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

MEMORANDUM DATE: February 4, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
MONTGOMERY, ALABAMA

Respondent

and Case No. AT-CA-03-0352

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3627

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

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

SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARING AND APPEALS MONTGOMERY, ALABAMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3627 Charging Party	Case No. AT-CA-03-0352

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 8, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

_____

PAUL B. LANG
Administrative Law Judge

Dated: February 4, 2004
Washington, DC

OALJ 04-13

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

SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS MONTGOMERY, ALABAMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3627 Charging Party	Case No. AT-CA-03-0352

Richard S. Jones
For the General Counsel

Cathy Six
For the Respondent

Carl L. Warren
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge which was filed on February 20, 2003, by the American Federation of Government Employees, Local 3627 (Union) against the Social Security Administration, Office of Hearings and Appeals, Montgomery, Alabama (Respondent). On August 1, 2003, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by eliminating the use of a metal detector at its Montgomery, Alabama Hearing Office (Hearing Office) without providing the Union

with advance notice and an opportunity to negotiate over the change to the extent required by the Statute.

A hearing was held in Montgomery, Alabama on October 30, 2003.[1] The parties were present along with their respective counsel and were afforded an opportunity to submit evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the General Counsel and the Respondent.

Findings of Fact

The Respondent is an "agency" as defined in § 7103(a)(3) of the Statute. The Union is an agent of a "labor organization" as defined in § 7103(a)(4) of the Statute. The Union represents some of the Respondent's employees at the Hearing Office in a unit suitable for collective bargaining.

The Acquisition of the Magnetometer

On or about August of 2000 representatives of the Hearing Office were contacted by the Federal Protective Service (FPS) and asked if they could store a magnetometer that had previously been used in the local federal courthouse; it was understood that the device could be used in the Hearing Office if it were so desired.[2]

Charles A. Thigpen is the Hearing Office Chief Administrative Law Judge (HOCALJ) of the Hearing Office and, as such, is in overall charge of the facility. He reports directly to the Regional Chief Administrative Law Judge (RCALJ). When Judge Thigpen learned of the availability of the magnetometer he readily accepted it without seeking approval from the Regional Office. According to Judge Thigpen, "I couldn't conceive of any reason why I couldn't enhance the security for my employees and the people without contacting somebody. . . . FPS provides our security. I assumed that they knew whether or not we were entitled to have it." (Tr. 146)

---

[1] The Respondent's motion to stay proceedings pending the disposition of another case was denied.

[2] The Hearing Office also acquired an electronic wand which could be used for a more detailed screening of visitors who were found to be carrying metal objects. The evidence indicates that the wand is an adjunct to the magnetometer and that its removal need not be considered separately from that of the magnetometer itself.

Judge Thigpen further testified that, when the magnetometer became available, he was aware that the Respondent had a national policy regarding such devices. He construed the policy to mean only that the Respondent would not provide a magnetometer to a Level II facility such as the Hearing Office. He did not believe that there was a prohibition against the installation of a magnetometer at no cost to the Respondent.

Paul Reams, the Hearing Office Director (HOD), testified that the magnetometer was installed by the FPS employee who delivered it and by the contract security guard who was assigned to the Hearing Office. According to Reams the "installation" of the magnetometer consisted of plugging it in. Reams did not report the installation of the magnetometer to the Regional Office or to any other unit of the Respondent.[3]

Bobby Hudson, the contract security guard at the Hearing Office, testified that the magnetometer was not calibrated at the time of its installation and did not come with an instruction manual. Hudson had been trained on the use of a magnetometer, but not on its calibration, by his former employer. Hudson further testified that a sign is posted at the entrance to the Hearing Office stating that weapons are not permitted. He has, from time to time, found knives in his search of visitors' handbags; such searches have been conducted regardless of the presence of the magnetometer. When knives have been found, their owners are denied access to the reception area until they dispose of them. The guards do not have the authority to confiscate items.

Hudson testified that, when the magnetometer was in use, he prevented numerous visitors from bringing knives into the reception area. He also described at least one incident when a visitor left the building after he saw the magnetometer and returned shortly thereafter. Such an occurrence suggests that the presence of the magnetometer has caused visitors to remove knives from their pockets before entering the reception area.

The Layout of the Hearing Office

The Hearing Office is in a freestanding building. The magnetometer was located near the front entrance which is used only by visitors; there is a separate entrance for

[3] Although the Union did not receive prior notice of the installation of the magnetometer it made no objection and apparently welcomed the acquisition.

employees. Visitors come through the front entrance and approach the guard station where the magnetometer was located.[4] After passing through the guard station visitors enter the reception area. They announce their presence to a receptionist whose work station is behind a window which has a slot through which documents can be passed (Resp. Ex. 8, No. 17).

The work stations of bargaining unit members (work area) are separated from the reception area by doors with combination locks.[5] The same types of doors separate the hearing rooms from the reception area. Access from the hearing rooms to the work area can only be obtained by passing through doors with the same type of locks. There are separate restrooms for visitors. Visitors do not enter the work area unless escorted by employees.

Claimants are escorted to the hearing rooms by hearing reporters who are employed by contractors. Claimants who have made appointments to examine their files receive the files from bargaining unit employees who meet them in the reception area and explain their contents.[6]

The Removal of the Magnetometer

Caren Bright has been the Team Leader for the Security, Health, Safety and Wellness Branch of the Office of Hearings and Appeals (OHA) since August of 2001. Among her responsibilities is ensuring that Agency[7] security policies are complied with at OHA headquarters and nationally. She carries out this responsibility through regional security conference calls, the issuance of memoranda to the field, surveys in the field and site reviews. In Bright's own words, "we're in constant communication with the field and with headquarters." (Tr. 104) Bright drafted a memorandum dated May 9, 2002 (Resp. Ex. 6) from Patricia A. Carey, Acting Director of the Office of Management, to RCALJ's and

[4] Reams described the layout of the Hearing Office while using a diagram (Resp. Ex. 8).

[5] It is unclear whether the receptionist is a member of the bargaining unit.

[6] There is no evidence that bargaining unit employees have any other work related reasons for entering the reception area.

[7] The terms "Agency" and "SSA" will be used to refer either to the Social Security Administration as a whole or to the Office of Hearings and Appeals. The security policies of those entities are binding on the Respondent.

other regional officials. The stated purpose of the memorandum was to "remind" the recipients that hand wands, magnetometers and other security devices were not to be "routinely" used in agency facilities. The stated rationale for this policy was that such devices were not required by Department of Justice security guidelines for facilities below security Level IV.[8] Furthermore, the installation of magnetometers and wands at hearing offices would require the presence of an additional guard whose sole duty would be to operate the devices. An additional reason was that, according to FPS recommendations, hand wands are to be used only in conjunction with magnetometers.[9]

By memorandum of June 4, 2002 (Resp. Ex. 7), Henry G. Watkins, who was then the RCALJ of the Atlanta Region (of which the Hearing Office is a part), forwarded Carey's memorandum to all HOCALJ's and HOD's in the Atlanta Region. The second sentence of the first paragraph states that,

> SSA policy is that hand wands, magnetometers or other similar security devices may not be used routinely[10] in any SSA field facility.

The last sentence of the memorandum seems to suggest that the devices may be used under certain circumstances:

> If you wish to discuss issues specific to your office's use of security wands, magnetometers or other security devices, please contact [two named staff members].

Taken together, this language supports the inference that magnetometers would be allowed in Hearing Offices under certain circumstances.

Ollie Lawrence Garman, III has been the Acting RCALJ of the Atlanta Region since March 1, 2003. Prior to his current appointment Judge Garman was the Assistant to the

---

[8] The Hearing Office is a Level II facility.

[9] SSA facilities are sometimes located in buildings which are occupied by several federal agencies. In such cases, magnetometers may be located in the lobby and operated by employees of the General Service Administration. Such arrangements are not considered to be contrary to agency policy inasmuch as the magnetometers are neither operated nor controlled by the SSA.

[10] There has been no explanation of the meaning of the term "routinely" in the context of the agency policy.

RCALJ since February of 1999. He testified that magnetometers and other metal detection devices are generally not in place in hearing offices because, "It is not Agency policy." (Tr. 125).[11] He further stated that neither he nor, to the best of his knowledge, anyone else in the Atlanta Regional Office approved the installation of the magnetometer in the Montgomery Hearing Office. Neither Judge Garman nor Judge Watkins visited the Hearing Office after it moved to its current location. Judge Garman learned of the magnetometer in the Montgomery Hearing Office around October of 2002 as the result of an unfair labor practice charge involving the Lexington, Kentucky Hearing Office.

The magnetometer was not immediately removed after Judge Thigpen received Judge Watkins' memorandum of June 4, 2002, because he did not understand the memorandum as requiring its removal, but only as an indication that the Agency would not provide such a device. The Regional Office finally ordered the removal of the magnetometer in January of 2003 at which time it was placed in a storage area where it remained as of the time of the hearing.

It is undisputed that the Union was not given advance notice of the removal of the magnetometer and that the Respondent has not agreed to bargain on the subject.

The Agency's Policies

The Agency's policies relevant to this case were adopted as a result of the destruction of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma on April 19, 1995. On May 24, 1995, the Agency issued Instruction No. 01 (Resp. Ex. 1) which established the Protective Security Program. The purpose of the program was to set policies and guidelines for preventing, handling and monitoring disturbances caused by members of the public who come into contact with Agency employees. Although Instruction No. 01 allocates responsibility for maintaining physical security, it makes no mention of specific protective devices.

On June 28, 1995, the Department of Justice (DOJ) issued a Vulnerability Assessment of Federal Facilities (Resp. Ex. 2). SSA was one of a number of federal agencies which participated in the assessment. DOJ defined five

[11] Judge Garman did not indicate when the policy went into effect. However, it is significant to note that he first became aware of the policy upon receipt of Carey's memorandum of May 9, 2002 (Tr. 129).

levels of federal facilities, from Level I to Level V, in relation to their security needs. According to the assessment, a typical Level I facility is a small "store front" operation such as a military recruiting office (Resp. Ex. 2, § 2.2.1, p. 2-3). A Level II facility has between 11 and 150 federal employees, from 2,500 to 80,000 square feet, a moderate volume of public contact and federal activities that are routine in nature and are similar to commercial activities. The stated example of such a facility is the Social Security Administration Office in El Dorado, Colorado (Resp. Ex. 2, § 2.2.2, p. 2-4).[12] A Recommended Standards Chart indicates that the presence of x-rays and magnetometers at public entrances to Level II facilities is deemed to be desirable (Resp. Ex. 2, p. 2-7).

As a result of the DOJ Vulnerability Assessment, SSA engaged CTI, a private contractor, to conduct an in-depth review of each of its facilities. By memorandum dated November 22, 1995 (Resp. Ex. 3), John Dyer, the Deputy Commissioner for Finance, Assessment and Management, informed various SSA management officials, including the Associate Commissioner for Hearings and Appeals, of CTI's role. Dyer also stated that SSA policies were to be enforced to the extent possible at facilities where SSA is not the lead Agency and that SSA policies are mandatory at facilities where SSA is the lead Agency or is the only occupant of the building. The memorandum makes no mention of specific security procedures, but states that security upgrade requests should be sent to the Director, Office of Protective Security Services of SSA.

On July 11, 1996, Barbara S. Sledge, the Associate Commissioner of the Office of Facilities Management of SSA, issued a memorandum regarding security funding (Resp. Ex. 4); the Associate Commissioner for the Office of Hearings and Appeals was among the addressees. The memorandum stated that the addressees would shortly be receiving allocations for additional security improvements for the remainder of the current fiscal year. It also stated that SSA was adopting a two tier approach to security improvements. Tier I would include duress alarms, peepholes, locks and panic bars, intrusion detection systems and security lighting. Tier II would include emergency lighting, emergency power backup systems, closed circuit television systems and physical modifications such as the installation of barriers, walls, partitions, plexiglass separations and separate restrooms. SSA offices were

---

12 The General Counsel has not challenged the proposition that the Hearing Office is a Level II facility and there is no evidence that the Union has done so.

directed to procure Tier I items before purchasing Tier II items unless there was a compelling reason in an individual office to make a Tier II improvement ahead of other offices receiving Tier I items. Emphasis was to be placed on repairing and expanding existing systems rather than the purchase of new ones. Regional management was directed to obtain the input of union officials with regard to spending priorities. Although magnetometers are not mentioned in Sledge's memorandum, the use of the word "includes" leaves open the possibility that the installation of magnetometers would be authorized in at least some locations. In any event, there is no evidence that this document was ever shown to a representative of the Union or that its contents were communicated to the Union.

The topic of magnetometers was addressed at meetings of the National Health and Safety Partnership Committee for Security, a body composed of representatives of both the Union's parent organization and the Agency. However, as shown in the draft of the minutes of the meeting of December 6, 2000[13] (Resp. Ex. 5), the parties failed to reach a consensus.

Gary Arnold has been the SSA Associate Commissioner for Publications and Logistics Management since January of 2003. Prior to that time he was the Deputy Associate Commissioner for the Office of Facilities Management since 1989. In his current position he has responsibility for the physical security of the various SSA offices throughout the country. During the course of his testimony, Arnold described the security guidelines and policies in effect at SSA. He further stated that the Union had consistently pressed for the installation of magnetometers in field offices while management maintained that they were unnecessary.

On cross-examination Arnold acknowledged that SSA has no written policy prohibiting the use of magnetometers in Level II facilities (Tr. 67).[14] He emphasized, however, that the Agency has never approved expenditures to acquire such devices. Arnold also acknowledged that it is important to look at each office individually (Tr. 70). The Hearing Office should have been evaluated at the time of the move, but Arnold could not confirm that the evaluation actually occurred. There is no evidence that the Hearing Office was

[13] The Agency terminated the Partnership Committee following this meeting.

[14] There is no evidence of any SSA policy or directive which generally prohibits the use of any equipment which was not purchased by the Agency.

ever evaluated subsequently. SSA has a policy of evaluating 20% of its facilities each year.

According to Arnold, the Agency ordered the removal of the magnetometer from the Hearing Office because the office did not have a second guard to operate and monitor the device. Also, there was no sign which warned visitors that the magnetometer might interfere with surgically implanted devices such as pacemakers. Other concerns about the installation of magnetometers, even at no cost, include the possibility of interference from nearby metal window frames, the effect on handicap access and the fact that the guards are not authorized to confiscate weapons.

Upon consideration of all of the evidence, I find as a fact that SSA, and therefore the Respondent, did not have a policy prohibiting the installation and use of magnetometers in hearing offices prior to Carey's memorandum of May 4, 2002. I further find that the policy was not communicated to the Union until the magnetometer was actually removed from the entrance to the Hearing Office in January of 2003.

In making these findings, I take particular note of the testimony of Arnold, the SSA official who is responsible for physical security, that SSA has no written policy prohibiting magnetometers. I have also attached considerable weight to Judge Garman's testimony that he first became aware of the OHA policy prohibiting magnetometers upon receipt of Carey's memorandum of May 9, 2002. Surely, these witnesses for the Respondent would have been aware if such a policy had been in place. The testimony of Arnold and Judge Garman is corroborated by the contents of the policies and directives which were issued prior to Carey's memorandum. Those documents prove, at the most, that the Respondent was not authorized to expend funds for the installation and operation of magnetometers. They do not support the proposition that the use of magnetometers was prohibited under any circumstances and at all SSA facilities.15

I also find as a fact that the Respondent's decision not to provide magnetometers in hearing offices was motivated by security concerns. The documentary evidence and the testimony of Arnold show that SSA had made a careful study of the security needs of its facilities and had determined that the installation of magnetometers was

15
In view of the finding that the Respondent did not have a policy which prohibited magnetometers under all circumstances, it will not be necessary to address the issue of whether the presence of the magnetometer was a past practice.

unnecessary in view of its other measures to promote security. That determination was made in the context of an overall security analysis and must be considered in that context. There might well have been a consideration of cost in the Agency's decision. However, the General Counsel has cited no authority for the proposition that an agency may not, in the exercise of its management rights, include cost considerations among other factors in determining its actions regarding internal security.

Discussion and Analysis

The Presence of the Magnetometer Was a Condition of Employment

The Respondent maintains that the removal of the magnetometer did not affect a condition of employment of bargaining unit employees. In support of this proposition, the Respondent refers to evidence that visitors going through the magnetometer could proceed no farther than the reception area or hearing rooms, both of which were separated from the work area by doors with combination locks. The Respondent does acknowledge that bargaining unit employees enter the reception area to assist claimants in reviewing their files (Respondent's post-hearing brief, footnote 3, page 11). There is no evidence as to how often this contact occurs, how long it lasts or how many bargaining unit employees are involved.

The Respondent correctly cites *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*) as establishing the criteria for determining whether a matter affects a condition of employment. Those criteria are (a) whether it pertains to bargaining unit employees, and (b) whether there is a direct connection between the matter and the work situation of bargaining unit employees. The application of those criteria leads to the conclusion that the presence and the removal of the magnetometer affected the conditions of employment of Respondent's bargaining unit employees.

The purpose of the magnetometer is to prevent, or at least discourage, the introduction of weapons into the reception area. Although it may be assumed that the presence of an armed intruder would have the greatest effect on persons actually in the reception area, it is reasonable to assume that such an occurrence would also seriously affect the work situation of bargaining unit employees, even if one of their number were not assisting a claimant in the review of his or her file. It defies imagination and experience to suppose that, even if the Respondent or the

local police were not to order the evacuation of the building, bargaining unit employees would continue with their normal routine simply because the reception area is separated from their work area by locked doors. Therefore, the removal of the magnetometer affected bargaining unit employees, thus satisfying the first of the *Antilles* criteria.

The Authority has long held that the subject of safety concerns a general condition of employment, *U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania*, 38 FLRA 671, 677 (1990). The removal of the magnetometer made it more likely that weapons could be introduced into the reception area. The increased likelihood of such an occurrence has a direct connection with safety which, in turn, effects the work situation of all employees in the Hearing Office. Accordingly, the second of the *Antilles* criteria have been satisfied, thus leading to the conclusion that the presence of the magnetometer in the Hearing Office was a condition of employment and that its removal constituted a change in the conditions of employment of bargaining unit employees.

The Removal of the Magnetometer Was an Exercise of a Management Right [16]

The General Counsel acknowledges that the installation of the magnetometer was the exercise of a management right under § 7106(a)(1) of the Statute. However, the General Counsel expresses some doubt as to whether its removal was also a management right. In support of its position, the General Counsel has cited *U.S. Environmental Protection Agency, Washington, DC*, 38 FLRA 1328 (1991) (*EPA*). That case stands for the proposition that, in determining whether a change involves security considerations, the controlling factor is the agency's purpose in proposing the change. In *EPA* the Authority found that the agency's stated purpose for unlocking stairway doors was to facilitate the movement of its employees. Therefore, regardless of the security concerns of the union, the change was not an exercise of a management right.

The situation in *EPA* is clearly distinguishable from that in the instant case. The SSA security policies (Resp. Ex. 1, 3 and 4) as well as the testimony of Arnold show that the decision not to install magnetometers in Level II

[16] Although the Respondent did not raise the issue of a management right in its post-hearing brief, the issue was raised at the hearing in the opening statement by the Respondent's counsel (Tr. 32).

facilities was made as part of the formulation of the Agency's overall security strategy. It is also clear that Carey's memorandum of May 9, 2002, and the subsequent removal of the magnetometer from the Hearing Office were intended as implementations of the SSA policy, such as it was. It may well be that the SSA policy was influenced by economic as well as by security factors. However, there is no basis for a finding that consideration of economic factors, among others, will take a decision as to internal security outside of the scope of management rights.

A conclusion to the contrary is not compelled by the factual finding that SSA does not have a written policy prohibiting the installation of magnetometers under all circumstances. In accordance with the holding in *EPA*, it is the agency's purpose rather than the merits of its decision that is controlling in determining whether an action is an exercise of management rights. OHA felt that it was compelled under the SSA security program to order the removal of the magnetometer. Therefore, the removal of the magnetometer falls within the scope of management rights as defined in § 7106(a)(1) of the Statute.

The Change in Conditions of Employment Was Not *De Minimis*

Although the Respondent has not specifically raised a *de minimis* defense, such a defense is implied in its argument that the removal of the magnetometer had little or no effect on the conditions of employment of bargaining unit members. Therefore, the issue must be addressed in order to determine whether the change in conditions of employment by the Respondent was greater that *de minimis*, thereby triggering a duty to bargain, *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407 (1986) (*SSA*).

As stated above, the purpose of the magnetometer is to deter or prevent visitors to the Hearing Office from bringing weapons into the reception area. The Respondent maintains that bargaining unit employees were not affected by the removal of the magnetometer because bargaining unit members only enter the reception area to assist claimants in reviewing their files. The work stations of all bargaining unit members are separated from the reception area by locked doors.

In *SSA*, 24 FLRA at 408, the Authority indicated that, in applying the *de minimis* test, the number of employees involved will not be a controlling consideration. Rather, it will be applied primarily to expand rather than limit the number of situations where bargaining will be required. In

this case the seriousness of employees' concerns over the possible presence of an armed intruder offsets the fact that large numbers of bargaining unit employees do not have their work stations in the reception area. Those concerns may not legitimately be dismissed as trivial. In addition, the expected effect of an armed intruder on employees in the work area is clearly above the *de minimis* level.

While there is no evidence that the presence of the magnetometer stopped a visitor from perpetrating an assault, the same is true of the Respondent's other security measures. In *Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998) the Authority held that, in determining whether a change in procedure has more than a *de minimis* effect on conditions of employment, it is appropriate to determine the nature and extent of either the effect, or *the reasonably foreseeable effect*, of the change. At the time of the removal of the magnetometer it was reasonably foreseeable that the effect of its absence, *i.e.*, the increased likelihood of weapons in the reception area, would be more than *de minimis*. That is sufficient to overcome the Respondent's defense.

A *Status Quo Ante* Remedy is Appropriate

The General Counsel has urged that a *status quo ante* remedy be imposed. In *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*) the Authority set forth five factors to be considered in determining whether such a remedy is appropriate where the agency's action was an exercise of its management rights. Those factors, as applied to the instant case, are as follows:

Whether, and when, notice was given to the Union by the Respondent. It is undisputed that the Respondent provided the Union with no advance notice before ordering the removal of the magnetometer.

Whether, and when, the Union requested bargaining over the removal of the magnetometer. It is also undisputed that the Union did not request bargaining, even after the magnetometer was removed. Although the General Counsel maintains that the Union had no opportunity to request bargaining because of lack of notice from the Respondent, there is no reason why the Union could not have requested bargaining after the removal of the magnetometer.

The willfulness of the Respondent's actions in failing to discharge its bargaining obligations under the Statute. Although the Respondent might have believed that it was under no duty to bargain because of a national policy which

prohibited magnetometers, the evidence indicates that the belief was unfounded because no such policy existed. In any event, the Respondent's belief that it had no duty to bargain does not detract from the willful nature of its failure to do so, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000).

The nature and extent of the impact experienced by adversely affected employees. The impact on bargaining unit members, regardless of whether they are required to enter the reception area, is somewhat conjectural in view of the lack of proof that the magnetometer actually prevented an assault. However, all security systems and procedures are designed to have a deterrent effect. While the impact of the removal of the magnetometer might have been reduced by the presence of other security measures, its deterrent effect and the sense of security which the device could be expected to provide to bargaining unit employees was significant.

Whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the Respondent's operations. The Respondent has submitted no substantive evidence that the restoration of the magnetometer to the Hearing Office, at least until the completion of bargaining, would have any effect on the efficiency or the effectiveness of the operation of the Hearing Office. Indeed, the only rationale which the Respondent has presented in support of its prohibition of the use of a no-cost magnetometer is that it might put the security guard in an awkward position if a weapon were detected, that the magnetometer might be subject to interference from metal objects in the vicinity and that it might interfere with access to the Hearing Office by handicapped visitors. As to the first reason, the detection of weapons is squarely within the scope of the duties of the security guard. As to the second reason, there is no evidence that the effectiveness of the magnetometer was impaired by its surroundings. Finally, there is no evidence that the magnetometer blocked the passage of handicapped persons. Taken as a whole, the evidence is insufficient to justify a finding that the efficiency and effectiveness of the Hearing Office would be adversely affected by the return of the magnetometer to its former location. See, *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 907 (1999).

In summary, the first, third, fourth and fifth of the *FCI* criteria support the Union's entitlement to a *status quo*

ante remedy, thereby establishing the appropriateness of such a remedy.

It is significant to note that the Union is only entitled to the restoration of conditions as they existed immediately prior to the removal of the magnetometer. Accordingly, this Decision should not be construed as requiring the Respondent to arrange for a second security guard at the Hearing Office or from incurring any other expense such as for the maintenance or calibration of the magnetometer. Furthermore, the intent of this Decision is not to prohibit the Respondent from requiring the posting of a notice warning visitors of the possible effect of the magnetometer upon pacemakers or other such devices.

In view of the foregoing factors, I have concluded that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute by ordering the removal of the magnetometer from the entrance to the Hearing Office without affording the Union advance notice and the opportunity to negotiate. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS HEREBY ORDERED, pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), that the Social Security Administration, Office of Hearings and Appeals, Montgomery, Alabama, shall:

1. Cease and desist from:

(a) Implementing changes in the use of magnetometers and hand held wands at the Montgomery, Alabama Hearing Office without providing advance notice to the American Federation of Government Employees, Local 3627 (Union), and affording the Union the opportunity to bargain over the proposed changes to the extent required by the Statute.

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

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

(a) Restore the use of the magnetometer and hand held wand at the Montgomery, Alabama Hearing Office under

the same terms and conditions as existed immediately prior to its removal.

(b) Notify and, upon request, bargain with the Union prior to effecting any changes in the use of the magnetometer and hand held wand at the Montgomery, Alabama Hearing Office.

(c) Post the attached Notice for 60 days at the Montgomery, Alabama Hearing Office on forms to be furnished by the Authority. The Notice is to be signed by the Regional Chief Administrative Law Judge of the Atlanta Region of the Office of Hearings and Appeals and is to be posted at all locations in the Montgomery, Alabama Hearing Office where employees represented by the Union are assigned, 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) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Atlanta Region of the Authority in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, February 4, 2004.

PAUL B. LANG
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 Social Security Administration, Office of Hearings and Appeals, Montgomery, Alabama has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement changes in the use of magnetometers and hand held wands at the Montgomery, Alabama Hearing Office without providing advance notice to the American Federation of Government Employees, Local 3627 (Union), and affording the Union the opportunity to bargain over the proposed changes to the extent required by the Federal Service Labor-Management Relations 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 restore the use of the magnetometer and hand held wand at the Montgomery, Alabama Hearing Office under the same terms and conditions as existed immediately prior to its removal.

WE WILL notify and, upon request, bargain with the Union prior to effecting any changes in the use of the magnetometer and hand held wand at the Montgomery, Alabama Hearing Office.

_____
(Respondent/Agency)

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 of the Federal Labor Relations Authority, Atlanta Region, Two Marquis Two Tower,

Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270 and whose telephone number is: 404-331-5212.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-03-0352, were sent to the following parties in the manner indicated:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Richard S. Jones **7000 1670 0000 1175 3413**
Federal Labor Relations Authority
Two Marquis Two Tower, Suite 701
285 Peachtree Center Avenue
Atlanta, GA 30303-1270

Cathy Six **7000 1670 0000 1175 3420**
Social Security Administration
2355 Annex Building
6401 Security Boulevard
Baltimore, MD 21235

Carl L. Warren **7000 1670 0000 1175 3437**
AFGE, Local 3627
3605 Springhill Business Park
Mobile, AL 36608

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: February 4, 2004
Washington, DC