72 FLRA No. 3

DEPARTMENT OF DEFENSE
DEPARTMENT OF DEFENSE EDUCATION ACTIVITY
(Respondent)

and

OVERSEAS FEDERATION OF TEACHERS
(Charging Party/Union)

WA-CA-17-0170

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DECISION AND ORDER

January 7, 2021

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

In the attached recommended decision, the Federal Labor Relations Authority's (FLRA) Chief Administrative Law Judge David L. Welch (Judge) found that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by discontinuing personalized workplace package delivery to employees without first providing the Union notice of, and an opportunity to bargain over, the change. Because the Judge erred in concluding that this dispute affected employees' conditions of employment, we find that he erred in concluding that the Respondent violated its duty to bargain.

II. Background and Judge's Decision

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

The bargaining-unit employees (BUEs) in this case are teachers, counselors, and nurses who work for the Department of Defense's Department of Defense Education Activity (DODEA/Respondent) and are stationed in Rota, Spain. The DODEA school is a tenant at the U.S. Navy Base in Rota.

As is the case at many overseas military installations, the Navy operates a post office for the benefit of military members and any civilian employees who are assigned to the Rota base.[1] Around 1992, a practice began whereby, every business day, a DODEA supply clerk would pick up from the base post office the personal mail of school employees and deliver the mail to those employees' individual "distribution box[es]."[2] The practice was recognized by, and incorporated into, the parties' collective-bargaining agreement (CBA or agreement) in 1994.[3]

On August 8, 2016, the Navy's postmaster notified the school's principal that, pursuant to a modification to Navy Instruction 5112.1 (in January 2016), the DODEA supply clerk—whom the parties sometimes refer to as a mail orderly—could no longer be permitted to pick up and deliver personal mail to employees at the school.[4] In turn, the principal of the school immediately sent an email to the school's employees, which explained that, due to a "change in . . . Navy policy," the mail delivery practice could no longer be continued.[5] The principal, however, convinced the postmaster to delay the effective date of the change to September 15, 2016. As a result of a series of further discussions between the employees and the principal, and the principal and the postmaster,[6] some employees continued to have their mail picked up and delivered until April 2017.[7]

The Union filed an unfair-labor-practice (ULP) charge on January 26, 2017, alleging that, by failing to provide it notice of, and an opportunity to bargain over, the change in the mail delivery policy, DODEA committed a ULP. The General Counsel (GC) issued a complaint on June 14, 2017, arguing that by failing to give notice and an opportunity to bargain before implementing the change, the Respondent violated § 7116(a)(1) and (5). After a hearing, the Judge issued a recommended decision on May 31, 2018.

In that decision, as relevant here, the Judge found that the change affected conditions of employment.[8] Applying the two-pronged test found in *Antilles Consolidated Education Ass'n* (*Antilles*) and discussed further below,[9] the Judge emphasized that not only was the practice reflected in the parties' CBA, but lunch breaks, planning periods, meetings, and

[1] *See* 39 U.S.C. §§ 406, 3401; Executive Order 12,556, 51 Fed Reg. 13205 (Apr. 16, 1986).
[2] Judge's Recommended Decision at 4.
[3] Art. 20, § 6(f). Joint Ex. 1, Collective-Bargaining Agreement at 58.
[4] Judge's Recommended Decision at 4.
[5] *Id.*
[6] *Id.* at 5-13.
[7] *Id.* at 13.
[8] *Id.* at 23-24.
[9] *Id.* at 24-26 (citing *Antilles*, 22 FLRA 235, 237 (1986)).

extracurricular activities would be impacted by the change as well.[10] Accordingly, the Judge concluded that, under *Antilles*, there was a "direct connection between the delivery of personal mail and the work situation or employment relationship of unit employees."[11]

The Judge also determined that the change had greater than a de minimis effect on conditions of employment. Evaluating both the actual and reasonably foreseeable effects, he noted that after the change some employees were unable to retrieve—or were delayed in retrieving—packages, others had to sacrifice their lunch break or planning period time, and some had to ask coworkers to coach sports practices for them in order to be able to retrieve packages.

In conclusion, the Judge found that the Respondent violated § 7116(a)(1) and (5) of the Statute by unilaterally implementing a change with greater than de minimis effects on conditions of employment.

The Respondent filed exceptions to the decision on July 2, 2018, and the GC filed an opposition on July 20, 2018.

III. Analysis and Conclusion: The Judge erred in finding that the delivery of personal mail constituted a condition of employment.

In its exceptions, the Respondent argues that the Judge erred in his application of *Antilles*, resulting in the erroneous conclusion that the ability to have personal packages delivered to employees' workplaces concerns those employees' conditions of employment.[12]

To determine whether a matter concerns bargaining-unit employees' conditions of employment, the Authority has previously applied a two-pronged test set forth in *Antilles*.[13] Under *Antilles*, the Authority has asked whether: (1) the matter pertained to bargaining-unit employees; and (2) the record established a direct connection between the matter and the work situation or employment relationship of unit employees.[14] With respect to the second prong of the test—direct connection—the Authority has "inquire[d] into the extent and nature of the effect of the practice" on employees' work situation or employment relationship, including whether there is a "link" or "'nexus' between th[e] matter and the worker's employment."[15] "In 'close cases,' which 'fall[] within [a] gray area' where a matter might or might not be a condition of employment under the Authority's precedent, the existence of a 'past practice can be determinative.'"[16] However, a matter that is not a condition of employment does not become one "through practice or agreement" alone.[17]

In this case, we must determine whether a requirement that the Respondent devote personnel to the retrieval and delivery of employees' personal packages to their workplaces concerns those employees' conditions of employment. Under the first prong of *Antilles*, the proposal pertains to bargaining-unit employees because it concerns their personal packages.

As to the second prong of *Antilles*, the Judge found that prong satisfied because he determined that: (1) "it is essential for employees to have access to the American mail system";[18] (2) the change in package delivery "could lead employees to sacrifice lunch breaks and planning periods, as well as after-school meetings and overseeing extracurricular activities, in order to pick up packages";[19] and (3) the direct connection to

[10] *Id.* at 25.
[11] *Id.* at 24.
[12] Exceptions Br. at 11-14.
[13] 22 FLRA at 236-37. However, the Authority has more recently undertaken a reexamination of the relationship between the terms "conditions of employment" and "working conditions" in § 7103(a)(14) of the Statute. *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503 & n.33 (2018) (Member DuBester dissenting), *recons. denied*, 71 FLRA 49 (2019) (Member DuBester dissenting), *pet. for review granted & decision remanded sub nom. AFGE, AFL-CIO, Local 1929 v. FLRA*, 961 F.3d 452 (D.C. Cir. 2020). The *Antilles* test likewise will merit a plain-wording reformation to clearly differentiate between the terms "conditions of employment" and "working conditions." However, we need not explore that eventuality in this particular case because—for the reasons explained more fully below—even under the expansive *Antilles* test, as the Authority has previously applied it, we find that the Respondent did not have a duty to bargain here. *See also* note 14.
[14] 22 FLRA at 237. Because the Judge applied *Antilles*, and as both parties base their arguments on the application of *Antilles*, Exceptions Br. at 11-14; Opp'n Br. at 5-7, we apply that test here, consistent with our observations in note 13 above. *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 68 FLRA 976, 979-80 (2015) (assuming applicability of precedent on which both parties and initial decisionmaker relied), *recons. denied*, 69 FLRA 256 (2016); *see Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (assuming applicability of § 706(1) of Administrative Procedure Act based on parties' arguments).
[15] *U.S. Dep't of the Army, Aviation Sys. Command, St. Louis, Mo.*, 36 FLRA 418, 422-24 (1990) (quoting *AFGE, Local 2761, AFL-CIO v. FLRA*, 866 F.2d 1443, 1445, 1449 (1989) (*Local 2761*), *superseded by statute as to other matters*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 651, 118 Stat. 1811, 1964-73 (2004), *as recognized in Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 962 (D.C. Cir. 2016)).
[16] *AFGE, Local 12*, 60 FLRA 533, 534 (2004) (*Local 12*) (quoting *Local 2761*, 866 F.2d at 1448).
[17] *Id.*
[18] Judge's Recommended Decision at 25.
[19] *Id.*

employees' work situation or employment relationship is "readily apparently from the Respondent's longstanding [delivery] practices," including the regulation of those practices through the parties' collective-bargaining agreement.[20]

Concerning the Judge's first finding, unit employees do benefit from their access to the American mail system. However, even before the change here, employees "would have to go to the post office to *send* packages,"[21] which shows that access to the American mail system is not dependent on a personal, employer-sponsored delivery service to transport mail items to (or from) the employees' workplaces. Rather than access to the American mail system, what is at issue here is personalized workplace package delivery. We acknowledge the Judge's findings that several employees found it inconvenient to retrieve their packages from the post office.[22] But the inconvenience of needing to retrieve a package during work hours is not unique to the employees at issue here or their particular work situation. In fact, it seems reasonable to assume that most employees in any vocation would prefer if their employers were responsible for retrieving all of their packages and delivering them to the workplace so that the employees never had to adjust their daily routines. However, the added convenience of personalized workplace package delivery does not establish a direct connection to the work situation or employment relationship of unit employees.[23]

We find this case similar to *Maritime Metal Trades Council*,[24] where the union proposed that the agency authorize professional employees to cash personal checks through the agency's treasury or its branch offices. The proposal aimed to expand employees' opportunities to interact with the banking system while at their workplace—an aspect of their daily lives that seems no less important than accessing the mail system. And at the time that the Authority decided the case in 1985, before ubiquitous electronic-payment systems, the ability of employees to cash their personal checks was essential for maintaining their finances.[25] But the Authority found that employees' ability to cash checks through the treasury at their workplace did not concern their conditions of employment.[26] Thus, the importance of the activity to the employees' lives outside of work was insufficient to bring personal check cashing at the workplace within the duty to bargain.[27]

To further support his conclusion that personalized package delivery satisfied *Antilles* prong two, the Judge relied on certain Authority decisions that we find distinguishable for the following reasons.

The Judge cited a decision involving a workplace fitness facility that the Authority found concerned employees' conditions of employment.[28] However, the agency in that case had, for an extended period of time, publicly linked employee fitness to *work productivity*.[29] Moreover, the Authority cited Congress's determination to authorize agency heads to establish health-service programs for employees as bolstering the agency's own public statements about the connection between fitness and employees' work situations.[30] In contrast, the present case does not involve a similarly direct connection between personalized workplace package delivery and work productivity, nor has the Union cited a congressional determination to encourage agencies to provide personalized package delivery.

[20] *Id.* at 24-25.
[21] *Id.* at 15 (emphasis added).
[22] *E.g.*, *id.* at 13-14 (employee who was a volleyball coach had to ask assistant coach to oversee one practice while the employee retrieved an engagement ring that he purchased), 15 (employee had difficulty retrieving a legal document concerning her sister—a power-of-attorney).
[23] *See, e.g.*, *AFGE, Local 2094, AFL-CIO*, 22 FLRA 710, 714 (1986) (recognizing that when a matter concerns non-work activities, that factor weighs against finding that it concerns a condition of employment), *aff'd sub nom. AFGE, AFL-CIO, Local 2094 v. FLRA*, 833 F.2d 1037, 1043 (D.C. Cir. 1987).
[24] 17 FLRA 890 (1985).
[25] *See id.* at 891 (discussing proposal that would require that the agency "do everything it can to see that professional employees are authorized to cash personal checks" through the agency's treasury or branch offices).
[26] *Id.* at 891-92. Here, as mentioned, the Judge found that teachers may need to miss their lunch breaks, planning periods, or extracurricular activities in order to pick up a package. Judge's Recommended Decision at 25. However, a similar situation would have confronted the employees in *Maritime Metal Trades Council* who needed to cash a check during a bank's regular business hours. Occasionally, they may have had to miss a small amount of work time in order to cash their checks. But that minimal loss of work time did not change the result in *Maritime Metal Trades Council*, and we do not think it changes the result here either.
[27] We recognize that in *Maritime Metal Trades Council*, the Authority found that check cashing involved "non-work activities while in *non-duty status*." 17 FLRA at 892 (emphasis added). By comparison, the Agency here sometimes permits employees to make trips to the post office while they are in *duty status*. However, like check cashing, retrieving packages remains the type of personal errand that many employees in other work environments perform while in non-duty status. So, we still find *Maritime Metal Trades Council* a useful comparator.
[28] Judge's Recommended Decision at 26 (citing *Local 12*, 60 FLRA at 533-34).
[29] *Local 12*, 60 FLRA at 534.
[30] *Id.* (citing 5 U.S.C. § 7901).

Further, the Judge compared the current dispute to cases concerning workplace daycare facilities.[31] But the Authority found that the "existence and availability of such facilities can be *determinative* of whether an employee will be able to accept a job with an employer and of whether an employee will be able to continue employment with an employer."[32] Here, none of the Judge's findings establishes that the end of personalized workplace package delivery would lead employees to end their employment with the Respondent. Nor can the importance of package delivery reasonably be compared to the wellbeing of employees' children while the employees are at work.

The Judge also relied on an Authority decision holding that the ability of employees to make and receive personal calls at work concerned a condition of employment.[33] However, the Authority's decisions on such telephone calls have been limited to employees' use of phones for infrequent or emergency situations, or to communicate with a union.[34] For example, in a decision applying *Antilles*, the Authority noted that employees may need to: (1) let their families know that they must work overtime; (2) schedule medical care; or (3) arrange transportation or car repairs.[35] As for these examples, working overtime is a direct result of the employment relationship, medical care is necessary for employees to remain well enough to be able to work, and transportation to and from the workplace is similarly necessary to allow employees to perform duties there. Regarding the use of phones for communication with a union, the substance of such communications would primarily involve workplace concerns, and the Statute protects the ability to engage in such communications.[36] Thus, the Authority's precedent on personal calls using agency phones found a direct connection between making such calls and employees' work situations or employment relationships for purposes of applying the second prong in *Antilles*.

Although the Judge's prong-two analysis additionally relied on the Agency's longstanding practice of providing personalized workplace package delivery, and the regulation of that practice in the parties' collective-bargaining agreement,[37] we would rely on those considerations only if this were a "close case[]" in a "gray area."[38] But because we do not find that personalized workplace package delivery is closely analogous to previous matters that the Authority has found to concern a condition of employment, that matter did not become a condition of employment "through practice or agreement."[39]

For all of the foregoing reasons, we find that, even under the expansive *Antilles* precedent, the Judge erred in concluding that this dispute affected employees' conditions of employment. Consequently, we also find that he erred in concluding that the Agency violated its duty to bargain by discontinuing personalized workplace package delivery without first providing the Union notice and an opportunity to bargain.

Because the Judge erred and the Respondent did not have a duty to bargain, there is no basis for finding a violation of the Statute. Accordingly, we set aside the Judge's recommended decision and dismiss the complaint.[40]

IV. Order

We set aside the Judge's recommended decision and dismiss the complaint.

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[31] Judge's Recommended Decision at 26.

[32] *AFGE, AFL-CIO*, 2 FLRA 603, 606 (1980) (*AFGE*) (emphasis added); *see also AFGE, AFL-CIO, Local 32*, 6 FLRA 423 (1981) (relying completely on the analysis in *AFGE* to find that daycare facilities at the workplace concerned conditions of employment), *aff'd sub nom. OPM v. FLRA*, 706 F.2d 1229 (D.C. Cir. 1983) (unpublished table decision).

[33] Judge's Recommended Decision at 26 (citing *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 53 FLRA 1664, 1673 (1998) (*Warner Robins*)).

[34] *E.g., AFGE, Local 1122*, 47 FLRA 272, 276 (1993) (*Local 1122*) (concerning use of agency telephone for "emergency calls" and communication with union representatives); *AFGE, AFL-CIO, Local 3511*, 12 FLRA 76, 99 (1983) (*Local 3511*) (proposal concerning "personal emergency calls" of short duration); *see also Warner Robins*, 53 FLRA at 1668-69 (finding that phone access concerned conditions of employment based entirely on the analyses in *Local 1122* and *Local 3511*).

[35] *Def. Mapping Agency Aerospace Ctr., St. Louis, Mo.*, 40 FLRA 244, 244, 256-57 (1991) (Authority adopted ALJ's decision that the ability to make emergency phone calls concerns conditions of employment).

[36] *E.g.*, 5 U.S.C. § 7102 ("Each employee shall have the right to form, join, or assist any labor organization . . . .").

[37] Judge's Recommended Decision at 25.

[38] *Local 12*, 60 FLRA at 534.

[39] *Id.*

[40] *See U.S. Dep't of the Interior, Bureau of Indian Affairs, S.W. Indian Polytechnic Inst., Albuquerque, N.M.*, 58 FLRA 246, 250 (2002) (dismissing a complaint alleging a failure to bargain when the Respondent had no duty to bargain), *pet. for review denied sub nom. NTEU v. FLRA*, 435 F.3d 1049 (9th Cir. 2006).

Member DuBester, dissenting:

Contrary to the majority, I agree with the Administrative Law Judge's (the Judge's) decision finding that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by discontinuing workplace mail delivery (the mail delivery) to teachers and other school personnel (employees). In my view, moreover, the Judge properly found that the change concerned the employees' conditions of employment. To reach this conclusion, the Judge applied – properly in my opinion – the two-prong test set forth in *Antilles Consolidated Education Ass'n* (*Antilles*).[1] And I agree with the Judge that the change had a greater than de minimis effect on the employees' conditions of employment.

Under *Antilles*, to determine whether a matter concerns bargaining-unit employees' conditions of employment the Authority determines whether: (1) the matter pertained to bargaining-unit employees; and (2) the record established a direct connection between the matter and the work situation or employment relationship of unit employees.[2] Here, the Judge determined that there is a "direct connection between the [mail delivery] and the work situation or employment relationship of unit employees"[3]

In support of his determination, the Judge made extensive findings. At the outset, he found that the Respondent provides postal services "in support of [Department of Defense (DOD)] missions" and that DOD, "and, by extension, the Respondent, have determined that it is essential for employees to have access to the American mail system."[4] And he found that the "[employees] depend on American mail to receive services and products that they could not easily access on or off" the base and for "their regular shopping needs."[5] Specifically, citing the overlap between the post office's limited hours and the employees' work hours, he found that the employees were dependent on the mail delivery "because it is difficult, if not impossible at times, for these employees to pick up their packages at the post office."[6]

Critical to his conclusion that there is a direct connection between the mail delivery and the employees' work situation or employment relationship, the Judge made several other significant findings. In particular, the Judge found that it was "beyond dispute that lunch breaks, planning periods, meetings, and extracurricular activities are part of the work situation or employment relationship."[7] Notably, he found that before the change, employees used those times for such duties as grading, lesson planning, meeting with students, parent-teacher conferences, cleaning up the classroom, overseeing extracurricular activities, and other school-related work.[8] He then determined that the change "could lead employees to miss these aspects of their work day" because they now had to use these times to attempt to pick up packages from the post office.[9]

In rejecting the Judge's conclusion, the majority summarily dismisses the significant facts and circumstances on which he relied. And, while purporting to "acknowledge" the Judge's findings, the majority cavalierly characterizes this loss of work time as a mere "inconvenience" and "minimal."[10] But again, the majority ignores the Judge's findings that it could take thirty to forty-five minutes or longer – essentially the entire length of most employees' planning or lunch periods – for employees to leave and return to school during the work day to pick up packages at the post office.[11]

Moreover, the primary case relied on by the majority, unlike the matter at issue before us, involved *non-duty* time.[12] Additionally, that case contained no findings regarding the impact of the activity on employees' duties.

In contrast, here, the Judge made extensive findings regarding the employees' loss of *duty* time resulting from the Respondent's termination of the mail delivery. Against this background of extensive findings, the Respondent's argument that the mail delivery had "no bearing on the [employees'] duty assignment[s]" was properly rejected by the Judge.[13]

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[1] 22 FLRA 235 (1986).
[2] *Id.* at 237.
[3] Judge's Decision (Decision) at 24.
[4] *Id.* at 24-25.
[5] *Id.* at 25 (citing Tr. at 27-28), 30 (citing Tr. at 149-50 (employee testifying that she does "a lot" of online shopping and generally receives one package per week, except in December when she gets packages nearly every day)).
[6] *Id.* at 25; *see also id.* at 31.
[7] *Id.* at 25 (citing *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358, 1369-70 (1998) (holding that change that affected employee lunch times and deprived employees of time to do certain tasks was greater than de minimis)).
[8] *Id.* at 3 (citing Tr. at 84, 128, 141, 160, 220; Joint Ex. 1, Collective-Bargaining Agreement at 76), 10 (citing Employee Survey at 5-6), 13-15 (citing Tr. at 111, 129 (planning periods are designed to be used for "curricular support")), 30 (citing Tr. at 118), 31 (citing Tr. at 152).
[9] *Id.* at 25.
[10] Majority at 5, 6 n.26.
[11] Decision at 32 (citing Tr. at 149-51).
[12] *Maritime Metal Trades Council*, 17 FLRA 890 (1985).
[13] Decision at 26 (citing Resp. Br. at 12).

Further, in my view, *NFFE, Local 1363* (*NFFE*)[14] is more relevant to the questions before us. A case that the majority does not mention, *NFFE* also concerned bargaining-unit employees stationed on an overseas military base. In *NFFE*, the Authority held that a proposal regarding those employees' access to essential services on the base *concerned* a condition of employment.[15]

As noted previously, the Judge found that access to the American postal system was an essential service. And, based on the Judge's thorough findings regarding the many problems that the change caused for the employees, I agree with his conclusion that terminating the mail delivery had a greater than de minimis effect on the employees.[16]

In sum, the record and Authority precedent support the Judge's conclusion that the Respondent's unilateral termination of mail delivery concerned a condition of employment. As I have stated before, the majority's ongoing efforts to "limit the scope of bargaining" by narrowing the matters that constitute conditions of employment is inconsistent with the Statute's core principles.[17] Accordingly, I dissent.

[14] 4 FLRA 139 (1980).
[15] *Id.* at 140-41.
[16] Decision at 30-31.
[17] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 14 (2021) (*El Paso II)* (Dissenting Opinion of Member DuBester) (quoting *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 506 (2018) (*El Paso I*) (Dissenting Opinion of Member DuBester)). For the reasons expressed in my dissent in *El Paso I*, the majority's claimed distinction between "conditions of employment" and "working conditions" (Majority at 4 n.13) is inconsistent with the Statute's legislative history, as well as Authority and judicial precedent. *El Paso I*, 70 FLRA at 505-06 (Dissenting Opinion of Member DuBester). Moreover, the majority's narrow definition of "working conditions" is also inconsistent with the Statute and precedent. *El Paso II*, 72 FLRA at 13 (Dissenting Opinion of Member DuBester). And, just as the majority ignored the facts and circumstances attendant to employees' job performance in *El Paso I*, here they also fail to answer "basic questions . . . [that are] the product of reasoned decisionmaking" regarding the connection between the matter and employees' job performance. *AFGE, Local 1929 v. FLRA*, 961 F.3d 452, 461 (D.C. Cir. 2020) (internal quotations omitted).

DEPARTMENT OF DEFENSE
DEPARTMENT OF DEFENSE EDUCATION ACTIVITY

RESPONDENT

AND

OVERSEAS FEDERATION OF TEACHERS

CHARGING PARTY

Case No. WA-CA-17-0170

Douglas J. Guerrin
For the General Counsel

Kristine T. Burgos
For the Respondent

Virginia Parkinson
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case entails an unfair labor practice under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On January 26, 2017, the Overseas Federation of Teachers (the Union or OFT) filed an unfair labor practice (ULP) charge against the Department of Defense, Department of Defense Education Activity (the Agency, Respondent, or DoDEA). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Washington Region issued a Complaint and Notice of Hearing on June 14, 2017, on behalf of the General Counsel (GC), alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by implementing a change without first providing the Union notice of, and an opportunity to bargain over, the change. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on July 10, 2017, denying that it violated the Statute. GC Ex. 1(c).

A hearing was held on December 1, 2017, in Rota, Spain. Tr. 4. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have reviewed, analyzed and considered.

Based on my consideration of the entire record, including my observations of the witnesses and their demeanor, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a unit of employees appropriate for bargaining at the Respondent. GC Exs. 1(b) & 1(c). The bargaining unit includes nonsupervisory professional school-level personnel (including teachers, counselors, and school nurses) in the Azores (Portugal), Spain, Italy, Greece, Turkey, and Bahrain. Jt. Ex. 1 at 6. In 1994, the Respondent and the Union reached a collective bargaining agreement (CBA), which continues to be in full force and effect. *See* Jt. Ex. 1 at 135; Tr. 29.

This case arose at Naval Station Rota in Rota, Spain. *See* GC Ex. 1(b); Tr. 20. There are about 6,000 people in the Rota community, including family members and dependents. Tr. 241. The base has an "industrial" area, which is where the base headquarters, the commissary, which is a grocery store, the post exchange, which is a small department store, the hospital, a bank, passport services, the American post office (the post office), and the Spanish post office are located. Tr. 21, 24-25, 90. Some services, like banking and passport services, are available only from 10:00 a.m. to 4:00 p.m. Tr. 90.

The post office is part of the military postal system, which is run by the Navy's Fleet Logistics Center. Tr. 242. Susan Brandenburg, a Navy employee, serves as the Postmaster of the post office. Tr. 236, 241. Brandenburg testified that the military postal system is an "extension" of the U.S. Postal Service and exists "to provide postal [services] for DoD [(i.e., Department of Defense)] employees in support of DoD missions." Tr. 237, 242. The military postal system is subject to Department of Defense and Navy regulations. Tr. 237-38. The post office serves all departments (e.g., the schools, the hospital) on the base. Tr. 119, 274-75.

Since 2015, the post office has been open from 10:00 a.m. to 4:00 p.m. on all business days except Thursdays, when it is open from 10:00 a.m. to 5:00 p.m.

See Tr. 26. In addition, the post office is open 10:00 a.m. to 2:00 p.m. the first three Saturdays in December. Tr. 26-27.

While some Agency employees use the Spanish mail system for limited purposes (*see* Tr. 143), many Agency employees use the post office at the Rota base for most or all of their postal needs. Virginia Parkinson, a Rota-based former teacher who now serves as the Union's European Director and Vice President, testified that employees rely on the post office to take advantage of "American prices" and to avoid the "inconveniences and difficulties of using an international mailing system." Tr. 16, 27-28, 36, 95-96. Further, Parkinson testified, using the post office allows employees to have an American mailing address, which is "required by many of the companies that we would deal with in the United States." Tr. 28.

The Respondent operates an elementary school and a middle school/high school (middle/high school) on the Rota base. Tr. 22. The schools are located in the base's housing area, about two miles from the base's industrial area. *See* Tr. 24, 227. The elementary school has 35 to 40 teachers and about 460 students, and the middle/high school has 30 to 35 teachers and about 250 students. Tr. 23. The regular duty day for elementary school teachers runs from 8:10 a.m. to 3:30 p.m., and the regular duty day for middle/high school teachers runs from 7:50 a.m. to 3:45 p.m. *Id.* Every Thursday, students are released from school early, at 2:00 p.m., so that teachers and school professionals may engage in "collaboration activities," which involve discussions about meeting student needs, looking at student data and implementing new educational standards. Tr. 68, 107.

All teachers have a forty-five minute break for lunch each day. *See* Tr. 107, 160; *see also* GC Br. at 8; Resp. Br. at 8. Elementary school teachers have forty-five-minute planning periods three days a week and ninety-minute planning periods two days a week, while middle/high school teachers have two forty-five-minute planning periods each day. *See* Tr. 84, 160, 220. Management has always permitted teachers to run errands during lunch and planning periods. Tr. 178, 228.

Most teachers – about eighty percent – choose to lead extracurricular activities (referred to colloquially as extra duty compensation or EDC, and in the CBA as extra duty assignments), which generally are held after school, between 4:00 and 7:00 p.m. *See* Tr. 84, 128, 141; Jt. Ex. 1 at 76. Teachers can make at least $1,000 per extracurricular activity led. Tr. 130-31. Management encourages teachers to lead extracurricular activities, and it can assign teachers to lead extracurricular activities in the event of a lack of adequate numbers of volunteer teachers seek to lead extracurricular activities. Tr. 84, 127.

Since 1992, if not earlier, the schools participated in the mail orderly program in which one of the Respondent's employees, a supply clerk (also referred to as a mail orderly), would pick up all mail (including packages) at the Rota post office and deliver that mail to employees at their schools, every business day. Tr. 28, 82. All departments at the base used the mail orderly program. Tr. 172.

The mail orderly program is reflected in Article 20 (entitled "Teach Conditions") of the CBA. As relevant here, Article 20, Section 6 is entitled "Teacher Facilities." Article 20, Section 6(f) of the CBA states:

> **Mail boxes.** Internal distribution boxes will be provided for each employee. When the employees' U.S. Mail is delivered to the school, mail normally shall be delivered on a daily basis except for weekends and federal holidays. If an employee has the option of having mail delivered to the Post Office, but instead chooses to have it delivered to the school, it will be placed in the employee's distribution box.

Jt. Ex. 1 at 58-59.

With respect to the CBA, Parkinson asserted that the CBA would be violated if teachers stopped receiving mail at schools. Tr. 75.

In January 2016, the Department of the Navy, NAVSUP Global Logistics Support, issued NAVSUP GLS Instruction 5112.1 (Navy Instruction 5112.1). Resp. Ex. 6 at 1. Navy Instruction 5112.1 modified the mail orderly program by permitting only "official" mail to be delivered to employees' workplaces. *Id.* at 32; *see also* Tr. 193.[1] Brandenburg was obligated to implement these modifications. Tr. 256. Employees at the Rota hospital still have mail delivered personally at work, and teachers at Navy bases in Naples and Sigonella continue to have mail delivered to them at their schools. Tr. 73, 90. It is anticipated, however, that the delivery of personal mail to employees' workplaces will eventually be phased out at all locations. Tr. 173.

On August 8, 2016,[2] Brandenburg called Dr. Kristin Forrester the Assistant Principal at the elementary school at the Rota base (and the only school administrator

[1] In this regard, Navy Instruction 5112.1 states: "Only official mail can be delivered via the mail orderly program . . . ." Resp. Ex. 6 at 32.

[2] Hereafter all dates are in 2016, unless otherwise noted.

on campus that summer) to inform her that, pursuant to Navy Instruction 5112.1, the post office would no longer permit the Respondent's supply clerk to pick up and deliver personal mail to employees at the Rota schools. Tr. 205-09; Jt. Ex. 2. Instead, all personal mail would be received at the post office. *See* Tr. 207. Letters would be delivered to new mailboxes at the post office, which could be accessed twenty-four hours per day. Tr. 27, 207. Packages would need to be picked up at the post office during the post office's business hours. Tr. 27. Brandenburg told Dr. Forrester that employees would need to fill out a form to be assigned a new mailbox at the post office, and that employees would also need to fill out a U.S. Postal Service change-of-address form. Tr. 207. Brandenburg further advised that these changes would be implemented at some point in mid-September. Tr. 210.

Minutes after the call ended, Dr. Forrester sent an email (the August 8th email) to elementary school staff announcing a "change in . . . Navy policy" that would require the following changes in the Respondent's mail delivery practices: school personnel would no longer receive personal mail (including packages) at school, and instead would have to go to the post office to pick up personal mail. (A supply clerk, who had previously delivered personal mail to employees at the school, would continue to deliver official mail to the school for staff to

receive.) Dr. Forrester directed staff to fill out forms with their new mailbox addresses and turn them in to Dr. Forrester by August 29, and she advised staff that personal mail would continue to be delivered until approximately September 15, which, she wrote, would "provid[e] the post office time to assign the new boxes." Dr. Forrester carbon copied Mohan Vaswani, the middle/high school principal at that time, and she forwarded the email to staff at the middle/high school. Jt. Ex. 2; *see also* Tr. 34, 36, 208, 225. Hereafter the changes in mail delivery practices at the two schools are referenced as "the change."

Most bargaining unit employees have only limited access to their official email accounts and choose to log into those accounts only at school, so most employees did not review the August 8th email until they returned to work, on or about August 20. *See* Tr. 35.

The Respondent did not provide the Union with advance notice of the change. Tr. 38, 226. When Parkinson was asked how she found out about the change, she testified, "I found out about it through" Jamie Matteson, the local union representative for the middle/high school, "who indicated to me that it was announced at a faculty meeting." Tr. 33, 39-40.

Not long after Dr. Forrester sent the August 8th email, Brandenburg told Dr. Forrester that deliveries of personal mail to school staff would cease on September 9th. Tr. 211. Dr. Forrester asked Brandenburg to delay the implementation until September 15th, the implementation date Dr. Forrester had provided to staff, and Brandenburg agreed to do so. *Id.*

Subsequently, Dr. Forrester learned that some employees had heard rumors that the change would not be implemented. On September 6th, Dr. Forrester sent elementary school staff an email advising them that these rumors were not true, adding that she had asked the post office to wait until September 15th to fully implement the change, rather than on September 9th, as Brandenburg had proposed. Tr. 214; Resp. Ex. 2. In addition, Dr. Forrester acknowledged that there were concerns with respect to the change, stating:

> I have shared our joint concerns with the post office hours with the post office command. As of now, the post office is open until 5 pm on Thursdays. The post office has assured me that any packages that are able to fit into the mail box will be placed in there so that you are able to pick up as much as possible at your leisure. If there is a concern over a particular package that you need to pick up and it isn't possible to do it on Thursdays or after school during the week, please see me and I will work with you to figure out a way for you to get your mail.

Resp. Ex. 2 at 2.

On September 8th, Vaswani sent an email to middle/high school staff that similarly advised them that September 15th was the last day staff could pick up personal mail at school. GC Ex. 2. Like Dr. Forrester, Vaswani acknowledged that staff had concerns about the change, stating: "I have shared our joint concerns with the package [pick-up] hours with the post office . . . . As of now, the post office is open until 5 pm on Thursdays. They are exploring other options. *Id.* In addition, Vaswani attached a copy of Postal Service Form (PS Form 3801), Standing Delivery Order, and advised staff that they could use the form to "designate an individual to pick-up your packages as a contingency." *Id.*

Around this time Matteson contacted Parkinson and asked her for help in responding to the change. Tr. 40-41. Parkinson, Matteson, and Janice Bradford, the local union representative for the elementary school, started working on proposals that could be brought to

management. Tr. 31, 42. At the hearing, Parkinson indicated that at this time management advised the Union that the change was "a done deal" and that there was "nothing that could be done." Tr. 43. So Parkinson sought to discuss the matter with Brandenburg, even though there is no bargaining relationship between the Union and the post office. *Id.*

On September 12th, Parkinson met with Brandenburg to discuss the change. Tr. 45. Parkinson told Brandenburg that the change was difficult for teachers who had to pick up packages at the post office because "the duty hours of the teachers were the exact same hours, or very close, to the post office hours." *Id.* Parkinson asked Brandenburg whether there were any "solutions" she could offer, and Brandenburg responded that she did not have any solutions. Tr. 45-46.

On September 14th, a teacher told Dr. Forrester that she had heard that management and the Union had "worked something out" regarding mail delivery. Tr. 214. Dr. Forrester informed the teacher that she was mistaken. Dr. Forrester then called Brandenburg to confirm, and Brandenburg told Dr. Forrester, "There's nothing to be worked out. This is out of our control. This is a change in regulation." *Id.* After talking with Brandenburg, Dr. Forrester sent an email to high school staff to deny the notion that the change would not be implemented. Resp. Ex. 2.

Later that day, Dr. Forrester sent an email to staff at both schools. GC Ex. 4. Responding to Union requests for extended hours at the post office, Forrester wrote:

> All: I was just informed that the post office is not able to justify extended hours at this point because the current usage doesn't support the change. In fact, the director told me that they were considering moving the Thursday closing hour back to [4:00 p.m.] due to low utilization. Over the past months since the change was made, they have serviced an average of 5 customers during the extended period.
> Because this change has just taken place for us and other commands around the base, they will maintain the Thursday late closure for now while they monitor the impact of the current transition.

Id.

Around this time, Parkinson and Matteson began communicating with Carl Albrecht, the Community Superintendent who supervised principals at the schools in Rota as well as at Navy schools in Naples, and Sigonella, Italy, and Bahrain. Tr. 42, 163, 165, 201.

On the morning of September 15th, Matteson submitted the Union's proposal (its first) to Albrecht via email. *See* Tr. 49-51; GC Ex. 4. In the proposal, the Union requested that they be allowed to use a PS Form 3801 to authorize the supply clerk to pick up their packages and deliver them to the schools. GC Ex. 4. The Union asserted that Brandenburg had told the Union that PS Form 3801 could be used in this way. *Id.* In addition, the Union asserted that its' proposal would counter negative effects of the change, stating that it was difficult for teachers, whose duty day ended at 3:45 p.m., to pick up packages at the post office by 4:00 p.m., or even by 5:00 p.m. on Thursdays. *Id.* In this regard, the Union asserted:

> It takes longer than 15 minutes to get to the post office from school.
>
> Teachers are entitled to daily mail including packages and should not be required to use their lunch or planning time to pick up packages. In addition, several teachers are assigned preps before the post office opens or do not have a prep at all. Many teachers have EDC contracts that require them to supervise students after school.

GC Ex. 4 at "OFT Memo for the Record". The Union asked management to provide a counterproposal if the Union's proposal was not acceptable. *Id.*

The official implementation of the change occurred on September 15th. Dr. Forrester testified that staff were expected to get their mail at the post office by September 15th, and that ninety percent of staff had executed the necessary paperwork to pick up mail at the post office by September 15th. (The change will be referenced as being officially implemented on September 15th, although a final delivery of personal mail was made on September 16th.) Tr. 81, 212, 229; GC Ex. 4. Dr. Forrester noted that after September 15th, there still were a few "holdout" employees who did not comply with the requirements of the change. Tr. 212, 223, 229. Dr. Forrester testified that the post office "still let us pick up . . . personal mail" for these employees because "the post office and also us, we didn't want anybody's mail to get returned." Tr. 212, 215.

According to Dr. Forrester, employees were informed at this time that they could pick up packages at the post office during their lunch periods. Tr. 220-21

On September 16th, Albrecht emailed a response to the Union's September 15th, email. Albrecht asserted that the change was implemented by the post office, rather than by the Agency, and that a similar change would take place at naval bases in other locations. In addition, Albrecht rejected the Union's proposal that deliveries continue for staff that fill out PS Form 3801, stating that the use of PS Form 3801 is limited to "temporary, short term needs." GC Ex. 4. Albrecht also stated that it was unrealistic for the Union to request that the supply clerk deliver personal mail on a daily basis, because there was not enough official mail to justify having the supply clerk make daily deliveries. Albrecht, however, acknowledged that it was likely that "personnel at Rota will need different opening/pickup times." *Id.* He added: "The solution I would offer [in line] with postal procedures is that staff unable to get to the post office utilize [PS Form] 3801 with a colleague. Keep in mind that mail is held for 30 days and with a note to the post office, even longer." *Id.* Albrecht also asked the Union to "keep data on what types of problems may actually occur." *Id.* Albrecht testified in this regard that he told Parkinson, "Let's find out how many people are really bothered by this, and what we need to do." Tr. 172 (internal quotation mark omitted).

On September 19th, Linda Hogan, the Union's President and Executive Director, sent Albrecht an email in response to his September 16th, email, along with a new proposal, which was substantively identical to the Union's initial proposal. Tr. 31; GC Ex. 4. With respect to Albrecht's proposed solution, Hogan wrote: "[T]o ask another colleague to leave during their lunch or planning period to pick up packages is not an acceptable solution. Neither is it acceptable to imply that a teacher can wait 30 days or more to pick up a package . . . ."
GC Ex. 4. (It is noted that Parkinson testified that planning periods are "essential to being an effective teacher and leading to higher student learning.") Tr. 69.

The Union asserted in its new proposal that the change entailed problems for employees, arguing that: (1) while the duty day ended at 3:30 p.m. for elementary school teachers and at 3:45 p.m. for middle/high school teachers, the post office was only open until 4:00 p.m. on all days except Thursdays, when it stayed open until 5:00 p.m.; (2) it was likely that the post office would start closing at 4:00 p.m. on Thursdays; (3) teachers are "entitled to daily mail, including packages"; (4) teachers "should not be required to use their lunch or duty time to pick up packages"; and (5) the change was hard for teachers worked "well after [4:00 p.m.] on many days" attending school meetings and leading extracurricular activities. *Id.*

On September 19th or 20th, Parkinson and Albrecht met but were unable to resolve this matter. Tr. 56.

On September 22th, Parkinson sent Brandenburg an email thanking her for her willingness to discuss the matter and asserting that teachers still were looking for "a workable solution . . . to retrieve their packages." GC Ex. 3. Parkinson added that teachers continued to face problems in the wake of the change, stating:

> [T]he current [post office] hours of [10:00 a.m. to 4:00 p.m.] do not allow for teachers . . . to leave their place of work, drive to the post office, stand in line to retrieve packages, and return to work during their lunch period, and for many, it's virtually impossible to be there by [4:00 p.m.] due to the established duty day along with many after school duties.

Id. at 2.

Parkinson noted that post offices at other Navy bases were open later and/or on weekends, and Parkinson asked Brandenburg if she would consider options such as allowing people to pick up packages until 5:00 p.m. every day. *Id.*

Brandenburg replied later that day. While she acknowledged Parkinson's "concerns," Brandenburg stated that business patterns did not justify opening the post office for additional hours. Brandenburg noted that the post office has considered closing on Thursdays at 4:00 p.m. because of low demand. She added, however, that the post office was "reevaluat[ing] that option "due [to] recent changes." *Id.*

On October 7th, Parkinson sent Albrecht yet another proposal. The main portion of the new proposal was essentially identical to the Union's previous proposals, except that the Union requested allowing for the possibility that packages would be delivered only three days per week. *See* Jt. Ex. 3. Alternatively, the Union proposed that teachers be allowed to change their mailing address to the school address and have the Agency's supply clerk deliver all mail (letters and packages) to schools three days per week. *See Id.*

The Union asserted in its proposal that planning periods were "key to [teachers'] instructional effectiveness," and that these periods were used "for communication with colleagues and parents and, often, to provide assistance to students." *Id.* Further, the Union asserted that while "some permissiveness may be needed for teachers to conduct occasional errands during the

school day, it is more of a burden than a gift," and in any event, requiring teachers to pick up packages during their planning periods constituted "a change in working conditions that must be negotiated." *Id.* In addition, the Union asserted that: (1) "[i]t takes longer than 30 minutes to make the round trip to the post office from a teacher's classroom"; (2) "[i]f there's a line for packages, that adds to that trip time, making trips during lunch or prep fruitless"; (3) teachers with planning periods that take place before the post office opens at 10:00 a.m. cannot use those periods to pick up packages; (4) it was "unreasonable to ask teachers to find somebody else to check their mail," especially because "[o]nly a few teachers have non-working spouses"; (5) teachers at both the elementary school and the middle/high school are "frequently involved in a wide variety of after school activities that prevent them from leaving at the end of their . . . duty day." *Id.*

Along with its' proposal, the Union submitted the results of a survey conducted, in apparent response to Albrecht's request for additional information about the effects of the change. Thirty-three bargaining unit employees (out of eighty total) responded to the survey, although only a portion of respondents provided answers to the survey questions asked. Tr. 83; Jt. Ex. 3.

Regarding the survey question, "I have been unable to pick up the package or I was delayed in picking up my package," eight respondents said "Yes," and four said "No." Jt. Ex. 3. Reasons given for not being able to pick up a package included a conflict with the first period planning period; needing to wait until Thursday; work schedule conflicts; and both spouses working during post office hours. *Id.* When testifying about this part of the survey, Parkinson noted that it was "also common for teachers to be single." Tr. 62; *see also* Tr. 157.

With respect to the question, "I have been able to get to the post office between . . . [10:00 a.m. and 4:00 p.m.]," seven respondents said "Yes, and fifteen said "No." Jt. Ex. 3. Reasons for not being able to pick up packages during that period included: planning periods that ended before the post office opened; needing to use planning periods for things like grading, lesson planning, and meeting with students; meetings; working during lunch; it taking thirty minutes to get to the post office and back; too much traffic during lunch; and long lines at the post office during lunch. *Id.*

Asked to list after-school commitments, such as meetings, preventing staff from getting to the post office prior to 4:00 p.m., the survey respondents indicated that they could not get to the post office before 4:00 p.m. because: the duty day ended at 3:30 p.m. for elementary school teachers and at 3:45 p.m. for middle/high school teachers; there was a need to prepare lessons after school; after-school meetings; extracurricular activities during lunch and after school; and parent-teacher conferences. *Id.*

Parkinson testified that despite a middle/high school teacher's duty day ending at 3:45 p.m., they thereafter have to "gather their stuff, walk out the building, get to their car, get to the post office," meaning that teachers "truly and honestly can't get [to the post office] before 4 o'clock on many occasions." Tr. 62. Further, Parkinson testified, "many teachers are unable to finish their prep in the fairly limited amount of time they are given for that, so they're continuing to prep after school." Tr. 62-63. Moreover, Parkinson testified that the "actual duty of teachers extends well beyond [duty hours] in many circumstances," due to school meetings, parent-teacher conferences, extracurricular activities, and "cleaning up" the classroom. Tr. 62-63. At the hearing, Parkinson noted that the survey was conducted "very close to the beginning of the implementation." Tr. 92.

On October 12th, Albrecht sent Brandenburg an email with respect to the change. Albrecht began by noting that he and Dr. Forrester had met with Brandenburg to talk about "the difficulty teachers have without . . . [p]ickups" at the schools. Resp. Ex. 7. In addition, Albrecht noted that the post office's business hours continued to be an issue, and he asked Brandenburg whether she was "anticipating any changes." *Id.* Further, Albrecht asked Brandenburg whether she had any guidance with respect to teachers using PS Form 3801. *Id.*

Dr. Forrester similarly testified that at some point she and Parkinson had asked Brandenburg if employees could use PS Form 3801 to have the supply clerk pick up mail for them indefinitely, and that Brandenburg denied the same. Tr. 216-17.

On October 14th, Parkinson sent an email to Albrecht asserting that teachers were "irate" about the lack of progress on the issue and were asking for an update on management's response. GC Ex. 5.

On October 18th, Albrecht sent an email to Parkinson and Hogan. Jt. Ex. 4. Albrecht began by asserting that management "did not have any option or input on the change." *Id.* Further, Albrecht asserted that the use of PS Form 3801 could not be used as the Union had proposed, because the form "is not meant to replace the continual pickup by a school clerk." *Id.* In response to the Union's proposals, Albrecht offered Parkinson some "points to consider." First, Albrecht stated that he had suggested to the school administration that the post office hours be on the agenda of the Installation Advisory Committee (IAC), a committee that meets

occasionally and that consists of the Base Commander and his representatives along with representatives of the school and the Union. *Id.*; Tr. 66. Second, Albrecht asserted that the schools have "relatively little to no official mail" from the U.S. Postal Service, and that the package deliveries that the Union proposed would essentially be "for the sole purpose of providing packages to teachers, and not to the benefit of the school." Jt. Ex. 4. Third, Albrecht asserted that employees can pick up letters at the post office twenty-four hours per day and that employees can pick up packages until 5:00 p.m. on Thursdays. *Id.* Finally, Albrecht offered the following counterproposal:

> The school and the [District Superintendent's Office] will work through the proper channels to request more suitable pick up hours/days with the base chain of command. Further, on Thursdays, the school administration will be lenient with release coming immediately at the end of the Collaboration Activities for package pickups.

Id. at 4.

Parkinson replied to Albrecht's email on October 20th. Parkinson asserted that the Agency's counterproposal was "unacceptable as it does not solve the problem." *Id.* at 2. Parkinson then stated that: (1) it was not necessarily true that PS Form 3801 could only be used for a limited amount of time; (2) the Union would nevertheless be willing to discuss letting staff use PS Form 3801 for only a limited amount of time; (3) the Union had already asked to be part of the IAC, and the next IAC meeting would not take place until November or December; (4) the Union previously indicated that its proposal could be reconsidered when the post office adopts "more reasonable . . . hours"; (5) teachers should be able to use their planning periods for planning, not running errands; (6) that teachers could access letters twenty-four hours a day did not address the fact that teachers could pick up packages only when the post office was open; (7) the post office was considering closing at 4:00 p.m. on Thursdays; (8) letting teachers have an "early release" from collaboration activities on Thursdays would "institutionally diminish[] the point of collaboration"; (9) giving teachers the opportunity only to pick up packages once every Thursday was "insufficient"; and (10) there was no indication that management's proposal to discuss the matter further would be fruitful. *Id.*

In addition, the Union offered a fourth proposal stating, in pertinent part:

> [S]chool administrators will . . . request more suitable pick up hours/days with the base chain of command. In the interim, the previously offered OFT proposal will be initiated, but with the modification of school personnel going only twice a week. This plan would be in place until the post office modifies their hours and will not set a past practice. If the post office hours have not been adjusted by [January 6, 2017], school personnel will begin going to the post office as proposed three times a week.

Id.

On October 24th, Brandenburg replied to Albrecht's October 12th, email regarding post office hours and the use of the PS Form 3801. Brandenburg stated that the post office had planned to close at 4:00 p.m. on Thursdays due to lack of demand, but that the post office had decided to continue to stay open on Thursdays until 5:00 p.m. "to accommodate the teachers." Resp. Ex. 7. At the hearing, Brandenburg similarly testified: "[T]he teachers brought up a concern so, therefore, to accommodate the teachers, we kept open from 4 to 5." Tr. 261. With respect to extending hours on other days, Brandenburg stated that the post office was not anticipating any other changes. Resp. Ex. 7. With respect to PS Form 3801, Brandenburg cited the Department of Defense Postal Manual (DPM), Section C3.2.5.7 for the proposition that customers should not use PS Form 3801 for one's personal convenience, and cited Navy Instruction 5112.1 for the proposition that a PS Form 3801 is intended to be used for no longer than six months.[3] *Id.* Brandenburg testified in this regard that these regulations meant that PS Form 3801 can't be used to let the Agency's supply clerk pick up mail for teachers indefinitely, and can't be used for the "convenience of the customer." Tr. 257, 264-65. Rather, Brandenburg testified, PS Form 3801 is to be used by people who are temporarily away from duty. *See* Tr. 258.

After hearing back from Brandenburg on October 24th, Albrecht told Parkinson that PS Form 3801 could only be used on a temporary basis and could not be used for convenience. *See* Tr. 76-77.

[3] With respect to PS Form 3801, Navy Instruction 5112.1 states that that form "remains in effect for a maximum of six months," (Resp. Ex. 6 at 31), and the DPM, Section C3.2.5.7, states: "Customers should not use [PS Form 3801] for the convenience of not retrieving their own mail . . . ." Resp. Ex. 4. at 71.

In November, Parkinson attended an Agency-hosted training session in Vicenza, Italy. Tr. 86. There she met with Derek Kushmerek, the Chief of Labor and Employment Relations for DoDEA Europe, Albrecht and other administrators to discuss post service for school staff. *See* Tr. 4, 86. According to Parkinson, Kushmerek asserted that the Union's proposals were nonnegotiable. Tr. 86-87. The Agency had not previously asserted the Union's proposals were nonnegotiable. Tr. 94-95.

On December 14th, Parkinson met with the Rota Base Commander, Captain MacNicholl, and Albrecht, Forrester, and other school administrators to discuss the Union's concerns. Tr. 71-72, 104. According to Parkinson, Captain MacNicholl "acknowledged that this was problematic[]" and indicated a desire to have a "discussion with the postal command structure." Tr. 72. However, Parkinson testified, there was "no follow-up . . . and no resolution." *Id.* Parkinson believed that Captain MacNicholl did not have the authority to change the post office's hours, but that he did have "the authority to influence[]" and "try to convince the postal Commander in Sigonella to instruct the postal officer to change the hours." Tr. 104. (Parkinson and Albrecht similarly indicated that DoDEA cannot dictate when the post office would be open.) *See* Tr. 80, 190.

Albrecht testified that Captain MacNicholl was "very supportive of us getting the later/earlier [pick-up] times" at the post office. Tr. 170. Dr. Forrester testified that Captain MacNicholl stated that the matter was not within his control, that he didn't have authority to override a Navy instruction, and that other units on the base were ending their orderly program and the school "should be able to do it too." Tr. 218.

In January 2017, the post office began offering package pickup services on Tuesdays from 7:00 a.m. to 8:00 a.m. *See* Tr. 26, 261-62. At the hearing, Albrecht and Brandenburg indicated the Tuesday morning hour was added at the request of school management to give school employees another opportunity to pick up packages during the day. *See* Tr. 179, 261-62, 266. Furthermore it is noted that Agency management officials had also asked Brandenburg whether the post office could stay open until 5:00 p.m. on a second day (in addition to Thursdays); however, Brandenburg replied in the negative. Tr. 266.

Also in January 2017, Dr. Forrester obtained from the post office a list of the remaining employees (the "holdout" employees) who had not signed up for a new mailbox. Dr. Forrester then informed these employees that "You really have to do this. They're going to cut us off [at] any time." Tr. 215.

As noted above, the Union filed its ULP charge on January 26, 2017. GC Ex. 1(a).

The post office continued to deliver personal mail to the three or four remaining "holdout" employees, until April 2017. Tr. 216.

At the hearing, multiple witnesses testified regarding the impact of the change.

Jason Fox teaches music at the middle/high school. Tr. 106. In the 2016-17 school year, Fox had two planning periods in the morning (i.e., from 8:15, when classes start until 9:45 a.m.). *See* Tr. 106, 108, 119. Fox uses his planning periods to prepare for his classes. *See* Tr. 111. Fox has previously coached soccer and volleyball, requiring him to attend practices every day from 3:45 to 5:45 p.m. Tr. 116-17. Fox currently leads music club, jazz band/pep band after school. Tr. 111-13. In addition, Fox is the co-chair of the college career readiness committee, which meets every Tuesday afternoon until 4:15 or 4:30 p.m. Tr. 113-14. Fox also is a professional leadership team leader and has a related meeting every Thursday at the end of the duty day. Tr. 114.

Asked to describe how the change has impacted him, Fox testified that he was unable to pick up a package containing an engagement ring he had ordered. Fox could not pick up the package during his planning periods, he stated, because they took place before the post office opened, and he could not accomplish the pick up after school due to a conflict with coaching volleyball. Tr. 119. Fox went to the administration to see if there was "some sort of thing that could be worked out," but, he testified, "[t]hat didn't end up coming to fruition." Tr. 120. Fox tried a couple of times to get the package during his lunch break, but was unsuccessful. "[T]he line was too long," he testified, and "there was just no way that I could wait around and . . . get back to the school in time." *Id.* Fox added that he doesn't live with anyone, and his fiancée was not able to pick up the ring for him. Tr. 121. Two or three days after the ring had been delivered, Fox asked his assistant coach to oversee volleyball practice while Fox went to the post office, the assistant coach agreed, and Fox was finally able to pick up the ring. Tr. 120-21.

It is easier for Fox to pick up packages this year, because his planning periods occur later in the day, while the post office is open, and because management has permitted him to go to the post office between the end of the duty day and the beginning of his extracurricular duties (except on Tuesday afternoons, when the college career readiness committee meets). Tr. 131 Fox added that he has to go to the post office about once every two weeks, and that this was "agreeable." Tr. 133-34.

As for the impact of the change on others, Fox testified: "[S]ome of my colleagues have found it very difficult. For whatever reason, for them, it's been difficult . . . to get over to the post office on a regular basis to pick up mail and to do what they need to do over there." Tr. 132. Relatedly, Fox testified that the post office is "[i]ncredibly busy" during lunchtime. Tr. 118.

In addition, Fox testified that while management permits teachers to run errands during planning periods, those periods were not designed for teachers to run errands. Rather, he testified, planning periods are for "curricular support," and school administrators "have the control over that time." Tr. 129.

Dr. Marcy Bond is a counselor at the middle/high school. Tr. 136. During the duty day, Dr. Bond has meetings with parents and students throughout the day, with each day presenting a potentially different schedule. Tr. 136-37. Dr. Bond chooses to spend her lunch period meeting with students, because that's when they have time to talk with her. Tr. 140. After the regular duty day, Dr. Bond coaches fall and winter cheerleading every evening, from 4:00 p.m. until 6:00 or 7:00 p.m. *See* Tr. 141.

Dr. Bond testified that her family does "a lot of online shopping," and she estimated that she receives a package once a week, except in December, when she gets packages nearly every day. Tr. 149-50.

Due to her busy schedule, Dr. Bond is unable to pick up packages during the day, so, after the change, Dr. Bond filled out a PS Form 3801 and authorized a teacher she works with to pick up packages for her. *See* Tr. 136-37, 150. "[H]is prep is connected to lunch," Dr. Bond explained, "so he has a little bit of a longer span. . . . [He] can get up there a couple of times a week." Tr. 150-51. But even with 135 minutes to spare (a 45 minute lunch break and a 90 minute planning period), lines are sometimes too long for Dr. Bond's colleague to get the packages waiting for her. Tr. 151, 158.

If her colleague is unable to pick up packages for her, Dr. Bond's husband, a German teacher at the middle/high school can go, even though he prefers to work during his planning periods. But Dr. Bond needs to ask her husband in advance, because his schedule is busy as well. Tr. 147, 152.

Dr. Bond noted that her husband was currently planning to go to the post office to pick up a "power of attorney" document from Dr. Bond's sister. Tr. 151. Dr. Bond stated at the hearing that she or her husband needed to get to the post office that day to pick up a legal document, her sister's power of attorney.[4] *Id.*

Dr. Bond stated that it was harder for her husband to use his two forty-five minute planning periods to get mail because they are not adjacent to lunch periods but instead are spread out throughout the day. Tr. 158. Dr. Bond added that her husband will usually wait until Friday to pick up a package, and that on the way he'll run errands at other stores at the base that also close at 4:00 p.m. or 6:00 p.m. Tr. 153. Dr. Bond noted that both before and after the change, she or her husband would have to go to the post office to send packages, something that they need to do once or twice a month. *See* Tr. 150, 155-56.

Dr. Bond and her husband receive some of their mail at their home, off-base, through the Spanish mail system, because it is easier to receive mail from her husband's family in the United Kingdom and from her business in Germany through Spanish mail. *See* Tr. 143. But Dr. Bond also receives mail from America, which is processed through the post office at the Rota base. *See Id.*

Notice is taken, based upon the evidence of record, that the drive between the school and the post office is about ten minutes, and that for staff at the middle/high school, the walk between the school and one's car can take ten minutes or more. *See* Tr. 24-25, 118, 145. Further, while there might be occasions without waiting periods at the post office during some visits, the wait can be longer for other visits, especially during lunch when, Dr. Bond testified, the post office is "[s]uper busy." Tr. 144. Assuming that it takes a few minutes on average for one to receive a package once in the post office, I credit Dr. Bond's testimony indicating that it can take an entire lunch period, i.e., forty-five minutes, or longer for an employee to go from the middle/high school to the post office and back. Tr. 145. (Parkinson's testimony suggests that the trip could be shorter for staff at the elementary school, because parking is better at the elementary school.) Tr. 24.

Relatedly, Dr. Bond testified that the duty free lunch period was not intended as a time to run errands so much as it was a time when teachers could "eat their lunch, with no students or meetings." Tr. 162.

As to how the change has affected others, Dr. Bond testified that some teachers are "able to get out

[4] It is inferred from Dr. Bond's testimony that there was a limited period during which she could obtain the legal document, indicating that the document was sent as a package, rather than as a letter, which could more easily have been picked up at any time. *See* Tr. 151.

more readily on their preps than others," either because they are "better planners" or because their planning periods are adjacent to lunch, giving them lots of time to run errands. Tr. 158.

For her part, Dr. Forrester explained how she has picked up packages after the change, stating: "I leave during my lunch and get my mail, or if I'm expecting something specific that I really need to get, then I ask my boss, 'Can I get up there real quick at the end of the day?' or something, and always I've been told yes." Tr. 220.

Relatedly, Dr. Forrester testified that teachers are permitted to leave campus to get mail (or perform other errands) "as long as they're not on teaching time, if they're not with students, they can go." Tr. 221. For security reasons, teachers are required to notify management on a sign-out board when they are going off-campus. *Id.*; *see also* Tr. 131, 145.

There was also significant testimony summarizing the attempts that management made to accommodate the Union's concerns about the change. Asked what steps he took to deal with the change, Albrecht testified:

> We were able [to] get [Brandenburg] to have a later opening and an earlier opening. We allowed the teachers to be able to use what time they needed. Teachers get prep periods during the day. We allowed them to be able to use their time to make those decisions if they had to go. . . . We were willing to offer time during [collaboration activities] if teachers needed to get [to] the post office to pick up packages.

Tr. 169-70.

Asked to summarize the discussions he had had with Brandenburg about the change, Albrecht similarly stated:

> [I asked i]f there was any – what could she do for us, what was she able to do for us. The unit mail pick-up wasn't possible. I think we probably said, "Can you stay open later?" I don't know if I ever thought of opening earlier, but we talked about staying open on Saturday and then between her and the Base Commander came up with the idea of what if we opened earlier.

Tr. 174.

POSITIONS OF THE PARTIES

General Counsel

The GC argues that the Respondent failed to provide the Union notice of the change and an opportunity to bargain. GC Br. at 19. The GC asserts that notice of a change must be

sufficiently specific to adequately provide the exclusive representative a reasonable opportunity to request bargaining. *Id.* (citing *Ogden Air Logistics Ctr., Hill AFB, Utah*, 41 FLRA 690, 698-99 (1991)). The GC argues that while the Respondent told employees directly about the change, the Respondent failed to provide adequate notice of the change to the Union. *Id.* The GC adds that a union is not obligated to request bargaining if a change is presented as a fait accompli. *Id.*

The GC contends that the change concerned conditions of employment. Specifically, the GC argues that the delivery of mail pertained to bargaining unit employees. *Id.* at 15. Further, the GC argues that there was a direct connection between the delivery of mail and the employment relationship of bargaining unit employees, because: (1) the delivery of personal mail was a "[longstanding] privilege;" and (2) as Brandenburg testified, the provision of postal services supports the mission of the Respondent and other activities within the Department of Defense. *Id.* at 15-16 (citing *Dep't of the Air Force, Eielson AFB, Alaska*, 23 FLRA 605 (1986)); Tr. 237.

The GC further argues that the change had a greater than de minimis effect on bargaining unit employees' conditions of employment. Specifically, the GC argues that staff "cannot pick up their packages" because they do not have regular access to the post office and because they have to work while the post office is open. GC Br. at 16. The GC adds that although the post office is open until 5:00 p.m. on Thursdays, that is of minimal benefit to teachers who lead extracurricular activities after school. *See id.* at 17. Moreover, the GC argues that lunch periods are intended for eating lunch, and that in any event the post office is especially busy during lunchtime. Further, the GC argues that planning periods are intended for teachers to prepare their lessons. Neither the lunch period nor the planning period is intended for running errands. *Id.* at 17-18 (citing Tr. 85, 128-29, 145, 162, 178).

Based on the foregoing, the GC contends that the Respondent was obligated to provide the Union notice of and an opportunity to bargain over the change in advance of its September 15th implementation. *Id.* at 21. By failing to do so, the GC argues, the Respondent

violated § 7116(a)(1) and (5) of the Statute. *Id.* at 15; *see also id.* at 21.

The GC further contends that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing and refusing to negotiate with the Union in good faith. *Id.* at 19, 21. In this regard, the GC argues that an agency engaged in bad faith bargaining when it gives the impression that it is futile for the union to attempt negotiations over its proposals. *Id.* at 19 (citing *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 855 (1999) (*Bastrop*)). The GC also contends that an agency is required to bargain to the extent of its discretion, and that the Respondent was obligated to bargain, because it had discretion over at least some aspects of the change. *Id.* at 19-20 (citing *Def. Contract Admin. Servs. Region*, 15 FLRA 750, 752 (1984); *AFSCME, AFL-CIO, Local 2477*, 7 FLRA 578, 585 (1982)).

The GC argues that the Respondent failed to meet its bargaining obligations. In support thereof, the GC asserts that the Respondent: (1) failed to submit any counterproposals; (2) "deflected blame to the [p]ost [o]ffice"; (3) told the Union that it was "up to staff to determine how to help each other retrieve mail"; and (4) recommended that the parties work through the Base Commander to get better hours at the post office. *Id.* at 20 (citing GC Ex. 4;
Jt. Ex. 3). The GC contends that the Respondent's words and actions "foreclosed negotiations." *Id.* at 21 (citing *Bastrop*, 55 FLRA at 855; *U.S. Dep't of HHS, PHS, Indian Health Serv., Indian Hosp., Rapid City, S.D.*, 37 FLRA 972, 981 (1990)).

As a remedy, the GC requests, among other things, that the Respondent be ordered to bargain with the Union over the change, and that the notice be signed by the Respondent's European Director, Dr. Dell W. McMullen. *Id.* at 22-23.

Respondent

The Respondent argues that to find an agency violated § 7116(a)(1) and (5) of the Statute by failing to provide a union with notice and opportunity to bargain over changes in conditions of employment, the agency must be found to have changed a policy, practice, or procedure affecting unit employees' conditions of employment. Resp. Br. at 13 (citing *NTEU*, 66 FLRA 577, 579-80 (2012), *pet. for review denied sub nom. NTEU v. FLRA*, 745 F.3d 1219 (D.C. Cir. 2014); *U.S. Dep't of VA, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93, 94 (2003) (*Sheridan*); *U.S. Dep't of Labor, OSHA, Region 1, Bos., Mass.*, 58 FLRA 213, 215 (2002) (*OSHA*)). The Respondent acknowledges that there was a change and tacitly acknowledges that it did not provide the Union with notice of, and an opportunity to bargain over, the change. *Id.* at 10, 13. However, the Respondent argues that it did not violate the Statute. In this regard, the Respondent contends that it was the Navy, not the Respondent, that implemented the change. *Id.* at 10. Accordingly, the Respondent contends that it had no discretion or control over the change. *Id.* at 13. The Respondent adds that Parkinson testified that she believed Captain MacNicholl did not have the authority to change the post office's hours, but only had the authority to try to convince post office officials to change the post office's hours. *Id.*

In addition, the Respondent argues that the change did not concern conditions of employment within the meaning of § 7103(a)(14) of the Statute. *Id.* at 11. While the Respondent concedes that the change pertains to bargaining unit employees, the Respondent contends that the change does not pertain to the work situation or employment relationship of bargaining unit employees, because the change pertains only to "personal" mail, which has "no bearing on the teachers' duty assignment[s]." *Id.* at 12. In addition, the Respondent asserts that a matter that is not otherwise a condition of employment does not become a condition of employment through past practice. *Id.* at 11 (citing *Maritime Metal Trades Council*, 17 FLRA 890, 892 (1985)).

The Respondent further argues that matters specifically provided for by federal statute are excluded from the definition of conditions of employment, and that the Respondent had no duty to bargain over the change because the delivery of mail is "provided for by federal statute," specifically, 39 U.S.C. § 406. *Id.* at 9, 11. In this regard, the Respondent contends that § 406 provides that the U.S. Postal Service "may establish branch post offices at . . . bases . . . of the Armed Forces," and that § 406 "highlights that the Secretary of Defense is responsible for
arranging with the Postal Service to perform postal services through personnel designated by them at or through branch post offices."[5] *Id.* at 9. The Respondent also asserts that under Executive Order 12,556, the

[5] 39 U.S.C. § 406 states:

> (a) The Postal Service may establish branch post offices at camps, posts, bases, or stations of the Armed Forces and at defense or other strategic installations.
>
> (b) The Secretaries of Defense and Transportation shall make arrangements with the Postal Service to perform postal services through personnel designated by them at or through branch post offices established under subsection (a) of this section.

Secretary of Defense is authorized to designate an area for free mailing privileges.[6] *Id.*

In addition, the Respondent cites the DPM for the proposition that the delivery of personal mail to bargaining unit employees is specifically provided for by federal statute. *Id.* Further, the Respondent argues that it had "restricted discretion" with respect to the change and that the Department of Defense and the U.S. Postal Service had "unfettered discretion" with respect to the change. *Id.* at 10 (citing *U.S. Dep't of Def. v. FLRA*, 982 F.2d 577 (D.C. Cir. 1993) (*DoD v. FLRA*)).

Moreover, the Respondent asserts that the Secretary of Defense has "delegated . . . unfettered discretion over the logistics and materiel readiness of the military postal service . . . thereby precluding the agency's duty to bargain." *Id.* at 9. In this regard, the Respondent argues that the change did not trigger the Respondent's duty to bargain because it was determined "[i]n a similar case" that "access to base commissaries and exchanges fall[s] outside the scope of collective bargaining because Congress vested the military with 'unfettered discretion' over the issues of access to such facilities." *Id.* at 10 (citing *Dep't of the Air Force v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016) (*Air Force*)).

In addition, the Respondent asserts that the Under Secretary of Defense for Acquisition, Technology and Logistics is the "final authority concerning requests for changes . . . in DoD Official Mail Management policies and procedures." *Id.* at 9. For support, the Respondent cites Department of Defense Instruction No. 4525.08, and requests that the undersigned take official judicial notice of the document. *Id.* at 9 & n. 35

The Respondent also argues that it had no obligation to bargain over the change because the change had only de minimis effects on conditions of employment. *Id.* at 14. In this regard, the Respondent contends that accessing packages after the change is "less convenient" but "not impossible." *Id.* at 12. The Respondent asserts that Fox and Dr. Bond both testified that the change has not prevented them from picking up packages. *Id.* at 14. Indeed, the Respondent notes, Fox testified that the current system is "agreeable" to him. *Id.* at 15. Further, the Respondent argues that if employees have to run other types of errands during the day, adding an extra stop at the post office is not a significant increase in the amount of errands teachers normally have to run. *See id.* In addition, the Respondent contends that the Union's survey showed that only eight employees out of the thirty-three who responded said they were unable to pick up their packages or faced delays in picking up their packages. *Id.*

Finally, citing the "covered by" doctrine, the Respondent also argues that it had no obligation to bargain over the change, because the delivery of mail is expressly contained in the CBA. *Id.* In this regard, the Respondent cites Parkinson's claim at the hearing that by implementing the change, the Respondent violated Article 20, Section 6(f) of the CBA. *Id.* at 6.

DISCUSSION

Preliminary Matter: Respondent Waived Its Right to Raise Its "Covered By" Defense

An argument that a matter is "covered by" a collective bargaining agreement is an affirmative defense that must be timely raised by a respondent, in order to put the opposing party on notice, or it will be deemed waived. *Soc. Sec. Admin., Region VII, Kan. City, Mo.*, 70 FLRA 106, 108 (2016). The Authority has previously held that the "covered by" doctrine cannot be raised for the first time in post-hearing briefs, absent extenuating circumstances, such as the existence of previously unavailable evidence. *Id.* Further, the fact that a respondent refers to a collective bargaining agreement and states as a theory of the case that it acted in accordance with the agreement is insufficient to raise a "covered by" defense. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 52 (2003). Likewise, the fact that a respondent introduces limited witness testimony concerning a matter does not, by itself, put the GC on notice that the matter is in dispute. *Id.*

Here, the Respondent did not expressly raise a "covered by" defense in its answer to the complaint or in its prehearing disclosure, where the Respondent asserted that the delivery of mail "is *not* covered by the current CBA." GC Exs. 1(c), 1(j) at 3 (emphasis added).

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[6] In this regard, Executive Order No. 12,556 states:

> The function conferred upon the President by section 3401(a) of title 39 of the United States Code of designating an area for free mailing privileges, is delegated to the Secretary of Defense.
>
> The Secretary of Defense shall provide timely notice to the United States Postal Service of any designations or terminations of designations made under this Order.

Executive Order No. 12,556, 51 Fed. Reg. 13205 (Apr. 16, 1986).

Section 3401 of title 39 is entitled "Mailing privileges of members of Armed Forces of the United States and of friendly foreign nations." As relevant here, the statute pertains to the circumstances in which mail shall be carried at no cost to the sender. 39 U.S.C. § 3401(a).

Similarly, the Respondent did not raise a "covered by" defense in its opening statement. Tr. 12.

As the Respondent failed to timely raise its "covered by" defense, and as the Respondent has failed to demonstrate extenuating circumstances justifying this failure, the undersigned respectfully finds the Respondent's "covered by" defense is waived.

Respondent Violated § 7116(a)(1) and (5) of the Statute

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain if the change will have more than a de minimis effect on conditions of employment. *Gen. Servs. Admin.*, 70 FLRA 14, 15 (2016). To find that an agency violated § 7116(a)(1) and (5) by failing to provide a union with notice and an opportunity to bargain over changes to conditions of employment, there must be a threshold determination that the agency made a change in a policy, practice, or procedure affecting unit employees' conditions of employment. *NTEU*, 66 FLRA at 579. The determination of whether a change in conditions of employment has occurred involves an inquiry into the facts and circumstances regarding the agency's conduct and the employees' conditions of employment. *Soc. Sec. Admin.*, 68 FLRA 693, 694 (2015).

The Respondent acknowledges that there was a change and tacitly acknowledges that it implemented the change without providing the Union with notice of the change and an opportunity to bargain over the change.[7] *See* Resp. Br. at 10, 13. However, the Respondent argues that it did not violate the Statute, asserting that: (1) the Respondent played no role in the implementation of the change and had no discretion with respect to the change; (2) the change did not concern conditions of employment; and (3) even if the Respondent did implement the change, and even if the change did concern conditions of employment, the change had only a de minimis effect on conditions of employment.

The Respondent Played a Role in Implementing the Change

It is clear that the Respondent played a role in implementing the change. Prior to the change, the Respondent had one of its supply clerks go to the post office every day, pick up personal mail (including packages) addressed to staff, and deliver it to staff at the two schools, a practice that the Respondent had engaged in since at least 1992. Once the change was implemented, the Respondent stopped having its supply clerk deliver personal mail to all staff at the two schools (except for a handful of "holdouts" who continued to receive personal mail from the Respondent's supply clerk until April 2017). By ending the practice of having its supply clerk deliver personal mail to staff at its schools, the Respondent altered practices in conjunction with the change.

The Respondent suggests that the case at bar is similar to cases in which the Authority found no change was made. But because the Respondent changed its' practices, our case is clearly distinguishable from the cases cited by the Respondent. *See NTEU*, 66 FLRA at 579-80 (agency did not cause increase in number of incoming cases that employees had to process); *Sheridan*, 59 FLRA at 94-95 (agency policy did not cause increase in number of patients); *OSHA*, 58 FLRA at 215 (change a result of the employee's actions only). Accordingly, the Respondent's reliance on these cases is misplaced.

With respect to discretion, it is well settled that matters concerning conditions of employment are subject to collective bargaining when they are within the discretion of an agency and are not otherwise inconsistent with law. *U.S. Dep't of the Treasury, IRS*, 66 FLRA 120, 122 (2011). Where an agency does not have sole discretion over a matter, the agency still must bargain to the extent of its discretion, even if that discretion is limited to making requests and recommendations to an outside party that controls the conditions of employment. *Id.*; *AFGE, Local 2923*, 64 FLRA 352, 353 (2009).

These principles are well illustrated in *Library of Congress*, 15 FLRA 589 (1984) (*LOC*). In *LOC*, a third-party food services company installed a system that required agency employees to use tokens to operate microwave ovens regarding certain food items purchased in the company's vending machines. *Id.* at 589-90. (Prior to the change, microwave ovens could be used free of charge, without tokens and without the need to purchase food.) *Id.* at 590. The agency did not provide the union notice and an opportunity to bargain over the

[7] To the extent this is in dispute, the record clearly indicates that the Respondent failed to provide the Union advance notice of the change and presented the change to employees as a fait accompli (*see* Jt. Ex. 2; Tr. 38, 43, 226), even though the Respondent was obligated to provide the Union advance notice of greater than de minimis changes to conditions of employment. *See U.S. Dep't of Def., Commissary Agency, Peterson AFB, Colo. Springs, Colo.*, 61 FLRA 688, 692 (2006) (notice must apprise the exclusive representative of the scope and nature of the proposed change); *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.*, 36 FLRA 567, 572 (1990) (change announced as a fait accompli indicates that it would be futile for the union to request bargaining).

change, and the union filed a ULP charge. *Id.* Before the Authority, the agency argued that it had no obligation to bargain because the change was implemented by the company, not the agency. *Id.* The Authority rejected this argument, finding that the agency still had discretion to bargain over the change, even if that discretion was limited to making requests or recommendations to the company. *See id.* As such, and as there was no law or regulation precluding the agency from bargaining over the change, the Authority found that the agency's failure to provide the union with notice and an opportunity to bargain violated § 7116(a)(1) and (5) of the Statute. *See id.* at 590-91.

The Respondent is correct insofar as it argues that the change in our case would not have arisen but for the actions of the Navy and the post office. That does not relieve the Respondent of liability, however, because the Navy and the post office did not deprive the Respondent of all discretion with respect to the change. Indeed, the Respondent demonstrated its discretion when, for example: (1) Forrester asked Brandenburg to delay implementation to September 15th; (2) Forrester asked Brandenburg whether the post office could be open for "extended hours" (GC Ex. 4); (3) Vaswani advised middle/high school staff that they could use PS Form 3801 to pick up packages as a contingency; (4) Brandenburg continued to keep the post office open on Thursdays until 5:00 p.m., in part in response to requests from the Respondent (Tr. 169-70); (5) Albrecht offered to "request more suitable pick up hours/days" and to have the school administration be "lenient with release" after collaboration activities (Jt. Ex. 4); (6) Captain MacNicholl offered to discuss the matter with postal command; and (7) the Respondent accommodated "holdout" employees by delivering personal mail to them at the schools until April 2017. Indeed, by arguing that its' discretion was "restricted," as opposed to non-existent, the Respondent would appear to concede that it had at least some discretion with respect to the change. Resp. Br. at 10. That the post office continued to allow other departments to deliver personal mail to their employees, and that teachers at Navy bases in Sigonella and Naples continued to have personal mail delivered to them at their schools, are further indications that the Respondent had discretion to exercise with respect to its' mail delivery practices. Given the strong evidence of the Respondent's discretion, the fact that the Navy and the post office played a role in bringing about the change does not relieve the Respondent of its' statutory obligation to bargain over the change.

The Respondent also attempts to bolster its argument by citing *DoD v. FLRA*, but that case pertains to whether a proposal concerning uniforms for national guard technicians directly interfered with management's rights under § 7106(b)(1) of the Statute; it does not pertain to an agency's discretion with respect to a change. 982 F.2d at 580. Accordingly, the Respondent's reliance on *DoD v. FLRA* is misplaced.

Based on the foregoing, the undersigned respectfully finds that the Respondent changed conditions of employment and had discretion with respect to the change.

The Change Concerned Conditions of Employment

The Respondent concedes that the change pertained to bargaining unit employees, but argues that the change did not concern conditions of employment, because there was no connection between the delivery of personal mail and the work situation or employment relationship of unit employees.

Section 7103(a)(12) of the Statute defines "collective bargaining" as "the performance of the mutual obligation . . . to . . . bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . ." Section 7103(a)(14), in turn, defines "conditions of employment" generally as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]" Section 7103(a)(14)(C) excludes from the definition of conditions of employment "such matters [that] are specifically provided for by Federal statute." 5 U.S.C. § 7103. The Authority has noted that the terms "conditions of employment" and "working conditions" are "related, but . . . not synonymous." *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 70 FLRA 501, 503 & n.33 (2018) (*DHS Customs*) (citing *Sheridan*, 59 FLRA at 95 (Concurring Opinion of Chairman Cabaniss); *OSHA*, 58 FLRA at 216 (Concurring Opinion of Chairman Cabaniss)).[8]

In order to determine whether a matter concerns conditions of employment, the Authority applies a two-pronged test, asking whether the matter pertains to bargaining unit employees and whether there is a direct connection between the matter and the work situation or employment relationship of unit employees. *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 237 (1986).

The Authority has indicated that the inclusion of a matter in a collective bargaining agreement and the fact that a matter has been a longstanding practice are indications that a matter is a condition of employment.

[8] In both concurrences, Chairman Cabaniss wrote that in determining whether conditions of employment have been changed, the Authority should: (1) consider whether the agency has changed existing personnel policies, practices, or matters affecting the employee's personal situation, i.e., his or her working conditions; and (2) examine the parties' collective bargaining agreement. *Sheridan*, 59 FLRA at 96; *OSHA*, 58 FLRA at 217.

See AFGE, Local 12, 60 FLRA 533, 533-35 (2004) (*Local 12*) (proposal requiring agency to maintain fitness facility and specifying hours of operation concerned conditions of employment, based on agency's own acknowledgement of link between employee fitness and job performance, recognition of this link in the parties' collective bargaining agreement, and the agency's longstanding practice of providing a fitness facility); *see also Sheridan*, 59 FLRA at 96 (Concurring Opinion of Chairman Cabaniss).

It is noted that parties may establish conditions of employment through a past practice, so long as there has been a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *E.g., U.S. Dep't of the Air Force, U.S. Air Force Acad., Colo.*, 65 FLRA 756, 758 (2011) (*Air Force Academy*).

The record reflects that there is a direct connection between the delivery of personal mail and the work situation or employment relationship of unit employees. This link is readily apparent from the Respondent's longstanding practices. Since at least 1992, the Respondent has had its supply clerks deliver personal mail to schools for the benefit of teachers and other staff employed by the Respondent. In addition, this link is reflected in Article 20, Section 6(f) of the CBA, which discusses the delivery of personal mail. And Brandenburg's testimony that postal services are provided "in support of DoD missions" further indicates that the Respondent's delivery of personal mail to employees on the Respondent's premises pertains to the work situation or employment relationship of bargaining unit employees. Tr. 237. (And while Dr. Bond and others use foreign mail services at times, it is apparent that employees depend on services provided by the U.S. Postal Service, and that the Department of Defense and, by extension, the Respondent, have determined that it is essential for employees to have access to the American mail system.) That employees depend on American mail to receive services and products that they could not easily access on or off the Rota base is yet another clear sign that the delivery of personal mail concerns conditions of employment. *See* Tr. 27-28; *cf. U.S. Dep't of HHS, PHS, Indian Health Serv., Quentin N. Burdick Mem'l Health Care Facility, Belcourt, N.D.*, 57 FLRA 903, 906-07 (2002) (agency-provided housing a condition of employment, in part because employees worked in a remote location where private housing was not readily available). And employees have depended on the Respondent delivering personal mail to them at the Respondent's schools because it is difficult, if not impossible at times, for these employees to pick up their packages at the post office.[9]

Furthermore, it is beyond dispute that lunch breaks, planning periods, meetings, and extracurricular activities are part of the work situation or employment relationship. *Cf. Soc. Sec. Admin., Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358, 1369-70 (1998) (change that among other things affected employee lunch times and deprived employees of time to do certain tasks, was greater than de minimis), and it is clear that the change could lead employees to sacrifice lunch breaks and planning periods, as well as after-school meetings and overseeing extracurricular activities, in order to pick up packages. That the change could lead employees to miss these aspects of their work day provides further strong support for the conclusion that the change concerns conditions of employment.

Finally, the undersigned notes that our case is easily distinguishable from *DHS Customs*. In *DHS Customs*, the agency unilaterally issued a memorandum setting forth the circumstances in which border patrol agents working at checkpoints would refer vehicles to a secondary inspection area. 70 FLRA at 502. The union filed a grievance alleging, as relevant here, that by issuing the memorandum, the agency unilaterally changed conditions of employment, in violation of the Statute.[10] The matter was unresolved and went to arbitration. The arbitrator found that the memorandum changed employees' conditions of employment because it resulted in fewer inspections in the checkpoint's primary inspection area and increased the duties of the border patrol agents assigned to the secondary inspection area. As such, and as the agency issued the memorandum unilaterally, the arbitrator found that the agency violated the Statute. *Id.* at 502-03. The agency filed exceptions to the arbitrator's award. *Id.* at 502. On review, the Authority found that while the memorandum affected employees' working conditions, the memorandum did not change employees' conditions of employment, because: (1) increases or decreases in normal duties do not constitute changes over which an agency must bargain; (2) the memorandum did not change the nature or type of duties performed; and (3) the memorandum "did not change anything" and "did not impact a condition of employment." *Id.* at 501, 503-04. Accordingly, the

[9] Additionally, it is apparent that the delivery of personal mail has been consistently exercised with full knowledge of, and no objection from, the parties, since at least the signing of the CBA in 1994. As such, the delivery of personal mail would qualify as a condition of employment established as a past practice. See Tr. 28; Jt. Ex. 1 at 58-59; *Air Force Academy*, 65 FLRA at 758.

[10] The union also alleged that the agency's unilateral actions violated the contract, 70 FLRA at 502, but the contractual dispute is not relevant to our case.

Authority granted the agency's exceptions and set aside the award. *Id.* at 504.

In the case at bar, it is clear (as the Respondent acknowledges) that a change occurred, and it is similarly clear, based on the foregoing, that the change concerned conditions of employment. Accordingly, our case is factually distinguishable from *Customs*, where the agency "did not change anything." *Id.* Moreover, our analysis, specifically, our consideration of the Respondent's mail delivery practices and its effect on the personal situation, i.e., working conditions, of employees, and our consideration of the CBA's reference to the delivery of personal mail, is consistent with Chairman Cabaniss's concurring opinions in *Sheridan* and *OSHA*, both of which the Authority relied on in *DHS Custom*.

The Respondent contends that the delivery of personal mail is not a condition of employment because it has "no bearing on the teachers' duty assignment[s]." Resp. Br. at 12. But a condition of employment is a concept that encompasses far more than aspects of employees' duty assignments. *See Local 12*, 60 FLRA at 533-34 (proposal requiring agency to maintain a fitness facility, and specifying hours of operation, concerned conditions of employment); *Gen. Servs. Admin., Region 10, Auburn, Wash.*, 47 FLRA 585, 593 (1993) (availability of day care facilities concerned conditions of employment). Indeed, conditions of employment can encompass matters related to employees' personal communications. *See Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 53 FLRA 1664, 1673 (1998) (agency required to bargain over the use and location of a telephone for employees' personal use). Accordingly, the Respondent's argument is misplaced.

The Respondent argues that the delivery of mail is not a condition of employment because it is specifically provided for by federal statute, 39 U.S.C. § 406. As noted above, § 7103(a)(14)(C) of the Statute excludes "such matters [that] are specifically provided for by Federal statute" from the definition of "conditions of employment." Thus such matters are also excluded from the duty to bargain over matters that are "specifically provided for by Federal statute." 5 U.S.C. § 7103(a)(14)(C). The Authority has held that "[m]ere reference to a matter in a statute is not sufficient to exclude it from the definition of conditions of employment under subsection C. *Int'l Ass'n of Machinists & Aerospace Workers, Franklin Lodge No. 2135*, 50 FLRA 677, 681-82 (1995) (*IAMAW*), *enforced sub nom. U.S. Dep't of the Treasury, Bureau of Engraving & Printing v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996). Rather, a matter is "specifically provided for" within the meaning of subsection (C) "only to the extent that the governing statute leaves no discretion to the agency." *IAMAW*, 50 FLRA at 682 (citation omitted). Insofar as an agency has discretion, the discretion is subject to negotiation. *Id.*

Section 406 of Title 39 states generally that the Postal Service may establish branch post offices at military bases, and that the secretaries of Defense and Transportation shall make arrangements with the Postal Service to perform postal services through personnel designated by them at the post offices at the military bases. 39 U.S.C. § 406. But nothing in § 406 specifically deprives the Respondent of discretion with respect to the delivery of personal mail to bargaining unit employees. For example, nothing in the text of § 406 bars the Respondent from submitting requests to the post office or, for that matter, working with representatives of the post office to accommodate bargaining unit employees affected by the change. Similarly, nothing in § 406 would prevent the Respondent from developing a policy that would allow teachers to leave collaboration activities early in order to pick up a package. *See* Jt. Ex. 4. Indeed, § 406 does not even mention the DoDEA. And the fact that § 406 contains references post offices at military bases generally is not enough to establish that the delivery of mail is "specifically provided for" by this statute. *See IAMAW*, 50 FLRA at 681. For these reasons, the Respondent's claim that the delivery of mail is specifically provided for by 39 U.S.C. § 406 is unfounded.

Further, because the other authorities cited by the Respondent in this regard –Executive Order 12,556, and Department of Defense policies and procedures – are not federal statutes, those authorities do not support the Respondent's claim that the delivery of mail is specifically provided for by federal statute.[11] *See Indian Health Serv.*, 57 FLRA at 907.

The Respondent similarly argues that it had "unfettered discretion" with respect to the change. Resp. Br. at 9. When a law or regulation gives an agency "unfettered" or "sole and exclusive discretion," over a matter, the Authority has found that it would be contrary to law to require that discretion be exercised through collective bargaining. In resolving an agency's claim of sole and exclusive discretion, the Authority examines the

[11] In quoting Executive Order 12,556, the Respondent references 39 U.S.C. § 3401(a), but the Respondent does not claim that the delivery of personal mail to employees at the schools is specifically provided for by 39 U.S.C. § 3401(a). *See* Resp. Br. at 9. The Respondent's failure to make such a claim is understandable, as the issue to which 39 U.S.C. § 3401(a) pertains – the circumstances in which mail can be delivered at no cost to the sender, is unrelated to the material issues in this present case.

wording and legislative history of the statute or regulation at issue. The Authority has found that laws giving agency officials the authority to make determinations "without regard to the provisions of other law," or "[n]otwithstanding any other provision of law," demonstrate sole and exclusive discretion. *See, e.g.*, *AFGE, Local 3295*, 47 FLRA 884, 894-95 (1993).

None of the laws or regulations cited by the Respondent demonstrate that the Respondent had "unfettered discretion" with respect to the change. As analyzed herein, 39 U.S.C. § 406, pertains generally to the establishment of branch post offices at military bases, but § 406 does not specifically name the DoDEA and does not specifically pertain to the delivery of mail at schools. Further, § 406 does not contain language indicating that it is to operate without regard to the provisions of the Statute. Moreover, the Respondent does not point to any legislative history, and none is apparent, indicating that § 406 was intended to provide the Respondent sole and exclusive discretion with respect to the change. Accordingly, the Respondent's argument is unfounded.

Similarly, 39 U.S.C. §3401(a) pertains to the circumstances in which mail shall be carried at no cost to the sender, an issue that has no relevance to our dispute. Further, § 3401(a) does not specifically pertain to the delivery of mail to the Respondent's bargaining unit employees. Moreover, § 3401(a) does not specifically reference the DoDEA, and nothing in § 3401(a) indicates that that provision is intended to preclude bargaining under the Statute with respect to the issues in our case. And again, the Respondent cites no legislative history, and none is apparent, indicating that § 3401(a) was intended to provide the Respondent sole and exclusive discretion with respect to the change. For these reasons, the Respondent's argument is unsupported.

The regulations cited by the Respondent also fail to indicate that the matter is within the Respondent's sole and exclusive discretion. In this regard, the Respondent cites, Executive Order 12,556, which provides that the Secretary of Defense may designate areas for free mailing privileges, but just as with 39 U.S.C. § 3401, this executive order does not pertain to the delivery of mail at the Respondent's schools and does not clearly preclude bargaining. Accordingly, the Respondent's reliance on Executive Order 12,556 is misplaced.

In addition, the Respondent cites the DPM for the proposition that the delivery of personal mail to DoDEA employees is specifically provided for by federal statute, but the Respondent does not cite a specific provision within these authorities supporting that claim. S*ee* Resp. Br. at 9 & n.34, and no part of these instructions clearly supports the Respondent's claim. Therefore this argument is also unsupported.

The Respondent further requests asks that official judicial notice of Department of Defense Directive Instruction 4525.08 be taken, which the Respondent cites for the proposition that the Under Secretary of Defense for Acquisition, Technology and Logistics is the final authority concerning requests for changes in DoD official mail management policies and procedures. Resp. Br. at 9 & n.35. As an initial matter, it is noted that the Respondent failed to reference this instruction in prehearing disclosures and failed to elicit testimony about this instruction at the hearing other than the oral motion. Because the Respondent's failure to raise this matter prevented the GC from being able to challenge it, the fairness to allow the Respondent to receive official notice of this instruction called into question. *See* 5 C.F.R. § 2423.24 (matters subject to official notice may be considered at prehearing conference); *id.* § 2423.31 (administrative law judge may take official notice of material facts during hearing). But even upon consideration of the instruction, and even if it provides, as the Respondent claims, that the Under Secretary of Defense for Acquisition, Technology and Logistics serves as the final authority concerning requests for changes in Department of Defense Official Mail Management policies and procedures (Resp. Br. at 9 & n.35), the Respondent's argument would be unavailing. Put simply, the fact that a Department of Defense official has final authority over at least some aspects of mail-related policies does not prove that the Department of Defense and the DoDEA are precluded from exercising their authority regarding the mail through bargaining under the Statute. Accordingly, the Respondent's reliance on Department of Defense Directive Instruction 4525.08 is misplaced.

Finally, the Respondent cites *Air Force* to support its "unfettered discretion" argument. In that case, the court held that civilian access to commissaries and exchanges is not a proper subject of collective bargaining because Congress has vested the military with unfettered discretion over the matter. 844 F.3d at 964. Because *Air Force* pertained only to access to commissaries and exchanges, an issue not before us, and because there is no indication that the Union sought to bargain over matters that Congress reserved for the military, the Respondent's reliance on *Air Force* is misplaced.

In sum, the undersigned respectfully finds that the change concerned conditions of employment, and the Respondent's arguments to the contrary are inadequately supported.

The Change Had Greater Than De Minimis Effects on Conditions of Employment

The parties dispute whether the change had greater than de minimis effects on conditions of employment. In assessing whether the effect of a change is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *AFGE, Nat'l Council 118*, 69 FLRA 183, 187-88 (2016) (*Nat'l Council 118*). Equitable considerations are taken into account in balancing the interests involved. *Dep't of Health & Human Servs., Soc. Sec. Admin.*, 24 FLRA 403, 408 (1986). The Authority has held that the number of employees affected by a change is not dispositive of whether the change is more than de minimis. *NFFE, IAMAW, Fed. Dist. 1, Fed. Local 1998*, 69 FLRA 586, 590 (2016). In determining whether the reasonably foreseeable effects of a change are greater than de minimis, the Authority looks to what the party knew, or should have known, at the time of the change. *Nat'l Council 118*, 69 FLRA at 188. The "de minimis" analysis is based on "the totality of the facts and circumstances . . . ." *Dep't of Transp., FAA, Wash., D.C.*, 20 FLRA 481, 483 (1985).

The Authority has explained that a change "need not have actual effects that are greater than de minimis in order to establish a bargaining obligation; reasonably foreseeable effects that are greater than de minimis are sufficient to establish such an obligation." *Nat'l Council 118*, 69 FLRA at 188 (emphasis omitted). Moreover, the Authority has stated that an analysis of whether a change is de minimis "does not focus primarily on the actual effects of the change, but on reasonably foreseeable effects." *Id.* (internal quotation mark and footnote omitted).

In the case at bar, it is clear that both the effects and the reasonably foreseeable effects of the change had greater than de minimis effects on employees' conditions of employment.

There are numerous indications in the record that the change has already had effects that were greater than de minimis. First, the Union's survey reveals that many employees encountered problems in the weeks following the change. Specifically, eight employees reported that they were unable to pick up packages or were delayed in picking up packages, and fifteen employees reported that they were unable to get to the post office between 10:00 a.m. and 4:00 p.m., i.e., its' regular business hours for all days other than Thursday, when the post office was open until 5:00 p.m. Further, the survey demonstrates that many teachers were unable to take advantage of the post office being open until 5:00 p.m. on Thursdays, because they had to attend after-school meetings or lead extracurricular activities. And while the extra hour on Thursdays might have helped some employees who would otherwise be unable to pick up packages, it forced those employees to spend that time on Thursdays picking up packages, and it also meant that those employees would have to wait up to six days longer to receive packages. These and other complaints in the survey confirm claims from Fox and Dr. Bond that the change was especially difficult for several employees. Tr. 132, 158.

Second, the delivery of packages is not a mere luxury. Rather, the delivery of packages is a matter upon which employees rely for their regular shopping needs. Dr. Bond's testimony illustrates this well; she testified that she does "a lot" of online shopping and generally receives a package once a week. Tr. 149-50. Further, employees rely on package delivery to obtain highly important items, such as an engagement ring. That the change interfered with a service upon which employees rely leads to the conclusion that the Respondent's change with respect to mail delivery practices was not merely de minimis.

Third, the change imposed burdens beyond the loss of access to package delivery. Specifically, the change required a teacher who needed to pick up a package to spend time – at least thirty minutes and often forty-five minutes or more (*see* Jt. Ex. 3; Tr. 144-45) – going to the post office, waiting in line, and returning, all at the potential expense of their lunch break or working during a planning period. For other teachers, getting a package could result in missing at least part of an afterschool meeting or an extracurricular activity. Forcing teachers to make these changes is more than trivial, especially given the likelihood that many employees, in addition to Dr. Bond, receive packages on a weekly basis. *See* Tr. 151.

Fourth, Fox and Dr. Bond testified in length regarding the change made it difficult, if not impossible, for them (and, presumably, other similarly situated employees) to personally obtain packages. In this regard, Fox testified that he was unable to pick up his engagement ring during his planning periods, because his planning periods ended before the post office opened, and during his lunch, because the lines were too long to pick up the package and return in time to his school to comply with his teaching responsibilities. Further, while management has since made efforts to be more lenient, management refused to let Fox pick up the package at another time. Without any other options, Fox had to go to the post office, which prevented him from engaging in his coaching duties. And if it were not for having an assistant coach who was willing to cover the practice for him, it would have taken Fox even more than the extra

two or three days to get his ring (if he could even pick it up at all). Such circumstances are not impossible to manage, but clearly more than de minimis.

Similarly, Dr. Bond testified that she was unable to pick up packages after the change was implemented. Dr. Brown's schedule did not permit her to leave campus during the duty day. Dr. Brown chose not to go during lunch, because that was often the only time when students were able to meet with her for counseling, and she could not go to the post office after the regular duty day ended at 3:45 p.m., because she coached cheerleading from 4:00 p.m. until 6:00 or 7:00 p.m. every evening. (Even if she didn't have work commitments after the duty day, it would still be difficult for Dr. Brown to make it to the post office before the regular 4:00 p.m. closing time.) *See* Tr. 118. Even if Dr. Bond wanted to go to the post office during lunch, that forty-five minute period often was not enough time to pick up a package, because lines at the post office during lunch are especially long. Tr. 144-45. Using PS Form 3801, Dr. Bond was able authorize a coworker, one who was able to go to the post office "a couple of times a week," to pick up her mail. Tr. 151. It is likely that other employees could not ask for this kind of favor, and in any event, the PS Form 3801 was not intended to be used in this manner in the long run, and the Respondent instructed employees that they could not use PS Form 3801 in this way. GC Ex. 4; *see also* Jt. Ex. 4. Further, there were times when Dr. Bond's colleague did not have enough time to pick up packages. This left Dr. Bond to ask her husband to pick up packages during his planning period, which prevented her husband from using that period to do work. *See* Tr. 152. And of course, if Dr. Bond were single (as many employees are), she would not have had that option. In sum, the testimony of Fox and Dr. Bond demonstrate that the change made it difficult and potentially impossible for employees to receive packages on a timely basis if at all.

Fifth, it is reasonable to assume that management's attempts at accommodating employees after the change was implemented – offering to let teachers leave collaboration activities early, persuading Brandenburg to open the post office from 7:00 to 8:00 a.m. on Tuesdays and to keep the post office open until 5:00 p.m. on Thursdays (Tr. 169-70), and continuing to deliver packages to "holdout" employees for more than six months – were made precisely because management acknowledged that the change had significant adverse effects on bargaining unit employees.

Based on the foregoing, the undersigned respectfully finds that the change had greater than de minimis effects on employees' conditions of employment.

In light of the evidence of record, it is proven that the change had reasonably foreseeable effects that were greater than de minimis.

First, management knew, or should have known, by September 15th that the change would make it difficult if not impossible for some teachers to pick up packages. Specifically, management knew or should have known that: (1) some teachers had early morning planning periods and therefore would not be able to go to the post office during their planning periods; (2) the post office was so busy during lunch time that employees would not have enough time during their lunch periods to get packages; (3) it would be difficult or impossible for teachers whose work day ended at 3:45 p.m. to travel to the post office before it closed at 4:00 p.m.; (4) many teachers (at least eighty percent) had work commitments after school, and thus, could not take advantage of the fact that the post office remained open until 5:00 p.m. on Thursdays; (5) employees would not be able to use PS Form 3801 as a long-term solution for receiving packages; (6) employees who were single could not rely upon spouses to pick up packages; and (7) many spouses also worked, at the schools or elsewhere, and would not be able to pick up packages.

Second, management knew, or should have known, that many employees rely on having access to package delivery for their regular shopping needs. Specifically, management knew or should have known that many employees would, like Dr. Bond, be regular online shoppers who depended upon package delivery for such order, especially regarding the receipt of American products that were not readily available in Rota, Spain. Moreover, management knew, or should have known, that for teachers who could pick up packages only during certain times (between the end of school and 5:00 p.m. on Thursdays), the change could force employees to wait up to six extra days to pick up their packages, an especially significant burden for employees waiting for items that they wanted delivered as soon as possible, such as a significant legal document or valuable and meaningful engagement ring. Also, as Dr. Bond's testimony purports, management knew or should have known that there would be a significant increase in package deliveries in December during the holiday season, and that many employees would have difficulties obtaining packages during that particular period, even with the post office being open for extra hours on Saturdays during that month.

Third, because management knew, or should have known, that that the post office was open only during workday time periods, that it could take thirty to forty-five minutes (or longer) for an employee to make the trip to the post office to pick up packages, and that it was likely that many employees would need to pick up

packages on at least a weekly basis (*see* Tr. 149-51). It was reasonably foreseeable that the change could force some teachers to regularly sacrifice their lunch breaks or planning periods, and could force other teachers to miss meetings or the beginning times of overseeing contractual extracurricular activity responsibilities.

Fourth, the Respondent's own actions demonstrate that management foresaw the change would likely have greater than de minimis effects on employees' conditions of employment. That is why, prior to implementation, Vaswani and Dr. Forrester sent emails to their staffs stating that they shared employees' concerns with the post office hours. Also this is explainable as to why Dr. Forrester encouraged employees to see her if it was not possible for an employee to pick up packages during the school day, and why Vaswani suggested that employees could use PS Form 3801 to pick up packages, at least as a "contingency." Resp. Ex. 2; GC Ex. 2.

The reasonable foreseeability of more than a de minimis effect of the change upon employees can also be determined from Albrecht's September 16th email to the Union, as Albrecht: (1) acknowledged that employees would probably need "different opening/pickup times" at the post office; and (2) acknowledged that employees might be able to mitigate the negative effects of the change by using a PS Form 3801 to authorize coworkers to pick up mail for them (while at the same time asserting that the PS Form 3801 could be used only for "short term needs"). GC Ex. 4. Moreover, Albrecht would not have asked the Union for data about the how many employees were "really bothered" by the change if it was not plausible that at least some employees would be affected by the change. *Id.*

The Respondent contends that the change was a mere inconvenience that was not greater than de minimis, especially since package delivery was "not impossible." Resp. Br. at 12. While it is true that Fox and Dr. Bond ultimately were able to pick up packages, this was the result of more than de minimis efforts on their part due to the change. And it was reasonably foreseeable that other employees would not be as fortunate as Fox or Dr. Bond in being able to accommodate these changed workplace circumstances. Some employees would not be able to miss an extracurricular activity like Fox, in addition all employees were precluded from long-term use of the PS Form 3801 in the manner in which Dr. Bond was using it, many employees would not be able or willing to ask a friend to pick up their packages regularly, on an ongoing basis, many employees were unmarried and thus could not ask their spouse to pick up packages, and many other married employees likely had spouses whose jobs (teaching or otherwise) made it difficult for them to pick up packages as well. Thus, while Fox ultimately found a way to adapt after the change to be "agreeable," it is nevertheless obvious that the change imposed significant changes, and reasonably foreseeable effects, upon employees as a whole. For all of these reasons, the Respondent's argument is rejected.

The Respondent contends that it is not unusual for teachers to perform errands during their workday, and that it would not be significant for teachers to add an additional trip to the post office while doing these other errands. Even many employees occasionally perform errands during their school workday, the record lacks evidence indicating that such errands occur regularly by many or that they pertain to necessary services that could only be carried out during the workday. By contrast, the record clearly indicates that many employees regularly received packages, and those packages could only be picked up during the workday. And even if employees regularly ran errands during the day in the past, the change still would have had greater than de minimis effects, because it imposed burdens that simply did not exist heretofore. Accordingly, the Respondent's argument is unpersuasive.

Finally, the Respondent suggests that the change affected only eight employees. But as analyzed herein, the number of employees affected by a change is not dispositive. Moreover, eight employees affected by the change is not a trivial number, and in any event it was reasonably foreseeable that more teachers would be adversely affected, either because the change would make it difficult or impossible to pick up packages, or because the change would force teachers to sacrifice their planning periods or lunch breaks. Accordingly, the Respondent's argument is unavailing.

CONCLUSION

Because the Respondent unilaterally implemented the change, and because the change had greater than de minimis effects on conditions of employment, the Respondent violated § 7116(a)(1) and (5) of the Statute. The violation is not cured by the Respondent's subsequent attempts to discuss the matter with the Union. *E.g.*, *Bureau of Engraving & Printing, Wash., D.C.*, 44 FLRA 575, 581-82 (1992) (post-implementation offers to bargain do not cure the statutory violation, and post-implementation actions are irrelevant).

With respect to the remedy, the GC pleads that the Respondent be ordered to bargain over the change, the undersigned finds this remedy to be appropriate. *See Cf. U.S. DOJ, INS, Wash., D.C.*, 56 FLRA 351, 358 (2000) (retroactive bargaining order a traditional remedy for change that was unilaterally implemented).

With respect to the notice, the Authority typically directs the posting of a notice signed by the highest official of the activity responsible for the violation. *Soc. Sec. Admin.*, 64 FLRA 293, 297 (2009). The GC however, pleads that the notice be signed by the European Director of the DoDEA, rather than by the Director of the DoDEA. GC Br. at 22; Tr. 10. Given that the violation occurred only at the two schools at the Rota base, the undersigned finds this remedy to be reasonable. Similarly, because the violations occurred only at the two schools at the Rota base, and because notices typically are posted only at the location (or organizational level) where they occurred, *see AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 23 (2009), the scope of the posting shall be limited to Rota-based bargaining unit employees.

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Defense, Department of Defense Education Activity (Respondent), shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment pertaining to its mail delivery practices without fulfilling its obligation to bargain with the Overseas Federation of Teachers (Union) to the extent required by the Statute.

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

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

(a) Upon request, bargain with the Union over changes to the Respondent's mail delivery practices.

(b) Post at its facilities in Rota, Spain, 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 Respondent's European Director. Notices shall be posted and maintained for sixty (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) Disseminate a copy of the signed Notice through the Respondent's email system to all bargaining unit employees in Rota, Spain.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, provide the Regional Director, Washington Region, Federal Labor Relations Authority, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., May 31, 2018

_____

DAVID L. WELCH

Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Defense, Department of Defense Education Activity, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change conditions of employment pertaining to our mail delivery practices without fulfilling our obligation to bargain in good faith with the Overseas Federation of Teachers (Union) to the extent required by the Statute.

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

WE WILL, upon request, bargain in good faith with the Union over proposals relating to changes in our mail delivery services.

_____

(Union)

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 communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.