FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-31
Office of Administrative Law Judges
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FEDERAL BUREAU OF PRISONS METROPOLITAN DETENTION CENTER BROOKLYN, NEW YORK RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3148 CHARGING PARTY	Case No. BN-CA-12-0205

Neil P. Daly
For the General Counsel

Tiffany O. Lee
For the Respondent

Tyrone L. Covington
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

In early 2010, the Respondent revised its policy manual concerning a housing complex it maintains for some of its employees. It apparently sent copies of the policy to the unions representing its employees, but the notice did not comply with the contractually required manner of service, and one of the unions claims to have never seen the notice. Near the end of 2011, when the union learned of construction that was going to disrupt activities at the housing complex, it also learned about the 2010 policy revision and sought to bargain over the policy and recent problems related to the construction. When the Agency refused to bargain, the union filed this unfair labor practice charge.

The main questions in this case are whether the union was authorized to bargain at the local level, whether it was entitled to engage in midterm bargaining, and whether it waived its right to bargain in 2011 by failing to request bargaining in 2010. Because the nationwide collective bargaining agreement authorizes local-level bargaining; because the nationwide agreement does not prohibit midterm bargaining; and because the union did not waive its midterm bargaining rights, the Respondent was obligated to bargain over the Supplement, and its refusal to do so violated § 7116(a)(1) and (5) of the Statute.

STATEMENT OF THE CASE

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

On March 2, 2012, the American Federation of Government Employees, AFL-CIO, Local 3148 (Local 3148) filed an unfair labor practice charge against the Federal Bureau of Prisons, Metropolitan Detention Center, Brooklyn, New York (the Agency or Respondent). In that charge, Local 3148 asserted that the Agency violated the Statute by refusing to engage in midterm bargaining over an Agency policy. GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Boston Region issued a Complaint and Notice of Hearing on October 31, 2012, on behalf of the General Counsel (GC), asserting that the Agency violated § 7116(a)(1) and (5) by refusing to bargain over the policy. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on November 26, 2012, denying that it violated the Statute. GC Ex. 1(e). On December 20, 2012, the GC filed an unopposed Motion to Amend Complaint, which was granted. GC Exs. 1(f) & 1(h). On January 18, 2013, the Respondent filed a Motion for Summary Judgment, which the GC opposed, and which was denied. GC Exs. 1(m), 1(n) & 1(p).

A hearing was held in this matter on January 31, 2013, in New York City, New York. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have 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 within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (AFGE or the Council of Prison Locals), is the exclusive representative of a nationwide unit of employees of the Federal Bureau of Prisons (BOP). Jt. Ex. 2; Tr. 125. The AFGE and the BOP are parties to a nationwide collective bargaining agreement, known as the Master

Agreement. Jt. Ex. 1. The term of the Master Agreement runs from 1998 to 2001, but the agreement allows the parties to agree to extend the term in one-year increments. *Id.* at 83. According to undisputed testimony, the parties have continuously extended the Master Agreement, which has remained in effect at all relevant times. Tr. 27-28, 130.

Local 3148, a labor organization within the meaning of § 7103(a)(4) of the Statute, is an agent of AFGE for the purpose of representing bargaining unit employees at the Metropolitan Correctional Center, New York, New York (MCC New York), a pretrial detention facility located in Lower Manhattan. Tr. 19, 27, 29, 41. Local 3148 and MCC New York are parties to a Local Supplemental Agreement, dated September 28, 1999. GC Ex. 2.

The BOP owns a 116-unit apartment building in Brooklyn, called Dayton Manor. Jt. Ex. 3 at 2. The Bureau leases these apartments exclusively to employees of MCC New York and of the Metropolitan Detention Center, Brooklyn (MDC Brooklyn) and their families. Tr. 23, 113, 190; Jt. Ex. 3 at 2. Employees at MDC Brooklyn are represented by AFGE Local 2005. Tr. 22-23, 41.

Dayton Manor offers below-market-priced housing with a number of amenities, including free outdoor parking, low-cost indoor parking, a gymnasium, community rooms, free electricity, gas, heat, air conditioning, grounds maintenance, and 24-hour security. Tr. 20-22. Demand for Dayton Manor housing outstrips supply – some applicants are put on Dayton Manor's waiting list. Tr. 199. Dayton Manor is often used as temporary housing by employees who are new to the area. Tr. 169; Jt. Ex. 3 at 2.

Dayton Manor is operated and maintained by MDC Brooklyn. Tr. 189-90. However, some aspects of Dayton Manor's operations, including residency applications, administration of the waiting list, maintenance problems, parking, and construction are overseen by the Dayton Manor housing committee, which includes associate wardens from both MDC Brooklyn and MCC New York and representatives of both Local 2005 and Local 3148.[1] Tr. 46, 54-55, 59, 198-99.

This dispute has its origins on March 30, 2010, when MDC Brooklyn distributed a policy, referred to as Institution Supplement Number BRO-4200.10-5F (the Supplement), via email. Jt. Ex. 3; Tr. 32, 178, 189. The Supplement (which revised an earlier version, BRO-4200.10E4, dated 3/31/09) sets forth rules and procedures for applying to, living in, and moving out of Dayton Manor, among other things. Jt. Ex. 3 at 1. Local 3148 did not seek to bargain over the Supplement at any time in 2010.[2] *See* Tr. 32-33, 38-40.

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[1] It is unclear whether, as suggested by the witnesses' testimony cited above, there is a single housing committee or separate committees for MCC New York and for MDC Brooklyn, as reflected in Joint Exhibit 3 at 1.

[2] Witnesses disputed whether anyone from MCC New York or MDC Brooklyn management ever notified Local 3148 prior to the implementation of the Supplement. This issue will be discussed in more detail below.

In November 2011, employees started to complain to Tyrone Covington, Local 3148's President, about parking problems and disruptions related to construction at Dayton Manor, and on November 16, Covington asked Suzanne Hastings, the Warden at MCC New York, to bargain over those matters. GC Ex. 3; *see also* Tr. 33, 38, 53.[3] Hastings advised Covington to contact officials at MDC Brooklyn, and she forwarded Covington's letter to Christine Dynan, the Associate Warden at MDC Brooklyn. GC Ex. 4 at 1. On November 17, Dynan sent a memorandum to Covington denying his bargaining request. *Id.* at 2. Dynan did so based on her belief that residing at Dayton Manor is a "personal choice, not one required . . . as a condition of . . . employment," adding that there is "no nexus between any [Dayton Manor] resident's employment" at MDC Brooklyn or MCC New York and "their maintaining a personal residence at Dayton Manor." *Id.* at 1. Since events or policies regarding Dayton Manor did not affect any employee's working conditions, she contended that there was no bargaining obligation on such matters. *Id.* Covington responded to Dynan's letter on November 18, asserting that there was a direct nexus between the policies and actions at Dayton Manor and bargaining unit employees' conditions of employment, and arguing that MDC's refusal to bargain on this matter constituted an unfair labor practice. GC Ex. 5 at 1.

Covington testified that he discovered the Supplement on the MDC Brooklyn intranet site, shortly after he received Dynan's November 17 response. Tr. 32-33, 63. After reading the Supplement, Covington contacted Local 2005 President Marcial Mundo, and the two discussed "things in the . . . [S]upplement that we wanted – we needed some fixing to it." Tr. 64, 69. With Mundo's support, Covington submitted a memorandum to MDC Brooklyn Warden Duke Terrell requesting bargaining over the entire Supplement, on December 15, 2011. Jt. Ex. 4; Tr. 64. Dynan responded to the request on January 25, 2012. Again, she asserted that Dayton Manor was not a condition of employment, and that management had no duty to bargain over the Supplement. Jt. Ex. 5. Covington replied by email to Dynan on January 26, asserting that the "union has the right to open mid-term bargain[ing]." R. Ex. 2. He filed the unfair labor practice charge a few days later. Tr. 71.

At the hearing, witnesses elaborated on a number of issues raised by Local 3148's bargaining request. A key factual dispute pertained to whether Local 3148 was notified about the Supplement. Covington testified that neither he nor anyone else in Local 3148 knew of the Supplement until November 2011. Tr. 30-31, 38-39. Covington also testified that the Agency did not send Local 3148 a copy of the Supplement by certified mail, as required

[3] Covington's letter referenced the subject of "Staff Parking," cited repairs that would soon be made to the parking area, and invoked the union's right under Article 3 of the Master Agreement to "negotiate these changes." GC Ex. 3. He explained at the hearing that while his letter to Warden Hastings referred to problems raised at a meeting of the housing committee, but not specifically to Dayton Manor, Dayton Manor is the only housing facility for employees; therefore, it was mutually understood that he was referring to problems at Dayton Manor. Tr. 53-54. Covington said he didn't mention the 2010 revisions to the Supplement in his letter, because he was not even aware of the Supplement when he wrote the letter. Tr. 56.

under Article 3(d) of the Master Agreement.[4] By contrast, Emmanuel DeSoto, a general foreman at MDC Brooklyn, testified that the Agency emailed copies of the Supplement to "Mr. Covington and numerous other people," on March 30, 2010. Tr. 172-73, 177.

DeSoto also testified on the question of when the Supplement went into effect. Asked whether the Supplement was issued when it was emailed on March 30, DeSoto asserted that the "date the warden signed it is the date it's issued. I don't know that date." Tr. 181. Asked whether there was a copy of the Supplement with the Warden's dated signature, DeSoto stated, "If the warden dated it, I assume so, but I don't know if the warden dated it. I don't know." *Id.* The Supplement itself is dated March 30, 2010, and it states that it is "effective upon issuance." Jt. Ex. 3 at 1, 17.

Another question discussed was whether Local 3148 was authorized to bargain at the local level. Testimony on this and other issues was provided by Philip Glover, Northeast Regional Vice President for the Council of Prison Locals and one of the negotiators of the Master Agreement. Tr. 125, 128. With regard to the authority of AFGE locals generally, Glover asserted that Article 7(a) of the Master Agreement, which refers to AFGE's "duly designated . . . representatives," "allows [AFGE] to delegate who will represent the Union and act on behalf of the Union." Jt. Ex. 1 at 16;Tr. 129. With specific regard to local level bargaining, Glover stated that such bargaining is permitted under Articles 3 and 9 of the Master Agreement. Tr. 135-38. Glover testified that Article 3(d)(5) provides for "local negotiations" over locally-proposed policy issuances, and Article 9(a) provides for local negotiations of "[s]upplemental agreements covering shared services . . . ." Jt. Ex. 1 at 6, 21; *see also* Tr. 136, 138. He added that every institution is "aware that the locals have the right to do local . . . bargaining," based on the wording of the Master Agreement and on the decades-long bargaining relationship between AFGE and the BOP. Tr. 133.

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[4] Article 3(d) states in pertinent part:

All proposed national policy issuances . . . will be provided to the Union. If the provisions . . . change or affect any personnel policies, practices, or conditions of employment, such policy issuances will be subject to negotiation with the Union, prior to issuance and implementation.
1. when national policy issuances are proposed, the Employer will ensure that the President, Council of Prison Locals . . . and each local President receives a copy of the proposed policy issuance . . . . This will be accomplished by the policy issuance being sent, by certified mail . . . .
2. after the last Council of Prison Locals Executive Board member receives the proposed policy issuance, the Union . . . will have thirty (30) calendar days to invoke negotiations regarding the proposed policy issuance. . . .
. . . .
4. should the Union . . . fail to invoke the right to negotiate the proposed policy issuance within the time required above, the Agency may issue and implement the proposed policy issuance; and
5. when locally-proposed policy issuances are made, the local Union President will be notified as provided for above, and the manner in which local negotiations are conducted will parallel this article.

Jt. Ex. 1 at 5-6.

Witnesses also disputed whether Dayton Manor is, in fact, a "shared service." Glover stated that in general, shared services are a way to "cut cost[s]" by "shar[ing] services between facilities as much as possible." Tr. 138. As an example, he stated that some facilities "share . . . department heads" or "whole departments." *Id.* Glover added that shared services often involve multiple bargaining units, and he provided examples of two shared-services agreements that were negotiated by three local unions with members working at three different institutions at a federal correctional complex in Pennsylvania. Tr. 138-40; GC Exs. 7 & 8. According to Glover, Dayton Manor falls within the definition of a shared service. Tr. 144.

Covington provided similar testimony. He asserted that a shared service involves "two or more institutions . . . shar[ing] the same service . . . [such as] human resources," and he argued that Dayton Manor is a shared service, based on the fact that employees from both MDC Brooklyn and MCC New York live there. Tr. 47-48, 59. In addition, David Ortiz, an Associate Warden at MDC Brooklyn, agreed with Counsel for the GC that housing at Dayton Manor is "a service that [the Agency] provided" that is "shared between two different facilities." Tr. 166.

Dynan provided a narrower definition, arguing that a shared service involves "two institutions shar[ing] departmental staff or the leadership of a department with regard to operations at the institution." Tr. 190. Further, Dynan maintained that Dayton Manor is not a shared service because the "shared service component regards the service being rendered, and only MDC Brooklyn staff managed and operated [Dayton Manor] so there's no service being shared . . . ." Tr. 190; *see also* Tr. 171-72.

I asked Dynan why Dayton Manor would not be considered a shared service, since it provides housing to employees of two institutions. Dynan said, "When you word it that way, yes." Tr. 190-91. But she insisted that "MDC Brooklyn staff have 100 percent management and oversight of Dayton Manor." Tr. 191. Moreover, she insisted that "staff housing isn't a service in and of itself. Staff live there. There's no service connection there." Tr. 192-93. I asked Dynan what she based this on, and she answered, "In my knowledge – in the manner in which I'm speaking, it comes from somewhere. It comes from either program statements or memoranda[] that were generated resulting with the shared services that are in existence." Tr. 193. Dynan then confirmed that she was not aware of specific references to shared services in the Master Agreement. *Id.*

With regard to Local 3148's ability to engage in midterm bargaining, Glover asserted that "locals have a right to midterm-initiated bargaining . . . at their level and on the issues that are impacting only at the local level." Tr. 134-35. Covington added that there is no "covered by" bar to bargaining, even though there is a passing reference to housing committees in Article 10(a) of the Master Agreement. Tr. 47.

Dynan, however, insisted that Local 3148 had no right to engage in midterm bargaining over the Supplement, asserting that such bargaining is "a process reserved for bargaining over matters in the master agreement and the local agreement," and that extra-contractual matters like the Supplement are not appropriate for midterm bargaining. Tr. 210.

When Dynan was asked what she based this on, she replied, "That's my understanding," based on "my opinion and my experience." *Id.* When asked whether there was specific wording in the Master Agreement supporting her claim, she answered, "I'm not aware of any." *Id.*

Witnesses at the hearing also discussed whether Dayton Manor is a condition of employment. Glover asserted that "it's a condition of employment if our staff are living in those facilities[,]" which are "controlled by the Agency." Tr. 147. Covington stated that living at Dayton Manor is a condition of employment because employees living there who "violate any of these rules . . . can be disciplined by the Agency . . . ." Tr. 24; *see also* Tr. 71. Covington stated that Dayton Manor is a benefit for employees, noting that the housing comes with "big amenities," such as free electricity and gas. Tr. 24. When MDC's associate warden, David Ortiz, was asked whether the availability of housing at Dayton Manor made it easier for him to move to New York City, he answered, "Absolutely." Tr. 165. In contrast, Dynan asserted that housing at Dayton Manor is not a condition of employment because there is "nothing connect[ing employees'] duties . . . with living there." Tr. 226-27.

Although witnesses did not cite specific provisions of the Supplement connecting the policies for living at Dayton Manor to employee working conditions, a surface reading of the document reveals numerous connections. Under the Supplement, Dayton Manor applicants generally must have completed their probationary periods and cleared their initial background investigations. Jt. Ex. 3 at 2. The housing committee assigns apartments "as institution needs dictate," giving "[p]reference . . . to . . . hard to fill positions, relocating staff, and positions that fulfill specific needs of the institution." *Id.* at 3. Residents may not run businesses from their apartments without permission from the Director of the Bureau of Prisons, and residents "may not sunbath[e]" because "inmates," who help with maintenance, "can be expected to be at Dayton Manor during a variety of hours." *Id.* at 5-6; Tr. 74-75. Further, "vandalism" at Dayton Manor is "construed as destruction of government property and grounds for termination of occupancy and/or disciplinary action." Jt. Ex. 3 at 7.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent violated § 7116(a)(1) and (5) by refusing to engage in midterm bargaining over the Supplement. GC Br. at 13. The GC first asserts that there is a general right to engage in midterm bargaining, and that the subject of housing was not covered by any provision in the Master Agreement or in any locally negotiated agreement. GC Br. at 18 (citing *U.S. Dep't of Labor, Office of the Assistant Sec'y for Admin. & Mgmt., Dall., Tex.*, 65 FLRA 677, 680 (2011) (*DOL*); *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 50-51 (2000) (*Interior*)). The Authority has held that agency-provided employee housing is a condition of employment, based in part on the fact that the housing benefits both employees and management. *U.S. Dep't of HHS, Public Health Serv., Indian Health Serv., Quentin N. Burdick Mem'l Health Care Facility,*

Belcourt, N.D., 57 FLRA 903, 906-07 (2002) (*Indian Health Service*); *Antilles Consol. Educ. Ass'n*, 22 FLRA 235 (1986) (*Antilles*). The GC also argues that Local 3148 did not waive its right to engage in midterm bargaining. GC Br. at 18, 20 (citing *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987) (*IRS II*)).

The GC states that parties to a nationwide collective bargaining agreement may authorize local-level bargaining, and that the Master Agreement explicitly authorizes such local bargaining in Article 3(d)(5). Additionally, Article 9 and 9(a) authorize the negotiation of local agreements in general, and local bargaining over shared services such as Dayton Manor in particular. GC Br. at 16-17 (citing *U.S. Food & Drug Admin., Ne. & Mid-Atl. Regions*, 53 FRLA 1269, 1274 (1998) (*FDA*); *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 39 FLRA 1409, 1417-18 (1991) (*Hill AFB*)). Thus, Local 3148 was authorized to request midterm bargaining regarding Dayton Manor and the Supplement, and the Agency was obligated to engage in such bargaining.

The GC rejects the Respondent's claim that Local 3148 should have requested bargaining in 2010, when MDC Brooklyn implemented the revised Dayton Manor supplement. Because the Respondent never served the Supplement on Local 3148 by certified mail, as required under the Master Agreement, the contractual thirty-day period for requesting bargaining in 2010 never began, and Local 3148 cannot be found to have clearly and unmistakably waived its right to bargain. GC Br. at 20. For the same reason, the GC argues that the unfair labor practice charge was not untimely. The six-month period for filing a charge is measured from the date the Respondent refused Covington's December 15, 2011, bargaining request, not from the date the Respondent implemented the Supplement. *Id.* at 21.

With respect to the remedy, the General Counsel requests that a notice be posted for employees of both MDC Brooklyn and MCC New York, because employees of both institutions live at Dayton Manor and would be affected by bargaining. GC Br. at 24-25. The GC argues that the notice should be signed by the Warden of MCC New York, in addition to the Warden of MDC Brooklyn, because Warden Hastings advised Covington to request bargaining with management at MDC Brooklyn. *Id.* at 25 (citing *U.S. DOJ, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394-95 (1999) (*OIA*)).

Respondent

As a preliminary matter, the Respondent argues that Local 3148 failed to file the unfair labor practice charge on time, waiting almost two years after the Respondent emailed the Supplement to Local 3148. R. Br. at 7. Accordingly, the complaint should be dismissed pursuant to § 7118(a)(4) of the Statute.

The Respondent acknowledges that it refused to bargain over the Supplement, but it argues that its refusal was not a violation of the Statute. *Id.* at 2, 16. In this regard, the Respondent claims that Local 3148 was "not authorized to negotiate regarding housing except to the extent provided by the Master Agreement." *Id.* at 8; *see also id.* at 13 (citing *FDA* and *Hill AFB*, *supra)*. The Respondent contends that Dayton Manor is not a "shared service" because MDC Brooklyn is solely responsible for operating and maintaining Dayton Manor. R. Br. at 8-9, 11.

Further, the Respondent argues that Local 3148 was not entitled to bargain over the Supplement midterm because midterm bargaining "is limited to items covered in the Master Agreement or the local agreement," and the Supplement "is not part of either the Master Agreement or the local agreement." *Id.* at 14. The Respondent adds that it "does not believe that Dayton Manor is a . . . condition of employment." *Id.* at 4 Moreover, the Respondent contends that Local 3148 waived its right to engage in midterm bargaining because the union received the Supplement by email on March 30, 2010, and failed to request bargaining within thirty days, as required under Article 3(d)(2) of the Master Agreement. *Id.* at 3-4, 6-7 (citing *Small Bus. Admin., Wash., D.C.*, 15 FLRA 522 (1984) (*SBA*)). The Respondent adds that, in addition to having notice of the Supplement through email, Local 3148 had a seat on the housing committee, and it is therefore "counterintuitive for the union to now claim it was unaware of" the Supplement. R. Br. at 3.

ANALYSIS AND CONCLUSIONS

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

1. The charge was timely filed

Section 7118(a)(4)(A) of the Statute generally requires that a charge be filed within six months of the alleged unfair labor practice. *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 65 FLRA 422, 424 (2011). Here, the alleged unfair labor practice occurred on January 25, 2012, when the Agency refused Local 3148's request to engage in midterm bargaining over the Supplement. As Local 3148 filed the charge less than two months later, on March 2, 2012, Local 3148's charge was timely.

The Respondent insists, however, that Local 3148 is actually challenging the issuance of the Supplement, which occurred in 2010, and thus it should have filed its charge within six months of the Supplement's issuance.[5] If Local 3148 had charged the Respondent with unilaterally implementing the Supplement, in violation of § 7116(a)(5), the Respondent's argument might have merit. But the charge protests the Agency's refusal to bargain, which occurred on January 25, 2012, and it therefore was timely.

[5] This argument actually seems to be a different way for the Respondent to argue that Local 3148 waived its right to bargain over the Supplement in 2010. The waiver issue will be discussed later at length.

2. Local 3148 was authorized to bargain over the Supplement at the local level

The Respondent asserts that Local 3148 was not authorized to bargain at the local level, since the Council of Prison Locals is the exclusive representative of the nationwide bargaining unit. The Respondent correctly asserts that it has no statutory obligation to bargain below the level of recognition. However, parties at the national level may authorize local components to bargain supplemental and other agreements over particular subjects or in particular circumstances. *FDA*, 53 FLRA at 1274. When the exclusive representative has delegated bargaining authority to a local union, the agency must respond to the local union's bargaining request just as it would respond to a request from the exclusive representative. *See Hill AFB*, 39 FLRA at 1417; *see also SSA, Office of Hearings & Appeals, Region II, Buffalo Office of Hearings & Appeals, Buffalo, N.Y.*, 58 FLRA 722, 726 (2003).

As Glover explained, the Master Agreement authorizes local-level bargaining generally, and the Agency was well aware of that fact. Tr. 133. Indeed, the Master Agreement is replete with examples of routine references to local-level bargaining on all sorts of matters that affect employees locally rather than nationally. Tr. 131-32. Glover also testified that the first paragraph of Article 9 of the Master Agreement authorized the parties on the local level to negotiate local agreements. Tr. 137-38; Jt. Ex. 1 at 21. Further, it is clear that Article 9(a) specifically authorizes local-level bargaining over shared services. Jt. Ex. 1 at 21; Tr. 138. The Respondent denies, however, that Dayton Manor constitutes a shared service.

Glover, who served as president of the Council of Prison Locals from 1997 to 2005 and helped negotiate the Master Agreement, indicated that "shared services" is a general term that is intended to apply broadly to two or more facilities sharing an asset, usually to cut costs and usually involving multiple bargaining units. Tr. 125-28, 138. He testified, persuasively, that Dayton Manor falls within this broad definition. Covington agreed with Glover's understanding of the term, and even Ortiz (a management official) agreed with the factual premise of their assessment. Tr. 59, 166. Even Dynan conceded that a "shared service" could be construed to include Dayton Manor, although she disagreed with it as a legal matter. Tr. 190-91, 193. Dynan also asserted that Dayton Manor is not a shared service because it is run solely by MDC Brooklyn, but she was unable to cite any authority to show that her definition of a shared service is correct. Tr. 190-93.

Consistent with Glover's testimony, I find that Dayton Manor falls within the meaning of a shared service under Article 9(a). Dayton Manor provides a service – employee housing – and that service is shared by the employees of two institutions, MDC Brooklyn and MCC New York. Dayton Manor provides services to employees in two different bargaining units, another indication of a shared service. Not only does this conclusion conform to the plain meaning of the words "shared service," but it is also consistent with the context of Article 9 and 9(a) of the Master Agreement. Article 9 is entitled "Negotiations at the Local Level," and it describes a variety of situations (in addition to the situation posed in Article 3(d)(5)) in which local conditions will warrant local bargaining. Dynan's

interpretation of shared service – "when two institutions share departmental staff or the leadership of a department with regard to operations at the institution" – creates a distinction without a difference, and distorts the plain language of the agreement. Tr. 190. Even though "staff" of both MDC Brooklyn and MCC New York live at Dayton Manor, and their conditions of employment are directly affected by their residence there, Dynan's interpretation would prevent the union representing MCC New York employees from having any say in those conditions, simply because Dayton Manor is operated and maintained by MDC. The "service" which Dayton Manor provides – a convenient and economical residence – is clearly "shared" by employees of both institutions, regardless of whose employees actually operate the building. The Respondent's interpretation also conflicts with the fact that both Local 3148 and Local 2005 are granted representation on the housing committee that oversees Dayton Manor. Jt. Ex. 1 at 24; Tr. 46, 198. The joint participation of the two affected unions in the governance of their shared residence is a clear indication that Dayton Manor is a shared service that warrants negotiations at the local level.

Even if the language in Article 9(a) regarding shared services did not exist, however, the testimony at the hearing and the Master Agreement as a whole demonstrate that the Council of Prison Locals and the BOP understood that matters affecting bargaining unit employees on a local level would be handled by the local unions and local management. Grievances, arbitrations, requests to bargain, notices of local changes, unfair labor practice charges, and joint committees were all within the responsibility of Local 3148, and the management of MCC New York regularly dealt with Local 3148 on these matters. It would be totally inconsistent and irrational for issues relating to Dayton Manor to be beyond Local 3148's scope of responsibility. It would also make no sense for the Council of Prison Locals to negotiate with BOP on parking and other conditions at a Brooklyn apartment building.

Accordingly, I find that Local 3148 was authorized to bargain over Dayton Manor, including matters contained in the Supplement.

3. Local 3148 was entitled to bargain over the Supplement during the term of the Master Agreement

Agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning conditions of employment not covered by the existing agreement, unless the union has waived its right to bargain about the subject matter involved. *Interior*, 56 FLRA at 54. An agency that refuses to fulfill its midterm bargaining obligations violates § 7116(a)(1) and (5) of the Statute. *DOL*, 65 FLRA at 685-86.

The Respondent argues that "[t]here must be a change in a condition of employment[]" before an agency can be required to bargain during the term of a contract. R. Br. at 14. This harks back to the early case law under the Statute, to a doctrine that has long been abandoned, both by the Authority and the courts.[6] Thus, while most bargaining occurs either in the context of negotiating a term collective bargaining agreement or of management-initiated changes to conditions of employment, a union may demand negotiations, as here, during the term of an agreement.

In *Interior*, the Authority justified its holding regarding union-initiated midterm proposals, in part, by quoting the Supreme Court that "[c]ollective bargaining is a continuing process," and that the obligation to bargain includes "resolution of new problems not covered by existing agreements." 56 FLRA at 51 (quoting *Conley v. Gibson*, 355 U.S. 41, 46 (1957)). Associate Warden Dynan turned this principle on its head when she testified that "[m]idterm bargaining is . . . a process reserved for bargaining over matters in the master agreement and the local agreement." Tr. 210; *see also* Tr. 205. The Respondent doubled down on this error by arguing in its brief that midterm bargaining "is limited to items covered in the Master Agreement or the local agreement." R. Br. at 14. Not only does this argument misconstrue the general duty to bargain midterm, but it misconstrues the "covered by" principle: issues covered by the Master Agreement or a local agreement are precisely those issues on which Local 3148 cannot demand midterm bargaining

The Respondent concedes that the housing policy over which Local 3148 requested bargaining is not covered by the Master Agreement or the Local Supplemental Agreement. *Id.* Instead, the Respondent argues that Dayton Manor is not a condition of employment, and that Local 3148 waived its right to engage in midterm bargaining. I will address these claims in turn.

3a. The Supplement concerns Dayton Manor, which is a condition of employment

The term "conditions of employment" generally encompasses "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). In order to determine whether a matter concerns a condition of employment, the Authority applies a two-prong test, asking whether

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[6] In *Internal Revenue Serv.*, 17 FLRA 731, 735-36 (1985) (*IRS I*), the Authority held that "where parties are negotiating a basic collective bargaining agreement," both management and unions may initiate negotiable proposals; but "outside this context, Congress intended the bargaining obligation to exist only with respect to changes in established conditions of employment proposed by management." But that doctrine was rejected first by the D.C. Circuit and then by the Authority, both of which determined that the Statute permits unions to initiate midterm proposals on negotiable subjects, as long as the subject is not covered by the parties' CBA and the union has not waived its right to bargain on that subject. *NTEU v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987); *IRS II*, 29 FLRA at 166. After the Supreme Court deferred to the Authority's role in interpreting the Statute regarding midterm bargaining in *NFFE, Local 1309 v. Dep't of the Interior*, 526 U.S. 86, 98-99 (1999), the Authority reaffirmed its *IRS II* holding, requiring agencies to negotiate over midterm proposals. *Interior*, 56 FLRA at 54.

the matter pertains to bargaining unit employees, and whether there is a direct connection between the matter and the work situation or employment relationship of unit employees. *Antilles*, 22 FLRA at 237. Whether such a connection exists is at least partially a question of fact. *See Indian Health Service*, 57 FLRA at 906-07.

The Authority has previously found agency-provided employee housing to be a condition of employment. In *Indian Health Service*, the Authority found that there was a direct condition between housing and the employment relationship based on the fact that the housing benefited both the agency and employees, as well as on the fact that housing was provided in a remote location where private housing was not readily available. The Authority held that this connection existed even though employees were not required to live in agency-provided housing. *Id.* The Authority also found a direct connection between housing and the employment relationship in *Dep't of the Army, Dugway Proving Ground, Dugway Utah*, 23 FLRA 578, 583 (1986), based in part on the fact that the agency used housing as a recruitment inducement. And, in *U.S. DOJ, U.S. Immigration & Naturalization Serv.*, 14 FLRA 578, 579 & n.3 (1984), the Authority found that employee housing was a condition of employment, noting that the housing was provided specifically for the benefit and use of the agency's employees, and that the agency's representative was responsible for assignment of available housing.

I note as well that the Authority has indicated that policies pertaining to employee discipline can be connected to the employment relationship, even if the discipline is based on an employee's conduct off-duty. *U.S. Dep't of the Air Force, Griffiss AFB, Rome, N.Y.*, 37 FLRA 570, 575-78 (1990), *enforced*, 949 F.2d 1169 (D.C. Cir. 1991).

The first prong of the *Antilles* test is easily satisfied, as there is no dispute that bargaining unit employees live at Dayton Manor. The second prong of the test is also easily satisfied. While Dayton Manor is not exactly like the housing considered in the above-mentioned Authority decisions (it is not located in a remote area), Dayton Manor is similar in that its availability benefits both employees and the two institutions. Dayton Manor offers employees attractive amenities and, as Associate Warden Ortiz indicated, Dayton Manor makes it easier for employees to move to New York City. The existence of a waiting list for Dayton Manor apartments further suggests that it is seen by employees as providing a benefit. Tr. 24, 165, 199. Management also benefits from Dayton Manor, as it is able to assign units "as institution needs dictate." Jt. Ex. 3 at 3. For example, management uses the housing to help attract and recruit employees and to assist employees relocating from other areas. The Supplement gives preference to applicants based on a variety of factors, including "hard to fill positions, relocating staff, and positions that fulfill specific needs of the institution. . . . In the absence of other factors, employee grade level shall be given preference." *Id.* These preferences demonstrate a strong connection between the housing at Dayton Manor and the employment status of residents.

Additional indications of a connection between Dayton Manor and the employment relationship abound. Dayton Manor is provided exclusively for Bureau of Prisons employees and their families, and the application process is specifically connected to employment concerns, such as whether the employee has passed his or her probationary period.

Employees must follow a host of regulations that could subject them to discipline, and many of these regulations, such as the prohibition on sunbathing, are directly connected to the fact that Dayton Manor is overseen by the Bureau of Prisons. The fact that the housing committee includes associate wardens and union representatives from both MDC Brooklyn and MCC New York further shows a direct connection between Dayton Manor and the employment relationship.

The Respondent cites no authority to support its claim that Dayton Manor is not a condition of employment. And while Dynan asserted that Dayton Manor is merely optional, *Indian Health Service* shows that optional housing may nonetheless constitute a condition of employment. 57 FLRA at 907.

For all of these reasons, I find that Dayton Manor is a condition of employment under *Antilles*, and that the Supplement concerns conditions of employment.

3b. Local 3148 did not waive its right to engage in midterm bargaining

A union may waive its right to engage in midterm bargaining, either expressly or implicitly. *Interior*, 56 FLRA at 53-54; *IRS II*, 29 FLRA at 166. A union may expressly waive this right by agreeing to a "zipper clause," a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement. *IRS II*, 29 FLRA at 166. A union may also expressly agree not to initiate bargaining over a particular subject. *Id.* Implicit waiver may be established through bargaining history, where evidence shows that the union raised, and the parties fully discussed, a proposal and then withdrew it in exchange for some other provision. *Headquarters, 127th Tactical Fighter Wing, Mich. Air Nat'l Guard, Selfridge Air Nat'l Guard Base, Mich.*, 46 FLRA 582, 584-85 (1992) (*Selfridge*); *IRS*, 29 FLRA at 166-67.

The Respondent does not point to any contractual provision indicating that Local 3148 waived its right to engage in midterm bargaining either outright or with regard to employee housing. On the contrary, as noted earlier, Article 9(a) provides that "[s]upplemental agreements covering shared services will be negotiated at the local level by the concerned parties." Jt. Ex. 1 at 2. Accordingly, I find that Local 3148 did not expressly waive its midterm bargaining rights.

However, the Respondent argues that by failing to request bargaining within thirty days of receiving notice of the Supplement on March 30, 2010,[7] Local 3148 waived both its right to bargain over the implementation of the Supplement in 2010 and its right to invoke midterm bargaining over the Supplement in late 2011 and 2012. First, the right to bargain over a change in working conditions before it is implemented exists separately and independently from the right to bargain over an already-implemented matter during the term of an agreement. Thus, a union that waives its right to bargain over a change does not

[7] Article 3(d)(1), (2) and (4) give a local union thirty days after receiving notice, by certified mail, of a proposed policy issuance to invoke negotiations. Jt. Ex. 1 at 5-6.

necessarily waive its right to bargain over the subject matter of the change, post-implementation. *See Dep't of the Air Force, AFMC, Wright-Patterson AFB, Ohio*, 51 FLRA 1532, 1535-36 (1996); *Selfridge*, 46 FLRA at 585-87. In this regard, while Article 3(d)(2) indicates that a local union has thirty days to request bargaining over a proposed policy issuance, Article 3(d)(4) shows that a local union's failure to request bargaining merely allows the proposed policy to be implemented. It does not shut the door permanently on bargaining over provisions in the Supplement and over conditions at Dayton Manor – in this case, nearly two years after the Supplement was implemented, based at least in part on subsequent events relating to parking and other matters affecting Dayton Manor residents in the autumn of 2011. *See* GC Ex. 3, Covington's November 16, 2011, letter to Warden Hastings, addressing problems at Dayton Manor that had recently occurred.

Second, the Respondent has failed to carry its burden of proving that Local 3148's actions (or inaction) in early 2010 constituted a knowing waiver of its right to later bargain over conditions at Dayton Manor. As noted by the Authority in *Interior*, the appropriate test for waiver is whether the matter in question was "fully discussed and consciously explored during negotiations" and whether the union "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." 56 FLRA at 53 (quoting *Selfridge*, 46 FLRA at 585). Covington testified that neither he nor any other union official knew about the 2010 revisions to the Supplement until November of 2011, while MDC General Foreman DeSoto testified that the MDC facility manager had emailed it to numerous parties on March 30, 2010, asking for their comments. While DeSoto suggested that the Supplemented would have been implemented sometime after March 30, 2010, the document does not reflect when the warden signed it, and no witness could attest to when it occurred.

From this evidence, it is clear (and the Respondent does not contest) that Local 3148 was never served with notice of the proposed Supplement by certified mail, as required by Article 3(d)(1) of the Master Agreement. While I do not doubt Mr. DeSoto's veracity, that Local 3148 was notified of the proposed Supplement by email, that does not establish that an authorized official of Local 3148 ever read the document, and Covington has affirmatively testified that he didn't read the document until November 2011. The Respondent seeks to apply Article 3(d)2)'s thirty-day time deadline for requesting to bargain, but it wants to slough off Article 3(d)(1)'s certified mail service requirement, in order to find that Local 3148 waived its right to bargain in 2010.[8] But the evidence of record does not show that Local 3148 was aware of the proposed changes to the Supplement in 2010, and it cannot, therefore, be found to have consciously waived its interest in the matter. Situations such as

[8] I reject the Respondent's argument that there was a past practice of notifying Local 3148 of changes by "conversations during meetings, telephone calls, or through e-mail." Tr. 161; *see also* Tr. 197; R. Br. at 5-6. The conclusory testimony by MDC Brooklyn officials is not supported by any documents showing consistent service by email of notices of changes in working conditions, and it does not meet the evidentiary standards for establishing a binding past practice, articulated in *U.S. Dep't of the Air Force, U.S. Air Force Acad., Colo.*, 65 FLRA 756, 758 (2011). Additionally, MDC officials are hardly in a position to establish the practice for notifying Local 3148, since it is MCC New York which primarily interacts with Local 3148 on most issues.

this are precisely the reason that contracts often require service of critical documents by certified mail. Both management and union officials are routinely deluged with email, and mere delivery of a document may not suffice (for the parties' purposes) to show that it was read. When a party is seeking to prove that the other party knowingly waived its right to bargain over a document, this distinction is important, and Article 3(d)(1) confirms that importance to these parties in particular.

Moreover, the Respondent has failed to establish that it provided Local 3148 with adequate notice of the changes to the Supplement in advance of its implementation. There is no probative evidence concerning the actual date the Supplement went into effect, other than the date shown at the top of every page of the Supplement, as it was printed from the MDC intranet site: March 30, 2010. While the warden may have sent it to a variety of interested parties on that same date and asked for their comments, that does not establish when it became effective.[9] If "March 30, 2010" appeared at the top of every page of the document over a year later, that is the strongest available evidence of when it was implemented, in the absence of testimony from the warden or a signed-and-dated copy of the Supplement. If the Supplement was effective on March 30 (the same date it was distributed to various parties), the parties receiving it were presented with a *fait accompli*, not an invitation to negotiate. Such notification is not considered adequate under the Statute, and any inaction on the part of Local 3148 in early 2010 would not constitute a waiver. *U.S. DHS, U.S. Customs & Border Prot.*, 64 FLRA 916, 921 (2010); *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 856 (2002).

Finally, the record does not demonstrate what changes, if any, were effectuated by MDC Brooklyn when it implemented the Supplement on March 30, 2010. The cover page of the Supplement, Joint Exhibit 3, indicates that the March 30, 2010, version of BRO-4200.10-5F revised and replaced an earlier version on the same topic, which itself had been implemented only a year earlier. It is possible that the 2010 version extensively changed the procedures governing the oversight of Dayton Manor, and it is equally possible that it made only minor, technical revisions. Any notice given to Local 3148 at that time would only have enabled the local to bargain over the changes being proposed. Local 3148's failure to seek bargaining at that time may have allowed MDC Brooklyn to implement those changes, but it did not constitute a conscious waiver by Local 3148 of its right to negotiate later on all matters relating to the Supplement. The construction-related disruptions to parking at Dayton Manor, which precipitated the union's request to bargain on November 16, 2011, and its follow-up request on January 26, 2012, are precisely the sort of unforeseen issues that warrant midterm bargaining. It would be inappropriate, in the circumstances of this case, to find that Local 3148 waived its right to engage in such bargaining.

The *SBA* decision, cited by the Respondent, does not compel a contrary conclusion. In that case, the agency provided the union with advance notice of a change in working conditions; the union objected to the change but did not request to bargain, and there was no request for midterm bargaining. 15 FLRA at 523-24. The Authority therefore held that the

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[9] Even if I were to accept Respondent's Exhibit 1 into evidence (*see* Tr. 104-11, where it was rejected), it would not alter my finding on this issue.

agency was free to implement the change. In the instant case, the implementation of the Supplement in 2010 is not challenged; accordingly, the Respondent's reliance on *SBA* is misplaced.

Based on the foregoing, I find that Local 3148 did not waive its right (either expressly or implicitly) to bargain over the Supplement midterm. Local 3148 was authorized to engage in local-level bargaining and was entitled to bargain over the Supplement midterm. By refusing Local 3148's request to bargain over the Supplement, the Respondent violated § 7116(a)(1) and (5) of the Statute.

REMEDY

The General Counsel requests that a notice to employees informing them of the Respondent's unfair labor practice, be signed by the Wardens of both MCC New York and MDC Brooklyn and posted at both facilities. I agree.

In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. *OIA*, 55 FLRA at 394. First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. *Id.* Second, in many cases, the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. *Id.* at 394-95. Typically, notices are posted at the location or organizational level where the violation occurred. *AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 23 (2009). However, the scope of a posting can go beyond where the violation occurred, in certain circumstances. *OIA*, 55 FLRA at 394. Here, the violation affected Dayton Manor residents, that is, employees of both MDC Brooklyn and MCC New York. Accordingly, there should be postings at both institutions.

The Authority typically requires a notice to be signed by the highest official of the activity responsible for the violation. *U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699 (2000). Although the warden of MDC Brooklyn was the official who refused to bargain with Local 3148, it was the warden at MCC New York who directed Local 3148 to bargain with management at MDC Brooklyn. Thus both wardens participated in the refusal to bargain, and it is appropriate to require both wardens to sign the notice to employees.

Finally, in accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, I find that both types of postings are appropriate in this case. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Federal Bureau of Prisons, Metropolitan Detention Center, Brooklyn New York, shall:

1. Cease and desist from:

(a) Refusing to bargain with the American Federation of Government Employees, AFL-CIO, Local 3148 (Local 3148), over Institution Supplement BRO-4200.10 (the Supplement).

(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) Upon request, bargain with Local 3148 to the extent required by the Statute, over the Supplement.

(b) Post at the Metropolitan Correctional Center, New York City, New York, and the Metropolitan Detention Center, Brooklyn, New York, where bargaining unit employees represented by the American Federation of Government 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 wardens of the Metropolitan Correctional Center, New York City, New York, and the Metropolitan Detention Center, Brooklyn, New York, 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.

(c) Notices shall also be disseminated, by email or other electronic media customarily used to communicate to employees, to all bargaining unit employees at the Metropolitan Correctional Center and the Metropolitan Detention Center.

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

Issued, Washington, D.C., May 29, 2015

RICHARD A. PEARSON
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, Metropolitan Detention Center, Brooklyn, New York, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to negotiate with the American Federation of Government Employees, AFL-CIO, Local 3148 (Local 3148), over Institution Supplement BRO-4200.10 (the Supplement).

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, upon request, negotiate with Local 3148 over the Supplement.

_____
(Agency/Respondent)

Date: _____ By: _____
(Signature) (Title)

_____
(Agency/Respondent)

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, Boston Regional Office, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: (617) 565-5100.