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

MEMORANDUM DATE: MAY 11, 2010

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FORREST CITY, ARKANSAS

RESPONDENT

AND Case No. DA-CA-09-0225

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, COUNCIL OF PRISON LOCALS, LOCAL 0922

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 and motions filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL OF PRISON LOCALS, LOCAL 0922 CHARGING PARTY	Case No. DA-CA-09-0225

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 14, 2010**, and addressed to:

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

RICHARD A. PEARSON
Administrative Law Judge

Dated: May 11, 2010
Washington, D.C.

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

FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL OF PRISON LOCALS, LOCAL 0922 Charging Party	Case No. DA-CA-09-0225

James P. Hughes
Charlotte Dye
For the General Counsel

Shawn A. Webb
For the Respondent

Jeff Roberts
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 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. part 2423.

On April 2, 2009, the American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 0922 (the Union or the Charging Party) filed an unfair labor practice charge against the Federal Bureau of Prisons, Federal Correctional Institution,

Forrest City, Arkansas (the Agency or Respondent). The Union filed an amended charge on October 15, 2009. After investigating the charges, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing on October 30, 2009, alleging that the Agency had installed digital video recorder racks in the Private Branch Exchange of its low security facility without providing the Union proper notice or an opportunity to negotiate, in violation of section 7116(a)(1) and (5) of the Statute. The Respondent filed its Answer to the Complaint on November 25, 2009, denying that it committed an unfair labor practice.

A hearing was held in this matter on January 12 and 13, 2010, in Memphis, Tennessee. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent have 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 Agency is a Federal prison complex that consists of a medium-security and a low-security prison and a federal prison camp, housing approximately 3,800 inmates and employing approximately 600 staff. Tr. 17, 375. The American Federation of Government Employees, AFL-CIO (AFGE), is the certified collective bargaining representative of a nationwide unit of employees of the Federal Bureau of Prisons. G.C. Ex. 2. AFGE's Council of Prison Locals and the Federal Bureau of Prisons are parties to a national collective bargaining agreement (CBA). G.C. Ex. 3. AFGE Local 0922 is an agent of AFGE and the Council of Prison Locals for the purpose of representing bargaining unit employees at the Forrest City, Arkansas prison complex. Tr. 21-22. Among other provisions, Article 3, Section d(5), and Articles 7 and 9 of the CBA authorize local unions to bargain with the Agency regarding certain matters on the local level. Tr. 20; G.C. Ex. 3.

The events central to this case occurred between February and May of 2009, and all dates hereafter refer to 2009, unless otherwise noted. As in every federal prison, the Agency utilizes video recording equipment to monitor the activities of prisoners, and the Forrest City facility was upgrading its equipment in 2009 to a faster, more sophisticated system that uses digital video recorders (DVRs). Tr. 328-29, 363-64, 375-76. The existing video monitoring equipment was housed in a room called the PBX or Premium Branch Exchange, which is located in the Administration Building of the low-security prison, outside the prison's secured perimeter. Tr. 27-28, 102-03, 116-18, 346-48. Even though the old video equipment was being phased out, it could not simply be taken out to make room for the new equipment; therefore, another location for the DVRs needed to be found. Tr. 347-48. The new DVR equipment had been sitting in boxes at the prison for nearly three years by this time, and officials had discussed a variety of plans and locations for it, but the installation of the

DVRs became a more urgent security priority in the minds of prison management in early 2009. Tr. 284-85, 354, 362-63. A regional telecommunications specialist, Jeffrey Ford, was brought to Forrest City to survey the facility, identify the best location for the new equipment, and expedite its installation. Tr. 337, 376-78.

The dates and other details regarding the events leading up to the installation of the DVRs are quite uncertain, as none of the parties introduced documents or notes reflecting their meetings and discussions, and most of the witnesses had differing recollections of these events. It is essentially undisputed, however, that Mr. Ford visited the Forrest City facility in February and met with some of the employees and managers regarding the installation of the new equipment. Either during this site visit or shortly thereafter, Ford became convinced that the DVRs should be installed in the low-security prison's PBX (the same room that housed the old video equipment), and he identified an open space in the room as the best location for the large metal racks that would house the DVRs. Tr. 286-87, 339-41, 343-45.[1] Ford also discussed with Agency officials and some affected bargaining unit employees what work needed to be done to accommodate the new equipment: the electrical box needed to be upgraded, for instance, and the actual hookup of the DVR system would be done by a contractor, not by the electronics technicians who work in the PBX. There were discussions, either involving Ford or Agency officials and employees, about fixing a leak in the ceiling of the PBX; about possibly cutting a hole in one of the PBX walls to expand the room to hold the additional equipment; and of whether the existing air conditioning would be adequate to alleviate the heat generated by the DVRs. Tr. 171-73, 253-54, 261-63. Within a week or two after Ford's visit to Forrest City, electricians did upgrade the PBX's electrical box. Tr. 183, 258, 289-90. The idea of expanding the PBX, however, was ruled out as impractical. Tr. 417-19. On April 6, Joseph Cook and Jason Carns, the two electronics technicians who use the low-security PBX as their main base of work and maintain most of the electronic and communications equipment that is housed in the PBX and around the prison, were given "Facility Work Requests" (commonly called work orders) to install the DVR rack "ASAP" in the PBX. G.C. Ex. 6, 8, 9, 10.

Between April 6 and 30, a variety of events and controversies occurred that delayed the installation of the DVRs and its racks, most of which I consider irrelevant to the disposition of the case before me. The Warden and his managers lost patience with the delay, and on April 30 Cook and Carns were each given a memorandum from their supervisor, ordering them to "complete the DVR project" and to "install . . . the DVR rack" by the end of that day. G.C. Ex. 4. Cook and Carns testified that Agency officials had been ambiguous and inconsistent as to where they wanted the equipment installed, and that they asked to be told specifically where to place it. Tr. 171-72, 189, 200-05, 269-71. Since the memorandum did not specify the desired location for the DVRs, Facility Manager Carol Brown and General

[1] The General Counsel's witnesses dispute, however, that Ford told them at that meeting a specific location where he thought the DVRs should be placed. Tr. 181-82, 256-57.

Foreman Matthew Sites added a handwritten clarification to the memo, instructing Cook and Carns to install the DVR rack in the space in the PBX that was then occupied by a refrigerator. G.C. Ex. 7; Tr. 200-05, 269-71. (This is a different part of the room than the space identified by Mr. Ford.) Cook was also concerned that the location identified by Brown and Sites was too crowded for the DVR equipment and might cause damage to the DVRs, and he didn't want to be blamed for any such damage. Tr. 206, 212-13. At around the same time on April 30, the work orders dated April 6 were also amended to reflect the specific location for the DVR equipment to be installed. *Compare* G.C. Exhibits 8 and 9, which do not specify a location for the equipment, and G.C. Exhibits 6 and 10, which are otherwise identical to 8 and 9, but do specify a location.[2] Despite receiving these instructions, Cook and Carns did not move the DVRs or their racks into the PBX by the end of the day; as a result, the Warden had them temporarily reassigned to the correctional services department from May 1 to May 15. When Cook and Carns returned to their regular assignment at the PBX in mid-May, the DVR racks had been placed in the open area in roughly the middle of the room – in other words, not in the location specified in writing by Brown and Sites but in the location identified by Ford. Tr. 188-89, 230. The new DVR system has been in operation since that time.[3]

Much of the testimony at the hearing involved the work performed by the electronics technicians at the low-security prison and how it was altered by the installation of the DVRs in the PBX.[4] Although the electronics technicians (also called communications technicians) are assigned additional space in the Facilities Department to store items and to perform work (Tr. 138-39, 241-42, 301-03, 333-36, 395), the PBX is their primary base of operations. It is a 10'-square room where they have their desks, telephones and computers, and prior to the installation of the DVRs, it was where they performed as much of their work as they could. Tr. 102-04, 228-29. While some of the Agency's witnesses disputed the appropriateness of the employees using the PBX for all of these tasks and suggested that some of the work should have been done in their space in the Facilities Department (Tr. 304, 333-36, 395), one Agency witness noted that the electronics technicians' desks were situated in the PBX in both the low-security and the medium-security prisons, and another agreed with the technicians that the PBX was suitable for performing many of the jobs that Cook and Carns used it for. Tr. 303, 419-20.

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[2] While Ms. Brown and Mr. Sites explained how and why the April 30 memos to Carns and Cook were revised, neither they nor any other witness could explain the discrepancies between the two sets of April 6 work orders. While the discrepancy is not material to the resolution of the case, it appears that the additional language on the work orders was added on April 30, for the same reason that the memo to the employees (G.C. Ex. 4) was "clarified" by G.C. Ex. 7.

[3] Witnesses dispute whether the DVRs themselves were installed on the racks and their cables hooked up by Ford or by Cook and Carns, and when the installation occurred, but these facts are not material to the resolution of this case. Tr. 225-26, 307-08, 353-56.

[4] Two other electronics technicians are assigned to a similar PBX at the medium-security prison.

Specifically, employees Cook and Carns explained that the PBX was both the safest, fastest and most convenient place for them to do prefabrication work on the many types of electronic and communications equipment that they are required to maintain and repair. The Facilities Department area is within the secured perimeter of the prison, meaning that inmates and staff are all around them and they have to protect all of their equipment even as they are working on it.[5] The PBX, on the other hand, is beyond the area accessible to inmates, and the technicians have many electrical outlets, their computers and their telephone readily accessible as they work on equipment. Tr. 121-22, 234, 239-40, 333-34. Prior to the installation of the DVRs, the technicians also had a 30"-by-6' work table in the PBX, which they had modified to allow them to perform a variety of prefabrication work on many types of equipment. Tr. 103-04, 107-08, 145-46, 231-32, 242-43. When the DVR rack was placed in the PBX, in the very spot where their table had been, the work table was removed by the Agency; and without that table to assist them, Cook and Carns stated that they now must either do the prefabrication work on the PBX floor or outside the PBX in areas frequented by inmates. Tr. 122-26, 225, 227, 232-33, 245-47.

The existence of this work table was a hotly contested issue at the hearing, as each of the Agency witnesses testified that they had never seen a table in the PBX. Tr. 292-93, 338, 381, 410-11, 437-38. Although I do not believe that the existence of the table is a *sine qua non* of the General Counsel's case, and my ultimate decision would be the same even if the technicians never had a work table in the PBX, I find nonetheless that Cook and Carns had indeed used a work table in the PBX to assist them in performing a significant amount of their work, and that after the DVRs were installed, there was inadequate space for the table to remain in the PBX. While I do not doubt that the Agency witnesses testified truthfully, to the best of their knowledge, I find that the testimony of Cook and Carns on this point is simply more detailed, authoritative and plausible. The electronics technicians gave detailed explanations of how they utilized the work table to assist them in performing a wide variety of repair and maintenance tasks, from the cleaning of fire alarm heads (Tr. 136-44, 240-42) to the use of a fiber termination kit to treat fiber optic cable (Tr. 145-51, 242-45), from repairing security cameras (Tr. 236-40) to programming the radios used by most employees (Tr. 245-46), and in each of these instances their testimony was consistent. On the other hand, the Agency witnesses had occasion to look in the PBX only infrequently, and briefly, and the presence of a work table would hardly have been a detail for them to take special notice of. Tr. 293, 410, 437. Moreover, it is evident to me from the overall tenor of their testimony that the Agency witnesses (with the exception of Ford, who was a communications specialist and would ultimately have to install the equipment) were not greatly concerned with the details and layout of the PBX or how the electronics technicians did their job, as long as they got their work done. Only when the Warden decided in April that it was urgent to install the

[5] Whenever Cook or Carns takes tools or equipment into the Facilities Department or other secured areas of the facility, he also has to "chit out" the equipment and pass through metal-detection devices. Tr. 125-27, 241, 245-46.

DVR system did his subordinates begin to insist that Cook and Carns move the DVR racks into the PBX, and even then they did not care where the racks were placed. Tr. 416-17, 443-44. Thus they had little cause or opportunity to pay attention to the layout and function of the PBX, and instead I credit the testimony of Cook and Carns: specifically, that they had a work table in the PBX prior to the installation of the DVR system and that the work table assisted them in performing their work more quickly and efficiently, in an area free from inmate security concerns.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel (GC) argues that the installation of the DVR system in the PBX constituted a change in the conditions of employment of Cook and Carns, and that the change had more than a *de minimis* effect on their working conditions. Therefore, it argues that the Respondent had an obligation to notify the Union in advance of the installation and afford it an opportunity to negotiate over the impact and implementation of the change. The GC further submits that the various discussions between Agency officials and employees prior to May 2009 regarding the installation of the DVRs did not constitute adequate notice as required by the Statute. Accordingly, in the General Counsel's view, the Respondent violated section 7116(a)(1) and (5) of the Statute.

In support of its first point, the GC argues that the installation of the DVR system in the open area of the PBX significantly reduced the space available for Cook and Carns to work. The racks housing the new DVRs are about 2' by 4', while the room is about 10' in each direction and has a considerable amount of furniture and equipment already in that space. Tr. 112-13; G.C. Ex. 5a-5e. The DVRs do not leave adequate space to continue to use the work table, and they require Cook and Carns to perform much more of their work outside the PBX, thereby carrying their tools and equipment considerable distances around the prison and requiring them to work in areas frequented by inmates. This poses more security concerns for the employees and dangers to the institution, and it makes the work more time consuming than before. Many of the tasks they continue to perform in the PBX must now be done on the floor and without the customized features that Cook and Carns had added to the table to expedite their work. The new DVR system is also much more noisy and hot than the old video system, making it more difficult for Cook and Carns to communicate while working in the PBX and raising the temperature of the room several degrees. Tr. 165-67, 251-52. The GC notes that the Authority has held that the location in which employees perform their duties, and other aspects of an employee's work environment, are "matters at the very heart of the traditional meaning of 'conditions of employment.'" *U.S. Dep't of Health and Human Serv., Soc. Sec. Admin., Baltimore, Md.*, 36 FLRA 655, 668 (1990)(*SSA*), *quoting from Library of Congress v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983).

The General Counsel cites much of the same evidence to support its claim that the change in conditions of employment was more than *de minimis*. The reduced open space in the PBX and loss of their work table has dramatically altered the manner in which Cook and Carns work. For some of their jobs, Cook and Carns now must walk to the prison camp or to the medium-security facility – anywhere from a quarter-mile to a mile -- to retrieve equipment that they previously stored in the PBX, and then take the equipment to the Facilities Department to perform the work. The effect of these changes is to make their work more physically difficult and more time consuming, while exposing them to additional security risks than before. The GC cites the Authority's recent decision in *United States Dep't of the Air Force, Air Force Materiel Command, Space and Missile Systems Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173-74 (2009)(*Kirtland AFB*), that the relocation of a single employee's office had more than a *de minimis* impact on his working conditions.

Finally, the GC insists that the Union was never properly notified in advance or given the opportunity to negotiate concerning the impact and implementation of the change in working conditions. Although there was disputed evidence regarding Union Vice President Jeff Roberts' presence at the February meeting with Ford concerning the planned installation of the DVR system, the General Counsel insists that the Agency did not inform either Roberts or any of the employees at that meeting where the DVR system would be installed. According to the GC, the February meeting was merely a discussion of what steps needed to be taken to install the DVRs; no clear statement was made by the Agency at that time regarding the details of any Agency decision. Similarly, the subsequent discussions between various Agency officials and various employees prior to April 30 regarding the installation were simply discussions of different alternatives, and there was no definitive announcement by the Agency of a decision or the details of such a decision. Moreover, the Union had previously advised the Agency that it should notify the Union of a change in conditions of employment by sending written notice to the Union President, who at that time was Shon Foreman. Tr. 22, 63-64. According to the GC, verbal notification or notice to a Union official other than the President, does not meet the requirements of the Statute. *Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Ga.*, 54 FLRA 1529, 1534 (1998)(*Warner Robins*). The only time that Foreman was notified of anything was when the Warden spoke to him on April 30, when Agency officials were ordering Cook and Carns to install the DVR racks in the PBX. At that time, Foreman and the Warden agreed that the employees would be given a work order that specified exactly where in the PBX the racks should be placed. Tr. 72-73, 385-87. The GC argues that this also was not adequate notice of a change, because the only issue being discussed was the contents of the work order, and because the Agency still had not made a final decision where the DVR racks should be placed. *U.S. Dep't of Health and Human Serv., Soc. Sec. Admin., Region I, Boston, Mass.*, 47 FLRA 322, 324 (1993)(*Region 1*); *Dep't of the Army, Harry Diamond Laboratories, Adelphi, Md.*, 9 FLRA 575, 575-76 (1982)(*Harry Diamond*).

Respondent

The Respondent asserts first that the installation of the DVR system in the PBX was not a change in the employees' conditions of employment. According to the Agency, Cook and Carns falsely testified that they had a work table in the PBX to help them perform much of their work. The Respondent submits, however, that the employees' allegation was refuted by the testimony of the Agency witnesses, none of whom ever saw the table. According to the Agency, the PBX has always been used for holding the prison's essential communications equipment, and the installation of the new DVR system was consistent with that use. Accordingly, nothing has changed that would warrant notice to the Union or bargaining. *Defense Logistics Agency, Alexandria, Va.*, 22 FLRA 327 (1986). The Agency alternatively argues that any change in working conditions caused by the installation of the DVR system was *de minimis*. *Dep't of Health and Human Services, Soc. Sec. Admin.,* 24 FLRA 403, 408 (1986).

The Respondent further argues that Union President Foreman, Vice President Roberts and the affected employees were all notified of the proposed installation of the DVR system from the very beginning, starting with the meeting with Ford in February 2009. The Agency made it clear to them that the open area in the middle of the PBX was the intended location for the system. Notwithstanding this advance consultation, the Union did not demand bargaining prior to the installation, and thus it waived its right to do so.

Finally, the Respondent asserts that it was permitted to act unilaterally to install the DVRs, because the new system was necessary to the functioning of the Agency. *See U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 55 FLRA 892, 904 (1999)(*INS*). It was essential for security at the prison, and the decision to install it in the PBX was an exercise of the Agency's management rights under section 7106(a)(1).

Analysis

The Respondent in this case denies that it had any duty to notify the Union or bargain regarding the installation of the DVR system, but it also argues that it met that obligation anyway. I will first examine whether the installation triggered a duty to notify and bargain.

In applying the statutory definition of "conditions of employment" in section 7103(a)(14) to the duty to negotiate changes therein, the Authority has looked to two basic factors: whether the subject matter of the change pertains to bargaining unit employees, and whether the record establishes that there is a direct connection between the subject matter and the work situation or employment relationship of unit employees. *SSA*, 36 FLRA at 666, *citing Antilles Consolidated Education Ass'n*, 22 FLRA 235, 236-37 (1986). The decision in dispute here, the installation of a DVR system in an open area of the PBX, clearly involved

the two bargaining unit employees who worked in the PBX, and was directly connected to their work situation. Respondent does not offer any evidence or argument that would rebut a finding that the installation of the DVR involved a condition of employment; instead, it argues that the installation did not change the employees' conditions of employment, and that any purported change was *de minimis*.

In support of its argument that there was no change in Carns and Cook's conditions of employment, the Agency insists that they were not required to do anything differently than before the installation of the DVRs, but this is thoroughly rebutted by the evidence. It is evident from the photographs of the PBX (G.C. Ex. 5a-5e) and the testimony regarding the layout and use of the room, that the location of the DVR system significantly reduced the amount of open space available in an already-crowded room. As a result, the employees' access to electrical outlets on the wall behind the DVR racks was impeded, requiring them to go to the central tool room to obtain extension cords that were not previously needed. Tr. 109-11. The DVR system is quite noisy, and it emits a significant amount of heat in a small room, making the room more uncomfortable to work in and more difficult for Cook and Carns to communicate. They are now also required to store items such as the fiber termination kit and the fire alarm head cleaning machine in other areas of the prison (Tr. 135-39, 149-50, 240-41, 242-44), making it much more time-consuming to use them. Most importantly, the current layout of the PBX does not leave enough room for the work table that Cook and Carns used. This has greatly altered the way in which they perform most of their basic work activities, including treating and terminating fiber optic cables, cleaning fire alarm heads, maintaining and repairing radios and video cameras, soldering wires, working on transponder boxes, and hooking up telephone and computer cables. Some of the work that Cook and Carns previously did in the PBX is now done throughout the institution, and much of the work that they still do in the PBX is more difficult, because they no longer have a table to work on. As I noted earlier, I find that Cook and Carns did have a work table in the PBX prior to the installation of the new DVR system. While some Agency officials may have considered it inappropriate for Cook and Carns to be performing all these tasks in the PBX (which they considered to be more of an equipment room than a work room), the fact remains that Cook and Carns were doing these tasks in the PBX prior to May 2009, and the installation of the DVRs has changed this. I therefore conclude that installation of the DVR system constituted a change in these employees' conditions of employment.

Much of the evidence that I cited immediately above also supports a conclusion that the change was more than *de minimis*. The Forrest City facility is a large complex; not only do Cook and Carns work throughout the low-security institution, but they sometimes must go to the prison camp and the medium-security institution to obtain tools and equipment for their work. Storing more equipment outside the PBX, as they have been required to do since May, requires more walking and takes more time to do a variety of tasks. Because they no longer have a work table to assist them in their electronic maintenance and repair work, they do some of this work directly on the floor or on a small wire spool on the floor. Not only

does this make the tasks more physically taxing to perform, but it makes their work less precise, resulting in more broken fibers, for example. Tr. 124-25, 244-45. When the employees work outside the PBX, they have to take their tools with them, and they must work in close proximity to inmates. This requires that Cook and Carns take greater security precautions, and it increases the time needed to perform their tasks. Indeed, the installation of the DVRs and the loss of their work table have altered almost every aspect of how these employees perform their work. The increased noise and heat from the DVR system, in and of itself, constituted a greater than *de minimis* change in the PBX work environment. In their totality, these changes are much more comprehensive than those which occurred in *SSA*, 36 FLRA at 668 (four employees had their desks moved about 50 feet within the same office and one of these employees lost access to a window), and in *Kirtland AFB*, 64 FLRA at 173-74 (single employee relocated to different, more cramped office), to take just two examples. Even if the Agency was not aware that Cook and Carns were using a work table to assist them in their work in the PBX, this was something that they should have been aware of, and its loss was a reasonably foreseeable effect of the installation of the DVR system. For all these reasons, I conclude that the change in conditions of employment resulting from the installation of the DVRs was more than *de minimis*.

Finally, although the Respondent argued in its brief that the new DVR system was necessary to the functioning of the institution, it never established such a defense through evidence on the record. I fully agree with Respondent that a system of cameras monitoring inmate activity is a vital aspect of the institution's security, and that the new system was a significant technological advance over the existing system. Neither the Union nor the General Counsel has questioned the Agency's right to install the new system. But the Agency had been functioning for quite a long time with the old monitoring system; indeed the new system had been sitting in crates in the building for more than two years. More importantly, notifying the Union and negotiating with it in advance of the installation need not have slowed down the Agency's action to any significant degree. The standard for a "necessary functioning" defense is not whether the change itself is necessary, but whether maintaining the status quo during bargaining would have impeded the Agency's ability to carry out its mission. *INS*, 55 FLRA at 904. Mr. Ford visited Forrest City in early February and testified that he identified the appropriate location for the DVD racks at that time. Although discussions among managers and employees about the installation continued after Ford's visit, the Warden did not consider it urgent to install the system until April. The Agency could just as easily have sent the Union written notice of its intent to install the system any time between February and April without causing any delay. Even if negotiations with the Union had begun in May, the evidence does not establish "an overriding exigency or other compelling reason which would justify adhering to the . . . implementation date . . . ." *Securities & Exchange Commission v. FLRA,* 568 F.3d 990, 994 (D.C. Cir. 2009), *quoting from 22 Combat Support Group (SAC) March Air Force Base, Cal.,* 25 FLRA 289, 301 (1987). In light of all the delays that the Agency itself had incurred prior to May, it cannot reasonably be held that a further, brief, delay for negotiations would have impeded the Agency's mission.

Having found that the Respondent changed conditions of employment to a degree that was greater than *de minimis*, and that there was no overriding exigency requiring the Respondent to implement that change without notifying and bargaining with the Union, I conclude that Respondent was indeed obligated to so notify and bargain. The final issue is whether the Agency fulfilled that obligation.

Specifically, the question posed by the facts of this case is whether the discussions between Agency officials and employees constituted notice to the Union of the Agency's intention to implement a change in working conditions. As the Respondent notes, "the agency announced its intentions well before the installation of the DVR racks in May 2009." Resp. Post-Hearing Brief. at 3. Moreover, the Union never actually requested to bargain over the change. If the Union had received proper notice of the proposed change, the burden would have shifted to the Union to demand bargaining, and its failure would be considered a waiver of its right to bargain. *U.S. Dep't of the Treasury, U.S. Customs Serv., Port of New York and Newark*, 57 FLRA 718, 720-21 (2002). But the burden is on the Respondent first to demonstrate that the Union received adequate notice of the proposed change. *Id.* at 720.

In order to fulfill its statutory obligation, an agency must notify the exclusive representative before a change goes into effect. *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9, 11 (1981). A union has the right to designate the person to be notified of changes, and an agency is obligated to honor the union's designation. *Warner Robins*, 54 FLRA at 1534. Notice of a proposed change in conditions of employment "must be sufficiently specific or definitive regarding the actual change contemplated so as to adequately provide the union with a reasonable opportunity to request bargaining." *U.S. Army Corps of Engineers, Memphis District, Memphis, Tenn.*, 53 FLRA 79, 81 (1997) (*Corps of Engineers*); *Ogden Air Logistics Center, Hill Air Force Base, Utah*, 41 FLRA 690, 698 (1991)(*Hill AFB*). The notice must apprise the union of the scope and nature of the proposed change, the certainty of the change, and the planned timing of the change. 41 FLRA at 699. A mere passing reference to a change, in a context unlikely to put the union on notice of its meaning, does not satisfy this requirement. *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 856 (2002)(*Willow Grove*); *Harry Diamond*, 9 FLRA at 576. Moreover, a union's obligation to request bargaining is not triggered if the change is presented as already having been "decided upon." *U.S. Dep't of Labor, Washington, D.C.*, 44 FLRA 988, 990, 994, 1007 (1992)(*DOL*).

With these principles in mind, I find that although Agency officials discussed the installation of the DVRs with several employees between February and April 2009, none of these conversations constituted legally sufficient notice to the Union that the Agency intended to change the working conditions of Carns and Cook. First, it must be noted that the testimony of all the Agency witnesses regarding these purported conversations was extremely vague, and the details varied considerably from witness to witness. None of the Agency

witnesses could state even approximately when each meeting or discussion occurred, or how many meetings they held, much less what was stated during the discussions, and no written record of the discussions was made. Since it is the Respondent's burden to prove its affirmative defense regarding notice, the ambiguity of the testimony renders it virtually impossible to conclude, as the Respondent urges, that it satisfied the requirements of specificity and definitiveness cited above.

Second, the evidence does not show that the Union President, Mr. Foreman, was present at any meeting or conversation regarding the installation of a DVR system until April 30, when he persuaded Agency officials to revise the orders issued to Cook and Carns so as to specify where to place the DVR racks in the PBX. The Union Vice President, Mr. Roberts, was present for at least a portion of one discussion, the one with Mr. Ford in February, but it is not at all clear whether he was present for the entire discussion or whether he just happened to overhear a portion of it. Tr. 40-41, 55-58, 285-86. There were also a myriad of other conversations between prison managers and the electronics technicians about the DVR system, but neither Roberts nor Foreman was present at any of them. The Union had previously advised the Respondent to serve all notices of proposed changes in working conditions on the Union President. Tr. 22-23, 63-64. Thus, it is evident that prior to April 30, the Respondent did not follow the official procedure for notifying the Union of a change in working conditions. If the Respondent provided any notice at all to the Union, it was done informally, and verbally, in either the February meeting or in one of the subsequent discussions with the electronics technicians.

The totality of the evidence demonstrates that none of these discussions apprised the Union of the scope or nature of the proposed change, the certainty of the change, or its planned timing. Instead, the record reflects that several possible locations for the DVR system were proposed and debated between February and May, and it was not until the written orders to Cook and Carns were modified on April 30 that a specific location for the system was pinpointed. Ironically, this "final" order to the employees identified the "wrong" location, and the DVR racks were ultimately placed in a different part of the PBX than the one specified in G.C. Exhibits 6, 7 and 10. Although Ford testified that he told the parties attending the meeting after his site survey of the PBX in February that the DVRs should go in the open area of the PBX (Tr. 339-41, 343; *see also* Tr. 287), he also stated that the actual decision was for the Warden to make, not him (Tr. 343). Cook and Carns testified, however, that Ford did not tell them where the DVRs would actually be installed (Tr. 180-82, 256-57), and the Associate Warden testified that Ford identified a different location for the DVRs (Tr. 406-07). From this muddled record, I conclude that the February meeting attended by Ford was simply a planning and discussion session, with no decision made or announced by the Respondent as to where the DVR system would go, or when. While Ford may have formed his own clear opinion in February as to the best location for the system, nothing definitive was announced to the employees, much less to the Union, and discussions about where and how to install the system continued through March and April. It was in this context that

Cook and Carns discussed with Sites, Taylor and other managers the possibility of cutting a hole in the PBX wall and expanding the room, options that were not ruled out by the managers until much later. In April, the Respondent finally made it clear to Cook and Carns that they were to install the DVR racks in the PBX as soon as possible, but even until the last minute, on April 30, the exact location in the room was undefined and the subject of discussion. *See* G.C. Ex. 4, 7. As in the *Corps of Engineers* and *Hill AFB* cases, the Agency's communications with the electronics technicians did not afford them (much less the Union, which was not present for many of these discussions) any certainty that a decision had been made or when it would be implemented.

The first time the President of the Union, Mr. Foreman, learned that a DVR system was to be installed in the PBX was on April 30, but his conversation with the Warden that day was not a notice to the Union that would satisfy the statutory requirements described above. On April 30, the Warden had already decided that Cook and Carns would install the DVR racks in the PBX immediately, and he sought out Foreman to ensure that the employees would comply with the order to install the racks. Tr. 383-88. Foreman, in turn, wished to ensure that any order to the employees be put in writing and that it specify exactly where they should place the racks. Tr. 71-72, 81-82, 387-88. It is clear that by the time this discussion occurred, the Agency was not interested in negotiating, but rather that it had made the decision and wanted the racks installed immediately. As in *Willow Grove* and *DOL*, the conversation between Foreman and the Warden on April 30 did not satisfy the statutory requirement that the Agency notify the Union before implementing a change and allow the Union the opportunity to negotiate over the impact and implementation of the change. 57 FLRA at 856; 44 FLRA at 990.

It is true, as the Respondent asserts, that Agency officials verbally communicated with Cook and Carns throughout the period from February to April when they were planning the installation of the DVR system, but none of these communications were directed to the Union as the exclusive representative of the bargaining unit. Moreover, prior to April 30, there was no definite statement from the Agency that the DVR system was going to be installed in a specific location at a specific time; a demand by the Union to bargain at that time would therefore have been premature. *Region I*, 47 FLRA at 324. Then, with the events of April 30, prison officials demanded implementation of their decision, leaving no room or time for negotiation. When Cook and Carns were ordered to move the DVR racks into the PBX on April 30, and Union President Foreman was called to assist in getting this done, the decision had been made, and the Union was not given any role in negotiating the impact and implementation of that decision. The pre-decision planning discussions with Cook and Carns were not negotiations, and Cook and Carns were not the Union. Including Cook and Carns in the pre-decision planning did not relieve the Agency of engaging in negotiations once a decision was made.

For all of the reasons stated above, I conclude that the Respondent failed to give the Union proper notice of its intent to install a DVR system in the PBX room. The Union therefore could not be expected to request bargaining or submit proposals. By its actions, the Respondent violated section 7116(a)(1) and (5) of the Statute.

In order to remedy the unfair labor practice, a cease and desist order and the posting of a notice are appropriate. My order requires the Respondent to negotiate, to the extent consistent with the Statute, regarding the installation of a DVR system in the PBX area of the Respondent's low-security facility.

Accordingly, I recommend that the Authority issue the following remedial 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 Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas (the Respondent) shall:

1. Cease and desist from:

(a) Changing the conditions of employment of bargaining unit employees without notifying the American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 0922 (the Union) and bargaining to the extent required by the Statute.

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

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

(a) Upon request, bargain with the Union to the extent required by the Statute concerning the installation of a DVR system in the PBX area of the low-security facility.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas 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, D.C., May 11, 2010.

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the conditions of employment of bargaining unit employees without notifying the American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 0922 (the Union), and bargaining to the extent required by the Statute.

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

WE WILL bargain with the Union to the extent required by the Statute concerning the installation of a DVR system in the PBX area of the low-security facility.

_____
(Agency/Activity)

Dated: _____ By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Region, Federal Labor Relations Authority, and whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, Texas 75202, and whose telephone number is: (214)767-6266.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DA-CA-09-0225, were sent to the following parties:

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

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_____
Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: May 11, 2010
Washington, DC