FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ESTILL, SOUTH CAROLINA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3976

CHARGING PARTY

Case No. AT-CA-13-0482

Carrie L. McCready
For the General Counsel

Jason White
For the Respondent

Jasper Scott
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On July 12, 2013, the American Federation of Government Employees, Local 3976, AFL-CIO (Union), filed an unfair labor practice (ULP) charge against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Estill, South Carolina (Respondent). (G.C. Ex. 1(a)). The Union filed an amended charge on September 13, 2013. (G.C. Ex. 1(b)). On September 23, 2013, the Regional Director of the Atlanta Region of the

FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by changing the procedure for canceling vocational training classes, without providing the Union notice and an opportunity to bargain. (G.C. Ex. 1(c)). The Respondent timely filed an Answer to the Complaint in which it admitted certain allegations but denied others, including the allegation that it violated the Statute. (G.C. Ex. 1(e)).

A hearing was held on November 14, 2013, in Estill, South Carolina. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent timely filed post-hearing briefs which have been fully considered.

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

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. (G.C. Exs. 1(c) & 1(e)). At all material times, Katheryn Mack served as the Supervisor of Education at the Respondent, was a supervisor or management official under 5 U.S.C. § 7103(a)(10) or (11), and acted on behalf of the Respondent. (G.C. Exs. 1(c) & 1(e)).

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under § 7103(a)(4) of the Statute, and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the Federal Bureau of Prisons. (G.C. Exs. 1(c) & 1(e)). The Union is an agent of the AFGE for the purpose of representing bargaining unit employees at the Respondent. (G.C. Exs. 1(c) & 1(e)).

The Respondent's most recent "Institution Supplement" on inmate accountability was instituted in November 2012. (R. Ex. 1). Generally, "inmate accountability is accomplished by daily census checks," (R. Ex. 1), "where each area is required, in the morning and the afternoon, to count the number of inmates in their building and report that number to the Control Center." (Tr. 140). The Respondent also utilizes a controlled inmate movement system that permits inmates to move within the compound at the top of the hour, for five minutes. (R. Ex. 1; Tr. 59-60). Special permission is required to move an inmate at other times. (R. Ex. 1; Tr. 60-61).

The Respondent's prison facility is separated into an operations division and a programs division. (Tr. 142-43). The programs division includes an Education Department that staffs five teachers and five vocational training instructors. (R. Ex. 11; Tr. 80, 142-43). Teachers hold classes for inmates in GED, English literacy, and Spanish literacy, whereas vocational instructors teach inmates a trade, such as HVAC or ServSafe. (Tr. 19, 75, 79; R. Exs. 11 & 13).

Vocational instructors have three to four classes each day, Monday through Friday, from 7:00am to 8:30pm. (R. Exs. 14 & 15; Tr. 42, 138). Each class has between fifteen and twenty-five inmates. (Tr. 46). The vocational training area contains three classrooms with computers, "a large . . . woodworking and equipment operating shop[]," a bathroom, and a drinking fountain. (Tr. 69-70). The vocational area is adjacent to the education department building, where Katheryn Mack's office is located. (Tr. 43-44).

At the beginning of class, instructors take attendance to "maintain accurate attendance logs so . . . the supervisor of education can evaluate" and "identify absences or unexcused absences." (Tr. 77). Unexcused absences affect an inmate's ability to receive a certificate or diploma in the respective course. (Tr. 77-78). During attendance, if an inmate is absent, the instructor must locate the inmate through radio contact with other employees; if the inmate cannot be located, the instructor calls the operations lieutenant to lockdown the prison. (Tr. 47). The staff then performs "controlled moves from the various areas of the prison," ordering inmates back to the housing units. (Tr. 48). Once the inmates are in the housing units, "each inmate is visually identified" until the missing inmate is found. (Tr. 48). This process can "easily take 15 minutes" or longer if there are several inmates absent from the class. (Tr. 47). When the inmates are present, it takes approximately five minutes for an instructor to take attendance. (Tr. 67).

Vocational instructors are required to spend "at least 75% of [the] 40-hour workweek in instruction or in work related to instruction, with a minimum of 50% spent in direct classroom instruction." (R. Ex. 15; Tr. 55-56). Time spent taking attendance or locating missing inmates detracts from instruction time. (Tr. 56-57). Instructors, unlike teachers, cannot provide substitute teaching: each instructor is certified to teach a specific trade and can lose their accreditation if an uncertified instructor teaches their course. (Tr. 75).

In addition to classes, inmates are assigned to work details. Work details are essentially jobs. Inmates get paid to "clean the bathrooms, mop the floors, sweep up the shop, take care of general maintenance," and take out trash. (Tr. 54). Every morning, there is a "work call" between 7:30am and 8:00am. (Tr. 45). At this time, inmates "report to their work detail and check in with their detail supervisor." (Tr. 45). Detail supervisors maintain a "detail pouch" containing the names and photos of the inmates assigned to their work detail. (R. Ex. 1; Tr. 66). The "pouch" also includes information concerning "call-outs or classes . . . ." (Tr. 45). If an inmate is scheduled to attend a class, he is excused from the work detail at the specified time, and is expected to return to the detail once the class ends. (Tr. 46). If the class is canceled, the inmate should return to his work detail. (Tr. 46, 146).

Robert Vanderslice has been a vocational training instructor at the Respondent since 2008. (Tr. 42). According to Vanderslice, since 2008, during an instructor's absence, other instructors would "hang a sign on the outermost door" of the vocational area, indicating that the absent instructor's classes were canceled. (Tr. 44-45). Instructors hung the sign so "the inmates didn't come into the vocational training area." (Tr. 44-45). If the instructors did not hang a sign, they would orally direct inmates "to go back to work or to report to their detail." (Tr. 45). Vanderslice also testified that Katheryn Mack directed him to hang a sign "a dozen" times. (Tr. 46, 61).

At the hearing, Mack did not recall ordering instructors to hang cancellation signs. (Tr. 116). She testified that vocational instructors started hanging signs recently, around April 2013. (Tr. 132). According to Mack, in addition to posting signs, instructors utilized the public address system to announce class cancellations. (Tr. 103-04). Associate Michael Warden Allen Robbins testified that he had a conversation with Mack regarding the signs in June or July 2013. (Tr. 155).

On July 10, 2013, Katheryn Mack met with three of the five vocational training instructors to outline "new procedures for taking [class] attendance . . . ."[*] (G.C. Ex. 2; Tr. 50-51). The Union was not represented at the meeting. (Tr. 51-52). Mack announced that, in order to cancel class, vocational instructors needed to request the cancellation by routing a memorandum, with an attached class roster, to Associate Warden Michael Robbins, through Mack. (Tr. 50). Mack assigned each instructor backup accountability duties for another instructor. During an instructor's absence, the backup instructor was required to "pull out a roster of [the] missing training instructor's classes, take attendance for them, write a memo to Ms. Mack stating who showed up and who didn't, and then go back to" teach their class. (Tr. 50-51).

The Union learned of the proposed change from one of the vocational instructors, (Tr. 25-26), and on July 11, 2013, the Union notified the Respondent of its intent to bargain. (G.C. Ex. 2). On July 15, the Respondent replied, informing the Union that the instructors could no longer post cancellation "sign[s] on the door . . . ." (G.C. Ex. 3). It also stated that vocational instructors were assigned "Backup Student Accountability duties[]" under the "2012 Education Staff Duties and Responsibilities," and must "follow procedures outlined in Institution Supplement EST 5500.13, Inmate Accountability, Section E." (G.C. Ex. 3).

Section E is entitled "Excusing Inmates from Work Details" and states in pertinent part:

> Detail supervisors are not authorized to release inmates from their assigned details prior to the end of normal working hours. Written authorization must be obtained from the associate warden of programs prior to releasing inmates early from any detail. The exception would be during a declared institution emergency. Approval will be obtained in advance from the associate warden of programs when any detail or part of a detail will not be working on a certain day. The detail supervisor, through the respective department head, will submit a request to the associate warden for authorization to release inmates from the detail. When approval is obtained, a list of those excused inmates will be published. The original will be sent to the captain's office with a copy to the control center officer, and one copy to the housing unit officer(s) affected.

(R. Ex. 1).

[*] At this time, the other two instructors were on leave. (Tr. 50).

The Respondent specified that it would implement the changes on August 1, 2013. (G.C. Ex. 3). It requested the Union to submit its "impact and implementation issues . . . no later than July 31, 2013." (G.C. Ex. 3 at 2). For some reason, Mack implemented the new class cancellation procedure the next day, on July 16, when she directed a vocational instructor to "route a memorandum" to Associate Warden Robbins, with an attached "current roster," "in order to cancel [the] assigned classes." (G.C. Ex. 4).

On July 29, 2013, the Union submitted its impact and implementation concerns to the Respondent in a five-page document. (G.C. Ex. 5). The Union noted that the presence of additional inmates in the vocational training area, without proper staff oversight, would pose a safety risk. (G.C. Ex. 5). In the past, the staff discovered homemade weapons and knifes, constructed from broken printers, in the vocational training area. (Tr. 117-18). On July 30th, the Respondent informed the Union that "[n]one of [its] impact and implantation issues warrant[ed] negotiations." (G.C. Ex. 6).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) contends that the Respondent violated § 7116(a)(1) and (5) of the Statute by changing the cancellation procedure for vocational training classes, without providing the Union notice and an opportunity to bargain. The GC maintains that the Respondent had an obligation to bargain over the change because the previous class cancellation procedure was established as a condition of employment through past practice. According to the GC, from 2008 to July 2013, the parties' practice was to place a sign on the front window of the vocational training area to alert inmates of class cancellations. During this time, instructors never took attendance for an absent instructors' class, nor did instructors submit a memorandum and roster to Associate Warden Robbins, through Katheryn Mack.

The GC asserts that the instructors' job description is unclear regarding backup accountability duties. It further avers that the relevant matter is whether instructors performed backup attendance duties prior to the change. *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 174 (2009) (*Kirtland*). Similarly, the GC argues that the Respondent's institutional supplement does not address the changes in this case. The institution supplement refers to "work details"; it does not discuss the cancellation procedure for "classes." Even if the Respondent's institution supplement addressed the change, the GC contends that the content of the supplement is not conclusive if the parties engaged in a different practice.

The GC next argues that the alleged change was greater than de minimis because it had a reasonably foreseeable impact on vocational instructors' performance appraisals. *See GSA, Nat'l Capital Region, FPS Div., Wash., D.C.*, 52 FLRA 563, 567-68 (1996). The procedure requires that an instructor take attendance for an absent instructor's classroom, which takes between five and fifteen minutes. Instructors are obligated to spend at least seventy-five percent of their workweek in instruction; time spent taking attendance reduces the time available to reach the requisite benchmark. The new procedure also reduces the

instructors' ability to monitor their own inmates, similar to the situation in *Fed. Bureau of Prisons, FCI, Bastrop, Tex.*, 55 FLRA 848 (1999) (*Prisons*) (changes to inmate lay-in and accountability practices). In turn, unsupervised inmates could foreseeably utilize class materials to craft makeshift weapons, creating a security risk for the instructors.

The GC further contends that requiring vocational instructors to submit a memorandum to the Associate Warden in order to cancel class creates a new condition for instructors to receive leave. *U.S. Gov't Printing Office*, 13 FLRA 203 (1983). Previously, leave requests were submitted to Mack.

As a remedy, the GC seeks a status quo ante relief. The GC argues that under the factors set forth in *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (*FCI*), a status quo ante remedy is appropriate because the Respondent did not notify the Union of the changes, the Union requested to bargain as soon as it learned of the changes, the Respondent did not intend to bargain with the Union, and the Respondent failed to demonstrate that a status quo ante remedy would impair its operations. The GC also requests that the Respondent be ordered to post a Notice signed by the Warden, and to electronically distribute the Notice to all bargaining unit employees.

Respondent

The Respondent denies that it violated the Statute as alleged. In support of this contention, the Respondent asserts that it did not change vocational instructors' conditions of employment by changing the class cancellation procedure. The Respondent maintains that requiring instructors to submit a memorandum to cancel class is a non-bargainable variation to the accountability procedures outlined in its institution supplement.

The Respondent disputes the existence of a past practice and argues that instructors utilized inconsistent approaches when canceling class, including making announcements over the public address system, informing inmates orally, and posting signs. Thus, according to the Respondent, the instructors did not consistently engage in a practice that established a condition of employment. *U.S. DOL, Wash., D.C.*, 38 FLRA 899 (1990). Furthermore, by providing the instructors with their job descriptions, the Respondent routinely assigned instructors the duty to provide backup accountability.

The Respondent disputes the GC's argument that the class cancellation procedure created an additional condition for granting leave. In the Respondent's view, the procedure for requesting leave is distinct from the procedure for requesting a class cancellation. Each involves a different management official.

In the alternative, the Respondent maintains that any change was de minimis. First, it argues that the memorandum required to cancel class necessitates only one or two sentences and contains similar information to the signs previously used by instructors. Second, the Respondent contends that the additional attendance duties are substantially similar to duties already performed by the instructors. *Nat'l Treasury Employees Union*, 64 FLRA 462, 464 (2010) (*NTEU*).

If a violation is found, the Respondent asserts that a status quo ante remedy is inappropriate. The Respondent specifically focuses on the last factor of the *FCI* framework, and argues that a status quo ante remedy would impair the efficiency of its operations by creating a security risk. According to the Respondent, under the previous procedure, there is no way to know if inmates return to their work detail after they are directed away from the vocational area. Posting signs and directing inmates away from the vocational area permits inmates to exploit the security of the prison and potentially subjects the Respondent to civil liability.

ANALYSIS AND CONCLUSIONS

It is well established that an agency may not change a condition of employment without fulfilling its bargaining obligations. *E.g., Kirtland*, 64 FLRA at 173. Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over the change, if the change will have more than a de minimis effect on conditions of employment. *Id.* Where, as here, the substance of a change is not subject to negotiation, an agency is nonetheless obligated to bargain over the impact and implementation of the change, so long as the change has more than de minimis effect on conditions of employment. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*).

Conditions of employment may be established for bargaining unit employees by either practice or agreement. *See U.S. Dep't of the Treasury, IRS*, 62 FLRA 411, 413 (2008). However, a matter that is not a condition of employment does not become a condition of employment through practice. *Id.* It is necessary to conduct an independent analysis of whether the matter is a condition of employment at the time the dispute arises. *Id.* If a matter is a condition of employment, it must then be determined whether that condition was established for bargaining unit employees through past practice. *See Id.*

The class cancellation procedure implemented by the Respondent affected the vocational instructors' conditions of employment

To determine whether a matter concerns a "condition of employment," the Authority applies the test set out in *Antilles Consol. Educ. Assoc. & Antilles Consol. Sch. Sys.*, 22 FLRA 235, 237 (1986). The Authority considers: (1) whether the matter pertains to unit employees; and (2) whether it has a direct connection to their "work situation." *Id.* The parties do not dispute whether the vocational instructors are bargaining unit members. In the absence of contrary evidence, I find that the vocational instructors are bargaining unit members.

As for the second factor, I find that there is a direct connection between the class cancellation procedure and the instructors' safety. Prior to the alleged change, during an instructor's absence, other instructors would "hang a sign on the outermost door" of the vocational area, indicating that the absent instructor's classes were canceled. (Tr. 44-45). This prevented the absent instructor's inmates from entering the vocational area. (*Id.*).

After the change, the Respondent required instructors to invite inmates into the vocational area for backup attendance. (Tr. 58-59). Once attendance is complete, the additional inmates cannot return to their work detail without "disrupting the compound's movement" (Tr. 60), and the instructors cannot monitor the inmates because they are required to teach their class, (Tr. 58). Consequently, fifteen to twenty-five unsupervised inmates have "full access to all the carpentry and HVAC equipment . . . and access to the various computer labs." (Tr. 58-69). The materials in the vocational area can be, and have been, used to make knives and other weapons. (Tr. 117-18). There is also evidence that inmates have transferred weapons from the vocational area to other areas of the prison, potentially affecting other bargaining unit employees. (*Id.*).

In my opinion, it is evident that the class cancellation procedure implemented by the Respondent directly affects the instructors' working situation by limiting the instructors' capacity to ensure their safety.

The parties established a past practice concerning class cancellations in vocational training

In order to determine whether the Respondent violated the Statute, there must be a finding that the Respondent changed unit employees' conditions of employment. *PBGC*, 59 FLRA at 50-51. In order to establish a condition of employment by past practice, the practice must have been "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 48 (2012). The "[e]ssential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time." *U.S. Dep't of the Air Force, U.S. Air Force Acad., Colo.*, 65 FLRA 756, 758 (2011) (*Air Force*) (quoting *U.S. DHS, Border & Transp. Directorate, Bureau of Customs & Border Prot.*, 59 FLRA 910, 914 (2004)).

To begin, I do not find that the Respondent changed its leave procedure, as maintained by the GC. Specifically, the GC asserted that, under the new class cancellation procedure, Katheryn Mack could not approve an instructor's leave request until Associate Warden Robbins approved the respective class cancellation request. However, there is no evidence on the record to support such an argument. Vocational instructors continued to submit leave requests directly to Mack, as they did before the change. (Tr. 49, 152). Such requests are "approved or denied based on whatever the staffing level may be." (Tr. 117). The record clearly establishes that Mack continued to approve instructors' leave requests, after the change, regardless of the corresponding class cancellation request. (G.C. Ex. 4; Tr. 123-24). As such, the Respondent did not impose a practice that was different than what previously existed.

As for the class cancellation procedure, the existence of a past practice, in this case, hinges on the credibility of the witnesses. The testimony varies considerably with regard to the duration of the practice. According to Vanderslice, instructors posted signs to cancel class for roughly five years. (Tr. 61). Mack, on the other hand, testified that signs were posted for approximately three months. (Tr. 132).

After carefully considering the record, the consistency of the witnesses' testimony, and the witnesses' demeanor, I credit Vanderslice's testimony. During the hearing, Vanderslice testified that Mack directed him to post a class cancellation sign at least twelve times over the course of five years. (Tr. 61). Mack did not refute Vanderslice's declaration. Instead, Mack stated: "[I]f I did, it was with my approval and that's the way it should be." (Tr. 116). Mack was also asked if there was a particular time when she noticed class cancellation signs. She responded: "Earlier in [the] year, I began to notice *with more frequency* flyers being posted on doors . . . ." (Tr. 103-04) (emphasis added). Mack was asked if this was the first time she noticed the signs, to which she replied: "This is when I delved into it . . . ." (Tr. 105). Based on the testimony, it appears that Mack was aware that signs were being posted for some time prior to April.

Crediting Vanderslice's testimony, I find that from 2008 to July 2013, instructors would hang a sign on the outermost door of the vocational training area to declare class cancellations. *See Air Force*, 65 FLRA at 758 ("[A] period of 'several years' suffices for purposes of establishing a past practice."). If the instructors did not hang a sign, they would orally notify inmates that the particular class was canceled. (Tr. 45). Also, the evidence demonstrates that the practice was consistently exercised with the knowledge and consent of the Respondent. Vocational instructors posted the signs on the front window of the vocational area, in clear view of Katheryn Mack's office. (Tr. 116). Mack sometimes called instructors, directing them "to hang a sign to cancel their classes." (Tr. 46). Mack instructed one of the instructors to post a sign no less than a "dozen" times. (Tr. 61).

The Respondent maintains that the practice was not consistently exercised because instructors also utilized the public announcement system to cancel classes. I find this argument unpersuasive. Mack was the only witness to provide testimony regarding the use of the public address system. (Tr. 103-04). There is no other evidence on the record to corroborate her account. The record establishes that all vocational class cancellations since 2008 have been governed by the parties' past practice. (Tr. 44-45). When instructors had advanced knowledge of another instructors absence, they would "hang a sign on the outermost door" of the vocational area. (Tr. 44). When the instructors were not afforded advanced notice, they would orally direct inmates "to go back to work or to report to their detail." (Tr. 44-45). During this time, instructors were not prohibited from hanging signs, they did not take roll for an absent instructors class, and they did not submit a cancellation memorandum. (Tr. 48).

Based on the record, the parties exhibited a consistent pattern of conduct. (Tr. 47-48). Accordingly, I find that the parties engaged in a past practice concerning vocational class cancellations.

I further find that the Respondent altered the parties' practice by proposing, then instituting, a new class cancellation procedure. In July 2013, the Respondent prohibited instructors from hanging signs to cancel class. (G.C. Ex. 3). Additionally, the Respondent required instructors to provide backup attendance for an absent instructor's class. (G.C. Ex. 2; Tr. 50-51). The procedure necessitates that an instructor leave his classroom, "pull up [the absent instructor's] roster and find out what classes . . . they should be teaching during that timeframe." Then "find out where those inmates were, what classroom they were in, and then," take roll. (Tr. 68). Taking roll requires instructors to locate missing inmates by calling other employees and the operations lieutenant. (Tr. 47, 58). After attendance, instructors are obligated to "write a memo to Ms. Mack stating who showed up and who didn't." (Tr. 50-51). Further, inmates in the cancelled class remained in the education area without direct supervision rather than returning to their work details. In short, the Respondent implemented a procedure that drastically differed from the parties' past practice.

The Respondent insists that it did not change conditions of employment because the class cancellation procedure is "merely a variation of an existing duty to conduct inmate accountability," as promulgated in the institution supplement and in the instructors' job descriptions. (R. Br. 5-6). First, it is apparent that the procedure outlined in the institution supplement is not applicable to class cancellations. Section E, is entitled "Excusing Inmates from *Work Details*." (R. Ex. 1) (emphasis added). Nowhere does that section directly or implicitly advance a *class* cancellation procedure for vocational training. Second, the Authority has held that an "employee's position description does not prevent the assignment of . . . duties from constituting a change in conditions of employment, if the employee had not been performing those duties before a change." *Kirtland*, 64 FLRA at 174-75. As demonstrated above, prior to 2013, vocational instructors did not perform backup attendance duties for absent instructors. (Tr. 48).

I conclude that the implementation of the class cancellation procedure changed the vocational instructors' conditions of employment.

The changes to the class cancellation procedures were more than de minimis

As mentioned previously, an agency that changes conditions of employment must provide notice and an opportunity to bargain over those changes that have more than a de minimis effect on conditions of employment. *E.g., Kirtland*, 64 FLRA at 173. To determine if a change is greater 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." *Id.*

The evidence establishes that the procedure implemented in this matter was greater than de minimis. In addition to submitting a memorandum and roster, which was not previously required, instructors must also leave their classroom, "pull up [the absent instructor's] roster," find out what course the absent instructor would be teaching and what classroom the instructor would be teaching in, "find out where those inmates [are and] what classroom they [are] in, and then," take roll. (Tr. 68). If an inmate is absent during roll, the

instructor must locate the inmate through radio contact with other employees; if the inmate cannot be located, the instructor must call the operations lieutenant to lockdown the prison. (Tr. 47). The staff then performs "controlled moves from the various areas of the prison," ordering inmates back to the housing units. (Tr. 48). Once the inmates are in the housing units, "each inmate is visually identified" until the missing inmate if found. (Tr. 48). The process can "easily take 15 minutes" or longer if there are several inmates absent from the class. After attendance, the instructor is required to "write a memo to Ms. Mack stating who showed up and who didn't." (Tr. 51-52). At that point, the instructor must return to teach his class. Further, the inmates in the cancelled class remain in the education area, essentially unsupervised.

Under the new procedure, each instructor performs backup attendance for just one instructor. Because each instructor teaches three to four classes per day, a backup instructor could foreseeably spend roughly one hour per day performing expanded attendance/reporting duties. *See NTEU*, 64 FLRA at 464 ("[T]he Authority has found a change to have a greater than de minimis effect when . . . employees' workloads increase significantly.")

The Respondent argues that instructors would need to perform backup duties only infrequently, during another instructor's absence. However, the evidence demonstrates that instructors are regularly absent. When Katheryn Mack announced the new class cancellation procedure on July 10, 2013, two of the five instructors were on leave. (Tr. 50). Instructor Vanderslice took a "significant amount of time . . . sick leave[]" in 2013, (Tr. 120), and another instructor was on military leave for "quite some time," (Tr. 65-66). *See Prisons*, 55 FLRA at 869 (sporadic workload increases, due to other employees' absences, found more than de minimis). Accordingly, it was reasonably foreseeable that requiring instructors to take attendance for an absent instructor's class would occur more than infrequently and have a greater than de minimis effect.

It was also reasonably foreseeable that the time-consuming cancellation procedure would adversely impact vocational instructors' appraisals. Each instructor is required to spend "at least 75% of [the] 40-hour workweek in instruction or in work related to instruction." (R. Exs. 14 & 15; Tr. 55-56). Under the new cancellation procedure, instructors are required to take attendance for an absent instructor's class. The entire process, as outlined above, generally takes between five and fifteen minutes per class, but can take longer. (Tr. 47). It is undisputed that the aggregate of the expanded duties detracts from instruction time, (Tr. 58), and impacts performance appraisals. *See U.S. DOJ, INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 35 FLRA 1039, 1048 (1990) (time spent on new assignment took time away from other work, and could affect promotions and ratings). Given the impact that an employee's performance appraisal can have on promotions, removals, within-grade increases, and awards, it was reasonably foreseeable that the changes in this case would have more than a de minimis impact on the instructors' conditions of employment.

Because the change was more than de minimis, I find that the Respondent was obligated to provide the Union with notice and an opportunity to bargain.

The Respondent failed to satisfy its bargaining obligations

As noted above, when an agency's decision to change a past practice involves the exercise of a reserved management right under the Statute, the agency is required to notify the exclusive representative before making the change, and to afford the exclusive representative an opportunity to bargain, upon request, concerning the impact and implementation of the change. *See PBGC*, 59 FLRA at 50.

The notice provided by an agency must be "sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining." *E.g., U.S. DOD, Def. Commissary Agency, Peterson AFB, Colo. Springs, Colo.*, 61 FLRA 688, 692 (2006) (*Commissary*). In this case, the Respondent predictably did not contend that it provided the Union with notice. The evidence reveals that the Union learned of the change through a vocational instructor, not the Respondent. (Tr. 25-26). Announcing a proposed change to employees is not tantamount to apprising the exclusive representative with notice of the change, the scope or nature of the change, the certainty of the change, or the planned timing of the change. *See Commissary*, 61 FLRA at 692. Thus, the Respondent failed to provide the Union with proper notice under the Statute.

I additionally find that the Respondent failed to bargain in good faith with the Union regarding the impact and implementation of the change. *See* 5 U.S.C. § 7114(b)(1) (it is an agency's duty to "approach the negotiations with a sincere resolve to reach a collective bargaining agreement."). Despite the lack of notice, the Union promptly requested to bargain over the proposed procedural change. (G.C. Ex. 2). In turn, on July 15, 2013, the Respondent requested "impact and implementation issues . . . no later than July 31." (G.C. Ex. 3 at 2). However, the next day, on July 16th, the Respondent implemented the change, two weeks before the implementation date provided to the Union. (G.C. Exs. 3 & 4). By implementing the change weeks before the Union was requested to submit, and did submit, its impact and implementation issues, the Respondent foreclosed the possibility of any meaningful bargaining. *See Dep't of the Air Force, Headquarters, 93rd Combat Support Grp. (SAC), Castle AFB, Cal.*, 18 FLRA 642, 653 (1985) (an agency must "retain an open mind and intend to bargain regarding the effect of, and procedures involved in, any contemplated action."). Such conduct demonstrates a categorical unwillingness to discuss or consider the issues with the Union and cannot be categorized as performed in good faith.

Consequently, I find that the Respondent's manifest failure to satisfy its statutory obligations constitutes a violation § 7116(a)(1) and (5) of the Statute.

REMEDY

Where an agency has failed to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a status quo ante remedy using the factors set forth in *FCI*. 8 FLRA at 606. The *FCI* factors are: (1) whether and when notice was given to the Union by the Respondent; (2) whether and when the Union

requested bargaining; (3) the willfulness of the Respondent's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a status quo ante remedy would disrupt the efficiency and effectiveness of the Respondent's operations. *Id.*

The first two factors weigh in favor of a status quo ante remedy. The Respondent did not notify the Union of the change, (Tr. 25, 51-52), and the Union promptly requested bargaining when it learned of the proposed change. (G.C. Ex. 2). With respect to the third and fourth factor, it is evident that the Respondent willfully failed to discharge its bargaining obligations and the change adversely impacted the instructors. Vanderslice testified that during the July 10, 2013 meeting, Katheryn Mack asserted that "the union had nothing to do with" the procedural change. (Tr. 51-52). I credit Vanderslice's testimony, especially given that Mack instituted the cancellation procedure two weeks prior to the implementation date that was provided to the Union. (G.C. Exs. 3 & 4). Moreover, as demonstrated above, the new class cancellation procedure had, or could have, a substantial impact on the vocational instructors' duties, safety, and performance appraisals.

Finally, considering the fifth factor, I recognize that the Respondent has a potential security concern in this case. I emphasize that the Respondent has demonstrated only the *possibility* of a security issue. A finding that a status quo ante remedy would disrupt the efficiency of the Respondent's operations "must be based on record evidence." *Army & Air Force Exch. Serv., Waco Distrib. Ctr., Waco, Tex.*, 53 FLRA 749, 760 (1997). In this case, the record does not support a conclusion that directing inmates back to their work detail would lead to a "security hazard" or "civil liability." (R. Br. 11). For the past five years, vocational instructors have directed inmates back to their work detail seemingly without issue. Although there is no way to determine if inmates actually return to their detail, there is no evidence that an inmate has ever failed to do so. Thus, it is unclear whether a status quo ante remedy would impair the efficiency of the Respondent's operations by creating a security risk. *Prisons*, 55 FLRA at 856-57.

After considering the factors, I find that it is appropriate to order the parties to return to the status quo.

The Respondent is further ordered to cease and desist from changing conditions of employment without satisfying its bargaining obligations. The Respondent is directed to bargain, upon the request of the Union, over the impact and implementation of changes to its vocational class cancellation procedure. I will incorporate an electronic dissemination into the Order in accordance with the Authority's decision that ULP notices should, as a matter of course, be posted both on bulletin boards and electronically. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

CONCLUSION

The Respondent was obligated to notify the Union of the procedural changes to class cancellations in vocational training, and to negotiate with the Union, upon request, over the impact and implementation of its decision. The Respondent's failure to do so constitutes a violation of § 7116(a)(1) and (5) of the Statute.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Estill, South Carolina, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes to working conditions of unit employees represented by the American Federation of Government Employees, Local 3976 (Union), including implementing changes to class cancellation procedures in vocational training, without first providing the Union with notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Notify and, upon request, bargain with the Union, over the impact and implementation of changes to the class cancellation procedure in vocational training.

(b) Restore the class cancellation procedure for vocational training, as it was prior to July 2013.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the 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.

(d) Disseminate a signed copy of the Notice through Respondent's e-mail system to all bargaining unit employees. This Notice will be sent on the same day that the Notice is physically posted.

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

Issued, Washington, D.C., May 15, 2015

Susan E. Jelen

SUSAN E. JELEN
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 Justice, Federal Bureau of Prisons, Federal Correctional Institution, Estill, South Carolina, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes to working conditions of unit employees represented by the American Federation of Government Employees, Local 3976 (Union), including implementing changes to class cancellation procedures in vocational training, without first providing the Union with notice and an opportunity to bargain to the extent required by the Statute.

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

WE WILL notify and, upon request, bargain with the Union over the impact and implementation of changes to the class cancellation procedure in vocational training.

WE WILL restore the class cancellation procedure for vocational training, as it was prior to July 2013.

_____
(Agency/Activity)

Dated: _____ 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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, Georgia 30303, and whose telephone number is: (404) 331-5300.