FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, DC 20424

U.S. DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE
Respondent

and Case No. CH-CA-70509

NATIONAL TREASURY EMPLOYEES UNION
Charging Party

Philip T. Roberts, EsquireJulie K. Anderson, Esquire For the General Counsel
John Landre, Esquire For the Charging Party
Robert E. Norman, Esquire For the Respondent
Before: Eli Nash, Jr. Administrative Law Judge

DECISION

Statement of the Case

On February 26, 1998, the Regional Director of the Chicago Regional Office, Federal Labor Relations Authority issued a Complaint and Notice of Hearing under section 7118 of the Federal Labor-Management Relations Statute (the Statute), pursuant to an unfair labor practice charge filed on June 25, 1997, by the National Treasury Employees Union (herein called the Union/NTEU).

The Complaint alleges that the U.S. Department of Treasury, Internal Revenue Service (herein called the Respondent) violated section 7116(a)(1) and (5) of the Statute by unilaterally implementing a new policy on appropriate use of electronic mail (herein called E-mail) for employees at the Cincinnati Service Center in Covington, Kentucky (herein called CSC).

A hearing was held in Cincinnati, Ohio, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. The parties filed timely post-hearing briefs which have been carefully 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

NTEU is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent, which includes the employees at the Cincinnati Service Center (CSC). NTEU, Chapter 73, is the agent of NTEU for the purposes of representing unit employees at the CSC.

The CSC processes individual, business and corporate tax returns. It is divided into five divisions: Compliance, Processing, Quality Assurance and Management Support, Customer Support, and Information Systems (IS). The Director and Assistant Director oversee the entire CSC and each division has a division manager who is referred to as a division chief. Each division is subdivided into branches that are managed by a branch chief and several unit chiefs.

Sometime in 1989, Respondent began providing E-mail access to employees in various branches at the CSC, including the Adjustments Correspondence Branch and the TeleFile Section. Since then, access to E-mail has expanded to include employees throughout the CSC. Before Respondent provided counseling memos for improper use of E-mail access, it had offered employees little training on how to use E-mail software and did not advise for what purposes E-mail could or could not be used. In this regard, Beverly Green, a computer operator in the IS Division, testified that when her branch received E-mail, her manager handed the employees a five-page instruction manual entitled "E-mail in a Nutshell" and told the employees "to play with it, get on it, just start sending E-mails out to whoever [you want] to, so you can get familiarized with the system."

Without an official policy on E-mail usage, managers set an example for what E-mail could or could not be used for.E-mail was primarily used to exchange messages concerning official CSC business. Prior to May 1997, however, there was a longstanding practice followed by both bargaining unit and nonbargaining unit employees, of using E-mail for nonwork-related communications. It is uncontroverted that CSC managers sent E-mail messages to employees conveying personal announcements about employees and their families, such as birthdays, weddings, anniversaries, graduations, births, holiday parties, picnics, retirements, showers and deaths. Also, solicitations for charity donations were circulated through E-mail messages. The former Chief of the User Support Section within the IS Division Greg Hawkins, testified that then-Chief, Network Support Branch, Dan Furst, arranged lunches with employees and other managers by exchanging E-mail messages. Further, in her testimony, Barbara Courtney, a lead tax examiner in the Customer Service Division, recalled exchanging personal messages with her manager, such as, jokes of the day or thoughts of the day.

It is not denied that CSC managers themselves sent a significant amount of sports-related E-mail. For example, the annual NCAA Basketball Tournament, often referred to as "March Madness," generated a lot of E-mail discussion at the CSC. The record evidence of such participation of CSC managers is plentiful. The evidence reveals that Bob Fry, a former Branch Chief in the Customer Service Division, often sent out University of Kentucky basketball updates through the E-mail system. Furthermore, it is uncontroverted that during "March Madness," CSC managers, through the use of E-mail, organized "Hat Days" so employees could support their favorite basketball team by wearing the team's logo to work. Similarly, before an annual horse race held in Louisville, the Kentucky Derby, there was a contest where employees competed by making their own derbies (hat wear). While it is argued that the above circulated information about the Hat Days and Derby Days through E-mail use was to encourage employee participation, it was nonetheless the same sort of action for which employees and some managers, were later disciplined without any warning that their conduct may have been improper.

It is undisputed that the second highest manager at the CSC, Assistant Director Wayne Hicks used E-mail for nonwork related messages, while he was in that position. There is uncontested testimony that Hicks and Paula Wells, a branch secretary, conversed about their favorite sports teams through E-mail messages(1). Hicks, while Assistant Director alsoregularly used E-mail to send and receive other messages unrelated to official business. He introduced himself to employees in different divisions of CSC and would relay inspirational quotations to employees through E-mail. In her testimony, Sylvia Sherwood, a clerk in the Compliance Division, described one of these introduction messages sent by Hicks as "cute E-mail, but not work related." There is no record that Hicks was admonished for his conduct, as many others were.

In line with the CSC managers' use of E-mail for other than official business, bargaining unit employees frequently used E-mail to send messages unrelated to official business. Thus, it was usual for employees to send or respond to brief messages relating to sports or entertainment trivia. An employee might even send an E-mail to say "hello" to a co-worker he or she had not seen in a while. Greg Hawkins testified that he believed it was appropriate to use E-mail for these purposes because managers other than Hicks, used E-mail for similar purposes. The evidence reveals that Mary Straman, then Chief of the Local Area Network (LAN) unit in the IS Division, Jeff Weber, Section Chief in the IS Division and Ted Beaulieu, Branch Manager in the IS Division, received many of the trivia messages for several years but no adverse action was taken against the employees until May 1997. Bargaining unit employees received these same messages, and it was easy for anyone to tell who received the messages since the list of addressees was at the top of each message. Bargaining unit employees not only knew that these messages were being

sent, they also knew that management was aware of the messages and did nothing about them.

In the spring of 1997, Dan Furst, Network Support Branch Chief,(2) and Peggy Badged, the Acting Division Chief of the BEING'S Division, launched an investigation of a group of employees who allegedly were involved in sending E-mail messages with sports-related themes.(3) In the investigative interviews, individual employees were questioned about their use of E-mail and informed that E-mail was to be used strictly for official business purposes. Although employees were notified, after the investigations began, that E-mail was for official business purposes only, it is uncontroverted that prior to the investigations Respondent had not notified employees that E-mail was to be used for official business only.

The investigation resulted in both bargaining unit employees and managers receiving discipline for using E-mail for purposes unrelated to official business. Respondent issued suspensions to several employees including Greg Hawkins, Paula Wells, Curtis Hill, and Jacqueline Burch. Hawkins, a branch chief at the time, was suspended for 14 days for condoning the misuse of government property and time by not stopping employees under his supervision from using E-mail for nonofficial purposes. Specifically, he was disciplined for permitting Paula Wells and Christine Egan to send E-mail unrelated to official business. Paula Wells received a 30-day suspension for misusing government property and time. Wells was disciplined for sending and receiving E-mail not related to official business, including E-mail from unit employee Christine Egan. Robert Jones received a letter of reprimand that will remain in his personnel folder for up to two years. Curtis Hill received a 10-day suspension, but has not yet served this suspension pending the outcome of an arbitration hearing on the matter. Finally, employees Jeff Edgington, Douglas Wehrle, Dan Seiter, Jeffrey Hoffman, Keith McClanahan, Mike Edmonson, and Jeff Weber received counseling memos for improper use of E-mail.

The counseling letters stated, in part, as follows:

> This is to document our discussion on [date], regarding use of E-mail. I explained that E-mail should not be used for other than work related business. Receiving and/or responding to E-mail not related to work is inappropriate. For example, an E-mail on sports trivia is in no way work related and is an inappropriate

use. If a non work related E-mail is received, the E-mail should be forwarded to or shared with your manager for action.

On June 24, 1997, CSC issued an "All Employees" policy memorandum advising employees that usage of E-mail for any purpose other than official business was prohibited. The June 24, 1997, policy memorandum states, in relevant part:

> Just as I expect employees not to use IRS fax machines or copiers for personal reasons, I expect no one to use E-mail for non-business reasons. Our computer systems and all government equipment are only for the purpose of conducting official government business. Misuse of government property and misuse of official time may result in disciplinary action.
>
> . . .
>
> Sending a non-business related message to anyone using government equipment and/or time is inappropriate.

Prior to the June 24, 1997, policy memorandum, no policies or memoranda specifically concerning appropriate use of E-mail had ever been issued by the CSC. Instead, Respondent based its disciplinary action on its interpretation of the Office of Government Standards of Ethical Conduct for Employees of the Executive Branch and the Internal Revenue Service Rules of Conduct. On June 27, 1997, the Union requested bargaining over the June 24 policy memorandum. Respondent did not negotiate with the Union over the appropriate use of E-mail either before or after the issuance of this memorandum.

Analysis and Conclusions

The basic issue in the case is whether Respondent's prohibition of the use of E-mail for nonwork related purposesunilaterally changed working

conditions at CSC in violation of section 7116(a)(1) and (5) of the Statute. This issue and several sub-issues are discussed below in finding that the Respondent violated the Statute.

A. Is There a Section 7116(d) Bar in This Matter?

As a first line of defense, Respondent claims that the unfair labor practice complaint in this case is barred by section 7116(d) of the Statute. There is no dispute that several grievances were filed concerning the disciplinary actions taken against bargaining unit employees concerning their misuse of government computers and misuse of official time to send, receive, read, and/or reply to unofficial E-mail messages. Respondent, in essence, believes that what is at stake here is only those suspensions, reprimands, and counseling of bargaining unit employees. Respondent's belief notwithstanding, the issue in this unfair labor practice case is different from that of the grievances and does not involve, other than for remedial purposes, any action taken against bargaining unit employees for misuse of E-mail.

In determining whether a grievance bars a later filed unfair labor practice, the Authority examines whether "the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievances are substantially similar." *Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 802 (1996), citing *U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411*, 38 FLRA 1345, 1351 (1991) *petition for review denied sub nom. AFGE, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992).

In this case, while the facts of both the grievances and the unfair labor practice charge are identical, the theories of the two proceedings appear to be different. Although Respondent recognizes that there is an issue of its unilaterally implementing a change in working conditions, it argues that the real issue in both proceedings involves only the propriety of the discipline imposed on employees who misused E-mail. Thus, in its opinion the issue in both the unfair labor practice case and the grievances is identical. As already noted, the undersigned disagrees. Clearly, the theory of the unfair labor practice is only that Respondent made a unilateral change in conditions of employment without giving notice or the opportunity to bargain about that change to the Union. The theory of the grievances, on the other hand, seems to be that Respondent improperly disciplined certain employees for improper E-mail usage. Furthermore, an arbitrator in the grievance proceeding would not be required to address the theory of the unfair labor practice in order to

resolve the issue of discipline in this case. Therefore, an arbitrator could dispose of the disciplinary matters here without having to deal with the issue of whether a statutory violation occurred. In such circumstances, it has been repeatedly held that an unfair labor practice charge is not barred by section 7116(d) of the Statute.

Accordingly, it is found that the complaint in this matter is not barred by section 7116(d) since the theories of the respective grievances and unfair labor practice are not the same.

B. Section 7118(a)(4)(A)

Section 7118(a)(4)(A) of the Statute has consistently been interpreted by the Authority to mean, that no complaint can be issued based on any unfair labor practice occurring more than six months prior to the filing of an unfair labor practice charge.[(4)] *See, for example, Department of Interior, U.S. Geological Survey Conservation Division, Gulf of Mexico Region, Metairie, Louisiana*, 9 FLRA 543, 551-57 (1982)*(DOI)*.

Respondent points out that the complaint in this case was not amended to include any later discipline imposed on bargaining unit employees after that imposed during May-June 1997, as charged in the complaint. Since its actions in disciplining employees after June 1997, were not alleged or tried by the General Counsel as separate violations of the Statute, the undersigned disagrees with Respondent. In view of the fact that the disciplinary actions were not alleged as violations, it was not necessary to amend the Complaint to include disciplinary actions which later occurred as a result of Respondent changing its policy with respect to nonbusiness related E-mail usage.

Additionally, Respondent defended its need to change the E-mail policy at the CSC and the necessity to discipline those using E-mail for personal use. All those disciplinary actions were a result of Respondent's single action in June 1997 in changing the E-mail policy concerning personal usage. The Authority has stated that a charge is not to be measured by the standards applicable to a pleading in a private lawsuit. Rather, the purpose of a charge is merely to set in motion the machinery of an inquiry. *DOI*, 9 FLRA at 552. In *Department of Defense Dependents Schools, Mediterranean Region, Naples American High School, Naples, Italy*, 21 FLRA 849 (1986), the Authority found that a charge serves merely to initiate an investigation and to determine whether a complaint in the matter should be issued. Furthermore, it held that a charge is sufficient in an administrative proceeding if it informs the alleged violator of the general nature of the violation charged against him. More importantly, it was noted that where a procedural defect exists concerning the charge, a respondent must be prejudiced by the alleged

defect in order to render the underlying charge fatally defective.

In *U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania,* 40 FLRA 449 (1991), *remanded as to other matters sub nom. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. FLRA*, 988 F.2d 1267 (D.C. Cir. 1993), the Authority went on to say that the issuance of a complaint complies with the requirements of its the Rules and Regulations if the allegations in the complaint bear a relationship to the charge and are closely related to the events alleged in the charge. Finally, in *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), the United States Supreme Court also examined a similar issue under the National Labor Relations Act and found that it is the function of the complaint and not the charge to give notice to the respondent of specific allegations made against it. The Court further held that the purpose of a charge is merely to put in motion the machinery of an inquiry, and that the investigation may deal with unfair labor practices that are related to those asserted in the charge and grow out of those assertions while the process is pending.

Accordingly, it is found that the Complaint in the instant matter was sufficient to put Respondent on notice of the violations of the Statute it was alleged to have committed. Furthermore, there is no showing that the failure to amend the complaint here prejudiced Respondent. In all the circumstances, it is the opinion of the undersigned that it was unnecessary to amend the Complaint, as Respondent urges, to include each individual employee or supervisor who was disciplined in the case.

C. Respondent's E-mail Policy Concerns a Condition ofEmployment

Under the Statute

With regard to the merits of the case, Respondent insists that it had no duty to negotiate with the Union concerning the right of employees to utilize government computers to send or receive E-mail for other than official government purposes. In this regard, Respondent maintains that there is congressional interest in ensuring that government computers are only used for official government business and that apparently the Union neither appreciated nor understood the sensitive issue of using government computers and government time only for official, government business. In Respondent's view, it does not constitute an unfair labor practice for management to enforce Government-wide Rules and Regulations as set forth in the Office of Government Ethics Standards of Ethical Conduct.

The record shows that prior to the spring of 1997, employees at the CSC used E-mail for nonofficial business purposes and were not subject to

discipline for such usage. In May and June 1997, Respondent began counseling and disciplining employees at the CSC for using E-mail to send nonofficial business messages. Around June 24, 1997, Respondent also published an E-mail policy which restricted E-mail use to official business purposes only and notified employees that any other use was inappropriate and grounds for discipline. The next day the instant unfair labor practice charge was filed.

It is well settled that prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice of the change and the opportunity to bargain over those aspects of the change that are within the duty to bargain. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 81 (1997). In this matter, Respondent does not contest the fact that it did not provide notice or an opportunity to bargain over the restrictive E-mail policy that was announced in May and June 1997 at the CSC. Respondent is, in essence, claiming that what it did during this time was not a change in working conditions. The question as to whether a change in conditions of employment occurred usually involves an examination of the facts and circumstances regarding the agency's conduct and the unit employees' working conditions. *92 Bomb Wing, Fairchild Air Force Base, Spokane, Washington,* 50 FLRA 701, 704 (1995)*(92 Bomb Wing)*. Initially, it must be determined whether the Respondent's E-mail policy concerns a condition of employment within the meaning of section 7103(a)(14) of the Statute. *Antilles Consolidated Education Association and Antilles Consolidated School System,* 22 FLRA 235 (1986)(does policy pertain to unit employees and is there a direct connection between policy and work situation of unit employees) and *Veterans Affairs Medical Center, St. Louis, Missouri, 50 FLRA 378, 379-80 (1995).* If Respondent's E-mail policy concerns a condition of employment under the Statute, the next question is whether the E-mail policy and restrictions that Respondent implemented and announced in May and June 1997, were different from Respondent's previous treatment of E-mail usage at the CSC. *92 Bomb Wing*, 50 FLRA at 704.

Here, it appears that Respondent's E-mail policy pertains to unit employees and has a direct connection to unit employees' work situation at the CSC. E-mail is a medium for communication and is equivalent to a telephone. With regard to the use of telephones in the workplace, the Authority has held that issues surrounding such use raise negotiable matters under the Statute. *Air Force Logistics Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia,* 53 FLRA 1664, 1673 (1998)*(Warner Robins ALC)*(agency required to bargain concerning use and location of a telephone for employees' personal use); *Defense Mapping Agency Aerospace Center, St. Louis, Missouri,* 40 FLRA 244 (1991)*(DMA)*(agency violated the Statute when it unilaterally removed telephone service that employees used for personal calls) and *American Federation of Government Employees, AFL-CIO, Local 3511 and Veterans Administration Hospital, San Antonio, Texas,* 12 FLRA 76, 100 (1983)(use

of an agency telephone by employees for personal calls is within the duty to bargain). In addition, failure to follow Respondent's E-mail policy subjected unit employees to discipline. Thus, the use of E-mail, as with use of the telephone, can be directly related to the unit employees' conditions of employment. Again, employees were given access to E-mail and restrictions on its use were not defined for employees until the spring of 1997. Clearly, there were no guidelines for E-mail usage prior to the spring of 1997, other than that stated by IS Division employee Green, who testified that employees were told "to play with it, get on it, just start sending E-mails to whomever [you want] to, so you can get familiarized with the system." These instructions set no limit on E-mail usage.

Accordingly, it is found that E-mail usage at CSC constituted a condition of employment in this case.

D. Respondent's E-mail Policy was a Change in Conditions of Employment and Therefore Required Bargaining

For almost ten years, from 1989 when E-mail was first introduced to CSC, until approximately May 1997, E-mail was used by employees at the CSC for both official business and nonofficial purposes without Respondent challenging any personal use. Furthermore, Respondent was undeniably aware of the nonofficial E-mail usage since the record clearly disclosed that managers not only received nonofficial E-mail from bargaining unit employees without challenging the practice for several years, but managers and supervisors actually sent out their own nonofficial E-mail messages.

Regarding the knowledge of Respondent's managers as to the practice, it is uncontested that Assistant Director Wayne Hicks, second highest official at CSC, led the way by sending and receiving numerous E-mails that were not related to official business and his use in this regard was known to employees at CSC. Additionally, Respondent's witness, Furst, conceded that as a branch manager, he sent E-mail to bargaining unit employees which was inappropriate under the new policy. The record also showed that supervisors Hawkins, Beaulieu, Straman, and Weber both sent and received nonofficial E-mail messages. Any employee who saw nonofficial business E-mail from Mary Straman could also have assumed that such E-mail was authorized by management. Straman was, after all, the official in charge of making sure that E-mail was being used properly by CSC employees. Accordingly, and based on the foregoing, the record establishes that prior to the spring of 1997, E-mail at the CSC was used by employees, both bargaining unit and nonbargaining unit, for nonofficial purposes over an extended period of time and Respondent was aware of such use and did not challenge it.

In addition to the General Counsel's case, the Union argues that a past practice of allowing E-mail use for nonofficial purposes existed and that the "particular practice" in this case was certainly an established past practice. Such a theory expands that of the General Counsel who stopped short of arguing that a past practice was established in this matter. In my view, there is validity in the Charging Party's position that a condition of employment based on a past practice indeed existed in this matter. The Charging Party asserts that in view of the past practice the use of E-mail here should be treated as the Authority handled use of agency telephones in *DMA*, 40 FLRA at 244. In the foregoing matter, while the telephones involved the technology of performing work under section 7106(b)(1) of the Statute the Authority nonetheless found that the elimination of the service was within the duty to bargain.

Beginning in May 1997, Respondent altered E-mail usage by defining, for the first time, what constituted appropriate use. At that time, Respondent also informed certain employees during an administrative investigation that E-mail could only be used for official business purposes. According to Beverly Green, "[I]t was the first time employees were notified that there was a do's and don'ts on E-mail." On June 24, 1997, Respondent distributed an "All Employees Memorandum" that spelled out the new policy and advised employees that nonofficial use of E-mail was indeed grounds for discipline. By comparing how E-mail was handled at the CSC before and after Respondent's announcements in May and June 1997, it is readily apparent that Respondent implemented a new and different E-mail policy. Before that time, it is clear that E-mail was permitted for nonofficial business messages, but afterwards it was prohibited and personal use exposed employees to discipline.

Respondent argues that there was no change because the Office of Government Ethics Standards of Ethical Conduct and the Internal Revenue Service, Rules of Conduct have always required that E-mail be used only for communication relating to official business. Neither the OGE's, Standards of Ethical Conduct nor the Internal Revenue Services, Rules of Conduct, standing alone, prohibits E-mail of the type involved here.

Office of Government Ethics, Standards of Ethical Conduct Rule 2635.704, Use of Government Property, states:

> "An employee has a duty to protect and conserve
>
> government property and shall not use such property,
>
> or allow its use, for other than authorized purposes."

Internal Revenue Service, Rules of Conduct, Section 0.735-50, Use of Federal Property, provides:

> Employees may not directly or indirectly use or allow the use of Federal property of any kind for other than officially approved activities.

Respondent incorrectly argues that "official business" is the same as "authorized use." Section 2635.704(b)(2) of the Standards explains that use of Federal property would be "authorized" when the use is for those purposes for which Federal property is made available to the public, or those purposes authorized in accordance with law or regulation. The regulation does not attempt to set forth the purposes which are authorized. Instead, what use is "authorized" is a decision within the discretion of the agency.

In *National Treasury Employees Union and U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms,* 45 FLRA 339, 373 (1992), the Authority explained, "Determinations as to what constitutes an 'officially approved activity' are within the discretionary administrative authority of an agency and an agency is obligated to exercise that discretion through negotiations unless precluded by regulatory or statutory provisions." *Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 625, 648 (1997) *(PTO)*(matters concerning conditions of employment are subject to collective bargaining when they are within the discretion of an agency and are not otherwise inconsistent with law or applicable rule or regulation) and *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA 6, 10-11 (1986), *enforced sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, 836 F.2d 1381 (D.C. Cir. 1988). In other words, "officially approved activity" is whatever management says it is, so long as it is not precluded by law and so long as management negotiates with the union over it. Where no negotiations occur, as in this case, "officially approved activity" is determined by what management has allowed in the past.

It is not contested that Respondent allowed bargaining unit employees and managers at the CSC to use E-mail to exchange messages not related to official business, for an extended period of time, with impunity. The acceptance and actual participation in this practice demonstrates that this use of E-mail was an "authorized use" and "officially approved activity." Respondent also admits that there were no policies addressing the use of E-mail. Instead its managers relied on their own judgment to determine what uses of E-mail were considered "authorized use" or "officially approved activity." In the spring of 1997, Respondent apparently determined that E-mail unrelated to official business was no longer an authorized use or officially approved activity. This was a change in the existing conditions of employment concerning use of E-mail. Those newly developed E-mail restrictions concern a negotiable condition

of employment, requiring notification and bargaining with the exclusive representative before implementing this policy.

The record is also devoid of any evidence indicating that the use of E-mail for purposes unrelated to official business is in any way "precluded by regulatory or statutory provisions." Such usage is obviously left to an agency's discretion and the Statute requires bargaining over how the agency exercises its discretion on matters pertaining to working conditions. *PTO,* 53 FLRA at 648. Nor does E-mail usage involve the exercise of a management right under the Statute. In these circumstances, it appears that Respondent's decision to restrict E-mail to official business purposes was substantively negotiable. Consequently, by: (1) unilaterally implementing a new E-mail policy that narrowed the scope of "authorized use" and "officially approved activity" by limiting use of E-mail to official business purposes only; and (2) by its declaring that any other use was inappropriate and grounds for discipline, Respondent violated section 7116(a)(1) and (5) of the Statute. *Warner Robins ALC*, 53 FLRA at 1664. *Department of Veterans Affairs Medical Center, Muskogee, Oklahoma*, 53 FLRA 1228, 1240-41 (1998); *Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico*, 53 FLRA 1161 (1998) and *DMA*, 40 FLRA at 259.

Assuming that the change herein was not substantively negotiable, Respondent still had an obligation to bargain about procedures and appropriate arrangements of that decision pursuant to section 7106(b)(2) and (3) of the Statute. *Department of Health and Human Services, Social Security Administration,* 24 FLRA 403, 407-08 (1986). In assessing whether the effect of a change in 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. In *General Services Administration, Region 9, San Francisco, California*, 52 FLRA 1107, 1111 (1997)the Authority found that the impact of a unilateral change is greater than *de minimis* if it expands the matters that could subject employees to discipline. In this case, the new E-mail policy places new requirements on unit employees and subjects them to discipline if they do not comply. In view of the widespread and varied discipline that employees received for sending out nonofficial business E-mails at the CSC, it can hardly be argued that the E-mail policy was a trivial matter which did not have more than a *de minimis* impact on bargaining unit employees.

In all the circumstances, it is concluded and found, that Respondent violated section 7116(a)(1) and (5) of the Statute by implementing a new policy on appropriate use of E-mail at the Cincinnati Service Center without notifying or bargaining with the Union.

The Remedy

To remedy the unfair labor practice of unilaterally implementing a new E-mail policy that restricted E-mail for official business the General Counsel seeks to impose the following remedial actions: reinstatement of the *status quo ante* and making whole any employees adversely affected by the unilateral change, notification and bargaining with the National Treasury Employees Union before changing the E-mail policy, and posting the appropriate Notice to Employees.

In the absence of special circumstances, a *status quo ante* remedy is appropriate in cases where, as here, the change itself is fully negotiable. *Veterans Administration, West Los Angeles Medical Center, Los Angeles, California,* 23 FLRA 278, 281 (1986). Since Respondent did not demonstrate the existence of special circumstances warranting denial of such relief, a *status quo ante* remedy is, therefore, found to be warranted herein.

In cases such as this one, it is also appropriate to rescind the new policy and to make employees whole. Make whole relief is proper when employees have been adversely affected by a unilateral change in working conditions. *Department of Health and Human Services, Social Security Administration*, 50 FLRA 296, 299-300 (1995). Likewise, make whole relief includes the rescission of any discipline taken against employees because of the unilateral change. *U.S. Department of Justice, Immigration and Naturalization Service, El Paso District Office,* 34 FLRA 1035, 1049-51 (1990).[(5)] Accordingly, it appears appropriate to require Respondent to rescind any disciplinary actions taken against employees based upon the unilaterally implemented policy and make such employees whole. This relief, in my view, should also include employees Greg Hawkins and Paula Wells. The Authority has broad discretion under the Statute to fashion appropriate remedies for unfair labor practices. *National Treasury Employees Union v. FLRA*, 910 F.2d 964 (D.C. Cir. 1990)(en banc). The purpose of a *status quo ante* remedy is to place parties, including employees, in the positions they would have been in had there been no unlawful conduct. *See, Department of Veterans Affairs Medical Center, Asheville, North Carolina*, 51 FLRA 1572, 1580 (1996). While Paula Wells and Greg Hawkins were not bargaining unit employees when they engaged in the conduct which led to their suspension, both were in the bargaining unit when Respondent issued their disciplinary action. Furthermore, both were disciplined, in part, for their failure to take action against bargaining unit employees based upon a policy that was unlawfully implemented. Thus, Hawkins and Wells would not have been disciplined, at least in part, had the unlawful change not been implemented. Therefore, restoration of *status quo ante* should include, in my opinion, restoring Hawkins and Wells to where they would have been absent the unlawful conduct by rescinding the suspensions imposed upon them and restoring the pay and benefits lost as a result of these suspensions.

Based on all of the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Treasury, Internal Revenue Service, shall:

1. Cease and desist from:

(a) Changing policies governing employee use of E-mail at the Cincinnati Service Center without first affording the National Treasury Employees Union, Chapter 73, the employees' exclusive collective bargaining representative, notice and an opportunity to bargain concerning any proposed change in such policies.

(b) Refusing to bargain with the National Treasury Employees Union, Chapter 73, the employees' exclusive collective bargaining representative, concerning any change in policies governing employee use of E-mail at the Cincinnati Service Center.

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

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

(a) Rescind the changes in policy governing employee use of E-mail at the Cincinnati Service Center announced on June 24, 1997, and return to the policy in effect prior thereto concerning appropriate use of E-mail.

(b) Notify and upon request, bargain with the National Treasury Employees Union, Chapter 73, the employees' exclusive representative, concerning any proposed change in policy regarding employee use of E-mail at the Cincinnati Service Center.

(c) Rescind any counseling memoranda, suspensions or other disciplinary actions taken against bargaining unit employees for failure to comply with the new E-mail policy at the Cincinnati Service Center and make such employees whole, except for those disciplinary actions that would have been appropriate and lawful despite the Cincinnati Service Center's improper implementation of a new E-mail policy.

(d) Post at its facilities at the Cincinnati Service Center, Covington, Kentucky, 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 Director, and they 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.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago 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, August 31, 1998.

_____

ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Treasury, Internal Revenue Service, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

We Hereby Notify Our Employees That:

WE WILL NOT change policies governing employee use of E-mail at the Cincinnati Service Center without first affording the National Treasury Employees Union, Chapter 73, the employees' exclusive representative, notice and an opportunity to bargain concerning any proposed changes in E-mail policies.

WE WILL NOT refuse to bargain with the National Treasury Employees Union, Chapter 73, the employees' exclusive representative, concerning any proposed changes in policies governing employees use of E-mail at the Cincinnati Service Center.

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

WE WILL rescind the changes in policy governing employees use of E-mail at the Cincinnati Service Center announced on June 24, 1997, and return to the policy in effect prior thereto concerning appropriate use of E-mail.

WE WILL notify and, upon request, bargain with the National Treasury Employees Union, Chapter 73, the employees' exclusive representative, concerning any proposed changes in policies governing employees' use of E-mail at the Cincinnati Service Center.

WE WILL rescind any counseling memoranda, suspensions or other disciplinary actions taken against bargaining unit employees for failure to comply with the new E-mail policy at the Cincinnati Service Center and make such employees whole, except for those disciplinary actions that would have been appropriate and lawful despite our implementation of the new E-mail policy that restricted E-mail usage to official business only.

_____

(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 any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312) 353-6306.

1. For example, in an E-mail message to Wells, Hicks wrote:

It is almost UK time <g> . . . which means it's almost time for the young Wolverines to gobble them up this year!!!! <smile> The city of New York has been on a high since the World Series win. The Yanks have really captured the hearts of folks. Personally, I was glad to see Cecil Fielder go from worst (Tigers) to first (Yanks). He deserved it.

Although Hicks was no longer Assistant Director at the time this message was sent, this E-mail appears to be representa-tive of the correspondence between Wells and himself.

2. The Network Support Branch was eliminated in May 1997, due to a reorganization.

3. The E-mails involved light-hearted testimonials regarding the University of Kentucky basketball team and sports trivia questions.

4. The Statute provides in 5 U.S.C. § 7118(a)(4)(A):

. . . no complaint shall be issued based on any

alleged unfair labor practice which occurred more

than 6 months before the filing of the charge with

the Authority.

5. In *United States Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 39 FLRA 1431, 1438 (1991), the Authority found that it was not appropriate to rescind

disciplinary actions that were based in part upon employees' insubordination or misconduct in failing to abide by unilaterally implemented policies. According to this principle, even though a new policy may have been implemented unlawfully, employees are not free to engage in self-help remedies by refusing to abide by the unilaterally implemented policies. To do otherwise would be to condone and encourage insubordination.

In the instant case, it is not contented that any employee was disciplined for failing to abide by a new policy, once it was announced and implemented. All of the discipline involved here was applied retroactively to conduct occurring before the new policy was implemented. One cannot be insubordinate in refusing to follow orders which have not yet been given or failing to comply with policies which have not yet been announced. The concept of insubordination simply does not apply here. Accordingly, it has not been shown that there is anything to prevent the disciplinary actions involved here from being rescinded.