Office of Administrative Law Judges

WASHINGTON, D.C.

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION

TALLADEGA, ALABAMA
Respondent

and Case No. AT-CA-70461

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 3844
Charging Party

Richard Jones, Esquire For the General Counsel
Granette Trent, EsquireW. Kirk Underwood, Esquire For the Respondent
Fetis Porter, Vice President For the Charging Party
Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101 *et seq.* (the Statute).

Based upon an unfair labor practice charge filed, and amended, by the Charging Party, American Federation of Government Employees, Local 3844 (AFGE Local 3844/Union), a Complaint and Notice of Hearing was issued on behalf of the General Counsel (GC) by the Regional Director of the Atlanta Regional Office of the Federal Labor Relations Authority (FLRA). The complaint alleges that the Federal Bureau of Prisons (FBOP), Federal Correctional Institution, Talladega, Alabama,(FCI Talladega/Respondent) violated section 7116(a)(1) and (5) of the Statute by changing the past practice of permitting employees to use government vehicles to travel between FCI Talladega and various medical institutions and by changing the overtime shift schedule of employees assigned to the medical institutions, without providing AFGE Local 3844 an opportunity to negotiate to the extent required by law about these changes. FCI Talladega filed an answer denying it had violated the Statute.

A hearing was held in Birmingham, Alabama, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. FCI Talladega and the GC of the FLRA filed post-hearing briefs,

which have been fully considered.

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

Findings of Fact

A. Background

The American Federation of Government Employees, Council of Prison Locals (AFGE) is the exclusive representative of a nationwide consolidated unit of employees of FBOP, including correctional officers, food service workers, and other employees at FCI Talladega. FBOP and AFGE are parties to a nationwide collective bargaining agreement covering employees at FCI Talladega. AFGE Local 3844 is the agent for representing employees at FCI Talladega.

B. Practices Before January 1997

Prisoners at FCI Talladega, when necessary, are placed in hospitals located in Alabama, primarily hospitals located in Talladega, Anniston, Birmingham, and Sylacauga. These medical facilities range in distance from a few miles from FCI Talladega, the hospital in Talladega, to almost 50 miles from FCI Talladega, the hospital located in Birmingham. Prisoners placed in these hospitals are guarded by FCI Talladega employees on an overtime tour of duty.

Prior to January 1997, and apparently continuing to today, employees of FCI Talladega, if they want to work overtime to guard these prisoners, put their names on an overtime list. Officials at FCI Talladega decide what overtime details are needed and then contact individual employees on the overtime list to ascertain if the employee wishes to work the requested detail. If an employee declines, which he/she is free to do if there is no emergency, he/she is dropped from the list and may put his/her name on the next overtime list. Lists are apparently compiled every two weeks.

For a number of years prior to January 1997, when an employee was to work overtime at one of the hospitals he was permitted to check out and use an automobile owned by FCI Talladega to travel between FCI Talladega and the hospitals in question. Apparently many employees did use agency

cars.[1] The travel times between FCI Talladega and the hospitals vary from one hour, each way, in the case of the hospital in Birmingham, to a few minutes, each way, in the case of the hospital in Talladega.

Prior to February 1997, the employees driving in the agency cars from FCI Talladega to a hospital were paid overtime for their travel time, both ways, and their actual guard shift at the hospital. Thus, employees driving to the hospital in Birmingham could be paid for up to ten hours of overtime, two hours of travel time and an eight hour shift. Of course, those driving to closer hospitals were paid for less overtime time because of the shorter travel time. The overtime tour of duty shifts started immediately after the regular duty shift ended.

In June 1994 Joe L. Sivley arrived as Warden of FCI Talladega.[2] He is assisted by an Associate Warden, a Captain who runs all the correctional services, eleven lieutenants who are primarily in charge of the shifts, and the department heads in charge of mechanical, food, education, and other services.

C. Changes in 1997 Concerning the Use of Government Cars and Overtime

During the latter part of 1996 Warden Sivley began to examine and reconsider both the use of agency vehicles policy and the overtime policy with respect to overtime served at the hospitals. A concern for expenditures led to the Warden's concern.

On January 7, 1997, Captain Ronald Fulcher, on behalf of FCI Talladega, issued a memorandum to "All Concerned" stating:

> Effective immediately, government vehicleswill
>
> no longer be available to staff for transportation
>
> to the local hospitals when working overtime.
>
> Overtime is voluntary and it is the responsibility
>
> of the staff member to get to his/her duty
>
> assignment.

Based on the credited testimony, I conclude that this is the first notification to employees and AFGE Local 3844, that the policy concerning the use of agency cars to travel to the hospitals to perform the overtime

guard duty was being changed.

After receiving the above notice, Anthony Williams, a Union Shop Steward, asked Assistant Warden Collins why the change was made. Collins replied that the prior practice was against the law, but did not, or could not, show Williams any law or regulation to support this conclusion. Similarly, after the change in the use of agency cars, Warden Sivley, during a conversation, told AFGE Local 3844 President Roger Colley that the warden thought that the prior practice with respect to the use of the agency vehicles was illegal, but he did not specify the law or regulation upon which he relied.

In January 1997, Warden Sivley's staff discussed a possible change in the overtime shifts directly with bargaining unit employees, not with AFGE Local 3844 officials. Then Warden Sivley discussed it with Fulcher. On February 6, 1997, FCI Talladega representatives and Union representatives held a regular labor-management meeting. Warden Sivley did not attend the meeting.

Although there is some conflict as to what exactly was said at this meeting, I find that the minutes of the meeting most accurately reflect what was said. These minutes state:

> The use of the POV's was discussed and will be looked into further, however; Capt. Fulcher stated that a change in the hospital overtime hours will be considered in an attempt to alleviate some of the current problems. Mr. Collins stated that there may be a possibility for some mileage reimbursement in specific cases. The issue was tabled until the next meeting.

With resect to this meeting I find, based on the credited testimony of Roger Colley, Henrietta Curry and Bonita Bibb, which was all consistent with the minutes of the meeting, that no agreement was reached with respect to a change in overtime hours or the use of POVs, personally owned vehicles. Fulcher seemed to have suggested some change in overtime hours to deal with some "current problems." Fulcher did not specify what precise changes in overtime hours were being considered. Bibb mentioned

that they were mostly interested in the use of POVs and in being paid for travel time to the hospitals and that the change in overtime hours was not their concern at the moment. The parties were to get back together to continue discussing the matters raised.

Fulcher issued a memorandum on February 12, 1997, to "All Concerned," announcing:

> Effective February 16, 1997, the shifts for overtime at the local hospitals will be as follows:
>
> M/W-1:00 A.M. to 9:00 A.M.
>
> D/W-9:00 A.M. to 5:00 P.M.
>
> E/W-5:00 P.M. to 1:00 A.M.
>
> This will allow staff sufficient travel time between the institution and hospital. This will also provide them the opportunity to get something to eat.
>
> Lieutenants will need to ensure hospital assignments do not overlap with regular duty assignments.

AFGE Local 3844 President Colley sent a memorandum dated February 16, 1997, concerning the subject "Violation of the MASTER AGREEMENT," to Warden Sivley which stated:

> It has been brought to our (Local 3844) attention that the Agency has instituted a change in working conditions. This change involves hours of <u>overtime</u>. We have no record that indicate these changes were

presented to or negotiated by any designated Union Representative.

This letter serves as an official request to negotiate these changes. The action taken by the Agency is an unlawful change in personnel policies, practices and conditions of employment for bargaining members. Local issuances, either oral or written, which change the above mention conditions must be negotiated prior to implementation. This violation of 5 U.S.C. [§] 7106, 7114 and 7117 is a blatant disregard for our Union (Local 3844) and a sense of fair play in bargaining.

We request the practice cease and desist with the overtime hours returned to the original times. In an effort to resolve this issue we anticipate timely and healthy negotiations.

Warden Sivley replied to Colley by memorandum dated February 19, 1997, concerning "Alleged Violation of the Master Agreement," which stated:

I am in receipt and have reviewed your correspondence of February 16, 1997, wherein you allege violations of the Master Agreement relating to a change of overtime hours. You quote 5 U.S.C. [§] 7106, 7114 and 7117, as the blatantly disregarded areas of the Master Agreement.

Please note the Master Agreement and 5 U.S.C. are two separate documents. 5 U.S.C. does not pertain to scheduled or unscheduled overtime.

I have absolutely no problem to your requestin writing, however, I have no earthly idea of what you are talking about. Please provide specific information pertaining to your alleged violations that I might understand your complaint.

I await your reply.

AFGE Local 3844 interpreted this reply as a refusal to bargain and filed the subject unfair labor practice charge.

D. Adverse Impact of the Changes

The employees were adversely affected by the changes in the use of agency cars and the overtime schedules. With respect to the change banning the use of agency cars, the employees now must use there own cars to drive to the hospitals, thus incurring wear and tear on the cars and paying the cost of gas and upkeep. Those without personal cars at their disposal have to forego working overtime in the hospitals.

With respect to the change in overtime schedules, employees assigned to the hospital in Birmingham receive 8 hours of overtime pay, whereas before the change such employees received 9 or 10 hours of overtime pay. Those performing overtime in hospitals closer to FCI Talladega, such as the hospital in Talladega now have as much as 52 minutes of downtime, in nonpay status, between the end of their regular time shift and the beginning of the overtime shift, whereas before the change there was no break between the regular shift and the overtime shift. There was no downtime in nonpay status. This downtime did give such employees a chance to have a meal between work shifts.

Discussion and Conclusions of Law

A. The Statute and Other Regulations

Section 7116(a)(1) and (5) of the Statute provides:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> * * * *
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

Section 7106(b) of the Statute provides, in part:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating-
>
> (1) At the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work[.]
>
> * * * *
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 C.F.R. § 551.422, "Time Spent Traveling," provides, in part:

> (a) Time spent traveling shall be considered hours of work if:
>
> (1) An employee is required to travel during regular work hours;
>
> (2) An employee is required to drive a vehicle or perform other work while traveling;
>
> (3) An employee is required to travel as a passenger on a one-day assignment away from the official duty station; or
>
> (4) An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.
>
> * * * *
>
> (d) Except as provided in paragraph (b) of this section, an agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel under this part. However, an agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General

Services Administration (41 CFR 301-1.3(c)(4)).

5 C.F.R. § 550.112(g)(2) provides, with respect to computation of overtime while in travel status:

> (g) *Time in travel status.* Time in travel status away from the official duty-station of an employee is deemed employment only when:
>
> (1) It is within his regularly scheduled administrative workweek, including regular overtime work; or
>
> (2) The Travel-
>
> (I) Involves the performance of actual work while traveling;
>
> (ii) Is incident to travel that involves the performance of work while traveling;
>
> (iii) Is carried out under such arduous and unusual conditions that the travel is inseparable from work; or
>
> (iv) Results from an event which could not be scheduled or controlled administratively . . . .
>
> * * * *

41 C.F.R. § 301-1.3(c)(4) provides:

> (4) *Official station and post of duty.*
>
> Designated post of duty and official station have the same meaning. The limits of the official station will be the corporate limits of the city or town in which the officer or employee is stationed. If the employee is not stationed in

an incorporated city or town, the official station is the reservation, station, or established area, or, in the case of large reservations, the established subdivision thereof, having definite boundaries within which the designated post of duty is located.

B. Changes in Past Practices

The GC contends that FCI Talledaga violated section 7116(a)(1) and (5) of the Statute by changing its practices concerning the use of agency vehicles to travel to and from FCI Talledaga on overtime assignments at hospitals, and concerning the overtime schedule time, without affording AFGE Local 3488 adequate advance notice and an opportunity to bargain about the changes.

1. The Use of Agency Automobiles

The record establishes that for a number of years prior to the changes that are the subjects of this case, employees of FCI Talledaga were permitted to, and did, use agency automobiles to drive from FCI Talledaga, at the end of their regular shift, to overtime shifts at hospitals where FCI Talledaga prisoners were hospitalized, and then, at the end of the overtime shift, to drive back to FCI Talledaga to turn in the agency car.

Providing agency cars to transport employees between work stations is a term and condition of employment. *See National Association of Government Employees, Local R1-109 and Department of Veterans Affairs Medical Center, Newington, Connecticut,* 53 FLRA 403, 411-14 (1997)(*VA Newington*); *National Federation of Federal Employees, Local 2015 and U.S. Department of the Interior, National Park Service,* 41 FLRA 1158, 1168 (1991); and *National Treasury Employees Union, Chapter 153 and Department of the Treasury, U.S. Customs Service,* 21 FLRA 1116, 1121 (1986)(*Customs Service*). Even though the travel may take place while the employee is not on work status, regular or overtime, the use of an agency car to travel between work stations is, nevertheless, a term and condition of employment.[(3)] *See American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals,* 10 FLRA 61 (1982)(*Board of Immigration Appeals)*; and *American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia,* 9 FLRA 1004, 1017 (1982).[(4)] The Authority has held that providing cars or other transportation that merely moves employees from one work site to another

is not the "technology, methods and means of performing work" within the meaning of section 7106(b)(1) of the Statute. *See Customs Service* and *Board of Immigration Appeals.*[5]

Although Sivley claims he ended the practice of lending agency cars to the employees to travel to the hospitals because such practice was illegal or unlawful, he did not identify at the hearing, or to the union, the law or regulation the practice violated and the Respondent, in its brief did not identify or specify such law or regulation. Similarly in its brief Respondent has failed to point out any law or regulation that made it illegal to let employees use agency cars and their brief made no such argument. In this regard FCI Talledaga failed in meeting its burden of proof in establishing the affirmative defense that providing agency's vehicles is unlawful. *See Department of Defense, Army and Air Force Exchange Service, Fort Eustis Exchange, Fort Eustis, Virginia,* 20 FLRA 248, 268 (1985) and *see also, VA Newington.*

Accordingly, I conclude that FCI Talledaga has failed to establish, or for that fact even argue, that permitting employees to use agency cars to travel between FCI Talledaga, at the end of their regular shifts, and the hospitals to perform overtime work is unlawful or illegal. FCI Talledaga has not argued or established that it had any other privilege that enabled it to unilaterally change this term and condition of employment.

This practice of using agency automobiles to travel between FCI Talledaga and the hospitals had been a term and condition of employment that had been in effect for a number of years before the change that is the subject of this case. In order to change this practice, FCI Talledaga had to give AFGE Local 3844 adequate advance notice of the change and an opportunity to bargain over those aspects of the changes that are negotiable. *See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut,* 41 FLRA 1309, 1317 (1991). Such notice must be sufficiently specific or definitive regarding the actual change contemplated so as to adequately provide the union with a reasonable opportunity to request bargaining. *Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Logistics Command, Wright-Patterson Air Force Base, Ohio,* 41 FLRA 690, 698-99 (1991)(*Ogden Air Logistics Center*).

FCI Talledaga gave no advance notice to AFGE Local 3844, or opportunity to bargain about the change. Rather the first notice about the change in the practice of using agency cars to travel between FCI Talledaga and the hospitals was the notice issued by Captain Fulcher on January 7, 1997, to all employees, changed the practice "[e]ffective

immediately," it was already a *fait accompli*.

In light of the forgoing, I conclude that FCI Talledaga violated section 7116(a)(1) and (5) of the Statute by changing the practice of providing agency cars to employees so they can travel between FCI Talledaga and hospitals for overtime shifts at the hospitals without providing AFGE Local 3844 with adequate advance notice and an opportunity to negotiate about the change.

2. Change in the Overtime Shifts

FCI Talledaga had, for many years, had the overtime shifts at the hospitals run for eight hours commencing immediately after the end of the regular time shifts, and the employees were paid overtime for the travel time between FCI Talledaga and the hospitals where the overtime was performed. The employees did not travel during their regularly scheduled workweek.

Paying overtime for time spent traveling and the starting and ending times of overtime shifts are terms and conditions of employment. FCI Talledaga changed the overtime tours of duty as a way to avoid paying employees overtime pay while they travel to their overtime assignments. The complaint in this case alleges only that the change in overtime tour of duty schedule is an unfair labor practice.

Paying employees for travel to an overtime assignment and the tour of duty of overtime shifts are clearly terms and conditions of employment. *See Department of the Air Force, Scott Air Force Base, Illinois,* 33 FLRA 532 (1988)(*Scott AFB*). They cannot be changed without affording a labor organization advance notice and an opportunity to negotiate about such changes, unless such changes were required by law or regulation, or the agency was somehow privileged to unilaterally make any such changes.

Because the decision to end overtime pay for travel to hospitals was not alleged in the complaint to be a violation of the Statute, I need not decide whether this unilateral change violated the Statute.

With respect to the new overtime tour of duty schedule issued on February 12, 1997, by FCI Talladega, I conclude it is covered by section 7106(b)(1) of the Statute, which states that an agency may bargain, at its election, concerning tours of duty. Thus, FCI Talladega was free to make a change in the overtime schedules without bargaining about the substance of the change with AFGE Local 3844. *Scott AFB,* 33 FLRA at 532. FCI Talladega contends that it gave AFGE Local 3844 adequate notice of

the change in the overtime schedules. (6)

Representatives of FCI Talladega and AFGE Local 3844 met at a labor-management meeting during which, while also talking about the use of POVs, Fulcher "stated that a change in the hospital overtime hours will be considered in an attempt to alleviate some of the current problems. The issue was tabled until the next meeting." The meeting adjourned and, before the parties had an opportunity to meet again, Fulcher issued his February 12, 1997, memorandum changing the overtime tours of duty at the local hospitals, effective February 16, 1997.

AFGE Local 3844 in its memorandum of February 16, 1997, asked Sivley to bargain about the change in overtime hours. Sivley responded in a memorandum of February 19, 1997, and stated that he "had no earthly idea of what you are talking about." In effect this memorandum constituted a refusal to bargain with the Union about the changes in the overtime schedule.

As discussed above, FCI Talladega was not obligated to bargain about the substance of the decision to change the overtime schedule. It nevertheless had to give the Union adequate notice and an opportunity to bargain over the impact and implementation of the changes in the overtime schedule, if the change had a more than *de minimis* adverse impact on unit employees. *See General Services Administration, National Capital Region, Federal Protective Service Division, Washington*, DC, 52 FLRA 563, 566-68 (1996)*(Federal Protective Service)*.

The change in the overtime schedule had substantially adverse impact on FCI Talladega's employees. They lost the overtime pay for travel time and those traveling to hospitals nearby the correctional institution have substantial downtime between the end of their regular shifts and the beginning of the overtime shifts. They are not paid for this time and they just have to hang around until the overtime shift begins, a waste of the employees' time. These effects are adverse and are more than *de minimis.* Accordingly, FCI Talladega was obligated to provide AFGE Local 3844 with adequate advance notice of the changes to permit the Union to bargain about the adverse effects the change had on employees.

Although the record establishes that during January 1997, FCI Talladega managers discussed possible changes in the overtime shifts with employees in the bargaining unit, but not with Union officials, the first mention of such a change in the overtime tours of duty to AFGE Local 3488 representatives was at the February 6, 1997, labor-management meeting.

The parties were primarily discussing the change in the use of agency supplied vehicles and the payment of mileage for use of POVs. Fulcher's mention that "a change in hospital overtime" would be considered to "alleviate some of the current problems" is hardly adequate notice that FCI Talladega considered the payment of overtime for the time spent traveling to and from the hospitals was illegal or unlawful, that it intended to change the starting and ending times of the overtime hospital schedule, or the precise nature of any such schedule change. This statement did not give the Union sufficient information to conclude a change would be made in the overtime schedule or to identify the nature of the change. This notice was not sufficient to permit the Union to identify the possible adverse effects of the change, to prepare bargaining proposals or to even ask to bargain. *See Ogden Air Logistics Center,* 41 FLRA at 697-98. AFGE Local 3488 did not have enough information to know about what it would be asking to bargain.

With no further negotiations, meetings, or notifications, FCI Talladega issued its February 12, 1997 memorandum to "all concerned" announcing the new overtime shifts for hospitals to be effective February 16, 1997. This notice to all concerned, not just to union representatives, did not constitute adequate notice. It was given only four days before the effective date of the change. It did not afford the Union sufficient time to formulate proposals. There was no attempt to notify the Union so as to afford it sufficient time to analyze the change and its effects, so that it could reasonably formulate a position. This is further complicated by the fact that the notification went to all affected employees, including Union officials. I conclude that such notice was not adequate notice of the change, as required by the Statute.[(7)]

Further, when AFGE Local 3844 clearly demanded in its memorandum of February 16, 1997, to bargain about the change, Warden Sivley in effect, refused to bargain. Warden Sivley's response by memorandum dated February 19, 1997, although he stated he awaited the union's reply, plainly constituted a refusal of the Union's request to bargain.

In light of the foregoing, I conclude that FCI Talledaga violated section 7116(a)(1) and (5) of the Statute by failing to provide AFGE Local 3844 with adequate notice and opportunity to bargain about the impact and implementation of the change in overtime tours of duty at the hospitals.

C. Remedy

With respect to the change in the practice of providing employees agency automobiles to travel to and from hospitals for overtime, FCI Talledaga violated the Statute by failing to provide AFGE Local 3844 with

adequate advance notice and an opportunity to bargain about the substance of the change. The appropriate remedy for this violation is a *status quo ante. See Federal Deposit Insurance Corporation,* 41 FLRA 272, 279 (1991). The GC asks for a make whole remedy for employees denied the use of an agency car on the basis of $0.31 per mile. I reject this request as too conjectural and, since it does not involve backpay, such a remedy would violate FCI Talledaga's sovereign immunity. *Cf. General Services Administration, Region 9, San Francisco, California,* 52 FLRA 1107 (1997).

With respect to the change in the overtime schedule, FCI Talledaga violated the Statute by failing to provide AFGE with adequate advance notice and an opportunity to bargain about the impact and implementation.

FCI Talledaga argues that whether to pay employees for time spent traveling to overtime shifts is governed by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, in accordance with regulations issued by the Office of Personnel Management in 5 C.F.R. Part 551. The travel time in question does not meet any of the requirements set forth in 5 C.F.R. § 551.422(a) to be considered hours of work.

In this regard the employees are not traveling during regular working hours; the employees are not required to drive a vehicle or perform other work while traveling; the employees are not required to travel as a passenger on a one-day assignment away from the normal duty stations; nor are the employees required to travel as a passenger on an overnight assignment from the official duty station during hours on nonworkdays that correspond to the employees' regular working hours. *Cf. Matter of Naval Undersea Warfare Engineering Station,* 68 C.G. 535 (1989 WL 237501) (July 11, 1989); and *Matter of Reclamation of Drill Rig Operators,* 70 C.G. 380 (1991 WL 83183)(March 29, 1991). In this regard, FCI Talledaga provided the agency cars as a convenience and it did not require employees to drive an agency car.

Even if the subject travel were considered travel away from the official duty station,[(8)] the travel time in question is deemed employment, for the purpose of computing the amount of overtime worked, only if it meets the requirements set forth in 5 C.F.R. § 550.112(g). The travel in question meets no such requirements. In this regard, I note that the travel to the hospital did not involve the regularly scheduled administrative workweek, including regular overtime.[(9)] A "regularly scheduled administrative workweek" includes a "period of regular overtime work, if any, if required of each employee." 5 C.F.R. § 610.111(a)(2)(emphasis added). In the subject case the overtime was voluntary and not required.

The GC of the FLRA, relying on paragraph 9a. of Department of Justice Order DOJ 1500.2, which provides, in part, that the time spent on official travel "is compensable when it is hours of employment and is officially ordered or approved," argues that FCI Talledaga could approve and then pay overtime for the travel in question. This argument is rejected because, clearly, FCI Talledaga cannot "approve" a payment that would violate government-wide regulations.

In light of the foregoing, I conclude that the then existing practice of paying employees while they drove between FCI Talledaga and the hospitals for overtime assignments at the hospitals was in fact in violation of government-wide regulations and that FCI Talledaga was required to stop that practice. Accordingly, FCI Talledaga was not able to bargain with AFGE Local 3844 about the substance of ending this unlawful practice, and is not able to reinstate the practice. *See Federal Protective Service,* 52 FLRA at 568.

In this situation I need not use the criteria set forth in *Federal Correctional Institution,* 8 FLRA 604 (1982), to determine whether a *status quo ante* remedy is appropriate because it would appear to be unlawful for FCI Talledaga to return to its prior practice of paying overtime for the travel time to the hospitals. *See Federal Protective Service,* 52 FLRA at 568. Rather, the appropriate remedy is to bargain about the impact and implementation of the change and about making any agreement retroactive to the date of the change.

Having concluded that FCI Talledaga violated section 7116(a)(1) and (5) of the Statute with respect to the change in the past practice of providing agency vehicles to travel to hospitals for overtime duty and about the implementation and impact of the change in the existing overtime tour of duty at hospitals, I recommend the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Federal Bureau of Prisons, Federal Correctional Institution, Talledaga, Alabama, shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment by eliminating the option for employees represented by the American Federation of

Government Employees, Local 3844, to use government vehicles when traveling between the Talledaga Correctional Institution and overtime assignments at medical facilities without first affording the Union adequate notice and an opportunity to negotiate concerning any proposed change.

(b) Unilaterally changing conditions of employment by changing the starting and quitting times of overtime tours of duty at medical facilities without first affording the Union adequate notice and an opportunity to bargain about the impact and implementation of any such change.

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

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

(a) Restore the option for employees to use government vehicles when traveling between Talledaga Correctional Institution and overtime assignments at medical facilities, as that option existed prior to January 7, 1997.

(b) Notify the American Federation of Government Employees, Local 3844, of any proposed changes in the practice of providing agency cars to travel between the correctional institution and overtime shifts at medical facilities.

(c) Upon request, negotiate with the Union concerning the impact and implementation of the change in overtime shifts for work at medical institutions made effective on February 16, 1997, and concerning making any agreement retroactive to the date of the change.

(d) Post at the Federal Correctional Institution, Talledaga, Alabama, where bargaining unit employees represented by the Union are located, copies of attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps should be taken to ensure that such

Notices are not altered, defaced, or covered by other material.

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

Issued, Washington, DC, February 13, 1998.

SAMUEL A. CHAITOVIT

Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Federal Bureau of Prisons, Federal Correctional Institution, Talledaga, Alabama, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this notice:

We hereby notify bargaining unit employees that:

WE WILL NOT unilaterally change conditions of employment by eliminating the option for employees represented by the American Federation of Government Employees, Local 3844 to use government vehicles when traveling between the Talledaga Correctional Institution and overtime assignments at medical facilities without first affording the Union adequate notice and an opportunity to negotiate concerning any proposed

change.

WE WILL NOT unilaterally change conditions of employment by changing the starting and quitting times of overtime tours of duty at medical facilities without first affording the American Federation of Government Employees, Local 3844 adequate notice and an opportunity to bargain about the impact and implementation of any such change.

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

WE WILL restore the option for employees to use government vehicles when traveling between Talledaga Correctional Institution and overtime assignments at medical facilities, as that option existed prior to January 7, 1997.

WE WILL notify American Federation of Government Employees, Local 3844, of any proposed change in the practice of providing agency cars to travel between the correctional institution and overtime shifts at medical facilities.

WE WILL, upon request, negotiate with American Federation of Government Employees, Local 3844, concerning the impact and implementation of the change in overtime shifts for work at medical institutions made effective on February 16, 1997, and concerning any agreement retroactive to the date of the change.

_____

(Activity)

Dated:_____ By:_____

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: Marquis Two Tower, 285 Peachtree Center Avenue, Suite 701, Atlanta, GA, 30303, and whose telephone number is: (404) 331-5212.

1. Apparently, at one time, employees were required to use agency cars, but that practice had stopped.

2. Warden Sivley testified at the hearing in this matter. I do not find him to be a reliable or credible witness. I found his testimony to be self-serving and inconsistent with surrounding circumstances. His testimony is in conflict with other credited testimony. I credit none of Warden Sivley's testimony.

3. Respondent has not contended that the provision of such agency automobiles is not a term and condition of employment.

4. This is analogous to parking arrangements for commuting employees, which have been found to be a term and condition of employment, and thus negotiable. *Immigration and Naturalization Service, Los Angeles District, Los Angeles, California,* 52 FLRA 103 (1996) and *Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia,* 46 FLRA 339 (1992).

5. Respondent has not contended that the provision of agency automobiles is the technology, methods and means of performing work.

6. The GC of the FLRA argues that if this defense is rejected, then FCI Talladega will bargain about the change in the overtime schedules because it is required to do so by Executive Order 12871. There is nothing in the record to support the GC's contention. Further, I reject the argument that Executive Order 12871 requires under the Statute, that FCI Talladega bargain about the schedule change, for the reasons set forth in *Department of the Air Force, 647th Air Base Group, Hanscom Air Force Base, Massachusetts*, OALJ 96-53, BN-CA-41011 (1996)(except for the "inference" set forth on p.4-5), currently pending before the Authority; but see *U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 858 (1997).

7. There is evidence in the record of some agreement by Sivley to negotiate in July 1997. This is well after the unilateral changes that are the subject of this case and even after the complaint herein was issued. It clearly is too late to be considered as any adequate advance notice and too late for meaningful bargaining about these changes. I note this communication was abruptly stopped by Sivley. Further, since it was apparently an attempt to settle this case, I will not consider it as any admission by Sivley that he had not previously bargained.

8. The record fails to establish that Federal Bureau of Prisons has established a mileage radius of not greater than 50 miles to determine whether an employee's travel is within the limits of the employee's official duty station, as provided in 41 C.F.R. § 551.422(d). In the absence of such a policy official duty station is defined in 5 C.F.R. § 301-1.3(c)(4).

9. GC of the FLRA refers, in his brief, to DOJ 1500.2, which he contends authorizes this overtime pay while traveling to hospitals. Again paragraph 9b(1) of this Order authorizes payment if their travel is within the employee's regularly scheduled administrative workweek, including regular overtime work. The subject travel was not during regular overtime work. It thus was not permissible.