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

DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE DISTRICT OFFICE, LAWRENCE, KANSAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3949 Charging Party	Case No. DE-CA-01-0256

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/her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 22, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: June 21, 2002
Washington, DC

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

MEMORANDUM DATE: June 21, 2002

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
DISTRICT OFFICE, LAWRENCE, KANSAS

Respondent

and Case No. DE-CA-01-0256

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3949

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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 02-46
WASHINGTON, D.C.

DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE DISTRICT OFFICE, LAWRENCE, KANSAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3949 Charging Party	Case No. DE-CA-01-0256

Jonathan C. Theodule, Esquire
For the Respondent

Hazel E. Hanley, Esquire
For the General Counsel

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an Unfair Labor Practice charge filed by the American Federation of Government Employees, Local 3949 (the Union), against the U.S. Department of Agriculture, Food Safety and Inspection Service, District Office, Lawrence, Kansas (the Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director, Denver Region of the Federal Labor Relations Authority (the Authority). The complaint alleged that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), on or about November 29, 2000, by changing conditions of employment with respect to the duty station of a bargaining unit employee without providing the Union with notice and an opportunity to bargain. The complaint alleges that this change, in turn,

adversely affected the employee's ability to earn administrative overtime and other conditions of employment.

A hearing in this matter was held in Kansas City, Missouri, on December 17, 2001. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely briefs.

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

Background Information

It is undisputed that the American Federation of Government Employees (AFGE), National Joint Council of Food Inspection Locals, is the exclusive representative of a unit of employees at the Respondent and that the Union is an agent of the AFGE National Council. (G.C. Ex. 1(c) and (f)). At all times material to the complaint in this case, David Kroeger served as the President of the AFGE Midwest Council of Food Inspection Locals. (Tr. 20-21) Ronald J. Wood is a Food Inspector employed with the Respondent and, at all times material, served as the President of the Union. (Tr. 44-45) At the times material, Wood reported to Dr. Harold Treese, Circuit Supervisor, who in turn reported to Dr. William Walker, District Manager of the Lawrence District. (Tr. 46-47, 121-22, 155-56) In 1998, Wood was assigned as the "relief" inspector for an inspector whose "patrol" consisted of slaughter and processing plants located in Montreal, Lebanon, Richland, Rolla, Vienna and Freeburg, Missouri, and who was absent for medical reasons.[1] (Tr. 47-48) As a relief inspector, Wood was a GS-10. (Tr. 47) When the inspector assigned to the "Montreal patrol" subsequently retired, Wood requested to remain in that patrol as his official assignment. (Tr. 48-49, 75) To accommodate that reassignment, Wood submitted a request in

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[1] A patrol is a fixed assignment consisting of multiple slaughter or processing plants for which a single inspector is responsible. (Tr. 28)

January 2000 to be changed to a GS-9.[2] (Resp. Ex. 1; Tr. 48) In response to his request, Wood's grade was changed to a GS-9 effective March 26, 2000. (Resp. Ex. 1)

Change in Wood's "Headquarters" Plant

Tom's Slaughter and Meat Processing, which was located outside of Montreal, was designated as the headquarters plant for Wood, as well as Treese and another employee, Vickie Anderjaska. (Tr. 136-37) The location of the headquarters plant, Montreal and Missouri, served as the designated duty station of those three individuals. (Tr. 136-37, 152) The record shows that Wood did not report to Tom's Slaughter at the beginning and end of each workday but usually traveled directly between his home and other plants in his patrol.[3] (Tr. 65-67) The travel time and distance between Wood's home and the designated duty station were construed as his normal commute for purposes of computing reimbursement for travel directly between his home and the other plants in his patrol and his overtime claims. (Tr. 52-53, 57-58, 85)

According to Walker, he had heard through the grapevine that Tom's Slaughter was in financial trouble. (Tr. 130) By communication dated January 18, 2000, Tom's Slaughter requested voluntary suspension from inspection service. (G.C. Ex. 12) A 120-day suspension was granted on January 19, 2000. (G.C. Ex. 12) On July 28, 2000, Tom's Slaughter requested to withdraw the plant from inspection and that request was granted on August 16, 2000. (G.C. Ex. 13) Once Tom's Slaughter withdrew from inspection, there was no longer a justification for continuing to designate it as a headquarters plant for Wood, Treese and

[2] At the hearing, Wood stated that the ability to earn overtime on the Montreal patrol was the "primary" attraction of that assignment and also alluded to the fact that the Montreal assignment allowed him to "stay home." (Tr. 48-49) On his request to be changed to the lower-grade, Wood stated that his reason for doing so was his inability "to keep pace" with the out-of-town and out-of-state details that the Relief Schedule entailed and health problems. (Resp. Ex. 1) I find that the reasons Wood gave at the hearing and on his earlier request for a change to a lower-grade are compatible. Thus, both the availability of overtime and the absence of out-of-town details were factors underlying his action.

[3] Wood testified without contradiction, and I find, that he rarely had business at Tom's Slaughter and seldom went there. (Tr. 65-67)

Anderjaska. (Tr. 131) Walker, however, delayed reassigning the employees because, among other things, a regular quarterly labor-management relations meeting was scheduled for the first or second week in September, which would afford him an opportunity to consult with Kroeger. (Tr. 131)

Notice to the Union

The quarterly labor-management relations meetings, which occur in Lawrence, are between representatives of the Midwestern Council of Food Inspection Locals and the District Office of Food Safety and Inspection Service. (Tr. 21-22, 124) Separate meetings occur: a "one-on-one" meeting between Kroeger, the Council President, and Walker, the District Manager; and a group meeting between those two as well as the presidents of the locals that constitute the Council and the circuit supervisors. (Tr. 124-26) Historically, the subjects of plant closings and employee reassignments were discussed at the quarterly meetings. (Tr. 35-36, 127) At the quarterly meeting held in September 2000, Kroeger and Walker met the day before the local presidents came in. (Tr. 21) Walker testified that at his "one-on-one" meeting with Kroeger he told Kroeger that Tom's Slaughter was closed and that they were going to do something with respect to designating duty stations for Wood and Anderjaska. (Tr. 131, 137) Walker recalled that after he advised Kroeger of the impending change in duty stations, Kroeger asked if Wood and Anderjaska knew and either Walker or Mary May, his Resource Management Specialist, replied that Treese, Wood and Anderjaska had been discussing it. (Tr. 136-37) Although uncertain and imprecise as to what Walker had said to him regarding the closure of Wood's headquarters plant and the need to designate a new duty station for Wood, Kroeger's testimony corroborated that some discussion of the matter occurred during his meeting with Walker.[4] (Tr. 22, 32-34)

According to Walker, he generally left the task of deciding the location of duty stations to May, his Resource

[4] To the extent that there is disparity between the testimony of Kroeger and Walker with respect to whether Walker informed Kroeger at their meeting that Wood's duty station was going to be changed, I credit Walker. His recollections on this point was more certain than those of Kroeger. Also, particularly in view of the fact that Walker believed that two of the three individuals assigned to the duty station were bargaining unit employees and one of those was the local president, it is highly probable that Walker would have raised the matter with Kroeger at their meeting.

Management Specialist, and he "sort of" had "the approving role[.]" (Tr. 131-32) Walker testified that he did not have any new location in mind for Wood's duty station when he informed Kroeger that the site was being changed. (Tr. 131-32) According to Kroeger, May initiated a discussion at a later point that day in which she showed him some maps. (Tr. 23) Kroeger testified that he thought the maps showed what Wood's patrol had covered and what it was going to cover. (Tr. 23) Kroeger's testimony demonstrates that he understood from the discussion that Wood's headquarters plant was going to change. (Tr. 23-24) Kroeger further testified that he thought that May informed him of the date when the change would occur, but could not remember what the date was. (Tr. 24) According to Kroeger, May did not discuss any alternatives for headquarters plants. (Tr. 24) On cross examination, Kroeger acknowledged that May explained Wood's "different duty location" on a map. (Tr. 34)

According to both Kroeger and Walker, there was no mention about Wood's ability to earn "administrative" overtime during the discussions about the change in headquarter's plant.[5] (Tr. 24, 148) Walker testified that terminating Wood's ability to earn overtime was not one of his plans. (Tr. 148) Kroeger testified that during his discussion with May, the main concern she expressed related to driving distances and times. (Tr. 42) In Kroeger's opinion, the driving distances and times were significant with respect to whether Wood would need to move and his overtime earnings. (Tr. 42) Kroeger acknowledged that during a conversation with either Walker or May, he made a statement to the effect that as far as he was concerned, "it" (presumably whatever they were presenting to him with respect to the change in Wood's assignment) looked okay; however, he thought that Wood, who would be in the next day, should have some input. (Tr. 32-33) During the hearing, Kroeger stated that the reason he told May it would be a good idea to consult with Wood was that he lacked familiarity with the roads involved or the facilities for a

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The parties and witnesses commonly used the term "administrative" overtime but did not provide any explanation as to what it is other than it involves work over 40 hours per week. (Tr. 90) Documents in evidence shows that Wood was "nonexempt" from the Fair Labor Standards Act (FLSA) (G.C. Ex. 3; Resp. Ex. 1) and that indeed he earned FLSA overtime. (G.C. Ex. 8(a)-(y)). In the absence of any indication that Wood was covered by overtime provisions in some other statute or regulation, I find that Wood was subject to FLSA for overtime compensation purposes.

government office at the plants in Wood's patrol and, thus, did not have the ability to recognize the effects of the change based on the maps he was shown. (Tr. 24-25) Walker was not present during Kroeger's discussion with May (Tr. 22) and May did not testify at the hearing in this case.

Walker stated that he was not aware of any proposed changes in Wood's patrol beyond the designation of the headquarters plant. (Tr. 144-46) There is no evidence that Respondent was considering any changes in Wood's patrol other than his headquarters plant.

Based on the record as a whole, I find it is more probable than not that May informed Kroeger that she was proposing that Lebanon be Wood's new duty station. Thus, based on a preponderance of the evidence, I find that during her discussion with Kroeger, May identified Lebanon as the proposed new duty station for Wood. In this regard, it is clear that no changes in Wood's patrol other than the elimination of Tom's Slaughter and the relocation of Wood's duty station to another site were planned. In view of the limited changes in Wood's patrol, it follows that one of the few things that May had to explain to Kroeger was the proposed site of Wood's new duty station.[6] Indeed, Kroeger acknowledged that in showing him the map, May explained the new duty location and did not discuss possible alternatives.

Wood's Knowledge of the Change in His Headquarters Plant

There was no discussion with Wood during the quarterly meeting regarding the planned changes in his patrol.[7] (Tr. 68) In his testimony, Wood professed that he was unaware of the fact that Tom's Slaughter was withdrawing

[6] In his testimony, Kroeger did not mention that any discussion of Anderjaska's situation occurred during his conversation with May. Thus, there is no indication that this subject was addressed during that conversation. Walker testified that Anderjaska was reassigned to Fair Grove, Missouri. (Tr. 153)

[7] When queried as to why he did not raise the matter with Wood during the quarterly meeting, Kroeger asserted that, in his view, it was incumbent on management to ask for a meeting that included Wood to discuss the patrol assignment. (Tr. 35) Nothing in Kroeger's testimony, however, indicates that he communicated to either May or Walker that they, rather than he, should take the responsibility for soliciting Wood's input or initiating a discussion with Wood.

from inspection. (Tr. 64) Dr. Treese, on the other hand, testified that he and Wood had frequent conversations about the fact that Tom's Slaughter was, initially, requesting suspension from inspection and, later, requesting to withdraw from inspection. (Tr. 156-57, 161-62) Treese stated that it was Wood who informed Tom's Slaughter that it needed to write a letter requesting suspension. (Tr. 157) Wood stated that Treese might have instructed him to pick up various equipment and documents in conjunction with the cessation of operations at Tom's Slaughter (Tr. 65) and, under cross examination, acknowledged that he might have heard from Treese that Tom's Slaughter was suspending operations. (Tr. 97) Treese testified that before they were officially notified, he and Wood had conversations to the effect that Lebanon would probably be designated as their new duty station. (Tr. 166) On the question of whether Wood and Treese had conversations about the cessation of operations at Tom's Slaughter and the likelihood that Lebanon would replace Montreal as their duty station, I credit Treese. It is simply implausible that Wood remained unaware of developments with respect to the plant that served as his duty station and far more believable that he and Treese, who shared the same duty station, were interested in and conversed about those developments.

A notification of personnel action approved on November 19, 2000, shows that effective October 22, 2000, Wood's duty station was changed to Lebanon, Missouri. (G.C. Ex. 3) Wood's unrebutted testimony was that he received this notification in very late November 2000. (Tr. 67) Other than the location of his headquarters plant and the elimination of Tom's Slaughter from it, Wood's patrol remained the same. (Tr. 75, 83-86)

Effects of Change in Wood's Headquarters Plant

Lebanon is 47 miles from Wood's home and requires a drive of approximately 1 hour; it is more distant from Wood's home than Tom's Slaughter (G.C. Ex. 10), which was approximately a 15-20 minute drive from Wood's home. (Tr. 52-53) According to Wood, one consequence of the change in the location of his headquarters plant is that an additional 22 miles is deducted from the distance for which he is reimbursed when driving between his home and the other plants on his patrol.[8] (Tr. 84-85) Wood also testified that although he is not certain, he believes that the change in his headquarters plant has resulted in limitations on his

[8] It appears that the 22 miles applies to a one-way trip between Wood's home and Lebanon rather than a round trip.

eligibility for workmen's compensation. (Tr. 73-74) More specifically, Wood opined that he would not be covered for travel to and from work beyond a 25 mile radius from the plant in Lebanon.[9] (Tr. 73) Wood did not provide any comparison between the conditions of his "government office" at Tom's Slaughter and those at Lebanon. Wood did, however, assert that the plant at Richland, which he described as equivalent to Lebanon in terms of distance from his home, afforded much nicer facilities for a government office than the plant at Lebanon. (Tr. 52-56) In making this comparison, Wood cited as undesirable features associated with his office at the Lebanon plant: lack of privacy; delay in installing a telephone; inability to use his computer; lack of a functioning shower coupled with proximity to the "kill floor" at the plant; and his desk being propped up because of a drain in the floor. (Tr. 53-55)

Wood's Administrative Overtime

It is undisputed that Wood "self-certified" his time and attendance reports; that is, he prepared his own reports and submitted them directly to the National Finance Center. (Tr. 79-80; 160-61) Wood obtained overtime pay by claiming it on his time and attendance report without prior approval from his supervisor. (Tr. 109-10) Wood testified that Treese reviewed his time and attendance reports "on occasion." (Tr. 80) Treese testified that he did not usually review Wood's time and attendance reports but did so from time-to-time, or if he thought there might be a problem, or if the District Office asked him to check into the amount of administrative overtime claimed. (Tr. 160-61; 166-67) Earnings and leave statements submitted into evidence show that from December 1999 through November 2000, Wood earned overtime during every pay period and totaled over $10,000 in one year.[10] (G.C. Ex. 8(a)-8(y)) Earnings and leave statements submitted into evidence show that from December 17, 2000, through October 20, 2001, Wood earned very little overtime. (G.C. Ex. 8(z)-8(aa); 9(a)-9(t))

[9] Although during his testimony in this regard, Wood made reference to "Directive 3800.2," that document was not submitted into evidence or further explained. (Tr. 73) Neither Wood nor the General Counsel provided any further support for Wood's view on his eligibility for workmen's compensation.

[10] No earnings and leave statement for the pay period December 3, 2000, through December 16, 2000, was submitted into evidence. Consequently, there is no information as to what, if any, overtime Wood earned for that particular pay period.

Wood stated that in the past, he would claim overtime for the drive from various plants in his patrol and his home at the end of the day, "if [he] were entitled to it[.]"[11] (Tr. 91) Wood asserted that shortly after his headquarters plant was changed to Lebanon, Treese told him that he could no longer earn "administrative" overtime. (Tr. 70, 72) Wood did not elaborate on this particular communication with Treese. In particular, Wood did not identify what reason Treese gave for his ineligibility to claim overtime other than that no overtime was approved for his "patrol assignment." (Tr. 70, 72, 108) Treese stated that he had not authorized overtime for Wood and, initially, was not aware that Wood was claiming overtime but, at some unspecified point prior to the hearing in this case, became aware that Wood had been claiming it. (Tr. 164) Treese's testimony neither confirmed nor denied that he told Wood that he could no longer earn overtime compensation. During his testimony, Treese stated, however, that Wood was not entitled to administrative overtime working out of Lebanon because it does not require him to be on duty more than 8 hours a day. (Tr. 167) I find that Treese advised Wood that he could not claim overtime. There is no other apparent explanation for why Wood suddenly stopped claiming overtime that amounted to over $10,000 per year. (G.C. Ex. 8(y)) Moreover, in its post-hearing brief, Respondent acknowledged that Treese advised Woods to stop his practice of charging overtime. (Resp. Brief at 4) The record does not, however, establish whether the change in Wood's duty station had a causal relationship to the almost total

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Wood did not explain what he meant by "entitled;" however, I understood it to refer to legal and regulatory requirements that must be met for overtime compensation, such as work exceeding 40 hours per week.

elimination of Wood's overtime earnings or whether the relationship was limited to coincidence in timing.[12]

Discussion

Positions of the Parties

The General Counsel

Counsel for the General Counsel contends that Respondent violated section 7116(a)(1) and (5) by changing Wood's duty station and other related working conditions, including his ability to earn administrative overtime, without providing the Union with notice and an opportunity to bargain. The General Counsel asserts that the change in Wood's conditions of employment had more than a *de minimis* effect. The adverse effects that Counsel for the General Counsel asserts that Wood suffered were: a reduction in his gross annual income of about $10,000; a loss of coverage under workmen's compensation for approximately 22 miles of his new normal commute; a government office that is not as nice as the one he could have had if the Richland plant was designated his headquarters plant.

Counsel for the General Counsel argues that the Respondent did not provide notice of the change in Wood's duty station and the related conditions of employment that was sufficient to satisfy its statutory obligation to furnish specific and definitive notice. The General Counsel acknowledges that although Wood could reasonably have anticipated some reduction in his overtime earnings based on the difference in the distance between his home and his new and old duty stations, the almost total elimination of Wood's overtime was not an obvious consequence of the change in his duty station. (G.C. Brief at 10, n. 10) Moreover, the General Counsel contends that because Kroeger was not in a position to recognize that Wood's overtime compensation

[12] In his testimony, Treese gave no clear and direct explanation as to why he would have advised Wood to stop claiming overtime. In fact, his testimony on that matter is confusing. At one point, Treese testified that in his opinion Wood was not charging too much administrative overtime. (Tr. 167) Immediately thereafter, Treese testified that in his opinion Wood was not entitled to administrative overtime working out of Lebanon because his official assignment did not require him to be on duty more than 8 hours a day. (Tr. 167) I infer from this latter statement that the reason Treese advised Wood to stop claiming administrative overtime was because he did not believe that his assignment required him to work more than 8 hours a day.

would be terminated in conjunction with the change in his duty station, the Respondent should have provided additional, specific notice that the overtime was being eliminated whether the elimination was part of the change in duty station or an additional change. The General Counsel argues that even assuming Wood had actual notice of the change in his duty station, this did not satisfy the Respondent's statutory obligation to provide adequate notice to the Union.

As remedy, the General Counsel requests a retroactive bargaining order. In this regard, the General Counsel concedes that because it has ceased to exist, Tom's Slaughter cannot be reestablished as Wood's headquarters plant. With respect to Wood's administrative overtime, Counsel for the General Counsel requests a *status quo ante* remedy including a make whole relief arguing that a *status quo ante* remedy is warranted under the factors articulated by the Authority in *Federal Correctional Institution*, 8 FLRA 604 (1982)(*FCI*). Applying the *FCI* factors, the General Counsel contends that the Respondent provided no or, at best, inadequate notice to the Union and, consequently, the Union had no opportunity to request bargaining. The General Counsel further asserts that under the *FCI* factors, Respondent's action was willful. The General Counsel maintains that the impact of the change on Wood's income and other conditions of employment was severe and that Respondent has not established that a *status quo ante* remedy would be disruptive to agency operations.

The General Counsel also requests that a Notice to Employees be posted in all government offices throughout the Lawrence District in locations where notices to employees are customarily posted and also electronically posted on all government-issued computers in that district.

The Respondent

Preliminarily, the Respondent renews a prior motion to dismiss the complaint. In support of the motion, the Respondent argues that it had no obligation to provide the Union with notice of the change in Wood's headquarters plant because the change "was an exclusive management right [.]" (Resp. Brief at 3) Respondent asserts that it nonetheless provided the Union with notice of the change, but the Union waived any right to bargain. Respondent further contends that the General Counsel failed to establish that the alleged denial of administrative overtime resulted from the change in Wood's headquarters plant. Respondent maintains that, in fact, Treese's action in advising Wood to cease claiming overtime was independent of

the change in his headquarters plant and resulted from Treese's discovery that Wood was "automatically" charging overtime and had succeeded in doing so because of his self-certifying status. (Resp. Brief at 3-4) Respondent asserts that the only impact of the change in Wood's headquarters plant that has been established is the loss of 22 miles from the amount that Wood is reimbursed for driving between his home and the plants on his patrol. The Respondent contends that this impact is *de minimis*.

In addition to renewing its motion to dismiss, the Respondent submitted arguments on the merits of the case, which in large part reiterate those made in conjunction with the renewal of its motion to dismiss. In its arguments, the Respondent acknowledges that prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. The Respondent asserts that the decision to change Mr. Wood's headquarters plant involved the exercise of management's right to assign work and, consequently, was not substantively negotiable. Respondent further contends that there was no obligation to bargain over the impact and implementation of the change because the impact was no more than *de minimis*. Additionally, Respondent asserts that nevertheless it provided the Union's representative, Mr. Kroeger, with adequate advance notice of the change and that he responded that the proposed change was okay with him. The Respondent argues that it met any notice obligation that it had and the Union's failure to request bargaining constituted a waiver of its right to bargain.

Analysis

Scope of the Complaint

The relationship between the change in Wood's headquarters plant, or duty station, and the change with respect to his claims for administrative overtime raises a question as to the scope of what is properly before me.

In relevant part, the complaint in this case alleges as follows:

> · On or about November 29, 2000, Respondent . . . issued a Notice of Personnel Action, effective on October 28, 2000, that changed the headquarters plant of a bargaining unit employee.

- On or about November 29, 2000, Respondent implemented the change described in paragraph 13, whereby a bargaining unit employee's ability to earn Administrative Overtime and other working conditions were adversely affected.

- Respondent implemented the changes described in paragraphs 13 and 14 without giving AFGE or Local 3949 notice and the opportunity to bargain to the extent required by law.

- By the conduct described in paragraphs 13 through 15, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).

As worded, the complaint presented the matter of Wood's "administrative" overtime as one of the results, or adverse effects, of the change in his headquarters plant. As evidence unfolded at the hearing in this case, it became apparent that the circumstances that produced the drastic reduction in Wood's overtime compensation were, at least in part, independent of the change in his headquarters plant. The complaint, however, did not include an allegation that any change in Wood's overtime occurred independent of the change in his duty station but, rather, encompassed the overtime issue only insofar as it flowed from the change in duty station. Consequently, I find that the change in Wood's overtime is included in the complaint only to the extent that it resulted from the change in Wood's duty station. Put another way, the complaint does not extend to any alleged change in Wood's overtime that resulted from circumstances other than the change in his duty station.

As a general rule, the Authority will not review allegations that are not included in a complaint. *American Federation of Government Employees, Local 2501, Memphis, Tennessee*, 51 FLRA 1657, 1660 (1996). An exception applies if the record shows that, despite the fact that an issue was not included in the complaint, it was fully and fairly litigated. The principle underlying this rule and its exceptions is that a respondent to a complaint must be afforded a meaningful opportunity to defend itself against allegations that it violated the Statute. The Authority has stated that "fully and fairly litigated" means that "all parties understood (or objectively should have understood) the issues in dispute and had a reasonable opportunity to present relevant evidence." *Id.* at 1661.

Although the Respondent in this case submitted evidence and argument relating to an allegation that a change occurred in Wood's overtime compensation, the focus of the evidence and arguments was not an allegation that it changed Wood's overtime compensation independently of his duty station change. Rather, the Respondent submitted the evidence and arguments in an effort to establish that the loss of overtime resulted from circumstances other than the change in Wood's duty station as a defense against an allegation that the change in Wood's duty station produced his loss of overtime compensation. It is difficult to predict how the Respondent would have defended itself if presented with allegations that it violated the Statute by changing Wood's duty station and also by independently changing his overtime compensation. It is possible that Respondent may have presented more or different evidence and argument than it did in an attempt to establish that Wood's supervisors were unaware that he was claiming overtime or that Wood's overtime claims were inconsistent with laws and regulations governing overtime compensation. I find that the issue of any alleged change in Wood's overtime compensation that resulted from circumstances other than the change in his duty station was not fully and fairly litigated.

In summary, I find that the issue of whether the Respondent violated the Statute by changing Wood's overtime compensation independently of the change in his duty station is not properly before me.

Respondent's Obligation to Provide Notice and an Opportunity to Bargain Prior to Changing Wood's Duty Station

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency generally is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999)(*FCI, Bastrop*). With limited exceptions, parties must satisfy their mutual obligation to bargain before changes in conditions of employment are implemented. The extent to which an agency is required to bargain over changes in conditions of employment depends on the nature of the change. Where an agency institutes a change in a condition of employment and the actual decision, or substance of the change, is negotiable, the extent of impact on unit employees is not relevant to whether the agency is obligated to bargain. *92 Bomb Wing, Fairchild Air Force Base, Spokane, Washington*, 50 FLRA 701 (1995). Where, however, a change in

a condition of employment entails the exercise of a management right under section 7106 of the Statute, the agency has a statutory obligation to bargain concerning the impact and implementation of such change but only if the change would result in an impact on employees that is more than *de minimis* in nature.

Here, it is undisputed that the Respondent changed Wood's duty station from Montreal to Lebanon. The Authority has found that the right to determine organization under section 7106(a)(1) refers to the administrative and functional structure of an agency and encompasses the designation of duty stations where that designation is for the purpose of implementing administrative matters, such as reimbursement for travel expenses. *See National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service*, 35 FLRA 398, 409-12 (1990). The record in this case demonstrates that the designation of Wood's duty station was for the purpose, among others, of determining reimbursement for duty-related travel expenses. Thus, the record shows that the designation of employee duty station was for the purpose of implementing administrative matters and, consequently, I find that it had a direct and substantive relationship to the agency's administrative structure. I find that the designation of Lebanon as Wood's duty station constituted an exercise of management's right to determine organization.[13] *See American Federation of Government Employees, AFL-CIO, Local 3805 and Federal Home Loan Bank Board, Boston District Office*, 5 FLRA 693 (1981). Thus, the Respondent was obligated to bargain concerning the impact and implementation of the change if the impact of the change was more than *de minimis*.

It is well-established that in assessing whether the effect of a decision on conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect or the reasonably foreseeable effect of the change on bargaining unit employees'

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13 The Respondent asserts that the designation of Lebanon as Wood's new duty station constituted an exercise of management's right to assign work under section 7106(a)(2). It is unclear to me that the decision of which among the plants Wood was assigned to perform inspection duties at would be designated as his headquarters plant constituted the assignment of work within the meaning of section 7106(a)(2)(b). In any event, as I have found that designation constituted an exercise of management's right to determine its organization, the question of whether it also constituted an exercise of management's right to assign work would make no difference to the outcome of this case.

conditions of employment. *General Services Administration, Region 9, San Francisco, California*, 52 FLRA 1107, 1111 (1997). Equitable considerations are also taken into account in balancing the various interests involved.

I find that the change in Wood's duty station had more than a *de minimis* effect on conditions of employment. In particular, the new duty station was 22 miles farther away from Wood's home than his prior duty station. This increased the length of Wood's commute on those occasions he traveled directly between his home and the plant at Lebanon. It also increased the distance that would be considered Wood's normal commute for purposes of eligibility for reimbursement of travel expenses with respect to those occasions when he traveled directly between his home and one of the other plants in his patrol. The circumstances here are distinguishable from those involved in *U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri*, 20 FLRA 117 (1985)(*Army Reserve, St. Louis*), which the Respondent cites in support of its argument that the change in Wood's duty station had no more than a *de minimis* effect. In that case, the Authority found that the impact of a relocation of 23 employees from the south side to the west side of the fourth floor of the same building was no more than *de minimis*. In view of the distance involved and the potential effect on Wood's travel expense reimbursement, the degree of impact in this case is significantly greater in this case than what was involved in *Army Reserve, St. Louis*.

In finding that the change had more than a *de minimis* effect on Wood's conditions of employment, I do not rely on the General Counsel's claim that the change also affected Wood's eligibility for workmen's compensation. As I have previously noted, neither Wood nor the General Counsel provided any support for this claim. Additionally, I do not rely on the General Counsel's assertion that another effect of the change on Wood were the conditions at the government office available to him at the Lebanon plant. As I have previously stated, the General Counsel offered little, if any, information about the office available to Wood at Montreal. Thus, I have no basis for determining whether, relative to what he had before, the conditions at the government office at Lebanon constituted or contributed to more than a *de minimis* effect on Wood either adverse or otherwise.

I find that the Respondent had a statutory obligation to bargain over the impact and implementation of its decision to change the designation of Wood's duty station.

Adequacy of Notice to the Union

Adequate notice of a proposed change in conditions of employment triggers the exclusive representative's responsibility to request bargaining over the change. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997)(*Corps of Engineers, Memphis*). Once adequate notice is given, the union must act to submit proposals, request additional information, or request additional time. *Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532, 1536 (1996). Failure to take such action may result in a finding that the union has waived its bargaining rights. Notice of a proposed change in conditions of employment must be sufficiently specific and definitive to provide the exclusive representative with a reasonable opportunity to request bargaining. *Corps of Engineers, Memphis*, 53 FLRA at 82. For example, the notice must apprize the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change. Where an agency asserts waiver of bargaining rights as a defense to an allegation that it failed to bargain over a change in conditions of employment, it bears the burden of establishing that the exclusive representative received adequate notice of the change.

As set forth above, I find that Walker informed Kroeger that Wood's duty station was going to be changed. I further find that May informed Walker that the Respondent proposed to designate Lebanon as Wood's new duty station and provided him with at least an approximate date as to when this would occur. I find that the notice that the Respondent gave Kroeger that it was going to change Wood's duty station was unconditional and unqualified and adequately informed him of the scope and nature of the change. In terms of the scope and nature of the change, it was sufficient that Respondent advised Kroeger that Wood's duty station would be changed from Montreal to Lebanon. Respondent was not required to provide Kroeger with an inventory of all the potential effects that the change in Wood's duty station would have on his conditions of employment in order to satisfy its obligation to provide adequate notice. In any event, to the extent that the change in his duty station may have caused a change in Wood's entitlement to overtime compensation, the General Counsel has acknowledged that Wood could reasonably have anticipated some reduction in his overtime earnings based on the difference in the distance between his home and his new and old duty stations.

I find that although Respondent provided adequate notice of the proposed change in Wood's duty station, the Union failed to take action to preserve its bargaining rights. In the absence of any evidence that Kroeger communicated to Walker or May his view that they should be the ones to seek Wood's input or arrange a meeting to do so, I find that Respondent discharged its obligation to provide the Union with notice of the impending change in Wood's duty station. Once this obligation was discharged, the responsibility rested with the Union to respond by submitting proposals, requesting information or additional time or taking some other appropriate action to pursue bargaining. The Union, however, failed to respond and, effectively, waived its right to bargain.

Therefore I find that the Respondent's action did not violate section 7116(a)(1) and (5) as alleged. Accordingly, I recommend that the complaint be dismissed.

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

ORDER

It is Ordered that the complaint be, and hereby, is dismissed.

Issued, Washington, D.C., June 21, 2002.

_____

SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-01-0256, were sent to the following parties:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JUNE 21, 2002
WASHINGTON, DC