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

U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW NEW YORK, NEW YORK Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 286, AFL-CIO Charging Party	Case No. BN-CA-02-0712

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 **SEPTEMBER 19, 2005**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____
RICHARD A. PEARSON
Administrative Law Judge

Dated: August 19, 2005
Washington, DC

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

MEMORANDUM DATE: August 19, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NEW YORK, NEW YORK

Respondent

Case No. BN-CA-02-0712

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 286, AFL-CIO

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW NEW YORK, NEW YORK Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 286, AFL-CIO Charging Party	Case No. BN-CA-02-0712

David J. Mithen, Esquire
Gary J. Lieberman, Esquire
For the General Counsel

Sharon J. Pomeranz, Esquire
Charles F. Smith, Esquire
For the Respondent

Kevin Kerr
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Chapter XIV, Part 2423.

Based on an unfair labor practice charge filed by the American Federation of Government Employees, Local 286, AFL-CIO (the Union or Charging Party), the Regional Director of the Authority's Boston Region issued a Complaint and Notice of Hearing on October 25, 2002, alleging that the U.S. Department of Justice, Executive Office for Immigration Review, New York, New York (the Agency or Respondent)

violated section 7116(a)(1) and (5) of the Statute by implementing a series of changes in the conditions of employment of bargaining unit employees without providing the Union with notice or an opportunity to bargain. The Respondent filed a timely answer, admitting certain factual allegations but denying that it had changed conditions of employment or committed an unfair labor practice.

A hearing in this matter was held in New York, New York, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

The Executive Office for Immigration Review, headquartered in Falls Church, Virginia, administers a nationwide system of Immigration Courts through its Office of Chief Immigration Judge; one of these courts is located in New York City. Since September 1999, the American Federation of Government Employees (AFGE) has been certified as the exclusive representative of a bargaining unit of approximately 50 legal technicians and interpreters employed at the Agency's Office of Chief Immigration Judge in New York. AFGE Local 286 is an agent of the AFGE for the purpose of representing these employees. At the time of the hearing in this case, the parties were engaged in contract negotiations but had not yet entered into an initial collective bargaining agreement (CBA).

The New York Immigration Court has, at all times relevant to this case, had its offices at 26 Federal Plaza in lower Manhattan. At one time, it occupied the 10th, 13th and 14th floors, and after a remodeling of the offices that took place approximately between 1999 and 2002, it now occupies the 12th and 14th floors (Tr. 138-39, 304-05). The Agency has 29 Immigration Judges, who are not in the bargaining unit. The highest nonjudicial official of the Agency in New York is the Court Administrator; since June of 1998, Star Beth Pacitto has held this position (Tr. 269).

Her deputy administrator is Regina Iacono.[1] The legal technicians are divided into six sections: four hearing units that directly provide clerical services to the Immigration Judges, an intake unit, and a post-hearing unit; a seventh section consists of the interpreters. Each section is headed by a supervisor. Two hearing units and the intake unit are located on the 12th floor; the other two hearing units, the post-hearing unit and the interpreters' section are located on the 14th floor (Tr. 19-23). The intake unit is responsible for staffing the front desk at the court's waiting room, where it provides information to the public and to members of the bar, as well as processing all mail and incoming case files (Tr. 48-49, 398-400). Employees in all units work fixed tours of duty, with some employees starting as early as 6:30 or 7:00 a.m. and others starting as late as 9:00 a.m.

After coming to the New York office in June 1998, Pacitto identified many problems relating to time and attendance, as well as other administrative issues, that needed to be corrected (Tr. 300-01). As a result, she drafted and gave to every employee a nine-page memorandum, dated September 2, 1998, entitled "Office Operations and Procedures," along with voluminous attachments of at least 100 pages of additional documents (G.C. Exhibit 3 consists of the memorandum itself; the attachments were not made a part of the record)(Tr. 290-95). Portions of this memo addressed the accuracy and storage of records and case files, processing mail, and standards of conduct, among other topics. A section of the memo entitled "Office Leave Policies" on pages 8 and 9 described the rules and procedures for requesting annual and sick leave. The last paragraph of this section provided:

> Every employee calling out from work must call the main number and leave a message on the emergency calling line, ext. 208. Additionally, they are to phone their supervisors, or the team leaders, in the supervisor's absence. If the team leader is also absent, employees must leave a voice message. Make certain when calling back to speak to your supervisor or team leader, in the unlikely circumstance that both supervisor and team leader are out, you are to contact another floor supervisor. You are required to tell that supervisor the kind of leave you are requesting,

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[1] Ms. Iacono married shortly before the hearing and her name changed to Regina Rau, but because most of the relevant documents refer to her as Iacono, I will also.

(e.g., sick or leave without pay). Failure to follow this procedure will result in an AWOL charge. AWOL can result in disciplinary charges against an employee.

In July 2002,[2] the Agency conducted a week of training for supervisors in New York, and during those training sessions it became apparent to Ms. Pacitto that some of her policies were not being followed by employees or her supervisors, and that different supervisors were applying conflicting policies, particularly with regard to tardiness and "calling out" sick in the morning (Tr. 307-09, 435-37).[3] Pacitto believed that she had previously made her views known to employees and supervisors on these issues, but she could see from the comments of the supervisors at the training that there were wide disparities. According to one of her supervisors, Pacitto "was upset. . . She gave us the riot act . . . She wanted us to call a meeting with our – with our people, with our subordinates and reiterate what was supposed to be going on . . . She set procedures in place and we didn't follow them." (Tr. 436-37).

Immediately thereafter, beginning on July 22, all of the supervisors held meetings with their employees and announced to them (each supervisor using different words) that office rules would now be enforced more strictly, with the possibility of disciplinary action for violations (Tr. 174-75, 208, 437). At least three of the supervisors distributed memos to the employees reiterating those rules (G.C. Ex. 2, 11, 12). While the meetings and memos covered a variety of topics, three issues are most relevant to the case at bar: the procedure for calling out, fixed consequences for tardiness, and notifying supervisors on arrival and departure from work.

Supervisor Maria Llerena called a meeting of her hearing unit on July 23 to discuss these issues, and later that day she sent her employees an email outlining them (G.C. Ex. 2). Under the heading "Time & Attendance," she told them:

. . . All employees are expected to report to work on time. . .

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[2] All dates are 2002, unless otherwise noted.

[3] This practice can also be described as the procedure for requesting unscheduled leave, but it is specifically the procedure used by employees to call their supervisors in the morning and notify them that they will be out, and why.

- Employees who are late must call the supervisor; those who will be absent must call the supervisor and ext. 1208 (emergency calling line). Your leave will not be approved until you speak to the Supervisor.
- First tardiness will be excused and a leave slip should be provided to the Supervisor.
- Second tardiness will result in AWOL.
- Third tardiness will result in AWOL and a letter of reprimand.
- Fourth tardiness will result in a suspension for at least 5 days.

Under the heading "Personal Calls & Whereabouts," she wrote: "Also, it's imperative that you let me know your whereabouts during working hours; sudden absenteeism is unacceptable." (G.C. Ex. 2). A copy of this email was sent to the Court Administrator and her deputy.

On July 31, Supervisor Joseph Webber met with his hearing unit and discussed many of the same issues that were outlined in Llerena's memo. At the end of the meeting, he handed his employees a memo reiterating these points (G.C. Ex. 11). Under the heading "Time & Attendance," he wrote:

- You are to report to work on your scheduled time.
- If you're going to be late, you must call your supervisor, if you have trouble reaching your supervisor call another unit supervisor.
First Time Late - excused w/leave slip
2nd - AWOL
3rd - AWOL/Reprimand
4th - Suspension

. . . .

ALL LEAVE MUST BE APPROVED BY SUPERVISOR.

Under the heading "Morning Call In," he instructed his employees, " - you are to call your supervisor in the morning to check in." Under "Area of work," he wrote, " - Must be in area of work during your scheduled time. If going to cafeteria/lobby store let supervisor know if longer than 5 minutes." (G.C. Ex. 11).

Supervisor Trachelle Apson met with her hearing unit on July 23 and discussed a similar set of topics. After the meeting, she emailed a memo to her employees reiterating those points (G.C. Ex. 12). In the introduction of this memo, she noted that these were "rules which will be

strictly enforced. If these rules are disregarded or not adhered to, you will be subjected to disciplinary actions." Under the heading "Time & Attendance," she stated:

> - Rules on tardiness will be strictly enforced
> a. 1st time late - you will be charged leave
> b. 2nd time late - AWOL
> c. 3rd time late - AWOL & a letter of reprimand
>
> . . . .
>
> - You may call in to request sick leave, however, you must call in 1 hour prior to the start of your work day. (i.e. if you are due in at 8:30, you must call in by 7:30). **Leave will not be approved until you actually speak with me or another supervisor in my absence**. You may leave a message to give me a heads up that you are requesting to take leave, but you must call back to receive approval for the leave; [emphasis in original]

Under "Miscellaneous," near the end of her three-page memo, Apson wrote, "When you leave the floor, I need to know your whereabouts in the event of an emergency." (G.C. Ex. 12).

Supervisors Raymond Towey and Shirley Rivas also met with their employees in late July and discussed the need to speak directly with a supervisor when calling out sick and the steps that would be taken against employees reporting to work late. Towey later sent his employees an email limited to the tardiness policy (G.C. Ex. 9); Rivas sent her employees a memo, but it was not offered into evidence (Tr. 446-47, 451-52).

Soon after these meetings were held, employees began complaining to their supervisors and to Kevin Kerr, the Union President, about what they considered to be new (and in some respects unfair) policies (Tr. 33-34, 121-22, 235-37). On July 22, the same day as Supervisor Towey met with his unit to discuss the rules regarding sick leave and tardiness, a member of his unit, Shana Williams, sent an email message to Deputy Court Administrator Iacono asking for clarification of the (allegedly) "newly implemented AWOL policy." (G.C. Ex. 7). Posing a hypothetical scenario of reporting late because of a delay in her son's school bus, she asked whether it was true that employees "will be put on AWOL if we call in late for ANY reason." She sent a copy of the message to Pacitto also. That same day, Pacitto responded by email, telling Williams, "The policy is to be

at work on time. For whatever reason, if you feel you can not be at work on time, you may want to consider changing your hours." (G.C. Ex. 8). Williams followed up with another email to Pacitto the next day, asking for a copy of "the AWOL policy in writing or the federal policy number" (G.C. Ex. 8). Pacitto responded, "There is no Federal AWOL policy." (*Id.*). On July 29, in response to employee questions, Towey sent his unit an email that set forth a three-step progression of adverse consequences they would face for tardiness (G.C. Ex. 9).

On August 20, Union President Kerr emailed Pacitto, protesting the "change in policy for calling in sick and also a new policy for procedures when arriving late and reporting in" and demanding negotiations on these issues. (G.C. Ex. 4). Pacitto replied that same day, denying that these were new policies, reminding Kerr of the memo she had given to employees back in September 1998, and insisting that she had "continually stressed in staff meetings" these same rules (*Id.*). She refused to bargain on the issues.

One of the recurrent employee complaints about the rule requiring them to speak personally to a supervisor when calling out was that it was very difficult at times to reach their supervisors, necessitating that they make numerous phone calls throughout the morning (Tr. 34, 48, 128-30). There was also some confusion as to whether employees could speak to a different supervisor or their team leader if their own supervisor was not in. Therefore, on August 21, Iacono notified all employees by email that if their own supervisor was unavailable when they called, they should phone the front desk, where one of the employees stationed there would find a different supervisor for the employees to talk to (G.C. Ex. 5). Some employees found this procedure equally unsatisfactory, because the front desk personnel were busy taking outside phone calls and handling customer questions throughout the morning and were sometimes unable to find an available supervisor to speak with the employee (Tr. 131-33). Starting in July, however, some employees who failed to follow the sick leave calling procedure were either given oral reprimands or were marked as "AWOL" and not paid for the day (Tr. 52, 129, 235-38). Also since July, employees have been required to use annual leave when they have reported to work late, but there was no evidence that employees have been marked AWOL or disciplined for repeated tardiness (Tr. 127-28, 141-42, 178-79, 211).

At the hearing, five bargaining unit employees and two members of management testified about working conditions both before and after July 2002. Court Administrator Pacitto testified that she had established a procedure in

her September 1998 memo requiring employees calling out sick to speak personally to their supervisor, if possible, or to another supervisor on the morning of their absence, and that she and her supervisors had repeatedly emphasized to employees in the ensuing years the importance of this procedure (Tr. 302-03, 409-10). Employees were encouraged also to leave a voice message on the emergency calling line, extension 208, but this was not a substitute for getting the express approval of a supervisor for their sick leave. Nothing about this rule changed between 1998 and the present, according to Pacitto. But she did admit that in July 2002 she realized that supervisors were not consistently applying the rule. She "couldn't really understand why they were having those problems with the individual people, because we have a leave policy." (Tr. 307). As a result, she said, "I made sure that they followed those procedures." (Tr. 308). She told her supervisors to meet with their employees and to let them know "that when I put something in writing, I expect it to be enforced." (Tr. 308).

With respect to a tardiness policy, Pacitto conceded that the 1998 memo did not address the issue, but she testified that she and the supervisors had consistently told employees that "you're supposed to be at work on time." (Tr. 288). She said she has never advocated a fixed set of penalties for each offense, but rather she has allowed supervisors to exercise discretion and to handle individual tardiness problems on a case-by-case basis, depending on how serious an employee's pattern of tardiness is (Tr. 304, 318-21). The supervisory memos and meetings of July 2002 did not change this policy, and she knew of no employees who had been charged with AWOL for a second instance of tardiness (Tr. 327-28). With regard to employees notifying their supervisors of their arrival and departure each day, Pacitto testified that this policy was established not in 1998 but approximately in 1999, when an office remodeling project was begun that resulted in the Agency occupying more office space on two floors than it had previously occupied on three floors. It became more difficult for supervisors to keep track of their employees' whereabouts, and thus employees were told to let their supervisors know when they arrived and departed each day. Supervisor Rivas echoed Pacitto's testimony that the Agency's policy on all three issues did not change in 2002. As a supervisor who arrives at work between 7:00 and 7:30 a.m., Rivas testified that even before 2002, employees understood that they had to speak to a supervisor when calling in sick, because she often received calls from employees in other units, whose own supervisors had not yet arrived (Tr. 409-16).

The five bargaining unit witnesses, on the other hand, testified that July 2002 marked a distinct break from the calling out, tardiness and reporting policies and practices of the previous four years. Most of these employees recalled that in 1998 Pacitto had distributed a document describing the various office policies and procedures (Tr. 139-40, 187-88, 250-51), but they were unfamiliar with its specific provisions (Tr. 251-52), and their supervisors did not refer to the memo in the intervening years (Tr. 44, 157). The actual sick leave practice enforced by supervisors and followed by employees between 1998 and July 2002 resembled the policy outlined in the September 1998 memo in some ways, as employees understood that they had to notify their supervisor of an unscheduled absence, and they would leave a message with the supervisor on his or her voice mail and by calling extension 208. But the practice differed from the 1998 memo in one significant respect: supervisors did not require employees to speak to them directly on the day of their absence, but only to leave a voice mail message if the supervisor was not available when they phoned (Tr. 28-30, 108-10, 181-83, 212-14, 230-31). Whenever employees took unscheduled leave, they were required to follow up by giving their supervisor a leave slip on their return to work; but according to the employee witnesses, prior to July 2002 no supervisor ever denied their leave request for failing to phone them personally, and no supervisor ever told them that simply leaving a voice mail message was insufficient (Tr. 31-32, 109-11, 183, 215, 233-34). (For their part, neither Pacitto nor Rivas cited any examples of employees being denied leave or disciplined, prior to July 2002, for failing to talk directly with a supervisor.)

This changed in July 2002, when the supervisors met with their units and emphasized, as Apson's memo stated, "Leave will not be approved until you actually speak with me or another supervisor in my absence. You may leave a message to give me a heads up that you are requesting to take leave, but you must call back to receive approval for the leave." (G.C. Ex. 12). This presented difficulties to the employees and required them sometimes to spend hours in the morning trying to reach a supervisor on days they or a family member were sick. Additionally, there was confusion whether employees could speak to a different supervisor if their own supervisor was unavailable, resulting in Shana Williams being reprimanded despite having spoken to another

supervisor (Tr. 129).[4] There was also confusion, or inconsistency, as to whether employees were required to call out a certain amount of time in advance of the start of their shift. Apson's memo expressly required her employees to call at least an hour before their starting time (G.C. Ex. 12), but other supervisors did not require this (compare G.C. Ex. 2, 11), and Pacitto testified that she disagreed with Apson's requirement and that it is no longer in effect (Tr. 345-47).

With regard to tardiness, each of the employee witnesses described their supervisors' pre-July 2002 policies slightly differently, but the overall contours of the policies were very similar: lateness of less than 15 to 30 minutes, as long as it was infrequent, was either overlooked entirely or employees were allowed to work late to compensate for the time missed; lateness of more than 30 minutes was charged to annual leave; and there were no set penalties for repeat offenses (Tr. 54-56, 103-106, 163-64). Luechia King had taken and saved notes from a unit meeting held by her supervisor, Joseph Webber, on July 30, 2001, which reflected that Webber would excuse tardiness of less than 15 minutes, would allow employees to "make up" tardiness of up to 30 minutes, and would require them to use leave for more than 30 minutes (G.C. Ex. 10). This changed dramatically in July, as all supervisors met with their employees and outlined a progressive scale of discipline, with specific penalties for a first, second, third and (sometimes) fourth offense of tardiness. Although the supervisors didn't explain what length of time would be used for calculating repeat offenses, they all told their employees that the first time they are late, they will be charged leave for the time; the second time they are late, they will be marked as AWOL (which involves loss of pay for the time AWOL); and the third time they will be marked AWOL and given a letter of reprimand. Some supervisors also stated that a fourth offense would result in suspension, while others were silent on this matter. (Compare G.C. Ex. 2, 11, 12). When employees asked them for more details, at least one supervisor specified a three-month period for calculating tardiness (Tr. 117-18), while others were indefinite on this point (Tr. 65, 174, 207). Since July, employees late even by a few minutes have been required to use annual leave (a minimum of 15 minutes), but no examples were cited of employees being treated as AWOL or otherwise disciplined for repeat offenses.

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4 While Apson's memo to her employees made it clear that they could speak to other supervisors, Shana Williams worked for Raymond Towey, who had not given written instructions to his unit.

With regard to reporting in and out to supervisors at the start and end of each day, some employees testified that the Agency had no such requirement prior to July 2002 (Tr. 65-66, 133-34, 221), but other employees stated that their supervisors did require them to let them know either when they arrived (Tr. 163, 189) or departed (Tr. 247). In the three July 2002 memos that were offered into evidence (G.C. Ex. 2, 11, 12), all three supervisors emphasized to their employees the importance of letting them know their whereabouts so that they could be accounted for in an emergency, but only one supervisor said anything about calling him upon arrival in the morning (G.C. Ex. 11). Another supervisor sent her employees a memo in September asking them to "check in" with her (either personally or by phone) on arrival and on departure (G.C. Ex. 6). All of the employee witnesses testified that since the latter part of 2002, all their supervisors now require them to report in and out each day: they can personally advise the supervisor if they work in close proximity, or they can send a voice mail or email message. No employees indicated that they had been disciplined in any way for failing to do so, but there was some concern that supervisors used the email or phone messages to calculate tardiness (Tr. 178-79). This was particularly a concern to employees because the phone system's clock was inaccurate (Tr. 68-69).

DISCUSSION AND CONCLUSIONS

Positions of the Parties

In its complaint, the General Counsel alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing three changes in conditions of employment: "a procedure requiring employees in the bargaining unit to call in one hour prior to the start of their work day and speak to a supervisor instead of leaving a voice mail message when requesting unscheduled sick leave" (G.C. Ex. 1(e), para. 10); "a tardiness policy involving a system of progressive discipline" (G.C. Ex. 1 (e), para. 11); and "a policy requiring employees in the bargaining unit to notify their supervisor when they arrived at work and when they left work." (G.C. Ex. 1(e), para. 12.) In its opening statement at the hearing, the General Counsel renewed its contention that the Respondent changed its policy in requiring employees to call in one hour before work (Tr. 9). In its post-hearing brief, however, the General Counsel did not reiterate this latter contention, perhaps because only one witness corroborated the allegation and several contradicted it; but the G.C. did not expressly

withdraw the allegation either. I will address this further in my conclusions.

The General Counsel argues that prior to July 2002, a practice had been established in which employees were permitted to request unscheduled sick leave by phoning their supervisors and leaving a voice message; a tardiness policy had been established which gave broad discretion to individual supervisors to excuse tardiness of only a few minutes, to allow employees to make up their tardiness by working late, or to require employees to use leave for their tardiness, and in which no fixed penalties were attached; and that no office-wide policy existed concerning employees reporting in and out. In the G.C.'s view, these practices (each of which concerned conditions of employment within the meaning of the Statute) had existed for several years, with the supervisors' knowledge and active participation, and by virtue of long standing they had become binding on the Agency and could not be changed by the Agency without bargaining. *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892 (1999); *Letterkenny Army Depot*, 34 FLRA 606 (1990).

Looking at the evidence concerning these three specific matters, the General Counsel concedes that the Court Administrator's 1998 memo at least impliedly requires employees to speak directly to a supervisor when calling out sick, but it argues that the evidence conclusively showed that this policy had been almost uniformly ignored by supervisors and employees alike in the subsequent four years. Five employees, who had worked under many different supervisors between 1998 and 2002, testified that they had frequently obtained unscheduled sick leave by simply leaving voice mail messages with their supervisors; on the other hand, only one first-line supervisor testified, and even she could not attest to any situations prior to July 2002 in which sick leave had been denied or employees counseled for leaving voice mail requests. Moreover, the Respondent failed to offer any documentary evidence that the requirement of personally speaking to a supervisor had been reaffirmed to employees between 1998 and 2002, or any documents showing the denial of sick leave on such grounds. The G.C. notes that sick leave must be approved by supervisors, so in every case here supervisors would have necessarily signed the sick leave forms submitted by employees who had initially phoned in their requests. Further evidence that the Agency had changed its policy in 2002 was the testimony of the employees and the managers concerning Pacitto's discovery in July that her 1998 policy had not been followed by her supervisors, and the subsequent evidence that all supervisors held unit meetings to

emphasize to employees that they had to speak personally to a supervisor when calling out, and the heretofore-unprecedented action of several supervisors issuing written memos to this effect. Furthermore, when some employees protested the difficulty of reaching supervisors in the morning, the Deputy Court Administrator modified the policy in August to instruct front desk staff to take employee calls and refer them to other supervisors. If Pacitto's 1998 rule had been enforced by supervisors in the intervening years, this problem in reaching supervisors would have been encountered, and the Agency would have modified its rule, long before 2002. Finally, the G.C. urges me to draw adverse inferences from the Agency's failure to call most of its first-line supervisors to testify, and from the Agency's incomplete compliance with the subpoena duces tecum seeking documents relating to the Agency's policies (G.C. Ex. 13, Tr. 270-79, 287, 311-14). These other supervisors, the G.C. argues, would have corroborated the bargaining unit employees' testimony concerning the calling out procedure, as well as the other practices described by the employees; moreover, production of the documents requested in the subpoena would have shown the existence of the practices described by the employee witnesses.

With regard to the Agency's tardiness policy, the General Counsel argues that the record established that the Agency moved from having no consistent policy whatsoever prior to July 2002 to detailing a highly specific, fixed series of penalties for each instance of tardiness. Pacitto admitted that nothing in her 1998 memo (indeed nothing in writing from management) referred to a policy in dealing with tardiness. The only written evidence of a pre-2002 tardiness policy was G.C. Ex. 10, notes from a unit meeting held by Supervisor Webber to the effect that lateness of 15 minutes was "okay" and lateness of 30 minutes was "okay to make up but more than that fill out slip". This was, according to the G.C., generally consistent with the testimony of the employee witnesses: while their descriptions of their supervisors' tardiness policies varied slightly, they all testified that if they were late by only a short time (usually 30 minutes or less), they were either allowed to work late an equivalent time or the time was excused altogether; they further testified that they were required to use leave only when they were more than about 30 minutes late, and they were never treated as AWOL or docked pay for lateness. Thus, contrary to the Respondent's argument that its policy and practice regarding tardiness didn't change after July 2002, the G.C. insists the evidence demonstrates that there was a marked change: employees were for the first time told that there were specific penalties

for each occurrence of lateness, and they were regularly required to use leave for even the briefest of late arrivals.

The General Counsel compares the requirement of reporting in and out each day to requirements of punching a time clock or signing an arrival/departure register for time and attendance, issues that the Authority has previously held to be substantively negotiable. *Planners, Estimators and Progressman Association, Local 8 and Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina*, 13 FLRA 455 (1983). As with the tardiness policy, for which there were no written rules issued to employees prior to 2002, the G.C. argues that prior to 2002 each supervisor followed slightly different procedures for reporting in and out, but that since July 2002 all supervisors have uniformly required their employees to notify them upon arrival and upon departure.

All of these changes in Agency practice, the General Counsel insists, have had more than a *de minimis* effect on working conditions in the bargaining unit; therefore, the Agency was required to provide the Union with advance notice of the proposed changes and an opportunity to bargain. The new sick leave policy has resulted in some employees being denied leave for the time they were absent, resulting at least in their loss of pay and potentially being disciplined. Absent employees have been forced to spend a considerable amount of time making repeated phone calls each day they take unscheduled leave, and employees working at the front desk have had a new task (finding available supervisors to talk to the absent employee) added to their already-hectic work serving customers at the busiest time of the morning. *See, Defense Logistics Agency, Defense Depot Tracy, Tracy, CA*, 14 FLRA 475, 478 (1984). The tardiness policy has already forced some employees to use annual leave, and the G.C. cites *U.S. Department of the Treasury, U.S. Customs Service, Region I, Boston, MA*, 16 FLRA 654, 668 (1984), as holding that this effect alone is substantial. Moreover, employees still face the threat of disciplinary action, including reprimands and suspensions, for as few as three instances of tardiness within an unspecified period of time. With regard to the new reporting policy, the G.C. argues that at least one employee was marked late based solely on the time recorded on her supervisor's telephone, thus supporting the employees' claim that the Agency was using the reporting requirement as a time clock for official time and attendance purposes.

The General Counsel seeks both *status quo ante* and make whole relief for these alleged unfair labor practices. It

argues that at least two of the policies at issue (calling out for sick leave and reporting in and out) are substantively negotiable; thus, *status quo* relief for unilaterally changing those policies is presumptively appropriate, absent special circumstances. *Department of the Air Force, Warner Robins Logistics Center, Robins Air Force Base, GA*, 52 FLRA 225, 246 (1996). Even if the more restrictive criteria applicable to violations involving the exercise of management rights were applied, however, the G.C. argues that *status quo* relief is still justified. *See, Federal Correctional Institution*, 8 FLRA 604 (1982)(*FCI*). The General Counsel urges that the three policies changed in July 2002 be rescinded, the Agency be ordered to negotiate any proposed changes, and that any employees penalized for violating any of the rules be made whole for any losses.

The Respondent insists, however, that no new policies were announced or implemented in July 2002; rather, the same policies that had been in effect prior to that date continued in force, albeit with some renewed emphasis by Pacitto and her supervisors. The unit meetings and memos of the supervisors in July 2002 did not announce new policies but simply reiterated the need to follow existing policies. Thus, while the employee witnesses insisted that the requirement of personally speaking to a supervisor to obtain approval for unscheduled sick leave was "new" in July, they also admitted that they had received Pacitto's 1998 memo, which expressed that very requirement. Moreover, Pacitto and Rivas testified that the importance of following this procedure in calling out sick (and indeed following the other rules) had been reiterated by management at staff and unit meetings repeatedly between 1998 and 2002. Indeed, according to Rivas, employees were aware of the need to speak to a supervisor and followed that rule, as she often received early morning calls from employees in other units who were calling out sick. Thus, in the Agency's view, the rule stated in the 1998 memo had never lapsed or been ignored, but was in continuous effect over the years and was simply reiterated again in July 2002. As for the alleged requirement of notifying management an hour ahead of an employee's starting time, Pacitto denied such a rule ever existed and most employee witnesses corroborated that view.

The Respondent makes a similar argument concerning the requirement of reporting in and out. While this rule was not announced in Pacitto's 1998 memo and was not otherwise put in writing, it was announced verbally by Pacitto and her supervisors starting in approximately 1999 and reiterated by them many times thereafter. Even some of the employee witnesses confirmed that they had been required to notify their supervisor, either at the start or the end of the day,

and this rule simply continued unchanged after 2002. With regard to tardiness, the Respondent discounts the importance of the supervisors' July memos specifying certain penalties for each late arrival. Instead, the Agency emphasizes that Pacitto applied a simple, consistent rule for the office, the same rule that applies throughout the government: employees must report for work on time. And if employees violated this rule, Pacitto allowed her supervisors to exercise discretion in dealing with employees; each employee and each instance of tardiness needed to be evaluated individually as to the circumstances of the violation and the appropriate response. Prior to July 2002, this is what supervisors did, and it is what they did after that date as well. Although employees may have been required to use leave for the time they were late, no employees have been treated as AWOL or otherwise disciplined for lateness.

With respect to all three of the policies in dispute, the Respondent asserts that its witnesses, Pacitto and Rivas, were more consistent and persuasive than the General Counsel's witnesses, who demonstrated inconsistency and often contradicted each other's testimony. Thus the Respondent argues that the General Counsel has not proved that the Agency made any changes in conditions of employment in July 2002.

The Respondent also argues that in order for the General Counsel to establish the existence of a binding past practice regarding any of these three policies, it must show that Pacitto, not her supervisors, knew of those practices and acquiesced to them. Citing the case of *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987) (*Norfolk*), it argues that a past practice must be known by and acquiesced to by "responsible management", and that in this case the only management official responsible for setting office policy was Pacitto. Thus if individual supervisors failed to follow her policies consistently, that is not sufficient to establish a practice as binding.

Finally, the Respondent argues that if any changes in working conditions were made, they were *de minimis*. The Respondent did not address the question of relief, other than the dismissal of the complaint.

Analysis

The Authority has held since its earliest days that "the duty to negotiate in good faith under the Statute requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment [.]" *Department of the Air Force, Scott Air Force Base,*

Illinois, 5 FLRA 9 (1981). Although the Statute does not explicitly include unilateral changes in conditions of employment among the unfair labor practices listed in section 7116(a), the Authority made it clear in *Scott* and subsequent cases that such conduct violates section 7116(a)(1) and (5). *Id.* at 10-11. The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding an agency's conduct and its employees' conditions of employment. *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646, 649 (2004) (*SSA Charleston*).

Additionally, it has long been held that conditions of employment may be established not only by a collective bargaining agreement, but also by the parties' practice or other forms of informal or tacit agreement. *See, Norfolk*, 25 FLRA at 286; *Department of the Navy, Naval Underwater Systems Center, Newport Naval Base*, 3 FLRA 413 (1980). Indeed, once a past practice relating to a condition of employment has become established, it cannot be unilaterally changed by management, "even if the condition established by practice differs from the express terms of the parties' collective bargaining agreement." *U.S. Patent and Trademark Office*, 39 FLRA 1477, 1482-83 (1991). In order to find that a condition of employment has become established by past practice, the General Counsel must show that the practice was "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals*, 55 FLRA 454, 456 (1999); similar, *U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky*, 42 FLRA 137, 142 (1991) ("consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent."); *see also SSA Charleston*, 59 FLRA at 663.

The first step in applying these principles is to determine whether the alleged change relates to a condition of employment. As the Authority explained in *Department of the Treasury, Internal Revenue Service (Washington, D.C.) and Internal Revenue Service Hartford District (Hartford, Connecticut)*, 27 FLRA 322, 324 (1987), practices do not "ripen" into or "become" conditions of employment. Thus, for example, an agency may unilaterally change the procedure it uses for filling non-bargaining unit positions, because such procedures are not a condition of employment. *Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey*, 24 FLRA 64, 68 (1986). If the alleged changes involve conditions of employment, it must then be

determined whether the Respondent changed any of those conditions. Finally, an agency is required to bargain only over those changes which have more than a *de minimis* effect on conditions of employment. *SSA Charleston*, 59 FLRA at 649-55.

The three policies in dispute in this case (procedures for using sick leave, penalties for tardiness, and notification of arrival and departure) all specifically cover bargaining unit employees, and they directly involve work procedures. *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235 (1986). There appears little doubt, therefore, that all three alleged changes relate to conditions of employment; indeed, the Respondent has not argued to the contrary.

The real dispute in this case is whether the Agency implemented, or tried to implement, changes in its rules or policies in these three areas in July 2002, or shortly thereafter. The case illustrates the many different ways in which an alleged "past practice" can arise. With regard to sick leave, the Agency had a definite policy in writing, but the official written policy was not consistently followed, either by supervisors or by employees. When supervisors met with their employees in July 2002, were they re-instituting the 1998 policy, or were they simply reiterating the policy that had always been in effect? With regard to tardiness, there was no written policy prior to 2002, but simply a verbally communicated policy leaving wide discretion in the hands of supervisors; when the supervisors met with their employees and sent memos to them in July, were they changing to a system of fixed, progressive penalties, or were they simply articulating the same old policy in a slightly different way? And with regard to reporting in and out each day, neither the "old" policy nor the "new" policy was ever put into writing. Did the verbally communicated policy change after July 2002? Answering these questions requires a detailed evaluation of the facts of each situation.

1. Tardiness

I will discuss the tardiness policy first, because it is the most clear-cut situation. There was general agreement among the employee and management witnesses that prior to July 2002, the Agency had no written policy on tardiness, and that supervisors had broad discretion to handle "problem cases" of tardiness as they saw fit. The testimony of the employee witnesses (not refuted by the Respondent) further demonstrated that prior to July, occasional tardiness of less than 30 minutes was either excused entirely by supervisors or employees were permitted

to make up the time at the end of the workday without being charged leave.[5] The witnesses also agreed that starting in late July, immediately after a training program for managers, all supervisors met with their units and advised them that office rules would thereafter be enforced in a more strict and uniform manner. Most, if not all, of the supervisors then sent memos to their employees defining those rules in very specific terms. The exact language of each memo varied, but all four of the memos entered into the record (G.C. Ex. 2, 9, 11, 12) used nearly identical terms to prescribe a progressive scale of penalties for first, second and third occurrences of tardiness: first, the employee would be charged leave for the time late; second, the employee would be considered AWOL (which meant loss of pay); and third, the employee would be considered AWOL and would receive a letter of reprimand. Two of the four memos went on to prescribe suspension for a fourth tardiness, while none of them specified a period of time for measuring the instances of tardiness.

It is clear, and indeed the management witnesses agreed, that the sudden torrent of unit meetings and supervisor memos in late July was triggered by Pacitto's discovery, at the management training sessions, that her supervisors had been ignoring some of her 1998 rules on unscheduled leave, and that they had been inconsistent in dealing with tardiness. It is a mystery to me, however, why Pacitto was surprised that different supervisors had been dealing with tardiness in different ways. She testified that her basic rule was "you're supposed to be at work on time", but in applying this rule (which is so general that it is of no practical value) to specific employee cases, she left it to each supervisor's discretion (Tr. 319-20). Prior to July, Pacitto had given her supervisors and employees no clear guidance on handling repeat tardiness; thus it was predictable that different supervisors would handle employees differently. But Pacitto was angered by what she learned in the July training; she read "the riot act" to her supervisors and instructed them to get "on the same page", particularly with respect to unscheduled sick leave and tardiness (Tr. 435-36). Immediately thereafter, at least four supervisors sent memos to their employees that marked

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I attach significant weight to G.C. Exhibit 10, as it is the only written evidence of the Agency's tardiness policy prior to 2002. Although it represents only the policy of one supervisor, and it is apparent that each supervisor had slightly different approaches to the subject, Supervisor Webber's approach was generally consistent with the office-wide pattern of tolerance of brief, infrequent tardiness evidenced by the other employees' testimony.

a 180-degree reversal of the previously vague policy: G.C. Exhibits 2, 9, 11 and 12 leave no room for supervisory discretion, but rather they tell employees exactly what will happen when they are late the first, second, third (and sometimes fourth) time. Those memos leave no doubt in my mind that Agency management was announcing to employees a new and different policy in dealing with tardiness.

In July 2002 and at the hearing, however, Pacitto continued to insist that the tardiness policy was exactly the same as it had always been. When Union officials protested to her about the supervisors' announcements, she told them, "[t]he policy is to be at work on time." (G.C. Ex. 8; see also G.C. Ex. 4.) At the hearing, she insisted that supervisors continue to have broad discretion in handling repeat tardiness, and that employees have not been treated as AWOL for second occurrences (Tr. 320-22).[6] But she clearly was aware that her supervisors were telling a very different story to employees in those July memos, because at least some of the supervisors' memos were sent to Pacitto and Iacono as well (G.C. Ex. 2, 9). The instructions given to employees in July 2002 totally refute Pacitto's testimony that nothing changed concerning tardiness. No longer would five-minute or ten-minute lateness be excused, or employees permitted to make up the time by working late. Instead, employees would have to use annual leave for the time, even on the first offense.[7] Even if supervisors did not subsequently apply the "new" policy strictly and did not treat employees as AWOL for second occurrences or discipline them for further occurrences, the supervisors uniformly communicated to employees that as of July, each repeat instance of tardiness within an unspecified period would result in specific penalties. These were entirely new rules put into effect at that time.

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[6] Her words on this point ring somewhat hollow, however. When asked whether she told supervisors to charge employees annual leave the first time they are tardy, she answered: "No. Basically, what I said was, they could take leave. . . . We don't charge anyone with leave. They have to request leave." (Tr. 321). This essentially left employees with a "choice" of "requesting" leave for tardiness or being treated as absent without leave, which would result in the employee losing pay entirely.

[7] While G.C. Exhibits 2 and 11 specify that first offenses would be "excused," they also state that employees must submit a leave slip for the time. Thus it is clear that first offenses are only "excused" in the sense that employees are not being disciplined.

They constituted a change in the employees' conditions of employment.[8]

To summarize, I find that from at least 1998 to July 2002, the Agency had a tardiness policy that gave each supervisor nearly unqualified discretion in deciding how to handle individual employees who showed up late for work. In actual practice, all or nearly all supervisors did not require employees to use leave when arriving less than a half hour late, and employees were not threatened with discipline or loss of pay for second, third or fourth occurrences. This practice was not merely tolerated by the supervisors, but rather they were active participants in it. By continuing for nearly four years, this practice had become well established at the Agency, so that it was a condition of employment that could not be changed without bargaining with the employees' exclusive representative. The Agency did change the policy in July 2002, by attaching specific threatened penalties for first, second and third instances of even a few minutes' lateness, and by requiring employees to use annual leave for even a single occurrence of lateness of less than a half hour. The Court Administrator and her deputy were aware that supervisors were changing the tardiness policy, and they did nothing to disavow the supervisors' announcements; indeed, the Court Administrator likely instructed the supervisors to change the policy in this manner.

Finally, I find that the change in tardiness policy was more than *de minimis*. Employees have routinely been required to take annual leave for all late arrivals since July 2002, and the financial impact of reducing employees' leave balance is in itself significant. It is likely to cause cautious employees to leave home earlier than they otherwise would, to allot extra time for unforeseen travel delays, thus adding to the length of the daily commute. The threat of losing pay for a second tardiness and of disciplinary action for all occurrences thereafter, is also

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[8] The attempts by Pacitto and the Agency to distance themselves from the specific three-tiered or four-tiered scale of penalties for repeat offenses, as articulated by the supervisors, are particularly self-defeating. The Respondent seems to be arguing that the scales of penalties do not represent a change from the supervisors' previously unqualified discretion, since no employee has actually been marked AWOL or reprimanded or suspended for repeat tardiness. Since Pacitto had just "read the riot act" to her supervisors for ignoring her policies, she is in no position to argue that the supervisors could now ignore the specific penalties laid out in memos signed by her supervisors and copied to her.

of great significance to employees, even if the Agency has not yet carried out disciplinary action for repeat occurrences. It is undisputed that the Agency refused to negotiate with the Union concerning either the substance or the impact and implementation of the change. Therefore, the Respondent violated section 7116(a)(1) and (5).

2. Unscheduled Sick Leave

As it did regarding the tardiness policy, the Respondent argues here that its post-July 2002 sick leave policy did not differ from its previous policy. But unlike the tardiness policy, the Respondent has written evidence of its pre-2002 sick leave policy: G.C. Exhibit 3, Pacitto's 1998 memo to her staff setting forth office policy on a wide variety of issues. I have no doubt, based on this document, that in 1998 Pacitto implemented a rule requiring employees calling out sick to speak directly to their supervisor. They were still permitted, as they had before 1998, to leave a message on their supervisor's voice mail and/or on the office's emergency line (extension 208) if the supervisor wasn't in, but they had to call the supervisor back to expressly receive permission to use sick leave. It is also clear that Pacitto never expressly changed the sick leave policy set forth in her 1998 memo.

The essential question now, however, is whether Pacitto's supervisors and employees violated her policy to such a degree between 1998 and 2002 that a contrary practice became established as a condition of employment. As I noted above, the Authority has often held that such conditions, established through practice, are binding on the parties, even when they contravene terms of a written agreement. *Defense Distribution Region West, Lathrop, California*, 47 FLRA 1131 (1993); *U.S. Patent and Trademark Office, supra*, 39 FLRA 1477 (1991). I must therefore evaluate, based on the evidence of record, whether the Agency's supervisors "consistently exercised" a practice of permitting employees to call out sick by simply leaving phone messages, "over a significant period of time."

Before doing so, however, I must dispose of two preliminary issues. First, I will address the complaint's allegation that the Respondent implemented a requirement that employees "call in at least one hour prior to the start of their work day." As I noted above, only one of the employee witnesses (Moises Roman) testified that his supervisor (Trachelle Apson) required employees to call in

at least an hour before the start of their shift; both Pacitto and Rivas denied that such a requirement had ever existed. While it is clear that Apson did at least briefly impose such a requirement, as evidenced by her July 23 memo (G.C. Ex. 12), this appears to have been an isolated action on her part, not shared by the other supervisors, and one which Pacitto herself disagreed with.[9] Therefore, I do not find that the Agency ever imposed such a requirement on employees, and I will dismiss this portion of the complaint.

Next, I must reject the Respondent's argument that "Ms. Pacitto as the Court Administrator was the only management official in the Immigration Court who could establish a past practice." Post-Hearing Brief at 13. The only case cited for this principle, *Norfolk*, 25 FLRA at 286, does not support such a point, while other cases refute it. Thus in *U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II*, 38 FLRA 193, 196 (1990), the Authority held (quoting the ALJ's findings) that "the obligation undertaken by the Respondent at the lower level was 'binding on the Respondent at all levels[.]'" *See also Norfolk Naval Shipyard*, 4 FLRA 686, 687 (1980). The crucial questions are whether a practice was consistently exercised over a significant period of time, whether the Agency had knowledge of the practice and whether the Agency either expressly or impliedly consented to the practice. If a significant number of supervisors demonstrated such consent over a significant period of time, the Agency itself will be obligated to negotiate an change in that practice.

In answering these questions, it is important to view the events in their full context. The evidence indicates that the practice of employees calling in sick by leaving phone messages for their supervisors predated Ms. Pacitto's arrival at the Agency. She clearly attempted to change this practice in September 1998, but it is far from clear that the 1998 memo ever altered the employees' behavior in this respect. The "calling out rule" was simply one small part of a very long document covering a large number of topics and containing voluminous attachments. As a result, the requirement of speaking personally to a supervisor when calling out sick could easily have been buried in an avalanche of new procedures in 1998, and the evidence

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[9] Interestingly, Anjanette Williams, who has worked for Apson since September 2002, did not mention a one-hour call-in requirement in her testimony. This suggests, in conjunction with Pacitto's testimony that Apson's requirement no longer is in effect, that Apson's rule had been rescinded by September.

suggests that this was the case. While some employees at the hearing were aware of Pacitto's 1998 memo, they were not aware that the memo had sought to change the procedure for calling out, and they conclusively demonstrated that most employees continued to call out by simply leaving a voice mail message for their supervisor.

It is also important to understand that this practice is not one that employees can undertake without the active approval of their supervisors. When employees call out sick, they are requesting sick leave, which must be followed up by a submitting a written sick leave form to their supervisors. Therefore, when employees were absent between 1998 and 2002 and failed to speak directly to their supervisors, the supervisors could have enforced Pacitto's rule simply by denying them sick leave for that time or by warning them that they were violating Agency policy. The testimony at the hearing (both from employees and management witnesses) conclusively demonstrated that employees were not denied sick leave or reprimanded for doing this prior to July 2002. At most, management representatives discussed the sick leave procedure at staff meetings, but even on this point the Respondent's evidence was not very persuasive. Pacitto and Rivas testified that sick leave procedures were discussed at staff meetings, but it is not at all clear that the specific rule requiring employees to speak directly to supervisors was cited at these meetings. The Respondent maintains leave and disciplinary records, and certainly some management representatives should have possessed some written notes of staff meetings or memos to employees from this four-year period, yet the Respondent offered no written corroboration of its assertion that its official policy was reiterated to employees, much less enforced, between September 1998 and July 2002.

Weighing against the employee witnesses' testimony that they and other employees consistently called out without speaking to their supervisor, was Supervisor Rivas's testimony that she often received calls from employees in her unit as well as from employees in other units. It was Rivas's view that employees understood and followed the policy of speaking directly to a supervisor; that employees knew she arrived at work early and called her when they couldn't reach their own supervisor. I am sure that this was true, and that some employees did comply with Pacitto's policy, but overall I find the evidence more persuasive that most employees in the Agency between 1998 and 2002 were not complying with the policy, and that most if not all supervisors were permitting their employees to take unscheduled leave by simply leaving a voice mail message with their supervisor and/or on extension 208. Indeed, the

testimony of both Rivas and Pacitto implicitly recognized that supervisors and employees alike had not been following Pacitto's policy prior to July 2002: they conceded that Pacitto became quite upset and angry with her supervisors when she learned just how widespread the noncompliance with her policies was, and she instructed them to meet with their units and change the office-wide practice. If Pacitto and her supervisors had been consistently reminding employees about the policy of personally speaking to a supervisor when calling in sick throughout the 1998-2002 period, and if they had been enforcing the policy by denying leave to employees who violated it, the meetings and memos of late July 2002 would not have been necessary, and Iacono would not have needed to devise a modified procedure for calling the front desk, as she did in her August 21 memo to employees (G.C. Ex. 5). If the rule had been consistently followed since 1998, the problems associated with contacting supervisors in the morning would have arisen years earlier, and this modified procedure would also have been devised much earlier.

The *Norfolk* case offers a useful comparison to our own. There, the Authority rejected the General Counsel's allegation that despite a regulation prohibiting respirator-qualified employees from growing facial hair, supervisors had permitted employees to grow facial hair and thus had allowed such a practice to develop. The Authority noted that not all employees were respirator-qualified and that supervisors would not necessarily know which employees were so qualified; thus the supervisors did not knowingly permit employees to violate the regulation. In our case, supervisors had to approve each employee's sick leave request in writing, and the evidence established that they routinely approved such requests after the employees had simply called in on the supervisors' voice mail. This is not a case, as in *United States Department of the Treasury, Internal Revenue Service, Des Moines District*, 13 FLRA 296, 307-08 (1983), where "sleuthing" or concerted investigation was required by supervisors to detect the employees' concompliance with agency policy. On the contrary, the supervisors were complicit in the employees' practice, and thus the practice was consistently exercised by both employees and supervisors over a sufficient period of time (nearly four years) to establish it as a condition of employment.

The change in policy effectuated by the Agency in July 2002 was more than *de minimis*. Requiring employees to speak directly to a supervisor meant that they often had to call several times throughout the morning until they reached a supervisor, a time-consuming process that is compounded by

the fact that either the employees or their dependent are sick and may need medical attention. Employees who did not comply with the rule after July were denied sick leave, resulting in the loss of pay for that day, a significant impact in itself. Moreover, after employees complained about the problems inherent in this rule, the Agency modified the policy to instruct employees assigned to the front desk to help callers find an available supervisor; this had an appreciable impact on the work load of the front desk employees at a very busy time of day.

Therefore, the Agency was not entitled to change its sick leave call-in policy without advance notice to the Union and an opportunity to bargain. Since it refused to negotiate, the Respondent violated section 7116(a)(1) and (5) of the Statute.

3. Reporting In and Out

The evidence did not reflect, however, a distinct difference between the Agency's policy before and after July 2002 concerning employees notifying their supervisors of their arrival and departure. Of the five employee witnesses, three testified that prior to 2002, their supervisors did not require them to let them know when they arrived at work or when they finished, while two said their supervisors did have some such requirement; of those two employees, one testified her supervisor required employees to notify him on arrival but not departure, and the other testified she was required to notify her supervisor when she left but not when she arrived. Employees could notify their supervisors by telephone or by email, or they could simply speak directly to the supervisor if they worked in close proximity. The Union perceived this policy, particularly after July 2002, as being tied to the Agency's stricter tardiness policy, since the email and voice mail systems record the time a message is sent. But the management witnesses described the policy not as one of time and attendance but of safety and accountability: that is, supervisors need to know where their employees are throughout the work day. Thus the managers attributed the policy as having originated in about 1999, when a lengthy remodeling of the office began, and as having become more urgent after the terrorist attacks of September 11 (26 Federal Plaza literally overlooks the site of the World Trade Center).

The memos sent by supervisors in late July 2002 reflect the inconsistency of the hearing testimony. Supervisor Llerena's July 23 memo told her employees, "it's imperative that you let me know your whereabouts during working hours;

sudden absenteeism is unacceptable." (G.C. Ex. 2). On September 12, Llerena sent another memo to her employees, telling them to "check in with me in the mornings and when you are leaving for the day . . . either by phone or personally." This memo also reminded them to inform her of their whereabouts during the day (G.C. Ex. 6). Supervisor Webber's July 31 memo instructed his employees to call him "in the morning to check in." (G.C. Ex. 11). Supervisor Apson's July 23 memo didn't refer to reporting at the start or end of the day, but it stated, "When you leave the floor, I need to know your whereabouts in the event of an emergency. In the event of an emergency, if you are on another floor, please do not return to this floor. When I account for the staff, you will be accounted for at the last known place" (G.C. Ex. 12).

In light of these facts, I cannot find that the Agency changed its reporting policy or practice in July 2002. Both prior to and after July, it appears that supervisors were responsible for keeping track of the whereabouts of their employees, and that each supervisor had his or her own specific way of doing so. Some asked their employees to notify them when arriving and departing, some didn't, and most of them required their employees to notify them when they left the work area during the day as well. This general subject was certainly one of the issues discussed by Pacitto with her supervisors in July when she "gave them the riot act," as the supervisors all mentioned something about keeping track of their employees in their July memos; but those memos do not reflect any real change in policy or practice from what had been previously required of employees. Unlike the post-July tardiness policy, in which every supervisor used almost identical language to describe their rules and procedures, the reporting policies retain a significant degree of variability and individuality. Thus I conclude that the General Counsel has not demonstrated that the Agency changed conditions of employment in this respect.

Moreover, the supervisors' reporting requirements do not appear designed as a time and attendance measuring tool, but simply as a means of enabling supervisors to know which employees are in the office throughout the day. If the reporting requirement had been intended to enforce the tardiness policy or to keep track of attendance for pay purposes, employees would not have been permitted to inform their supervisors verbally of their arrival and departure, because no time record is made in such cases. Therefore, the practice was not utilized as a means of disciplining employees or accounting for their pay or leave benefits. Indeed, even if it were determined that the Agency changed

its reporting policy in July 2002, I would consider such a change to be *de minimis*. Very little, if anything, about the employees' working conditions was affected by the supervisors' requirements that their employees notify them of their whereabouts. It cannot be said that prior to 2002, employees had no responsibility for keeping their supervisors informed of their whereabouts, and such a requirement is hardly an imposition on the employees in carrying on their work. As long as the rule is not tied to measuring employees' time and attendance, it has little or no impact on their working conditions, yet it significantly assists the supervisors in knowing where their employees are at any given time.

Accordingly, I find that the Respondent did not violate the Statute in this respect, and I will recommend that this portion of the complaint be dismissed.

Remedy

I have concluded that the Respondent committed an unfair labor practice, in violation of section 7116(a)(1) and (5) of the Statute, by unilaterally changing two conditions of employment: it required employees to speak personally with a supervisor when requesting unscheduled sick leave, and it imposed new rules concerning tardiness, which require employees to use sick leave for brief periods of tardiness and which mandate loss of pay and other disciplinary actions for repeat offenses. To remedy these violations, the General Counsel requests that the policies be rescinded, that the Respondent be required to notify and bargain with the Union before implementing any proposed changes in these policies, and that employees be made whole for any actions taken against them in enforcing these policies.

When an agency changes a condition of employment without fulfilling its obligation to bargain over the substance of the change, the Authority has held that a *status quo ante* remedy is appropriate, in the absence of special circumstances. *General Services Administration, National Capital Region, Federal Protective Service Division, Washington, D.C.*, 50 FLRA 728, 737 (1995). However, when an agency fails to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a *status quo ante* remedy using the factors set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI); U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 84 (1997).

The Authority has held that procedures and rules for obtaining sick leave are substantively negotiable. *U.S. Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, CA*, 37 FLRA 3, 21 (1990); *Defense Logistics Agency, Defense Depot Tracy, Tracy, CA*, 14 FLRA 475, 478 (1984). The Respondent has not asserted the existence of any special circumstances that would make it inappropriate to reinstitute the old sick leave procedure, nor does a review of the record reveal any such evidence. Therefore, I shall order that the Respondent rescind its July 2002 rule requiring employees to speak to a supervisor when requesting unscheduled sick leave and reinstitute the practice permitting employees to request such leave by leaving a message on the supervisor's voice mail and on the office's central line. Furthermore, any employees who have been penalized in any way for failing to speak to a supervisor (either through loss of pay or benefits or disciplinary action) should be made whole.

It would appear that the decision to change the Agency's handling of employee tardiness was a management right; thus the Agency was required only to negotiate with the Union concerning the impact and implementation of its decision. Accordingly, determining an appropriate remedy requires a case-by-case evaluation of the nature and circumstances of the violation, as set forth in *FCI*. The factors to be considered include: whether and when notice of the change was given to the Union by the Agency; whether and when the Union requested bargaining; the willfulness of the Agency's conduct in failing to discharge its bargaining obligation; the nature and extent of the adverse impact on unit employees; and whether and to what degree a *status quo ante* remedy would disrupt or affect the efficiency and effectiveness of the Agency's operations.

Unfortunately, the Respondent did not address these issues at the hearing or in its post-hearing brief, leaving me to review the record on my own. The General Counsel asserts that a consideration of the above-cited factors warrants rescinding the July 2002 rules for tardiness and reinstituting the prior policy, and I agree. The Union was not given any notice before supervisors met with their employees and sent out memos detailing the new tardiness rules; when the Union learned what was being done, it promptly demanded bargaining, but the Court Administrator flatly refused to discuss it. This was a willful violation; indeed, the Agency's position that its tardiness rules had not changed at all was less justifiable (and the bargaining violation was more extreme) than its similar position regarding the sick leave rules. At least with the sick leave rules, the Agency could cite its 1998 memo on the

subject, but with regard to tardiness, the July 2002 rules were completely new. The adverse impact of the new rules on employees was not severe, but the financial impact of losing pay and leave is nonetheless significant, and the new rules have likely caused many other employees to leave home earlier each morning. There is nothing in the record, on the other hand, to substantiate any disruptive effect that would be caused by reinstituting the pre-2002 tardiness rules. Thus I conclude that a *status quo ante* remedy is also appropriate for the tardiness rules.

I therefore recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Justice, Executive Office for Immigration Review, New York, New York (Agency) shall:

1. Cease and desist from:

(a) Unilaterally changing its established practices and procedures for requesting unscheduled sick leave and for handling employee tardiness without providing American Federation of Government Employees, Local 286, AFL-CIO (the Union), the exclusive representative of certain of its employees, with adequate notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Rescind the changes implemented in July 2002 concerning procedures for requesting unscheduled sick leave and for handling employee tardiness.

(b) Reinstitute the practices and procedures in effect prior to July 2002 for requesting unscheduled sick leave and for handling employee tardiness.

(c) Notify the Union of any proposed changes in established practices or procedures for requesting unscheduled sick leave and for handling employee tardiness,

and upon request, bargain with the Union over any such proposed changes to the extent required by the Statute.

(d) Make whole any bargaining unit employees adversely affected by the July 2002 changes in practices and procedures for requesting unscheduled sick leave and for handling employee tardiness, including reimbursing employees for any pay lost, restoring sick or annual leave which employees were required to use under the changed procedures, and reconsidering any disciplinary action taken against employees based on the changed procedures.

(e) Post a copy of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Court Administrator, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, August 19, 2005.

_____
RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Executive Office for Immigration Review, New York, New York, 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 change the established practices and procedures for requesting unscheduled sick leave and for handling employee tardiness without providing American Federation of Government Employees, Local 286, AFL-CIO (the Union), the exclusive representative of certain of our employees, with adequate notice and an opportunity to bargain to the extent required by the Statute.

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

WE WILL rescind the changes implemented in July 2002 concerning procedures for requesting unscheduled sick leave and for handling employee tardiness.

WE WILL reinstitute the practices and procedures in effect prior to July 2002 for requesting unscheduled sick leave and for handling employee tardiness.

WE WILL notify the Union of any proposed changes in established practices or procedures for requesting unscheduled sick leave and for handling employee tardiness, and upon request, bargain with the Union over any such proposed changes to the extent required by the Statute.

WE WILL make whole any bargaining unit employees adversely affected by the July 2002 changes in practices and procedures for requesting unscheduled sick leave and for handling employee tardiness, including reimbursing employees for any pay lost, restoring sick or annual leave which employees were required to use under the changed procedures, and reconsidering any disciplinary action taken against employees based on the changed procedures.

_____

U.S. Department of Justice
Executive Office for Immigration Review
New York, New York

Dated: _____ By:_____
Court Administrator

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: Thomas P. O'Neill, Jr., Federal Building, 10 Causeway Street, Suite 472, Boston, MA 02222, and whose phone number is 617-565-5100.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. BN-CA-02-0712, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

David J. Mithen **7000 1670 0000 1175 5547**
Gary J. Lieberman
Federal Labor Relations Authority
Boston Regional Office
Thomas P. O'Neill, Jr. Federal Bldg.
10 Causeway Street, Suite 472
Boston, MA 02222

Sharon J. Pomeranz **7000 1670 0000 1175 6377**

Charles F. Smith
U.S. Department of Justice
Executive Office for Immigration
Review
Office of the General Counsel
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

Kevin Kerr **7000 1670 0000 1175 6384**
AFGE, AFL-CIO, Local 286
c/o Executive Office of Immigration
Review Immigration Court
26 Federal Plaza, 12th Floor
Room 1237
New York, New York 10278-1099

Dated: August 19, 2005
Washington, DC