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

MEMORANDUM DATE: July 12, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
COMPLIANCE ARES 5, SMALL
BUSINESS/SELF EMPLOYED DIVISION
JACKSONVILLE, FLORIDA

Respondent

and Case No. AT-CA-03-0712

NATIONAL TREASURY EMPLOYEES UNION

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

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE COMPLIANCE AREA 5, SMALL BUSINESS/SELF EMPLOYED DIVISION JACKSONVILLE, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-03-0712

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 **August 11, 2004**, and addressed to:

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

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PAUL B. LANG
Administrative Law Judge

Dated: July 12,2004
Washington, DC

OALJ 04-34

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

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE COMPLIANCE AREA 5, SMALL BUSINESS/SELF EMPLOYED DIVISION JACKSONVILLE, MD Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-03-0712

Shamar R. Cowan, Esquire
Richard S. Jones, Esquire
For the General Counsel

Robert E. Norman, Esquire
For the Respondent

Timothy C. Welsh, Esquire
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On August 13, 2003, the National Treasury Employees Union (Union) filed an unfair labor practice charge against the Department of the Treasury, Internal Revenue Service, Small Business/Self-Employed (SB/SE) Division, Compliance Area 5, Jacksonville, Florida (Respondent). The Union filed an amended charge against the Respondent on August 20, 2003. On December 15, 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 unfair labor practices in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by implementing changes to the method by which Offer in Compromise (OIC)

Specialists count inventory from the number of offers to the number of taxpayers and to the timeliness guideline by which OIC Specialists are to respond to offers from taxpayers when the taxpayer has provided all necessary information. Each of those changes was allegedly implemented without providing the Union with notice and an opportunity to bargain to the extent required by the Statute.

A hearing was held on March 16, 2004, in West Palm Beach, Florida. The parties were present with counsel and were afforded the opportunity to present 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, the Union and the Respondent.

Positions of the Parties

The General Counsel maintains that the Respondent unilaterally changed the conditions of employment of its Offer in Compromise Specialists in the South Florida Group without providing the Union with notice or an opportunity to bargain. According to the General Counsel, the changes in conditions of employment consisted of (a) changing the method of calculating case inventory from the number of offers to the number of taxpayers, and (b) shortening the deadline for followup after a taxpayer has submitted all required information from 75 days to 30 days. By making those changes the Respondent departed from practices that had been followed for many years.

The General Counsel further maintains that the aforementioned changes had more than a *de minimis* effect because it was reasonably foreseeable that the change in the method of computing inventory would cause the affected employees to exceed the prescribed levels of from 34 to 50 cases. The shortening of the deadline could foreseeably affect the performance evaluations of bargaining unit members. The performance evaluations determine whether employees will receive monetary awards and are also used in assessing employees' prospects for transfer and promotion.

According to the General Counsel, the method of counting inventory is substantively negotiable because it is a change to a procedure which is not a management right. The General Counsel acknowledges that the change in the deadline is only negotiable with regard to impact and implementation inasmuch as it amounts to the implementation of a new performance standard which is a management right. In the case of both changes the circumstances support the imposition of a *status quo ante* (SQA) remedy.

The Union has submitted a separate post-hearing brief in which it espouses positions which are identical to those of the General Counsel other than with regard to the negotiability of the change in the deadline for followup. Unlike the General Counsel, the Union acknowledges only that the change in the deadline might have been a management right.

The Respondent contends that it did not make any substantive change to the method of calculation of the inventory levels of OIC Specialists. On the contrary, it merely corrected the method of calculating inventory, thereby adjusting the levels for each employee[1] to the upper level of the established range. Alternatively, the effect of the change was *de minimis* and was only intended to conform to the intent of the Internal Revenue Manual (IRM).

The Respondent also maintains that any negotiations concerning inventory levels could only be conducted at the national level. Therefore, there was no duty to bargain locally.

The Respondent acknowledges that there is no provision in the IRM regarding the standard for timely followup with a taxpayer who has submitted all necessary information. The Respondent argues that it is not fair to allow 75 days for a response to a taxpayer who is generally required to submit information within 30 days. The Group Manager of the South Florida Group had been relying improperly on the Offer in Compromise/Collection Quality Measurement System Documentation Guidelines (CQMS) in spite of the provision in CQMS that it is not to be cited as an authority for taking specific actions during an offer investigation.

According to the Respondent, employees had ample notice of the changes to the timeliness guideline before the end of their current rating periods and had an opportunity to make necessary adjustments. Furthermore, the potential harm arising out of the change is remote and speculative in the absence of any evidence that an employee has suffered adverse effects in his or her performance evaluation.

Finally, the Respondent argues that both of the actions upon which this case is based were exercises of its management rights and that the adverse effects, if any, were *de minimis*.

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[1] The word "employees" will be used interchangeably with "OIC Specialists" unless otherwise indicated.

Findings of Fact

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is suitable for collective bargaining. Among the members of the bargaining unit are OIC Specialists whose activities are concentrated on the evaluation of offers by taxpayers to settle their tax liability. The duties of these employees include communications with taxpayers as well as the collection of information which is needed to make informed decisions as to whether the offers are acceptable.

At all times pertinent to this case OIC Specialists in the State of Florida worked in one of two groups which were designated respectively as North Florida and South Florida. The South Florida Group consists of offices in West Palm Beach, Deerfield Beach, Plantation, Fort Myers, Sarasota and Miami. Stanley Hammack was the Group Manager for South Florida. His immediate superior was Van E. O'Neal, a Territory Manager whose responsibilities included both the North Florida and South Florida Groups.[2]

The Internal Revenue Service (IRS) considers OIC Specialists to be a type of Revenue Officer. While Field Revenue Officers are concerned with collecting unpaid taxes, OIC Specialists evaluate settlement offers from taxpayers.

The Changes to Respondent's Practices

In early or mid-March of 2003[3] O'Neal met with Hammack to conduct an operational review of the South Florida Group. According to Hammack's testimony, this review was much different from any that he had previously experienced. Hammack described O'Neal as "very tenacious"; O'Neal had Hammack pull up every case on a computer and they discussed almost every history entry. They also discussed the standard for a timely followup by an employee after the taxpayer has submitted all required information. Hammack informed O'Neal that he was observing a 75-day standard for followup. That standard was based upon his construction of §5.13.4.3.2 of the Internal Revenue Manual (IRM) (Resp. Ex. 1, p.3). The cited portion of CQMS, which is part of the IRM, states that:

[2] O'Neal had retired as of the date of the hearing and did not testify.

[3] All further dates are in 2003 unless otherwise indicated.

> (1) To meet this standard [of timeliness], case actions taken that move the case toward resolution must be recorded more often than 75 calendar days. Reasons for lapses in activities should be explained.
>
> (2) The absence of case related actions or activities for 75 or more days would result in this standard not being met.

According to Hammack, the IRM is not clear as to the parameters for timely action in such cases (Tr. 112). O'Neal told Hammack that his reliance on the CQMS was misplaced and directed him to use a 30-day standard for followup pending receipt of further guidance from the National Office.[4] O'Neal further stated that the standard for timely action should be determined on a case by case basis and that 30 days should be considered as the maximum allowable time for followup. According to Hammack, O'Neal did not cite any IRS directive or regulation in support of the 30 day standard. However, he relied upon the fact that taxpayers are generally given 30 days to respond to requests for information and concluded that this would be a reasonable standard for a timely response to the taxpayer after all the requested information had been received. He also made reference to §5.13.4.1(3) of the CQMS (Resp. Ex. 1) which states:

> This chapter is intended as an aid to effective case documentation as it relates to CQMS standards. It is not a substitute for the procedures in the IRM and handbooks. It must not be cited as an authority for taking specific actions during an offer investigation. The case actions should only be based on the official procedural guidelines.

During the course of the discussion O'Neal made a telephone call to Tom Weber, the Group Manager for the North Florida Group who also reported to him. In response to O'Neal's inquiry, Weber stated that he used a 30-day deadline for followup as a general rule (Tr. 115).

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[4] The Respondent acknowledges in its post-hearing brief (p.6) that there had been no guidance on the subject from the National Office.

O'Neal and Hammack also discussed the method of computing the inventory of cases assigned to each employee.[5] O'Neal directed Hammack to begin counting inventory on the basis of taxpayers rather than by individual offers as he had been doing.

The Communication of the Changes to Employees and the Union

On March 18 and 19 a meeting was held for all members of the South Florida Group. (The minutes of the meeting, which were prepared on March 21, have been entered into evidence as Resp. Ex. 9. Copies were sent to O'Neal and to Frank Moreno, a representative of the Union who attended the group meeting.) This was an annual event that had been scheduled prior to the operational review. The results of the operational review were part of the agenda and the Group members were informed of O'Neal's directives concerning the deadline for followup and the calculation of inventory.

According to Hammack, there was "a fair amount of pain and consternation" among the Group members whose principal concern appeared to be with regard to the possible impact of the changes on their evaluations (Tr. 118). Hammack was sympathetic to their concerns and hoped that they would soon receive guidance from the National Office.

Barry Silverman is the Chapter President of the Union with responsibility for five IRS offices in South Florida. At some point in March after the Group meeting, Silverman was informed by bargaining unit employees that the Respondent had initiated the aforementioned changes. Silverman had not previously been aware that those changes were either contemplated or in effect.[6]

On March 24 Silverman sent an e-mail message to O'Neal in which he protested the allegedly unilateral changes and demanded that they be rescinded until the completion of

[5] According to §5.1.1.13.5(1) of the IRM (Resp. Ex. 2) Grade 12 Revenue Officers (including OIC Specialists) should have inventory levels of between 34 and 50 taxpayer cases. During the course of a meeting of the South Florida Group on October 16 and 17, 2002, O'Neal stated that inventory levels in the Group should be between 45 and 47 cases. O'Neal indicated that he would rather that employees have too much work than not enough (Resp. Ex. 8, p.3).

[6] The position of Mareno, who attended the Group meeting, is unclear and there is no evidence as to whether he routinely communicated with Silverman.

negotiations.7 Silverman also demanded that the Respondent remove any "negative documentation" from the records of employees in South Florida.

In O'Neal's response (the date of this e-mail message is not indicated in the exhibit) he referred to a meeting with the Group Manager on March 21, 2003, during which he had asked the Group Manager to make "a slight change" in the way he was counting inventory so as to adhere to the nationally negotiated agreement which called for an inventory range of between 34 and 50 taxpayer cases for each Grade 12 Revenue Officer. According to O'Neal the prior reliance on the CQMS, which had been cited by Silverman in support of the 75 day deadline for followup with taxpayers, was incorrect because the Internal Revenue Manual (IRM) states that the CQMS is not to be cited as authority for taking any action during an offer investigation. O'Neal further stated that he was unaware of any negative documentation regarding employees, but that he would appreciate receiving an example that would indicate otherwise.

On April 23 Silverman sent an e-mail message to O'Neal in which he stated that he had been advised by the Union's national office that there were no written guidelines regarding the calculation of inventory levels for employees and that the subject was included in a redesign process. Silverman asked O'Neal when he would be prepared to negotiate.

There was a further exchange of messages between Silverman and O'Neal in which each of them asked for copies of documents supporting the other's position; there is no indication that any documents were provided. On April 23 Silverman sent another message to O'Neal reiterating the request for negotiations and stating that, "I am not into e-mail negotiations."

On April 25 O'Neal sent an e-mail message to Silverman in which he agreed that there was a national task force addressing the issue of OIC inventory levels. O'Neal stated that, because the issue was being addressed on the national level, there would be no local negotiations. However, O'Neal expressed his willingness to discuss any issues with the Union and to give full consideration to any information which would show that a negotiated agreement had been violated. It is undisputed that no negotiations

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All of the pertinent e-mail communications have been entered into the record as GC Ex. 2.

subsequently occurred with regard to the Respondent's employees in South Florida.

The Effect of the Changes

There can be little doubt that the effect of the change in the method of calculating inventory might be to increase the caseload of employees in instances when taxpayers have more than one offer pending. However, the frequency and amount of such increases is unclear. Hammack testified on cross-examination that, because of the change, employees could "feasibly" have more cases (Tr. 131).[8]

As with the change in the method of calculating inventory, the effect of the change in the timeliness standard on an individual employee will depend upon the composition of his or her caseload. If a taxpayer never submits all of the required information, the revised deadline will not apply to that case. Furthermore, there is no evidence as to how many cases in an employee's inventory can be expected to be simultaneously at the stage where the revised standard is applicable. Nevertheless, under the 30-day standard employees will either have to expend a greater effort to meet the revised deadline or they will face the prospect of a negative impact on their performance evaluations.

The foregoing conclusion is supported by the testimony of Hammack and two bargaining unit employees. Hammack testified that he examines two cases for every offer specialist each month and that he evaluates the employee's performance in three "critical areas", among which is timely case actions. Hammack provides written feedback to each employee (Tr. 119).

Hammack also performs two "quarterly" reviews of employees each year. The first review occurs between the beginning of the employee's rating period and the mid-year evaluation; the second review occurs between the mid-year evaluation and the annual appraisal. Hammack testified that he typically looks at five or six cases in each employee's inventory and evaluates the cases according to the critical elements in their job description. The results of both the

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8 There is no evidence as to how often individual taxpayers have more than one offer pending or how often the new method of computation has resulted in additional case assignments. Logically, this could depend on such factors as the number of cases already assigned to an employee and the backlog of cases, if any, for the Group.

monthly and quarterly reviews are placed in employees' performance folders (Tr. 120).

Hammack rates each employee in his Group on an annual basis. One of the elements in the ratings is "Business Results-Efficiency." This element consists of three factors: timely actions, inventory management and planning, and scheduling (Resp. Ex. 3, 4, 7).

Zoya Wollaston is a member of the bargaining unit who is assigned to the West Palm Beach office. Wollaston testified that employees in the South Florida Group had been using the 75-day guideline since 1998. According to Wollaston, the change in the deadline has had a negative impact on her evaluations. On November 25, 2002, during the course of a monthly review, Wollaston was rated YES on timely actions (GC Ex. 3, p.1). In a monthly review on July 11, 2003, Wollaston was rated NO on timely actions (GC Ex. 3, p.2).

Cyd Sykes is a member of the bargaining unit who is assigned to the Plantation office. Sykes testified that the change of the followup deadline from 75 to 30 days had an immediate negative impact on her monthly reviews (GC Ex. 4 is a sample of her monthly reviews from March 5 to September 8). One of the case review sheets for March 21 (GC Ex. 4, p.11) indicates that, for the first time, Sykes received a rating of "NO" for timely actions; all prior review sheets contain a "YES" rating for timely actions. Sykes also received "NO" ratings on two subsequent review sheets (GC Ex. 4, pp.12, 14).

Both Wollaston and Sykes testified that the IRS uses two systems to compute inventory. One is the Automated Offer in Compromise (AOIC) system that is only accessible by OIC Specialists and certain supervisors. Under the AOIC system, each offer is counted as a separate case.

The other system is known as the Integrated Collection System (ICS). Under the ICS, which is used by Field Revenue Officers as well as by OIC Specialists, inventory is counted according to taxpayers. The effect of the change mandated by O'Neal during the operational review is to calculate inventory according to the ICS rather than the AOIC system as was previously the practice in the South Florida Group.

By memorandum of March 26 to Hammack (GC Ex. 4, p.15) Sykes protested her second quarterly review. Hammack responded on the same date with a handwritten notation on the memorandum in which he stated that he would expunge the quarterly review and the monthly reviews upon which it was

based from Sykes' employee performance folder and would not use the review forms dated March 21, when she received the unfavorable ratings on timely actions.9

The probative value of the reviews of Wollaston and Sykes is somewhat limited inasmuch as the decline in their ratings could have been at least partially caused by their failure to meet the standards for timely action in circumstances that are not at issue in this case. However, the evidence does show that there may be a direct causal connection between the performance evaluations of the affected employees and the changes both in the method of computing inventory and the standard for timely action after a taxpayer has submitted all necessary information.

The Respondent's Policies

The Respondent has cited the following language in the IRM in addition to the portion of the CQMS stating that it is not to be used as authority for actions in an offer investigation:

§5.1.1.13.5(1) (Resp. Ex. 2) - This section establishes targeted inventory levels "in an effort to secure maximum productivity for the Collection Field function". Grade 12 Revenue Officers are to be assigned 34 to 50 "taxpayer cases". Although the section seems to be intended for collection rather than offer cases, neither the General Counsel nor the Union has challenged the applicability of this section. However, the Respondent has not cited any portion of this section, or of any other section in the IRM, which refers to the method of calculating inventory.

§5.8.4.2 (Resp. Ex. 5) - The section is entitled "Initial Contact and Follow-Up Time Frames". It requires employees to make contact with taxpayers or their representatives within 45 days of the assignment of the offer investigation. Followup actions are required within 15 days of a taxpayer missing a deadline. There is no

9
In its post-hearing brief the Respondent has argued that I should not consider Sykes' unfavorable evaluations since they were subsequently expunged from her record. While the evaluations are not proof of actual harm to Sykes or other members of the bargaining unit, they do tend to prove the likelihood of an adverse effect on the future performance evaluations of bargaining unit members. I will consider the evaluations for that purpose only.

mention of a time frame for followup after a taxpayer has submitted all required information.

Discussion and Analysis

The Legal Framework

The law applicable to this case has been well established by the Authority. Prior to implementing a change in conditions of employment an agency must provide the union with notice of the change and must afford the union the opportunity to negotiate over those aspects of the change that are within the duty to bargain, *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999).[10] The agency is not absolved of this duty even if the change in working conditions is an exercise of a management right under §7106 of the Statute, *United States Department of the Air Force, 913th Air Wing, Willow Grove Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 855 (2002). However, there is no duty to bargain over a *de minimis* change to conditions of employment regardless of whether the change is substantively negotiable or is an exercise of a management right, *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646 (2004).

The Authority has stated that, in determining whether a change involves a condition of employment, it will consider (a) whether the change pertains to bargaining unit employees, and (b) whether there is a direct connection between the change and the work situation of bargaining unit employees, *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*). A determination of whether a change is *de minimis* will depend upon the nature and extent of either the effect, or the reasonably foreseeable effect, of the change, *Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998) (*Air Force*).

The Change in the Method of Calculating Inventory Had a Greater Than *De Minimis* Affect on Conditions of Employment

The change in the method of calculating inventory clearly meets the first prong of the *Antilles* test in that

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[10] The Respondent has not alleged the existence of an overriding exigency such as would have relieved it of the duty to give advance notice in accordance with *United States Department of the Air Force, 832nd Combat Support Group, Luke Air Force Base, Arizona*, 36 FLRA 289, 300 (1990).

it affects bargaining unit employees. With regard to the second prong, it is undisputed that, since before the time of Hammack's appointment as Group Manager in January of 2000, the inventories of the members of the South Florida Group were calculated according to the number of offers and that this practice persisted until March of 2003 when O'Neal conducted the operational review.

The Respondent maintains that the change in the method of calculation was no more than a technical correction, the effect of which was to move the inventory levels of South Florida employees toward the upper limit of the targeted range set forth in the IRM and to comply with the intent of the IRM, specifically with the inventory ranges set forth in §5.1.1.13.5 (Resp. Ex. 2).

The Respondent has not explained its rationale in maintaining that the intent of the cited portion of the IRM is to count inventory by taxpayer rather than by offer. The term "taxpayer cases" as used in the cited section is ambiguous and, in itself, lends equal weight to either method of calculation. It is significant to note that the Respondent has not cited any other portion of the IRM (or any other directive) in support of its position, nor has it presented evidence as to the method of calculation used for any of the other IRS offer groups throughout the country other than the North Florida Group.

The undisputed result of the change in the method of calculating inventory is to reduce the inventory figure for at least some employees, thereby allowing for the assignment of additional cases without exceeding the targeted inventory range set forth in the IRM.[11] This result, or the realistic possibility of such a result, has a direct connection, which is greater than *de minimis*, with the work situation of the affected bargaining unit employees. Therefore, the second prong of the *Antilles* test has been satisfied. Accordingly, the change in the method of calculating inventory amounts to a change in conditions of employment for employees in the South Florida Group.

The Change in the Timeliness Guideline Had a Greater Than *De Minimis* Effect on Conditions of Employment

Once again, it is undisputed that the change in the

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[11] In arguing that the only effect of the change is to allow the upward movement of case assignments within the targeted inventory range, the Respondent has tacitly admitted that this was its purpose in implementing the change.

timeliness guideline affects bargaining unit employees within the meaning of *Antilles*. It is also undisputed that there is no national policy with regard to the guideline for followup in the situation at issue and that such guidelines are negotiable at the national level, at least as to impact and implementation.12

The Respondent argues that the change in the timeliness guideline has no impact on working conditions because the effect of the change is speculative and remote. Alternatively, the Respondent maintains that any changes in working conditions are *de minimis*. Those arguments are not supported by the evidence.

The Respondent correctly asserts that, as of the time of the hearing, there was no definitive evidence that any employee had been adversely affected by the change to the guideline. The change in Wollaston's performance evaluation is of questionable significance and its cause is unclear. Sykes' negative evaluations were expunged from her performance file.13 However, it is clear that timeliness is a key element in the performance evaluations of bargaining unit employees. Furthermore, Hammack testified that timeliness is a part of his monthly and quarterly reviews of all employees. Therefore, it is clear that the change in the timeliness guideline can reasonably be foreseen either to subject employees to the possibility of lower evaluations or to require them to work at a faster pace in order to avoid an adverse effect on their evaluations. Thus, in accordance with the holding in *Air Force*, the effect of the change was greater than *de minimis*. For the same reasons, there is a direct connection with the work situation of bargaining unit employees, thus satisfying the second prong of the *Antilles* test and leading to the conclusion that the change in the timeliness guideline resulted in a change in the conditions of employment of bargaining unit employees.

The Respondent has relied on the fact that inventory levels were negotiable nationally in support of the proposition that it had no duty to accede to Silverman's request for local bargaining (see O'Neal's e-mail of April 25, GC Ex. 2). While the Respondent's position is

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At the time the change was implemented a joint task force was studying the issue on the national level.

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The expungement of Sykes' evaluations did not result from the Respondent's disavowal of the new guideline. Rather, it was in recognition of the fact that the 30 day deadline had passed for certain of Sykes' cases by the time that the guideline was changed.

valid as to bargaining, it does not address either the issue of its change to conditions of employment without prior notice to the Union or of its refusal to rescind the changes until the Union had been given an opportunity to request bargaining or to complete bargaining at the appropriate level. The duty of a union to request bargaining is triggered by its receipt of adequate notice of a proposed change in working conditions, *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997). In the absence of adequate notice in this case, the Union was not required to request bargaining, nor does a technically deficient request for bargaining retroactively absolve the Respondent of its failure to give adequate notice.

A SQA Remedy is Appropriate

Management rights, as defined in §7106(a)(2)(B) of the Statute, include the right to assign work. The right to assign work includes the right to determine when work assignments will occur and to whom the duties will be assigned, *National Treasury Employees Union and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 539, 567 (1997).

The change to the method of computing inventory allows the Respondent to assign more cases to employees while remaining within the targeted inventory levels set forth in the IRM. That is clearly a determination of the employees to whom duties will be assigned. The change to the timeliness guideline is an exercise of the Respondent's right to determine performance standards and when work assignments will occur. Therefore, it is clear that both of the changes at issue in this case were exercises of the Respondent's management rights.

Each of the parties has correctly cited *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*) as establishing the criteria for determining if a SQA remedy is appropriate in a case involving an agency's breach of the duty to engage in impact and implementation bargaining. Each of those criteria will be applied to the circumstances of this case.

Whether and when notice was given to the union by the agency concerning the change. The undisputed evidence shows that the Union received no advance notice of either change. The Respondent argues that the Union did receive advance notice of the change to the timeliness guideline because the change went into effect before the end of the current evaluation period, thus giving employees the chance to conform to the

new guideline. That argument is unpersuasive because the effect of the necessity of meeting the new guideline was immediate. Therefore, this factor supports the granting of a SQA remedy.

Whether and when the union requested bargaining. Upon first learning of the changes, the Union, through Silverman, immediately requested that the changes be rescinded and that the Respondent participate in negotiations.[14] Even though Silverman requested local rather than national negotiations, there can be no doubt that the Union acted promptly to vindicate its statutory rights. This factor supports the granting of a SQA remedy.

The willfulness of the agency's conduct in failing to discharge its bargaining obligation. The evidence indicates that O'Neal thought that the Respondent had no duty to bargain because of the existence of a national task force which was addressing the subject of inventory levels. Nevertheless, the wilful nature of the Respondent's refusal to bargain is not alleviated by its belief that it had no duty to do so, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000). This factor supports the granting of a SQA remedy.

The nature and extent of the adverse impact on unit employees. Although the changes at issue undoubtedly have the potential of significantly affecting the working conditions of bargaining unit employees, the actual impact is unclear. In view of the fact that the General Counsel has the burden of proof as to the appropriate remedy, I have concluded that this factor does not support the granting of a SQA remedy.

Whether and to what degree a SQA remedy would disrupt or impact efficiency and effectiveness of the agency's operations. The Respondent has not addressed this factor other than to argue that the 75-day followup guideline is not fair to taxpayers who are generally required to meet 30-day deadlines. That argument does not establish that a SQA remedy would cause any disruption or deterioration of efficiency or effectiveness of the Respondent's operations. Realistically, it may be supposed that the restoration of the 75-day followup guideline would slow the resolution of offer cases. However, there is no evidence to show the magnitude of the effect on the Respondent's operations.

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[14] Even if it were determined that the Union was charged with knowledge of the changes through Mareno, the request for negotiations was still timely.

Consequently, I have concluded that this factor supports the granting of a SQA remedy.

Since four out of the five *FCI* criteria support the granting of a SQA remedy, such a remedy will be incorporated into the recommended Order.

For the reasons set forth herein I have concluded that the Respondent committed unfair labor practices in violation of §7116(a)(1) and (5) of the Statute by implementing changes to the method of calculating case inventories for OIC Specialists in the South Florida Group and by changing the timeliness guideline for those OIC Specialists from 75 to 30 days for followup with taxpayers who have submitted all required information. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.1 of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the Treasury, Internal Revenue Service, Small Business/Self Employed (SB/SE) Division, Compliance Area 5, Jacksonville, Florida, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes to the method of counting inventory for Offer in Compromise Specialists in the South Florida Group and to the timeliness guideline for responding to offers, where the taxpayer has provided all of the requested information, without giving prior notice to the National Treasury Employees Union (Union) and affording it an opportunity to bargain over the impact and implementation of those changes.

(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 practice of counting inventory of Offer in Compromise Specialists in the South Florida Group by the number of offers as the practice existed immediately prior to March of 2003.

(b) Restore the timeliness guideline of 75 days for Offer in Compromise Specialists in the South Florida Group to respond to offers where the taxpayer has provided all of the requested information, as the practice existed immediately prior to March of 2003.

(c) Notify, and upon request, negotiate with the Union on impact and implementation prior to making changes to the method of counting the inventory of Offer in Compromise Specialists in the South Florida Group.

(d) Notify, and upon request, negotiate with the Union on impact and implementation prior to making changes to the timeliness guideline for the Officer in Compromise Specialists in the South Florida Group.

(e) Post at its South Florida Offices, including West Palm Beach, Plantation, Fort Myers, Sarasota and Miami, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Territory Manager 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 with other material.

(f) 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 this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 12, 2004.

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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 Department of the Treasury, Internal Revenue Service, Small Business/Self Employed (SB/SE) Division, Compliance Area 5, Jacksonville, Florida 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 unilaterally implement changes to the method of counting inventory for Offer in Compromise Specialists in the South Florida Group and to the timeliness guideline for responding to offers, where the taxpayer has provided all of the requested information, without giving prior notice to the National Treasury Employees Union (Union) and affording it an opportunity to bargain over the impact and implementation of those changes.

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 practice of counting inventory of Offer in Compromise Specialists in the South Florida Group by the number of offers, as the practice existed immediately prior to March of 2003.

WE WILL restore the timeliness guideline of 75 days for Offer in Compromise Specialists in the South Florida Group to respond to offers where the taxpayer has provided all of the requested information, as the practice existed immediately prior to March of 2003.

WE WILL Notify, and upon request, negotiate with the Union on impact and implementation prior to making changes to the method of counting the inventory of Offer in Compromise Specialists in the South Florida Group.

WE WILL notify, and upon request, negotiate with the Union on impact and implementation prior to making changes to the timeliness guideline for the Officer in Compromise Specialists in the South Florida Group.

_____
(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 its provisions, they may communicate directly with the Regional Director, Nancy Speight, Regional Office, whose address is: Federal Labor Relations Authority, Marquis Two Tower - Suite 701, 285 Peachtree Center Avenue, Atlanta, Georgia 20303-1270, 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-03-0712 were sent to the following parties:

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CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS:**
Sharmar R. Cowan, Esquire Richard S. Jones, Esquire Federal Labor Relations Authority Marquis Two Tower - Suite 701 285 Peachtree Center Avenue Atlanta, Georgia 30303-1270	**7000 1670 0000 1175 4113**
Robert E. Norman, Esquire Office of Chief Counsel Internal Revenue Service 401 West Peachtree Street, N.W. Suite 640, Stop 180-R Atlanta Area Counsel, General Legal Services Atlanta, Geogia 30309	**7000 1670 0000 1175 4106**
Timothy C. Welsh, Esquire National Treasury Employees Union 2801 Buford Highway, Suite 430 Atlanta, Georgia 30329	**7000 1670 0000 1175 4007**

Dated: July 12, 2004
Washington, DC