Refresher

Training, is too general to be of use in addressing the safety concerns they face while on their relief posts. Tr. 156-57, 166, 274, 300. It is noteworthy that the local agreement reached by the parties in 2006, when the FCC Coleman first tried consolidating the sick and annual relief rosters, included a provision for training correctional officers about the workings of the other institutions. GC Ex. 2. The Union attempted to negotiate a similar provision in the aborted 2010 negotiations, as well as other provisions to address safety and other assignment-related issues, but those negotiations were cut off before many of the Union's proposals could be addressed. Tr. 39, 42-44. Both the 2006 agreement and the partially-negotiated changes of January 2010 also included a provision requiring the assignment of relief officers first to "like" institutions. GC Ex. 2; R. Ex. 3. This implicitly recognized that there are differences between the institutions, and that assigning an officer to a different facility might have adverse effects warranting appropriate arrangements and procedures.

The Authority has also held that changes presenting an increased health or safety hazard are greater than de minimis. *U.S. Dep't of Def., Dep't of the Air Force, Air Force Logistics Ctr., Tinker AFB, Okla.*, 25 FLRA 914, 917-18 (1987) (installation of a degreaser in in the work area presented an increased health hazard); *U.S. Dep't of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky.*, 38 FLRA 647, 664 (1990) (safety and training concerns associated with changes in job duties). Based on the safety issues and the many other foreseeable effects of the new policy implemented in January 2010, I conclude that the assignment of sick and annual relief employees to institutions other than their own triggered an obligation on the Agency's part to negotiate its impact and implementation.

Indeed, the Agency recognized this obligation when it planned the new policy in October 2009. It notified the Union of its intentions, submitted its proposals to the Union, and scheduled negotiations to begin in November 2009. Jt. Ex. 4. The parties held bargaining sessions in late 2009 and early 2010, and they agreed on some proposals, but a significant number of issues were still unresolved when the Agency terminated bargaining and implemented the proposals that had been settled. No signed agreement was negotiated, but the Agency put the new policy into effect on its own.

The Agency's cessation of bargaining and unilateral implementation of the new policy prompted the Union to file its ULP charge in AT-CA-10-0172 and the Regional Director to issue a complaint, alleging that the Agency failed to negotiate to the extent required by the Statute before implementing the policy. That complaint, in turn, resulted in the parties agreeing to the Settlement Agreement, in which the Agency agreed to "negotiate . . .

the appropriate arrangements for employees affected by the Administrative Roster implemented in January 2010." It also agreed that those negotiations would continue "until either (1) agreement is reached with the Union, (2) the Federal Services Impasses Panel asserts jurisdiction over the matter, or (3) bargaining is otherwise complete pursuant to the . . . Statute." Jt. Ex. 6 at 4.

Pursuant to the Settlement Agreement, the Agency returned to the bargaining table, and a series of bargaining sessions were held between February and June of 2011. These sessions were marked by serial suspensions and terminations of bargaining, and additional ULP charges by the Union alleging bad faith on the Agency's part. R. Ex. 1. The Regional Director dismissed one such charge, noting that the parties had reached agreement on some issues (R. Ex. 2), and the Union withdrew some of its charges in return for the Agency agreeing to resume negotiations. Mediation sessions were held in the spring of 2011 and again in December 2011. Negotiations were terminated by the Agency shortly after the December 2011 mediation (GC Ex. 3), but by February 16, 2012, at the latest, AW Lee had been deputized by Agency management to resume discussions with the Union on the unresolved issues relating to the consolidation of the relief rosters (GC Ex. 4).

I am not reviewing these events for the purpose of determining whether the Respondent committed an unfair labor practice by its conduct of negotiations with the Union in 2010 and 2011. But the earlier evidence shows that the Respondent pursued a course of negotiations that had its origins in two sources: it changed employees' conditions of employment in January 2010, and when it was accused of prematurely terminating negotiations over the impact of that change, it signed a written agreement to resume negotiations until either an agreement was reached or an impasse had been resolved. Both the change in conditions of employment and the Settlement Agreement imposed a duty on the Agency's part to bargain in good faith with the Union; that duty required the Agency "to approach the negotiations with a sincere resolve to reach a[n] . . . agreement." 5 U.S.C. § 7114(b)(1). Its duty in this regard did not end in June of 2011, or in December of 2011, as the Respondent contends; it continued until the impact and implementation of the policy regarding the assignment of employees on the sick and annual relief rosters was resolved. Recognizing that it needed to negotiate with the Union, and unwilling to undertake the litigation risks of an unfair labor practice hearing in Case No. AT-CA-10-0172, it signed the Settlement Agreement, but it never completed the bargaining process. The unresolved issues of 2010 and 2011 lingered throughout 2012, as Agency officials dangled the prospect of negotiations in front of the

Union, like Lucy holding the football for Charlie Brown to kick.

In *Federal Aviation Admin., Aviation Standards Nat'l Field Office, Mike Mulrone Aeronautical Ctr., Okla. City, Okla.*, 43 FLRA 1221, 1230-31 (1992), the Authority stated that noncompliance with a settlement approved by an FLRA Regional Director does not, in itself, constitute an independent violation of § 7116(a)(1) and (5) of the Statute. If a party fails to comply with a settlement agreement, the respondent may litigate, and the General Counsel must demonstrate, that the underlying conduct, which was the subject of the settlement agreement, violated the Statute. *Id.* at 1231. In our case, the GC is not alleging that the Agency violated the Settlement Agreement, but rather that the Agency failed to negotiate in good faith regarding the change in conditions of employment. I have concluded, for the reasons set forth above, that between February and August of 2012, the Agency violated its duty to bargain in good faith over the changed assignment policy regarding the relief roster.

The Respondent's New Policy Was Not "Covered By" Article 18 of the Master Agreement

The Respondent argues that it had no duty to bargain over its new sick and annual relief roster assignment practices because that issue was covered by Article 18 of the Master Agreement. The "covered by" doctrine excuses parties from bargaining when they have already bargained and reached agreement on the matter at issue. *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 617 (2009). The Authority has established a two-pronged test to determine whether a matter is covered by a collective bargaining agreement. *Nat'l Air Traffic Controllers Ass'n*, 66 FLRA 213, 216 (2011) (*NATCA*). The Agency bears the burden of providing a record to support its covered-by defense. *See NFFE*, 66 FLRA at 126 (citing *NTEU*, 61 FLRA 871, 875 (2006)); *see also U.S. Dep't of the Treasury, IRS*, 63 FLRA at 618 n.2.

The first prong involves an examination as to whether the subject matter is expressly contained in the agreement. An exact congruence of language is not required; instead, the matter is "covered" if a reasonable reader would conclude that the contract provision settles the matter in dispute. *NATCA*, 66 FLRA at 216. The Authority has found that the subject matter of a proposal is expressly contained in a contract provision when the proposal would modify or conflict with the express terms of the provision. *NFFE*, 66 FLRA at 126.

If the agreement does not satisfy the first prong of the test because it does not expressly contain the matter, the Authority applies the second prong, to

consider whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *NTEU, Chapter 160*, 67 FLRA 482, 485 (2014). Doing so may involve an examination of the parties' intent and bargaining history. A matter must be more than tangentially related to a contract provision to be covered by the agreement. Rather, the party asserting the "covered by" argument must demonstrate that the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the agreement that the negotiations that resulted in that provision are presumed to have foreclosed further bargaining over the matter. *NFFE*, 66 FLRA at 126. The Authority has determined that "the agency may not rely on [an] agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining." *Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993).

The Agency relies heavily on *BOP v. FLRA* to argue that the assignment of relief employees to posts at other institutions within the prison complex is covered by sections d and g. *BOP v. FLRA* involved the duty to bargain over the Agency's implementation of a "mission critical" roster standard that encouraged wardens to fill fewer posts on the regular quarterly rosters and to place more officers on the sick and annual relief roster instead, as a cost-savings measure. 654 F.3d at 93. The BOP declined the Union's demand to bargain over the new initiative, saying that any dispute over particular rosters issued pursuant to Article 18 was covered by Article 18. The Authority upheld an arbitrator's decision that Article 18 addresses only the procedures for filling rosters, not the elimination of positions from rosters. *Id.* at 94. The court, however, agreed with the Agency that the parties had already bargained over the impact and implementation of management's right to assign work, citing testimony from Glover that the AFGE and BOP had negotiated Article 18 to "place procedural checks upon the Bureau's authority to assign work." *Id.* at 96. The court held that Article 18 covers "the substance of all decisions reached by following [Article 18's] procedures . . . [i.e.] the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift." *Id.* at 95. The court concluded that "Article 18 therefore covers and preempts challenges to all specific outcomes of the assignment process." *Id.* at 96.

On remand, in *BOP*, the Authority adopted as "the law of the case" the court's holding that Article 18 covers the Agency's mission critical roster program. 67 FLRA 69, 70 (2012). Since then, the Agency has unsuccessfully tried to apply *BOP v. FLRA* to a variety of situations, arguing, for instance, that Article 18, Section b, justified its refusal to bargain over compressed

work schedules for correctional officers,¹⁰ and that Article 18, Section 1 justified its unilateral actions regarding light-duty requests.¹¹ Similarly, the Authority refused to apply the covered-by defenses raised by BOP in *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metropolitan Det. Ctr., N.Y., N.Y.*, 67 FLRA 442 (2014) (Article 18, Section a, and changes in shift hours), and in *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Complex, Terre Haute, Ind.*, 67 FLRA 697 (2014) (Article 18, Sections o and r and overtime assignments). Member Pizzella dissented in all these decisions.

I find that the court's rationale in *BOP v. FLRA* does not extend to the present case. The covered-by test remains good law and must be applied in evaluating the Agency's defense that it had no statutory duty to bargain. The Agency argued in *BOP v. FLRA*, and the court agreed, that Article 18 covers "all disputes about particular rosters issued pursuant to and in compliance with the procedures in Article 18(d)." 654 F.3d at 95. As noted above, the court defined this as "the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift." *Id.* The procedure in dispute in that case was management's exercise of discretion as to what posts should be listed on the regular quarterly rosters, a matter that fit squarely within the scope of Article 18 articulated by the court. But the current case does not involve a dispute about "particular rosters," nor does it involve the procedures by which the various wardens at FCC Coleman "formulate a roster, assign officers to posts, [or] designate officers for the relief shift." Instead, our case involves questions of how correctional officers are assigned to specific posts, on a day-to-day basis, *after* they have already been assigned to the relief shift (the sick and annual relief roster).

Neither Section d nor g of Article 18 offers any help or direction in addressing those day-to-day issues. Section d sets out detailed rules for developing the quarterly rosters and for filling the positions on those rosters. Section g describes how the sick and annual relief roster is set up and how officers are assigned to it, but it says nothing about assigning officers to specific posts in the FCC once they are on the relief roster. Neither the Master Agreement nor FCC Coleman's Local Supplement addresses whether an employee on the relief roster of one institution can be assigned to relieve

an officer at another institution, since multi-institutional prison complexes were a new phenomenon that the negotiators did not consider in 1998 or 2000. To the extent that such complexes existed, the longstanding past practice at FCC Coleman and other complexes dictated that each institution was operated independently. Consequently, a vacant post at the Medium facility (for example) could only be filled by an officer on the Medium's relief roster, not by someone on another facility's relief roster. At FCC Coleman, in 2006, the Agency decided to change this policy and to assign employees on one institution's sick and annual roster to fill temporary vacancies at another institution. Recognizing that it had a duty to bargain over the implementation and impact of this change, the management of FCC Coleman entered into a comprehensive MOU with the Union, addressing concerns specific to these relief assignments (GC Ex. 2), but in 2008 the parties mutually agreed to return to the old policy. Many of the issues covered in the 2006 MOU were raised again by the Union when it sought to negotiate over the Agency's 2009 decision to resume inter-institutional relief assignments, because nothing in Article 18 offered the parties any guidance as to how such issues should be handled.

Thus, applying the covered-by test, I find that issues related to the inter-institutional assignment of officers on the relief rosters are neither expressly contained in, nor inseparably bound up with the language of Article 18, Section d or Section g. Section d sets forth specific, detailed procedures for developing, bidding, and implementing quarterly rosters to fill Correctional Services posts. Section g establishes the procedures for assigning employees to the sick and annual relief rosters. Nowhere in either section is there a reference to the assignment of officers – on sick and annual relief, or for any other reason – to other institutions. Nothing in either section suggests how officers on the relief roster of one institution can be assigned to fill in for officers at other institutions. Furthermore, no aspect of the change implemented by the Agency in 2010 or proposed by the Union in relation to the policy would have modified or conflicted with the express terms of Section d or g. *See NFFE*, 66 FLRA at 126. Thus, the first prong of the test is not satisfied.

A second prong analysis falls short as well. The Master Agreement became effective on March 9, 1998. Mr. Glover, who participated in all phases of the negotiation of the 1998 Master Agreement, testified that Article 18 was negotiated when there were few, if any, large federal correctional complexes. He offered undisputed testimony that the issues relating to multiple relief rosters at multi-institution complexes were never contemplated by the negotiators. Tr. 131-32, 136-38. Mr. Pike, who chaired the Union team that negotiated the

¹⁰ *U. S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 583 (2015) (issue not covered by contract, as Article 18(b) expressly provides for local bargaining over compressed work schedules).

¹¹ *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Miami, Fla.*, 68 FLRA 61, 64 (2014) (Authority did not address the covered-by defense, because award was based on contractual provisions).

2000 Local Supplement, stated (and the Agency did not dispute) that at that time, no officers on the sick and annual relief roster were assigned to fill sick and annual posts at other institutions within the FCC. An employee could work at a different facility only by requesting a permanent transfer from the warden. Tr. 57-60.

The only testimony offered by the Agency to support its covered-by argument was the testimony of Mr. Wade, who conceded that he was not involved in the negotiation of the Master Agreement, nor was he involved in any negotiations regarding sick and annual rosters at FCC Coleman, other than the national LMR meeting he attended in August of 2010. Tr. 347. At that LMR meeting, the Union cited the unresolved negotiations concerning FCC Coleman's sick and annual relief roster prompting the committee to adopt a resolution that Article 18, Section d of the Master Agreement should be followed "when it comes to the correctional services roster." Tr. 344; *see also* Jt. Ex. 7 at 2. However, Mr. Young, a Union official present at that meeting, testified that the Union cited the situation at FCC Coleman only as an example of the Agency's poor handling of local disputes relating to the mission critical policy. The resolution was intended to improve overall labor relations, not to dictate the outcome of the specific controversy regarding FCC Coleman's sick and annual relief rosters. Tr. 354-56, 369-70. I find that the evidence regarding the August 2010 meeting supports the Union's interpretation. The resolution issued by the LRM committee states simply that Article 18, Section d will be followed "when preparing quarterly rosters." Jt. Ex. 7 at 2. That resolution is so broad that it offers no specific guidance regarding the dispute at FCC Coleman. In the situations in dispute in our case, the quarterly rosters have already been finalized; officers have already been assigned specific fixed posts, or they have been placed on the sick and annual relief roster for their institution. Article 18, Section g, which deals with the sick and annual relief rosters, is not mentioned in the LMR resolution, nor are any issues related to the assignment of officers on the relief roster to different institutions at the complex. I find no support here for the Agency's argument that Article 18 covers the issue of inter-institutional relief assignments.

Moreover, the actions of the local parties at FCC Coleman between 2006 and 2012 suggests that both management and the Union understood they needed to negotiate the impact and implementation of the new relief roster assignment policy, and that Article 18 offered no guidance. At no time prior to filing its Answer to the Complaint in this case – that is, not when the warden first experimented with inter-institutional relief assignments in 2006; not when management notified the Union of its intent to change the policy in 2009; not when

it exchanged bargaining proposals and bargained partially in early 2010; not when it defended its conduct in response to the complaint in AT-CA-10-0172; not when it helped draft the Settlement Agreement; not when it returned to the bargaining table in the spring of 2011; and not when Lee and Morris engaged Seidel in a seven-month game of "kick the football" – did the Agency state that the issue of inter-institutional assignments from the relief rosters was covered by the Master Agreement. While the Respondent may be entitled to raise a covered-by defense this late in the process, its failure to do so during the six years in which the subject had been debated at FCC Coleman is a significant indication that Agency officials had never previously understood Article 18 as covering the issue.

In light of the parties' bargaining history, along with the other evidence described above, I conclude that the issue of assigning officers from one institution's relief roster to another institution at the complex is not covered by Article 18 of the Master Agreement.

In summary, I conclude that the Agency had an obligation to bargain when it resumed a policy of assigning correctional officers from the sick and annual relief rosters of one institution to relieve officers at other institutions within FCC Coleman. This was a change in the conditions of employment of bargaining unit employees that had a greater than de minimis impact on working conditions and is not covered by the parties' Master Agreement. At various times between October 2009 and August 2012, the Agency engaged in bargaining, but it never allowed those negotiations to reach a conclusion. Its obligation to bargain in good faith continued through 2012, but the Agency's actions in 2012 specifically frustrated the bargaining process and demonstrated an absence of intent to reach an agreement. Accordingly, the Respondent violated section 7116(a)(1) and (5) of the Statute.

REMEDY

Having found that the Respondent violated § 7116(a)(1) and (5) of the Statute, by bargaining in bad faith with the Union over the assignment of correctional officers from the sick and annual relief roster of one institution to another institution at FCC Coleman, it is appropriate that the Respondent be ordered to bargain with the Union and post a Notice to Employees. The General Counsel does not seek to rescind the roster assignment policy that was implemented in 2010, but rather to order the Agency to bargain in good faith over the impact and implementation of the policy. I agree that this is the appropriate remedy, but I emphasize to the Respondent that this order requires it to fully comply with the bargaining obligations imposed by the Statute. Additionally, the Authority held in *U.S. Department of*

Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma, 67 FLRA 221 (2014), that the notice to employees should be distributed electronically, as well as posted on bulletin boards.

Accordingly, 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 (the Statute), the Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 506 (the Union) regarding the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another;

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

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

(a) Bargain in good faith with the Union regarding the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another;

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Complex Warden, and posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to the posting of paper notices, the Notice shall be distributed to bargaining unit employees electronically, such as by e-mail, posting on an intranet or internet site, or by other electronic means that the Respondent customarily uses to communicate with employees.

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

Issued, Washington, D.C., September 30, 2015

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 Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL comply with the settlement agreement we made in Case No. AT-CA-10-0172, requiring us to negotiate over the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another;

WE WILL NOT unreasonably delay or threaten to terminate negotiations over the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another;

WE WILL NOT cancel or place unreasonable conditions on meetings to negotiate over the assignment of employees on the sick and annual relief roster of one institution within FCC Coleman to another;

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

_____ Agency/Activity

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

This Notice must remain posted for sixty (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 be communicated directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, N.E., Suite 1950, Atlanta, GA 30303, and whose phone number is: (404) 331-5300.