UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION BASTROP, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3828, AFL-CIO Charging Party	Case Nos. DA-CA-60254 DA-CA-60549 DA-CA-60550 DA-CA-60551

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JUNE 30, 1997**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: May 30, 1997
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 30, 1997

TO: The Federal Labor Relations Authority

FROM: Jesse Etelson
Administrative Law Judge

SUBJECT: FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
BASTROP, TEXAS

Respondent

and Case Nos. DA-CA-60254
DA-CA-60549
DA-CA-60550
DA-CA-60551

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3828, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION BASTROP, TEXAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3828, AFL-CIO Charging Party	Case Nos. DA-CA-60254 DA-CA-60549 DA-CA-60550 DA-CA-60551

William D. Kirsner, Esquire
Joseph T. Merli, Esquire
For the General Counsel

Steven R. Simon, Esquire
Octavia R. Johnson, Esquire
For the Respondent

Pamelia A. Clampit, Vice President
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

These four consolidated cases involve allegations that Respondent: (1) failed to comply with section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute) on two separate occasions by holding "formal discussions" with employees at which it announced changes in general conditions of employment without affording the Charging Party (the Union) notice and the opportunity to be represented; (2) implemented changes in conditions of employment regarding practices and procedures for the supervision of inmates who were assigned to work crews without providing the Union with an opportunity to negotiate concerning those changes; and (3) refused to bargain over

either the substance or the impact and implementation of those changes by declaring nonnegotiable proposals the Union submitted concerning the changes after they were implemented. It is alleged that these actions violated sections 7116(a)(1), (5) and (8) of the Statute.

Respondent, denying all but the jurisdictional allegations and the allegations that two meetings with employees occurred, asserts that: (1) there were no substantive changes in the practices concerning "laying in" the inmate work crews (2) only *de minimis* changes were made to the procedures for releasing inmates from their work crews; and (3) Respondent, after declaring the Union's proposals about lay-in practices to be nonnegotiable, offered a counter-proposal, but the Union suspended bargaining.

A hearing was held in Austin, Texas. Counsel for the General Counsel and for Respondent filed post-hearing briefs.[1] The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence.

Findings of Fact

A. General Background

The Union is the agent of the exclusive bargaining representative of a nationwide consolidated unit of employees. In that capacity the Union represents employees at the Federal Correctional Institution, Bastrop, Texas, who are assigned to the institution's facilities department as foremen of inmate work crews. These foremen are responsible for the security of the inmates in their crews, for supervising their work activities and their access to tools, and for related paperwork.

The inmates assigned to these work crews had been placed in one or another "custody level," presumably according to a determination of the risk of their attempting escape. Crew sizes varied over time, but during the period relevant to these cases the work crews with which these cases are concerned averaged in the range of 15 to 25 inmates. The foremen are responsible for accounting for the

[1] 1/ Counsel for Respondent also moved to correct several minor errors in the transcript of the hearing. The motion is granted and the transcript is corrected accordingly. I hereby also correct the volume containing Respondent's exhibits to show, as noted in the transcript, that Respondent's Exhs. 3, 12, 13 and 14 were rejected.

location of each inmate every 30 minutes. Part of the foremen's job is "custody level work," which entails checking tools and checking or "shaking down" the workshops for contraband. The foremen have specialized skills in various aspects of construction and maintenance and are normally assigned to supervise work projects related to their individual skills.

When a crew foreman is not available for one reason or another, some provision must be made for the supervision of the crew. One option is a "lay-in," whereby the inmates normally assigned to the work crew remain in, or are sent back to, their housing units. Inmates who are thus "laid in" are not in the custody of facilities department foremen, but of officers assigned to the correctional services department. An alternative to a lay-in, when a work crew's regular foreman is not available, is a "double up," whereby a foreman is assigned to supervise his own crew and the missing foreman's crew. A lay-in must be approved by the appropriate associate warden. However, certain practices with respect to the conditions under which lay-ins were customarily ordered form part of the basis for the complaints in Case Nos. DA-CA-60254 and DA-CA-60550.

Facilities department foremen are required to attend daily meetings at 7:30 a.m., in a small area called the facilities office, at which management passes along information about operations and changes within the institution. Facilities Manager Calvin Bowen and General Foreman Blan Patterson are usually present, although Bowen sometimes observes the meetings from inside his private office. (Tr. 99, 137, 171). These meetings normally last between 5 and 10 minutes, although they may occasionally extend to 20 minutes. The Union is usually not given notice of the subjects to be discussed at these meetings.

B. Events Leading to Case No. DA-CA-60254

1. Lay-In Practices

Before January 19, 1996, lay-ins were routinely requested and approved for work crews when their regular foremen were not available and when the option of "doubling up" would interfere with the doubled-up foremen's ability to proceed with the work project and to oversee all of the inmates in both crews. (Tr. 206-07, 245-47). For example, the practice on the occasion of a foreman's vacation appears to have been mixed. During at least one foreman's vacation, the foreman who had been working on a project with him was doubled up to continue the project. (Tr. 160). Other foremen's vacations resulted in lay-ins. Sicknesses and training or other temporary assignments for the regular foreman commonly resulted in lay-ins. (Tr. 82, 160, 206-07).

2. January 19, 1996, Facilities Department Meeting

Facilities Manager Bowen and General Foreman Patterson (the foremen's second-line and first-line supervisors) attended the foremen's daily meeting on January 19, 1996. Bowen had met previously with his supervisor, Associate Warden Michael Jackson. They had discussed the issue of lay-ins, and Jackson had made some suggestions about steps to be taken to maintain the work crews in the department instead of laying them in.

At the January 19 meeting, either Bowen or Patterson announced that lay-ins would no longer be considered routine, but that a greater effort would be made to keep the crews at work, whether this meant doubling up or seeking assistance from officers from other departments or "outside" (Tr. 247-49). Bowen "had on [his] agenda that this topic of lay-ins and doubling up was going to be addressed" at the meeting (Tr. 282).[2] No notes were taken at the meeting, which, according to a composite of the estimates of various witnesses, lasted between 10 and 20 minutes, or, as Skubiata put it, "maybe a little longer than what we normally have" (Tr. 205).

Reaction from the foremen included a concern with how this policy would affect their workload (Tr. 255). Foremen in attendance understood the new policy as one that would mean more doubling up. Their feedback made Bowen understand that they interpreted the announced policy as the elimination of lay-ins. (Tr. 230-31, 292-93).[3]

Among the foremen present were Union Vice President Timothy Curry and Treasurer Wayne Skubiata.[4] The Union had not been notified of the meeting. Curry and Skubiata attended only as employees who were required to attend. The Union was not otherwise notified of the policy announced at the meeting.

2/ This concession by Bowen renders moot, for purposes of the "formal discussion" issue, the factual dispute as to whether one of the bargaining unit foremen raised the subject of lay-ins first by asking a question about them.

3/ Bowen, when asked whether he announced such a policy, testified, "I can't say that that was the exact wording that I used that day" (Tr. 250).

4/ Skubiata was the Union's treasurer at the time of the hearing, approximately one year after the January 19 meeting. It is not clear whether he was the treasurer at the time of the meeting, but it appears that, treasurer or not, he was then one of the Union's stewards.

3. Implementation and Effects of Announced Policy

The lay-in policy announced at the January 19 meeting apparently went into effect immediately.[5] A set of documents implicitly represented to be a compilation of the lay-ins ordered for February and March 1996 shows 5 full-day and 4 half-day lay-ins, combining to make the equivalent of seven full days of lay-ins (GC Exh. 9). Four of the lay-ins occurred on a single date on which the absent foremen were all assigned to training. A compilation representing the equivalent period in 1995 shows 17 lay-ins for various periods, totaling 67½ days. (GC Exh. 8). While I do not accept these data as definitive, and allowing for the possibility that these respective two-month periods do not present the most representative sampling of the practices before and after January 19, 1996, I find, in the absence of evidence to the contrary, that lay-ins were reduced drastically.[6]

It is also uncontroverted that there was at least some off-setting increase in doubling up. Foreman Vernon Handcock, who supervised a construction crew, testified credibly that records he kept showed that he had been doubled up with inmates from another work crew for five days in 1995. I also credit as an approximation Handcock's recollection that on all but one or two of those occasions only one or two of that crew's inmates were assigned to him, the rest having been laid in. In 1996 from February 20 to the year's end, he was doubled up with the other crew on 36 days. (Tr. 101-03, 131). Construction Foreman John Eberle, Jr., who at the time of the hearing had become the Union's president, testified with somewhat less precision, but credibly, that his doubling up increased from about 10 to 40 days between 1995 and 1996. (Tr. 141-42, 158-59). This and other testimony estimating increased doubling up in 1996 was not controverted. Nor was there any reliable evidence to

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5/ There is credible evidence that even before the January 19 meeting, Bowen had begun to implement the policy changes he had discussed with his supervisor, and that his purpose in putting this subject on the meeting's agenda was to explain the policy behind the changes that the foremen had already experienced.

6/ R Exh. 7 might be interpreted as supporting rather than questioning such a finding, but is inconclusive. *See* Tr. 335-37. Associate Warden Jackson testified that Bowen was the official who "should" keep track of lay-ins.

indicate how often, if ever, the situations formerly handled by laying in crews were handled after January 1996 by augmenting the staff of working crew foreman from outside the facilities department.7 In the absence of any showing that this option, discussed previously by Bowen and Jackson as an alternative to doubling up, was used to any substantial extent, I infer that the perception of the foremen that the reduction in lay-ins resulted in a corresponding increase in doubling up was essentially accurate.

Foremen testified credibly that the added burden of supervising and accounting for a second crew, which sometimes performed work of a type in which the doubled-up foreman was less proficient, and which sometimes worked at different locations from those of the foreman's primary crew, affected their conditions of employment in several ways. Aside from the most self-evident accompaniments of such extra responsibility, the foremen noted the necessity of obtaining and monitoring the use of an additional set of tools and materials and of making visual checks of each inmate at least every 30 minutes. Doubled-up foreman sometimes find themselves unable to issue certain classes of tools to the crews because such tools, for security reasons, may not be used by inmates outside the direct observation of the inmate's supervisor. Such effects of doubling-up have the further consequence of slowing the progress of the crews' work projects, or at least making it substantially more difficult to remain on schedule *and*, at the same time, remain in reasonable control of the quality of the work.

These effects are essentially uncontroverted. In dispute, and not subject to a definitive finding on this record, is the secondary effect of all of this on the foremen's ability to meet their supervisors' expectations with respect to performance and productivity, and the resulting impact on their performance evaluations. In their testimony, the foremen expressed fear of such results, but none had yet experienced an effect on their evaluations. On the other hand, while Jackson and Bowen testified that the additional load would be considered so as not to prejudice the foremen, Bowen also testified that no record was kept of when the foremen were doubled-up. This, of course, limited Respondent's ability to allow for such occurrences.

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7/ Here again, R Exh. 7 and the accompanying testimony is inconclusive. What it does show, however, is a dramatic decrease in the loaning of correctional services department employees to "CMS," (another designation for the facilities department) for *any* purpose, after January 1996.

4. Union Request to Negotiate

On January 22, 1996, the Union's president had a memorandum delivered to Respondent's warden. It referred to Bowen's January 19 discussion of the change in lay-in policy and stated that the Union had not been notified or given the opportunity to bargain about this change. The memorandum concluded with a request that "this change, which was implemented immediately, be stopped, until such time as it has been negotiated with the Union. The Union demands negotiations on the issue."

Respondent did not respond to this memorandum for several weeks. The Union filed the unfair labor practice charge in Case No. DA-CA-60254 on February 23, 1996. Some time after that, Union Steward Pam Clampit, who handled unfair labor practice matters, telephoned Respondent's human resources manager, Elizabeth Eskew. Eskew's response was to schedule an
"informational meeting," as provided in the parties' local Supplemental [collective bargaining] Agreement, for April 4.

C. Events Leading to Case No. DA-CA-60551

1. "Accountability" procedures for lunch and end-of-day release of inmates

Inmates in the work crews are released from their crews and divided into two groups for lunch. They are released again at the end of the work day. The crew foremen must account for all tools that have been issued to the inmates. Some or all of the crews have "shops" in which or out of which they work. Before March 11, 1996, the foremen were to remain in their shops when releasing the inmates to the appropriate gate, where the inmates passed through a metal detector before proceeding to their next assigned destination. One foreman, assigned in rotation, supervised the metal detector check. The other foremen (since the time for lunch release for each work crew varied from day to day) could keep their crews at work, either outside or in the shops, until it appeared necessary to ready them for release.8

2. March 11, 1996, Facilities Department Meeting

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8/ I find Bowen to be mistaken to the extent that his testimony implies that all foreman had been required to bring their crews in at 10:15 a.m. to prepare them for the noon meal (Tr. 295-96).

At the regular daily morning meeting on March 11, 1996, General Foreman Patterson, by prearrangement with Bowen, announced a change in the release procedure. (Tr. 282). All of the foremen would now be required to report to the gate, at designated times, to be present while the inmates were checked through the metal detector. The Union was not given notice that this announcement would be made or that a change in the procedure was about to occur. Union Vice President Curry was at the meeting as a foreman. The record does not reveal whether Union Treasurer Skubiata or any other foreman who was also a Union official, besides Curry, was present. Nor is there any evidence of the length of the meeting.

3. Effects of the Change in Procedure

Under the new system, the foremen were required to report to the gate at approximately 10:30 a.m., in advance of lunch, for which the inmates might be released as late as 12 noon. At first, there was some confusion and inconsistency as to whether all of the foremen or only those whose inmates were in the first group for lunch had to report to the gate at 10:30 a.m. Eventually the procedure was clarified, so that approximately half of the foremen, those with inmates in the first group, are to report at 10:30, and the other foremen are to hold their inmates in their shops until notified by radio or buzzer to proceed to the gate. The second group is typically called about ten minutes, but occasionally 15 or 20 minutes, after the first. The two groups rotate weekly.

Foreman Eberle estimated that the time for inmates to report to the gate was 30 minutes earlier than previously. Foreman Curry estimated that after the change he spent 30 to 60 minutes a day standing at the gate. Foreman Handcock testified that, previously, the time to begin preparing inmates for release varied according to the foreman's judgment but was earlier under the new system. The end-of-day release apparently is not as time consuming. Typically, the foremen spend both periods standing and waiting. Previously, they were able to perform some of their production or paperwork duties during the release process.

Bowen characterized the change differently. In fact, the contrast between his perception, and the foremen's, of how the new system affected the foremen, borders on the bizarre. The difficulty may have resulted in part from some of the witnesses' failure to distinguish clearly between the situation as it existed immediately after the March 11, announcement and the situation at the time of the hearing, following further modifications. It is, of course, the

change that was announced and effectuated at the March 11, meeting that is pertinent here.

Bowen saw no difference in what the foremen did at the gate under the new system and what they did in their shops under the old: they accounted for their inmates and made sure they were released at the appropriate time for the noon meal. Therefore, he testified, releasing the inmates at the gate took no more time out of a foreman's "work load" than "doing the same thing in his shop." Moreover, Bowen estimated that it would take a foreman no more than a minute to release his inmates at the gate, except that it would take "a little longer" on days that he had a double crew. On the other hand, Bowen conceded on cross-examination that the foremen "could be standing at the gate anywhere from five to ten minutes," occasionally longer, (or, under the old system, waiting in their shops) before the lunch release. He also estimated that they stood at the gate for approximately ten minutes at the end-of-day release.

Prompted by a question by Counsel for the General Counsel to explain what might otherwise have appeared to be a discrepancy between the one-minute and the five or five-to-ten minute estimates, Bowen testified (Tr. 287):

> My statement was: From the time that they were called for the noon meal and called to release their inmates, it took them individually approximately a minute to release their inmates. The total time they're back there, I haven't addressed that until now.

Given the interest of the foremen to maximize and Bowen's interest to minimize the waiting times at the gate, I conclude that the new system often required individual foremen to spend at least 30 minutes a day, between the lunch and the end-of-day releases, waiting at the gate. I also credit the foremen who testified that, when they had waited instead in their shops, they were able to perform other duties while keeping the inmates under their supervision. Handcock and Curry in particular appeared to be reliable witnesses. Bowen was their second-line supervisor and did not satisfy me that he had first-hand knowledge of the minute-by-minute activities of each of the foremen. General Foreman Patterson, who might be expected to have had more opportunity to observe these activities, did not testify about this alleged impact of the change.

4. Union Request to Negotiate

On March 22, 1996, the Union's president submitted a memorandum to the warden, requesting a return to the *status quo ante* with respect to the March 11 change, and "to negotiate the change to the full extent required by law and executive order." The memorandum referred to Patterson's March 11, announcement instructing foremen to stand next to the gate until the "details" are released for lunch and at 3:30 p.m. until "yard recall." It also stated that the Union had not been notified that a formal discussion was being held or given the opportunity to bargain.

There is no evidence of a response to this memorandum. Union Steward Clampit subsequently called Human Resource Manager Eskew, and there was apparently an understanding that the inmate release matter would be discussed at the April 4 informational meeting along with the inmate lay-in issue.

D. Events Leading to Case Nos. DA-CA-60549 and 60550

1. The April 4 Informational Meeting

Representatives of the Union and of Respondent's management met on April 4 and attempted to resolve informally the issues raised by the Union's requests to negotiate as well as other issues. Management explained the concerns that led to the changes it had implemented and the Union voiced its concerns over the changes. Bowen also explained that the new inmate release "accountability" procedures were not what the foremen had understood as a result of the March 11 meeting. No agreements could be reached on the lay-in or inmate release issues. Union Steward Clampit suggested that the Union submit proposals for formal negotiations, and the parties proceeded on that basis. The Union also requested that Bowen provide a memorandum describing correctly his expectations of the foremen under the new inmate release procedures.9

2. April 5: Memorandum on Inmate Release Procedures

Pursuant to the Union's request at the April 4 meeting, Bowen issued a memorandum the following day. Its subject, in Bowen's terminology, was "Meal Rotation and Recall

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9/ Bowen and Human Resources Manager Eskew both testified about having the impression that the Union had agreed orally, probably at the April 4 meeting, to a 6-month trial period for these procedures. Eskew ultimately conceded that she could not remember the Union actually agreeing to such a suggestion. I find insufficient evidence that there was such an agreement.

Procedures." The memorandum was addressed to all facilities department foremen. Its opening paragraph described as its purpose, "to clarify any misunderstanding about the Facilities Foremen's responsibilities on the meal rotation and recall procedures."

For the "meal rotation," the memorandum documents the clarification in the new inmate release procedure that was discussed in the first paragraph of section C.3. of these findings of fact. Thus, the foremen are instructed that, at 10:30 a.m.:

> First Group Foremen will report to the side gate to wait for call by Compound Officer. When lunch is called inmates will be release [d] by shops, identified by their foreman. When all shops from first group ha[ve] gone through, the General Foreman or Chief will call the metal detector and inform them this is all of group one. At this time the first group
> forem[e]n will start their lunch period.
>
> NOTE: Second group forem[e]n need not report to side gate, but will be held accountable for inmates in their shops. Second group will be released when called by radio or buzzer. Second group foremen will begin their lunch at this time.

The instruction for the "recall" (afternoon) release is that, at 3:30 (p.)m.: "All forem[e]n will report to gate to help with the control of contraband."

A final note to the April 5, memorandum, presumably applicable to both the meal rotation and the recall procedures, states that, "If there is inclement weather the staging area will be the east side doors of the Facilities Shops."

3. Negotiations

On May 31, 1996, Union Vice President Curry signed off on a set of bargaining proposals regarding the policy for lay-ins and a separate set of proposals addressed to "inmate accountability," concerning the procedure for releasing inmates for lunch and for the afternoon recall. Both sets of proposals were submitted to management. Representatives of management and the Union met on June 6, to negotiate.

The Union's proposals on lay-ins essentially restricted doubling up of crews by mandating lay-ins whenever more than four of an absent foreman's inmates would otherwise be assigned to another facilities department foreman. Associate Warden Joe Haro, on behalf of management, responded that the Union's proposals on this subject were nonnegotiable as they involved the assignment of work. He may have added as a secondary reason that they involved internal security. (Tr. 56, 320-24.)

A management representative said that, although they had declared the Union's proposals nonnegotiable, management would consider, but not bargain over, whatever else the Union could come up with.(Tr. 378, 403-04). Union Steward Clampit proposed that, if an absent foreman's inmates were assigned to another foreman, they be given a task but no tools (Tr. 55-56, 396-97). Although Eskew testified that management addressed the concerns raised by Clampit's suggestion. (Tr. 384-85), there is no evidence of a specific management response. Clampit was left with the impression that management's declarations of nonnegotiability applied to her proposal about tools. (Tr. 56).

The Union's proposals on "inmate accountability" were to the effect that foremen should release their inmates from their shops, as their crews are called for the noon meal and, in the afternoon, at the time of the "yard recall."

During the parties' discussion of the subject of releasing the inmates, management expressed a concern with the metal detector being flooded with too many inmates released at the same time. A Union representative suggested that the releases be staggered. Associate Warden Haro, on behalf of management, said that the Union's proposals on this subject were nonnegotiable because they involved internal security. (Tr. 70, 323-24.)

Clampit testified that, at some point after Respondent declared union proposals to be nonnegotiable, and on the advice of the AFGE national representative who was a member of the Union's bargaining team, she introduced the phrase, "appropriate arrangements." She testified that she did not use the words, "impact and implementation," but that she made a statement to the effect of, "the least we can do is look at appropriate arrangements for affected employees" (Tr. 397-99). Eskew denied that Clampit used the words, "appropriate arrangements," but testified that, after the declaration of nonnegotiability, the Union indicated that it "wanted us to consider other things," and that management responded only that it would look at whatever else the Union submitted, but would not treat it as a

proposal, nor did management intend "starting to talk about negotiations," because Eskew knew that "if I ever start I have to continue it." (Tr. 384-85, 403-04).10

Analysis and Conclusions

I. Case Nos. DA-CA-60264 and 60551: Formal Discussions

In its recent decision in *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149 (1996)(*F.E. Warren*), the Authority took a fresh look at the analytical framework it employs in determining whether a management meeting with one or more employees is a "formal discussion . . . concerning any grievance or any personnel policy or practices or other general conditions of employment" within the meaning of section 7114(a)(2)(A) of the Statute. The Authority reaffirmed its basic four-part requirement for showing that a statutory formal discussion occurred--that there was: (1) a discussion; (2) that was "formal"; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or any other general condition of employment. *Id.* at 155.

The trickiest of these elements to apply, and the one most subject to dispute in the instant cases, is the second element, the "formality" of the discussion. While the Authority has long indicated that, in determining formality, it considers "the totality of the facts and circumstances presented," *Id.* at 157, quoting *U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988) (*Department of Labor*), it had, at times, placed in a position of special importance a list of "factors" (sometimes 7 and sometimes 8) that it labeled as "relevant." *See, for example, U.S. Department of Justice, Bureau of Prisons, Federal Correctional*

10/ While I suggested to the parties at the close of the hearing that they educate me as to the significance of whether or not Clampit used the words, "appropriate arrangement," or otherwise made an independent request for "impact and implementation" bargaining, at the June 6 meeting, neither party has seen fit to treat this as an issue or provided any reason to resolve the factual dispute one way or the other. Therefore, I shall make no credibility finding on this dispute. However, I accept Eskew's other characterizations of the postures the parties took after the declaration of nonnegotiability, and shall base certain conclusions on the implications I draw from those characterizations.

Institution, Bastrop, Texas, 51 FLRA 1339, 1343-44 (1996) (*FCI Bastrop*). The factors, as listed in *FCI Bastrop*, are:

> (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

The eighth factor, when included in the list, is whether each employee's attendance was mandatory. *Department of Labor*, 32 FLRA at 470.

In *F.E. Warren*, however, the Authority made a point of stating that these factors are "merely illustrative." 52 FLRA at 157. Further, the Authority demonstrated that in some cases the analysis of a meeting's "formality" may be affected only secondarily by what the Authority now calls the "*Department of Labor* factors" and that in some cases they may be only marginally, if at all, relevant. *Id.* at 156-58.

Consistent with this understanding, but on a more basic level, the Authority adopted a statement from the legislative history of the Statute as the explanation for the insertion of the word, "formal," in what is now section 7114(a)(2)(A). The statement it adopted is that the word was inserted "to make clear that this subsection does not require that an exclusive representative be present during highly personal, informal meetings such as counseling sessions regarding performance." *Id.* at 156, quoting *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print 1979) 957 (124 Cong. Rec. 29,200). By adopting this statement of the word's purpose, previously cited only as the statement of an individual Member of Congress, *see, for example, Department of Health and Human Services, Social Security Administration*, 18 FLRA 42, 44 n.5 (1985), the Authority signified even more clearly that the 7 or 8 "factors" have no intrinsic weight but should be considered only to the extent that: (1) their consideration is necessary; and (2) they shed any light on the distinction between "highly personal, informal meetings" and meetings that cannot be so characterized.

Thus, in *F.E. Warren*, the Authority determined that, "even if evidence regarding the factors did not indicate formality," the purpose of the meeting--to prepare employees to be laid off--was of sufficient gravity that it was highly implausible that any second level supervisor would leave such an announcement "to a spontaneous, casual encounter with affected employees." 52 FLRA at 158. Therefore, the Authority concluded, the meeting was a formal discussion. *Id.* *Cf. U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania*, 38 FLRA 671, 677 (1990) (*New Cumberland*)("formality" of meeting shown by its having been attended by supervisors and unit employees and by its purpose having concerned general conditions of employment).

The Authority's formulation, "spontaneous, casual encounter," counterpoised in *F.E. Warren* as the opposite of a "formal discussion," follows its adoption of the congressional formulation, "highly personal, informal meetings," in the same decision. I conclude, therefore, that the Authority regards the two terms as sharing a significant characteristic. The essence of the Authority's formulation, however, is the absence of prearrangement, and that serves adequately for the purposes of the instant cases. *Cf. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 35 FLRA 594, 604 (1990)(interview was a "formal discussion," not a "casual conversation or a conversation that followed from an impromptu meeting").11

The two employee meetings with which the instant cases are concerned present instances where application of most of the *Department of Labor* factors would be particularly unhelpful. Because the meetings themselves were scheduled, daily events, their form and arrangement followed a pattern that was not established for the purpose of the specific meetings in dispute. The significance of the length of each of the meetings in question is debatable. The "discussions" relevant to these cases may not have been as long as each meeting as a whole, and the record does not support any finding as to the length of such discussions. There is no evidence at all on the length of the March 11 meeting, and the most reliable evidence concerning the January 19 meeting that is relevant to this inquiry is that it was "maybe a little longer than what we normally have."

On the other hand, I have made probative findings that relate to three of the *Department of Labor* factors, and

11/ Among potential tests of "formality" for section 7116(a)(2)(A) purposes, prearrangement has a practical advantage in that it makes possible the providing of notice to the union.

shall mention them in ascending order of my assessment of their importance. First, Bowen, a second level supervisor, attended both meetings. Second, attendance was mandatory for the bargaining unit employees. Although the Authority has omitted this factor when it limits the list to seven factors, as it did in *FCI Bastrop*, this factor tends to show prearrangement, and pertains here because the daily meetings typically consisted principally of a flow of information from the supervisors to the employees, which implies some preparation of the matter to be communicated. Third, one of the supervisors had planned in advance of each of these meetings that the subject about which there was an alleged "formal discussion" would be raised. Whether or not this constituted a "formal agenda," as contemplated in the pertinent *Department of Labor* factor, it serves, especially when viewed in conjunction with the attendance at the meetings, to foreclose the characterization of either meeting as "highly personal," "spontaneous," or "casual." In contrast to any of these, both meetings were **relatively** formal, to a degree that, in my view, satisfies the purpose for which the requirement of formality was inserted in the Statute.

The only other of the traditional elements of a statutory formal discussion that requires analysis here, since the remaining elements are so clearly present, is the fourth, which specifies the subjects with which a section 7116(a)(2)(A) formal discussion is concerned. Here, the focus is on whether or not the subjects raised at these meetings were "general condition[s] of employment."

First, I must reject as irrelevant Respondent's contention that the subject addressed at the January 19 meeting was a *de minimis* change.12 The issue is whether the subject was a general condition of employment. I take it as beyond dispute that an employee's workload and the procedures for performing his or her job are conditions of employment, irrespective of the negotiability of such conditions. *See National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA 769, 778-79 (1980), *aff'd sub nom. National Treasury Employees Union v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982). Moreover, since these meetings were called to announce at least some change in these conditions of employment, the instant cases are unlike *Department of Veterans Affairs, Veterans Affairs Medical Center, Gainesville, Florida*, 49 FLRA 1173 (1994), where a meeting at which a supervisor's "statements about disciplinary policy and work requirements

12/ Respondent makes no such argument, or *any* argument, concerning the March 11, meeting.

were nothing more than routine reminders of past policies and requirements" was held not to be a formal discussion. *Id.* at 1175-76. Therefore, the only remaining question, for "formal discussion" purposes, is whether the conditions of employment addressed at these meetings were "general."

A condition of employment need not affect all the employees in a bargaining unit in order to be considered "general." Thus, in *General Services Administration*, 50 FLRA 401, 405 (1995), the Authority refrained from "defining the precise boundaries of what constitutes a 'general' condition of employment for purposes of section 7114(a)(2)(A)," but cited with approval its prior decision in *U.S. Department of Defense, Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 37 FLRA 952 (1990)(*Defense Depot Tracy*), to the extent that it had found that a meeting came within section 7114(a)(2)(A) when it concerned a general condition of employment of "all warehouse employees," a category comprising about 20 employees within a larger bargaining unit. *Id.* at 966-67. While the record here does not reveal the number of foremen who were affected by the conditions discussed at these two meetings, the conditions applied throughout the facilities department. This, I conclude, was sufficient to make them "general" for section 7114(a)(2)(A) purposes.13

Having concluded that the January 19 and March 11, meetings included "formal discussions" that required that the Union be given an opportunity to be represented, it only remains to consider Respondent's argument that the Union in fact was given that opportunity at the January 19, meeting because Vice President Curry and Wayne Skubiata, then

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13/ However, it must be noted that, in *Defense Depot Tracy*, 37 FLRA at 960, the Authority distinguished between the warehouse employees in the case before it and "a small subcomponent of [four] unit employees" whose conditions of employment had not been regarded as "general" in an earlier decision. *See also American Federation of Government Employees, Council 214 and U.S. Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 38 FLRA 309, 330 (1990), where the Authority maintained the doctrine, announced in earlier decisions, that "general" conditions are limited to those that "concern conditions of employment affecting employees in the unit generally." This doctrine could be interpreted in a manner that is irreconcilable with my conclusion here. However, I read the Authority's more recent decisions as minimizing any reliance on a comparison between the size of the group of employees affected and the size of the bargaining unit.

apparently a Union steward, were present. Respondent contends that the presence of a steward satisfied any requirement of Union representation because a provision in the parties' local supplemental agreement states that "Stewards designated by the Union President shall be vested with sufficient authority to represent the Union at the informal and formal steps of any matter of concern."

Whether or not the January 19, meeting may properly be condidered one of the "steps of any matter of concern," as that phrase is used in the agreement, the Union president did not, nor did he have the opportunity to, designate Skubiata or anyone else to represent the Union at that meeting. Both Curry and Skubiata attended the meeting as employees. Neither was a designated representative of the Union. Therefore, their presence did not satisfy the section 7114(a)(2)(A) requirement, as interpreted by the Authority, that the exclusive representative be given the opportunity to select representatives of its own choosing to be present during formal discussions. *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*,
29 FLRA 594, 604-07 (1987). My ultimate conclusion on the "formal discussion" allegations is that Respondent violated sections 7116(a)(1) and (8) of the Statute by failing to comply with the requirements of section 7114(a)(2)(A).

II. Case Nos. DA-CA-60264 and 60551: Unilateral Changes

Counsel for the General Counsel contends that, by implementing the changes in the lay-in practice and in the inmate release procedures before giving the Union notice and an opportunity to bargain about those changes, Respondent violated sections 7116(a)(1) and (5) of the Statute. While the argument is made that Respondent was obligated to bargain both as to the substance and as to the impact and implementa-tion of these changes, the argument for "substance" bargaining is not much more than pro forma. In fact, later in his brief the General Counsel takes the position that the subjects these changes concern fall within section 7106(b)(1) of the Statute and are negotiable as to substance at the election of the agency. From there, the General Counsel argues that, by virtue of Executive Order 12781 (Oct. 1, 1993), the President made the election in favor of negotiating on all section 7106(b)(1) subjects.

To date, all of the administrative law judges to whom this argument has been presented have rejected it, and the issue is currently before the Authority. I incorporate by reference the discussion in which I rejected the Executive

Order argument in *U.S. Department of Justice, Immigration and Naturalization Service*, Case No. WA-CA-50048 (Aug. 27, 1996). Essentially, I concluded there that, while the President ordered agency heads to negotiate over section 7106(b)(1) subjects, this order was not self-fulfilling, and is, by its terms, not enforceable by any administrative body outside the direct control of the President.

With regard to the alleged unilateral changes made here, both parties have concentrated on the separate but related issue of whether the changes that were made without giving the Union notice or an opportunity to negotiate were more than *de minimis* changes in conditions of employment. The *de minimis* standard is applicable to the obligation to negotiate not over the substance of a change but over procedures to be observed in the exercise of management rights and over appropriate arrangements for employees adversely affected by such exercise, as defined in sections 7106(b)(2) and (3) of the Statute and commonly referred to as the "impact and implementation" of the changes. *See Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 405-08 (1986).

The obligation to bargain over the impact and implementation of changes made by an employing agency or activity depends on whether the changes had more than a *de minimis* impact on employee's conditions of employment. As recently restated by the Authority in *General Services Administration, Region 9, San Francisco, California*, 52 FLRA 1107, 1111 (1997) (*GSA Region 9*), "in assessing whether the effect of a decision on conditions of employment 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."14 In determining whether the impact of the change is sufficient to meet this standard, the Authority has made clear that the effect need not be substantial, but "only be more than *de minimis*." *Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 45 FLRA 574, 575 n.2 (1992) (*Portsmouth*). Thus, the effect may be considered

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14/ The Authority also reaffirmed that part of its customary description of how it makes this assessment, to the effect that "[e]quitable considerations will also be taken into account in balancing the various interests involved." *Id.* However, *GSA Region 9* may to be the first case in which an "equitable consideration" (there the fact that the changed that was implemented was in response to a related suggestion from the union) expressly figured into the Authority's determination.

insubstantial and yet be sufficient to require impact and implementation bargaining.

The Shift from Lay-ins to Doubling Up

I find it virtually self-evident that the increase in responsibilities of foremen whose crews are doubled up is not only more than *de minimis* but is substantial. Independent of any increase in what may be regarded as their workload, the additional *responsibilities* in connection with monitoring the location and the activities of a second crew has an enormous impact on the conditions under which a foreman works. Without the benefit of expert testimony, I venture that the highest priority among a work crew foreman's duties, notwithstanding the work project involved, is to maintain an appropriate level of surveillance of the inmates. Thus, he is required to account for each inmate every 30 minutes. At the same time, the foreman has the work project, and each inmate's participation, to supervise.

Doubling, or substantially increasing, the size of the crew has the reasonably foreseeable effect of making these duties at least twice as difficult and stressful (recognizing that numerical values can be assigned to such qualities only metaphorically and for an illustrative purpose) but arguably increasing in greater multiples. The foreman's increased surveillance responsibilities necessarily reduce his opportunity to monitor each inmate's involvement in the work project. This aspect of his job is also made more difficult to accomplish to the extent that the additional inmates are performing aspects of the construction process that are outside the foreman's specialty. A non-expert in the art or science of corrections may venture further that an inmate who is actively and visibly involved in an appropriate activity is considered to present less of a risk of dangerous behavior than one whose activities are observed only once every 30 minutes. This is a perception that I find reasonable to infer that the foremen share.15

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15/ The reasonable perceptions of the affected employees offer as sound a basis on which to evaluate the impact as any "neutral" perspective. The Authority has given at least some indication that it is less concerned with whether, from the agency's perspective, the actual effects of the change were reasonably foreseeable. *Compare Portsmouth,* 45 FLRA at 575, with the judge's decision in that case. *Id.* at 582-83.

An appropriate analogy, if not an exact parallel, might be drawn to a classroom situation. Doubling the size of a class in which student participation is an integral part undisputedly has an immense impact on a teacher's conditions of employment. Doubling the size temporarily by merging one's class with that of an absent teacher would, in effect, make the merged class's teacher a "substitute" as far as the supernuminaries were concerned. This might not make things any easier.

The other side of the coin here is that the increases in crew size did not occur on most days of the working year. A composite of the best evidence presented leads me to conclude that, from 1995 to 1996, the number of days of doubling up increased by as much as 30 days for some foreman, with no evidence as to the minimum increase. This represents somewhat over 10 percent of at least some foremen's working days. In terms of frequency alone, that might be considered insubstantial. However, given the impact of doubling up on the days that it occurs, the overall impact is more than *de minimis.*

Respondent asserts that one set of indications of the *de minimis* nature of the change is the fact that it had a policy of long standing that required written approval from an associate warden for any lay-in, and that such decisions are within the management rights recognized in the parties' collective bargaining agreement. However, these are matters of process and authority. What changed was the policy governing decisions to use lay-ins, and the consequent increase in doubling up. This policy change required that the Union be provided with the opportunity to bargain over its impact and implementation.

The Change in the Inmate Release Procedure

I have found that the change requiring foremen to release inmates at the gate instead of from their shops placed them at the gate for at least 30 minutes every day. Respondent's evidence contested the amount of time involved. Essentially denying that there was anything but a minimal change in the foremen's duties, Respondent presented nothing to suggest that any impact on their ability to perform their other duties was recognized and accommodated. The situation is thus in material respects substantially comparable to that in *General Services Administration, National Capital Region, Federal Protective Service Division, Washington, D.C.*, 52 FLRA 563 (1996), where the Authority found a change in practice to be more than *de minimis* because the new

practice added a procedure that occupied employees anywhere from 2 to 90 minutes a day. The Authority stated that "it is reasonable to conclude that a time-consuming . . . procedure would, in turn affect working conditions involving such matters as work assignments and appraisals. In these circumstances, the impact of the change on employees' working conditions is more than *de minimis.*" *Id.* at 567-68. I conclude that, absent any persuasive argument to the contrary, this rationale is applicable here.

Aside from its dispute as to the facts, Respondent relies principally on management's perception that security considerations dictated the decision to make this change. However, reliance on security considerations only insulates the decision from "substance" bargaining. It does not affect the obligation to bargain over the impact and implementation of the decision. I therefore conclude that when it implemented the change in the inmate release procedure, as well as the change of policy on lay-ins, without first giving the Union the opportunity to bargain, Respondent violated sections 7116(a)(1) and (5) of the Statute.

III. Case Nos. DA-CA-60249 and 60250: Refusal to Bargain on Union's Proposals

The proposals that the Union submitted in advance of the parties' June 6 negotiating session were essentially for reconsideration of the decisions to make the changes discussed above. In declaring these proposals nonnegotiable, Respondent essentially reaffirmed the position in which it placed itself by implementing these changes in the first place. Although the General Counsel argues that Respondent committed additional violations of sections 7116(a)(l) and (5) by its actions on June 6 and thereafter, he places the subjects of the proposals within section 7106(b)(1) of the Statute. Respondent appears to agree. If these subjects fall within section 7106(b)(1), they would be "negotiable" (subject to a mandatory bargaining obligation) only as to impact and implementation, unless Executive Order 12781 makes them negotiable as to substance. In any event, I have already concluded that the changes regarding these subjects required impact and implementation bargaining but not substance bargaining. Respondent's reaffirmation and continuation of its refusal to bargain over these subjects might arguably affect the effective date of the unfair labor practices for statute of limitations purposes, but adds nothing to the violations of sections 7116(a)(1) and (5) found above. *See Kentucky National Guard*, 4 FLRA 534, 545 (1980).

The events following implementation and the Union's bargaining requests, however, could affect Respondent's previously established obligation to bargain over the impact and implementation of the changes. That is, in the course of the parties' discussions of these issues, the Union might have waived its right to negotiate over the impact and implementa-tion of the changes. This could have occurred if, following Respondent's refusal to negotiate over the substance of the changes (and over the Union's proposals to rescind the changes) the Union had made it clear that it had no interest in negotiating only over impact and implementation, or had otherwise exhibited a conscious decision to forego such negotiations.16 Such conduct presumably would have met the Authority's test for determining whether a waiver of the right to bargain over a particular matter has been established by bargaining history. That is, the matter must have been fully discussed and consciously explored during negotiations and the union must have consciously yielded or otherwise clearly and unmistakably waived its interest in the matter. *Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan*, 46 FLRA 582, 585 (1992).

That did not occur here. Respondent's response to the Union's substantive proposals was to the effect that the subjects they treated were nonnegotiable and that anything else the Union submitted would be considered, but not negotiated. This in itself had the tendency to foreclose bargaining over any aspect of the subjects of the proposals, including those aspects that were negotiable. *See U.S. Department of Health and Human Services, Public Health Service, Indian Health Service, Indian Hospital, Rapid City, South Dakota*, 37 FLRA 972, 981 (1990). Thus, although the Union did take up Respondent's offer to submit other suggestions, Respondent was not prepared to treat them as proposals for negotiation purposes. Nothing came of these suggestions. The Union was not required to insist specifically on "impact and implementation" bargaining. *Id.* at 980. To the extent that the Union failed otherwise to present further proposals, Respondent's course of conduct made such actions appear to be futile and were therefore not required in order to preserve the Union's bargaining rights. *See Blue Grass Army Depot, Richmond, Kentucky*, 50 FLRA 643, 653 (1995); *U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 38 FLRA 887 (1990).

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16/ This assumes the correctness of my previous conclusion that Respondent was entitled to refuse to negotiate over substance.

Remedial Considerations

The only dispute about the appropriate remedies for these unfair labor practices is whether the bargaining to be ordered over the impact and implementation of the changes should be "prospective" only or should be conducted upon a return to the *status quo ante*. The General Counsel contends that the latter type of a bargaining order is appropriate under the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982)(*FCI I*), based on Respondent's unilateral implementation of the changes, its long delay in responding to the Union's post-implementation bargaining demands and further delay before declaring the Union's proposals nonnegotiable, and the immediate and ongoing impacts on the employees. The General Counsel also notes the absence of evidence that a *status quo ante* remedy would disrupt or impair the efficiency of the agency's operations.

Respondent, on the other hand, asserts that rescission of either of the unilateral changes would have a disruptive effect and, relying on *U.S. Army Adjutant General Publications Center, St. Louis, Missouri*, 22 FLRA 457, 459 (1986), argues that where, as here, a management action is based on its right to determine internal security practices, "greater weight must be given to the disruptive effect in applying the factors contained in *[FCI I.*]" Respondent also asserts that a *prospective* bargaining order is the appropriate remedy because the parties met and "bargained to some extent."

As the Authority noted in *FCI I,* 8 FLRA at 606, the appropriateness of a *status quo ante* remedy must be determined on a case-by-case basis, "carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." Among the aspects of the particular violation that the Authority examines are (presented here in summarized form): (1) the notice, if any, that the agency gave to the union concerning the change; (2) the union's bargaining request, if any; (3) the willfulness of the agency's conduct; and (4) the impact on employees. *Id.* However, these factors are only examples of the considerations that go into determining whether such a remedy is appropriate. They should not, in my view, be given any weight beyond what use they serve in determining whether the purposes of such a remedy will be served.

The Authority, in a long line of cases, has explained that a purpose of restoring the *status quo ante* where

management has made an unlawfully unilateral change is to ensure that the obligation to bargain is not rendered

meaningless. *See, for example, U.S. Department of the Treasury, Customs Service, Region IV, Miami District, Miami, Florida*, 38 FLRA 838, 844 (1990). The Court of Appeals for the District of Columbia Circuit has placed its imprimatur on the Authority's explanation in that case, understanding it to mean that the purpose is "to ensure that agencies will have the incentive to bargain with their unions." *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992).

It must be acknowledged here that the Authority has employed such an explanation only in cases where the unilateral change concerned a matter that was "substantively" negotiable. But notwithstanding that the Authority applies a different test to determine the appropriateness of a *status quo ante* remedy for unilateral changes that were negotiable only as to impact and implementation, the predictable effect of this remedy on the negotiations ordered by the Authority in such cases is not distinguishable in kind from its effect in "substance" bargaining cases.17 Moreover, the similarity in effect is too obvious to allow for it being unintentional when the Authority orders such a remedy in impact and implementa-tion cases.

The Authority has recently reaffirmed, in a case involving a unilateral change without bargaining over impact and implementa- tion, another purpose of a *status quo ante* remedy. That purpose is "to place parties, including employees, in the positions they would have occupied had there been no unlawful conduct." *Department of Veterans Affairs Medical Center, Asheville, North Carolina*, 51 FLRA 1572, 1580 (1996). That this is a purpose the fulfillment of which the Authority deems to be significant in these kinds of unilateral change cases is reflected in its acknowledgment of the admonition: "[W]here an agency has taken unilateral action that disturbs the *status quo* and has illegally refused to give a union the opportunity to bargain over the decision (or its impact), a stronger case can be made for the proposition that the Authority, as does the NLRB, *should* restore the *status quo ante* in a remedial

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17/ I presume that one reason for the difference in the Authority's test for applying this remedy in these two types of cases is that it is highly predictable that once the obligation to bargain over impact and implementation alone has been satisfied, the changes originally made unilaterally will either be made again or, if not rescinded in the interim, will remain in place.

order--that is, make the employees whole." *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and U.S. Department of Health and Human Services, Hartford District Office, Hartford,*

Connecticut, 37 FLRA 278, 290-91 n.1 (1990)(*SSA Hartford*), *quoting National Treasury Employees Union v. FLRA*, 910 F.2d 964, 969 (D.C. Cir. 1990)(*en banc*).18

Restoration of the *status quo ante* pending the parties' negotiation of impact and implementation here will manifestly serve both of the purposes the Authority has identified in connection with such a remedy. First, Respondent's desire to re-implement the changes it deems necessary should provide an incentive to proceed with meaningful negotiations without delay. Second, the employees whose conditions of employment have been adversely impacted, the harm suffered not having been ameliorated by any of the protective procedures or appropriate arrangements that the Union might have been able to negotiate if given the opportunity, would be relieved at least temporarily, if not made whole. The basic issue then, is whether there are factors militating against the imposition of such a remedy that outweigh its supposed benefits.

Respondent asserts that restoration of the *status quo ante* will "disrupt or impair the efficiency and effectiveness" of its operation. (Br. at 22). However, it points to no specific evidence as to the extent of such disruption, or to the particular "internal security" risks that would occur. *FCI I,* appears to recognize that restoration of the *status quo ante* will often have some disruptive effect. Thus it places in the balance the *degree* of disruption, not merely whether there will be *any* disruption. Moreover, in balancing such adverse effects against the competing factors, the Authority looks for

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18/ Neither the Authority nor the court it quoted made clear to what the phrase, "stronger case," was being compared. However, the court, in a footnote within the quoted passage (announced as "deleted" by the Authority), noted that: "In unilateral action cases, the NLRB has taken the view that it will 'order restoration of the *status quo ante* to the extent feasible, and in the absence of evidence showing that to do so would impose an undue or unfair burden upon the respondent.'"

"specific evidence in the record indicating the disruption that will be caused," rather than bare assertions that such results will follow. *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky*, 38 FLRA 647, 650 (1990) (*Lexington-Blue Grass*). The Authority also considers the fact that its *status quo ante* remedy requires restoration of the former situation only until the agency has satisfied its obligation to bargain over the impact and implementation of the decision to make the change. *SSA Hartford, 37 FLRA* at 287.

This balancing of relevant considerations thus appears to make a *status quo ante* remedy appropriate here. To the extent that other of the *FCI I* factors may be deemed significant for purposes of the instant cases, they too tend to weigh in on the *status quo ante* side of the scale. No notice of the changes was given to the Union, either before or after their implementation. Soon after each of the changes, the Union requested negotiations, but there was no immediate response, and none, in fact, until after the Union filed its first unfair labor practice charge and, even then, until Union Steward Clampit followed up with a telephone call several weeks after the initial (January) unilateral change.

Respondent denies that its failure to discharge its bargaining obligation was willful, asserting that it acted under a mistaken belief, based on an arguably supportable position (provided by its labor relations office) concerning its bargaining obligation. That denial must be rejected on two counts. First, the evidence concerning advice from the labor relations office relates only to the June declarations of nonnegotiability, not to the unilateral actions in January and March. Second, the Authority no longer sees an agency's arguable but mistaken belief as to its bargaining obligation as a reason not to order *status quo ante*. Rather, it considers an intentional failure to notify a union of an impending change to be willful although based on an agency's erroneous conclusion that it was not obligated to bargain over the subject matter. *Lexington-Blue Grass, 38 FLRA* at 649.

The last *FCI I* factor that remains to be considered is the nature and extent of the impact experienced by adversely affected employees. I have, of course, made and recorded my findings about this impact in the course of disposing of the *de minimis* issue. I would not characterize the impact of either of the changes as severe, but at least somewhat beyond the threshold level at which the bargaining obligation attached. My analysis of this factor leads me to

regard it as slightly persuasive on the side of the appropriateness of a *status quo ante* remedy.

An additional factor, presented by Respondent, is that some bargaining occurred. However, Respondent's reliance on *U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts*, 38 FLRA 989, 992 (1990), seems misplaced. There, in a case not involving unilateral changes but a refusal to resume negotiations, the Authority was dealing with the issue of whether to provide a *prospective* or a *retroactive* bargaining order. That issue involves somewhat different policy considerations from those used in determining the appropriateness of *status quo ante* remedies. Moreover, the Authority was influenced in *Customs Service* by the fact that the parties had been able to reach agreement on various matters related to the remaining issues to be addressed when the ordered resumption of negotiation occurred. In the instant cases, no bargaining on the impact and implementation of the changes at issue occurred, at least in part because Respondent in effect preempted such bargaining.

One practical problem stands in the way of ordering restoration of the *status quo ante* with respect to the lay-in policy. The notice to employees that the General Counsel has proposed characterizes the former practice as "generally laying in inmate crews when their foremen are out[.]" Even accepting that as an accurate characterization, I regard it as too vague as a basis for measuring Respondent's compliance with a *status quo ante* order. Moreover, the record shows that characterization to be oversimplified. One might summarize as accurately by stating that the former practice was to order lay-ins on some occasions and not on others, perhaps ordering them more often than not. In these circumstances, having concluded that a *status quo ante* remedy is otherwise appropriate, I shall formulate a description of the *status quo ante* with respect to lay-ins and doubling up that, although unavoidably arbitrary, I believe will probably approximate the manner in which the former practice applied to individual foremen. This variant on the standard *status quo ante* order is nothing but a temporary expedient, and is designed for application in relation to months, not years, since its aim in part is to encourage prompt and successful conclusion of the parties' negotiations.

I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, shall:

1. Cease and desist from:

(a) Conducting formal discussions with its employees in the bargaining unit exclusively represented by the American Federation of Government Employees, AFL-CIO (AFGE), without affording AFGE's agent, AFGE, Local 3828, prior notice of and the opportunity to be represented at the formal discussions.

(b) Unilaterally changing working conditions of bargaining unit employees by implementing new policies on inmate lay-ins and on inmate release procedures without fulfilling its obligation to bargain with AFGE, Local 3828, concerning the impact and implementation of such changes.

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

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

(a) Notify AFGE, Local 3828, and afford it the opportunity to be represented at formal discussions.

(b) Rescind the change in inmate lay-in policy announced in January 1996, and the changes in inmate release procedures announced in March and April 1996.

(c) Restore the practices concerning the ordering of inmate lay-ins as they existed prior to January 1996 to the extent that the assignment of more than four inmates from an absent foreman's work crew to another foreman shall not occur more than an average of two days every six months for any individual foreman receiving such additional inmates, and no foreman shall be required to receive such additional inmates on more than two days in any calendar month, except that these limitations shall not apply if the

receiving foreman is provided with suitable assistance in the supervision of the inmates.

(d) Restore the procedures for releasing inmates from their work crews before lunch and before the afternoon recall as they existed prior to March 1996.

(e) Provide AFGE, Local 3828, with notice of any intention to change the practices and procedures addressed in this order and, upon request, bargain in good faith over the impact and implementation of such changes.

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

(g) Pursuant to section 2423.30 of the Authority's Regulations, notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., May 30, 1997.

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JESSE ETELSON
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, Bastrop, Texas 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 conduct formal discussions with any bargaining unit employees concerning any grievance or any personnel policy or practices or other general condition of employment without affording the American Federation of Government Employees, Local 3828, AFL-CIO (the Union) prior notice of and the opportunity to be represented at the formal discussions.

WE WILL NOT unilaterally change working conditions of bargaining unit employees by implementing new policies on inmate lay-ins and on inmate release procedures without fulfilling our obligation to bargain with the Union concerning the impact and implementation of such changes.

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

WE WILL provide the Union with prior notice and an opportunity to be represented at any formal discussion between one or more representatives of the institution and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

WE WILL rescind the change in inmate lay-in policy announced in January 1996, and the changes in inmate release procedure announced in March and April 1996.

WE WILL restore the practices concerning the ordering of inmate lay-ins as they existed prior to January 1996 to the extent that the assignment of more than four inmates from an absent foreman’s work crew to another foreman shall not occur more than an average of two days six months for any individual foreman receiving such additional inmates, and no foreman shall be required to receive such additional inmates

on more than two days in any calendar month, except that these limitations shall not apply if the receiving foreman is provided with suitable assistance in the supervision of the inmates.

WE WILL, restore the procedures for releasing inmates from their work crews before lunch and before the afternoon recall as they existed prior to March 1996.

WE WILL, provide the Union with notice of any intention to change the practices and procedures addressed in this order and, upon request, bargain in good faith over the impact and implementation of such changes.

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(Activity)

Date: _____ By:

_____

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, TX 75202-1906, and whose telephone number is: (214)767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Decision in Case Nos. DA-CA-60254, DA-CA-60549, DA-CA-60550, DA-CA-60551, issued by JESSE ETELSON, Administrative Law Judge, were sent to the following parties:

CERTIFIED MAIL, RETURN RECEIPT REQUESTED	**CERTIFIED NOS.**
William D. Kirsner, Esquire Joseph T. Merli, Esquire Federal Labor Relations Authority 525 Griffin Street, Suite 926 Dallas, TX 75202	P600-695-281
Pamelia A. Clampit, Vice President AFGE, Local 3828 P.O. Box 744 Bastrop, TX 78602	P600-695-282
Steven R. Simon, Esquire Federal Bureau of Prisons Labor Law Branch West 522 North Central Avenue, Suite 247 Phoenix, AZ 85004	P600-695-283
Octavia R. Johnson, Esquire Federal Bureau of Prisons Labor Law Branch West 522 North Central Avenue, Suite 247 Phoenix, AZ 85004	P600-695-284

REGULAR MAIL

Assistant Director
Labor Management Relations
Office of Personnel Management
1900 E Street, NW.
Washington, DC 20415

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Dated: June 6, 1997

Washington, DC