



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 17-12

SOCIAL SECURITY ADMINISTRATION, REGION II
NEW YORK, NEW YORK

RESPONDENT

AND

Case No. BN-CA-16-0134

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2608, AFL-CIO

CHARGING PARTY

Daniel J. Silva
William D. Kirsner
For the General Counsel

Sheila Bello-Class
Edward Taylor
For the Respondent

Rafael Arroyo
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On January 12, 2016, the American Federation of Government Employees, Local 2608, AFL-CIO (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Social Security Administration, Region II, New York, New York (Respondent). GC Ex. 1(a). The charge was amended on May 17, 2016. GC Ex. 1(c). After an investigation of the charge, the Boston Regional Director issued a Complaint and Notice of

Hearing on May 31, 2016, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to bargain before assigning Title XVI benefit claims to employees. GC Ex. 1(e). On June 27, 2016, the Respondent filed its Answer to the Complaint admitting some factual allegations, but denying that it violated the Statute. GC Ex. 1(g).

A hearing on the matter was conducted on August 18, 2016, in Hato Rey, Puerto Rico. All parties were represented and afforded an opportunity to be heard, introduce evidence, and examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it changed working conditions for Disability Examiners in the Puerto Rico Disability Processing Unit. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under 5 U.S.C. § 7103(a)(3). GC Exs. 1(e), 1(g). At all times material, Maria Maldonado occupied the position of Area IV Director and acted on behalf of the Respondent.

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a) (4). GC Exs. 1(e), 1(g). AFGE is the exclusive representative of a unit of employees at the Puerto Rico Disability Processing Unit (PR DPU). The Union is an agent of AFGE for the purpose of representing employees at the PR DPU. The Respondent and the Union are parties to a national collective bargaining agreement (CBA). Jt. Ex. 1.

The Social Security Administration administers two forms of disability benefits: Title II and Title XVI. Tr. 35, 37. Individuals are entitled to Title II benefits if they have paid FICA taxes and they have a disability. Tr. 36-37, 92, 237-38. Individuals are entitled to Title XVI benefits if they prove that they have a financial need and they have a disability. Applications seeking both benefits at the same time are considered "concurrent" claims. Tr. 96. The commonwealth of Puerto Rico is a territory of the United States, and while residents of Puerto Rico who pay FICA taxes are eligible for benefits awarded pursuant to Title II, they are not eligible for benefits awarded pursuant to Title XVI. Tr. 37, 92-93.

After an individual applies for benefits at an SSA field office, a Service Representative first determines if the applicant is eligible for benefits. Tr. 60, 122. If eligible, the claim is processed by a Claims Representative and the developed file containing the claimant's medical evidence of record (MER) is ultimately forwarded to a Disability Examiner who determines whether the applicant has a disability that entitles them to benefits. That examiner may work at a Disability Processing Unit (DPU) or at Disability Determination Service (DDS) operated by a state or territory. Tr. 254-55. Luiz Perez, a former Disability Examiner, and Carlos Caceres, a current Disability Examiner, testified that

whether made under Title II or Title XVI the disability determination is very similar. Tr. 87, 123. While Union President Rafael Arroyo testified that there was a difference in the adjudication of disability under the two titles, he has never been a Disability Examiner or made a disability determination. Tr. 59, 63.

To make a disability determination, a Disability Examiner reviews medical information in the claim file, submits requests for additional medical evidence, and, if necessary, schedules appointments with medical providers (“consultative examinations”). Tr. 91, 238-39. Disability Examiners also send numerous letters to claimants, attorneys, and medical providers as part of completing the medical file they use to adjudicate the claim. Tr. 154-55.

In Puerto Rico, disability examinations occur at either a DPU operated by SSA, or at DDS operated by the territory of Puerto Rico. Tr. 60. DDSs are also found in other states, including Maine. Tr. 23, 122. The Disability Examiners who work in DDSs operated by a state or territory are not federal employees. Tr. 23.

The PR DPU operated by SSA in Puerto Rico was created in 2011 to help the Puerto Rico DDS make disability determinations and to investigate possible fraudulent activity. Tr. 72, 241. Currently, there are seventeen Disability Examiners working in the PR DPU. Tr. 95. The examiners are bargaining unit employees represented by the Union. The Disability Examiners in the PR DPU primarily use the Iron Data system to manage their workload. Tr. 93, 132-33, 183. The Iron Data system can only be used with claims for benefits made by residents of Puerto Rico. Tr. 246. Examiners input information into the Iron Data system and it automatically prepares letters to send to applicants, attorneys, and medical providers. Tr. 93, 156-57. The system has a list of the addresses for medical providers. Tr. 105-06. Furthermore, Iron Data helps the examiners monitor their claims and establishes a due date when a request for additional medical evidence is sent. Tr. 148. The system automatically recognizes if the requested medical evidence is scanned into the system and if no medical evidence is received by the deadline, the system reminds the examiner to prepare a follow-up letter. Disability Examiners working at state DDSs and DPUs located within the United States use a different data system, the Modernized Integrated Disability Adjudication System (MIDAS) instead of the Iron Data system. Tr. 94.

While the Respondent does not require Disability Examiners to process a specific number of claims, it does evaluate them on their ability to complete claims within 120 days. Tr. 105, 126, 154. This is considered a “key” metric so supervisors follow-up with employees on a regular, almost daily basis if they have claims that are over 120 days old (“overage”). Tr. 100-01, 194. Obviously, if an employee wants to complete claims within 120 days, they must complete at least as many claims as they received over that period of time. Tr. 126. Disability Examiners are also evaluated based on the number of errors they make when processing claims. Tr. 100, 151, 193.

The general position description for Disability Examiners working in an SSA DPU states that they process Title II and Title XVI claims. R. Ex. 2. However, prior to February of 2016, Disability Examiners in the PR DPU processed only Title II claims because residents of Puerto Rico were not eligible for benefits under Title XVI. Tr. 77, 131,

184, 268. For this reason, bargaining unit employees at the PR DPU were not trained on processing Title XVI claims. Tr. 138, 184, 268. Also, the examiners working at the PR DPU did not use the MIDAS data system used by DPUs and DDSs located in the United States. Tr. 97, 186. Although Disability Examiners in the PR DPU answered calls made to their own phone numbers, two office clerks employed within the office answered telephone calls to the general office phone number. Tr. 107, 158, 196. These office clerks also processed mail for the PR DPU. Tr. 111-12. The office clerks employed at the PR DPU are not bargaining unit employees. Tr. 274. Finally, the PR DPU did not process payments for MER as those payments were handled by the Puerto Rico DDS. Tr. 109-10, 125, 246-47.

Sometime prior to January 5, 2016, the Respondent decided to transfer Title II, Title XVI, and concurrent claims from the DDS in Maine to the PR DPU because the DDS serving Maine had a backlog while the workload for the PR DPU had dropped significantly. Tr. 122, 243-44. On January 5, 2016, the Union was notified by letter and email that the Disability Examiners in the PR DPU would start making disability determinations for applicants from outside of Puerto Rico on January 25, 2016. GC Ex. 2. The communication also indicated that the examiners would be given training on Title XVI claims and the MIDAS data system beginning January 11, 2016. The letter sent to the Union was described within as an informational notice, indicating that the Respondent had no duty to bargain and was sent as a “courtesy” *Id.*

On January 7, 2016, Carmen Guzmán, a supervisor in the PR DPU, notified the Union that she was going to have a meeting to discuss these changes with the employees on January 8, 2016, and she invited the Union to send a representative. Tr. 29; GC Ex. 3. She also sent him a copy of the agenda for the planned Title XVI and MIDAS training sessions, asserting that there was no change to the position description or expectations of the Disability Examiners. Jt. Ex. 3, 4. At the January 8, 2016 meeting, Guzmán notified employees that they would be processing Title II, Title XVI, and concurrent claims from the state of Maine and that they would be given the training necessary to complete these new duties. Tr. 29, 185. During the meeting, the Union expressed its belief that the Respondent was violating the Statute by implementing these changes without bargaining with the Union. Tr. 29.

On January 11, 2016, the Union sent an email requesting to bargain over the changes that were being made and informing the Respondent that it was going to file a ULP. GC Ex. 4 at 4. On January 20, 2016, Maldonado responded that the Respondent did not have a duty to bargain because any adverse impact of this change was speculative or de minimis. *Id.* at 3. On February 5, 2016, the Union replied to Maldonado by reiterating that the Respondent had a duty to bargain because examiners in the PR DPU had never processed Title XVI claims or used the MIDAS system and that significant training would be necessary. *Id.* at 1-2.

On January 11 and 12, 2016, the Respondent provided the PR DPU examiners a half-day of training on consecutive days about processing claims filed under Title XVI. Tr. 186. Employees listened to an instructor on a telephone and watched a computer screen that was linked to the instructor's computer screen. Tr. 97. The examiners who received the two half-days of training testified that the training was inadequate because it was not provided in-person, not enough examples were provided, and there was no time to prepare questions. Tr. 97-98, 187.

From January 19 to 22, 2016, the examiners were trained on how to use the MIDAS data system. Tr. 188. Although this training was conducted in-person, employees identified several problems with this training. Employees stated that they did not have individual access to a computer connected to the MIDAS data system during the training. Tr. 98, 141-42, 188. Therefore, employees had to take turns with a single computer using the instructor's access account rather than their own. Tr. 98, 188. Moreover, the employees only had access to actual pending claims, therefore, instruction was limited to issues present in that claim and the employees were unable to explore the MIDAS data system because doing so would impact an actual claim. Tr. 168. During the training, the employees received fifty pages of instructions on how to use the MIDAS data system. Tr. 189; GC Ex. 7. After the training, employees received a 99-page training guide further explaining how to use the MIDAS data system. Tr. 142, 144; GC Ex. 6.

When examiners complained to management about the training they were given, they were told to seek assistance from individuals at the disability processing unit located in New York if they had any questions. Tr. 114-15, 168. The PR DPU examiners had a difficult time learning the system because the MIDAS data system was not congruent with the Iron Data system. Tr. 155, 190. Emilia Ramos, a Disability Examiner, stated that she felt like a trainee again. Tr. 191. Caceres stated that it took three to four months of trial and error to learn how to properly process these claims using the MIDAS data system. Tr. 99-100. Carol Martinez, another Disability Examiner, testified that she remained uncomfortable with the new duties required by the MIDAS data system. Tr. 139, 152.

The Respondent selected seven Disability Examiners to do a trial run during the week of February 8, 2016. Tr. 150, 191-92. Examiners did not have an opportunity to volunteer for the trial run. Tr. 175. During the trial run, examiners discovered that the letters prepared using the MIDAS data system had the address for the office in the Virgin Islands instead of Puerto Rico.¹ Tr. 192-93. However, this variance in the systems was eventually resolved. On February 22, 2016, the Respondent began assigning Title II, Title XVI, and concurrent cases from Maine to all of the examiners in the PR DPU. Tr. 155.

Examiners testified that there are several disadvantages to using the MIDAS data system compared to Iron Data system. The MIDAS system does not automatically prepare letters for applicants, attorneys, and medical providers. Tr. 156-57. Instead, the employees had to modify paragraphs in a form letter. Tr. 157, 198, 275. Although Melissa Bruckner, the Deputy Director, suggested that this gave the employees more "flexibility"; Martinez cogently observed that it increased the time needed to process a claim and created

¹ The PR DPU was provided the MIDAS data system already in use in the Virgin Islands. Tr. 106.

opportunity for more errors. Tr. 157, 278. Furthermore, the MIDAS data system that was provided did not have a list of addresses for medical providers in Maine; therefore, employees had to research, often relying on internet searches to find addresses. Tr. 105-06, 200. One witness estimated that it took about one to two hours per week to perform this additional task. Tr. 106-07. Also, at least initially, several addresses proved incorrect so the letters were returned as undeliverable which further delayed the processing of the claim. Tr. 106, 148-49, 200. In addition, unlike the Iron Data system, the MIDAS system did not automatically create reminders or notify the employees that medical evidence was missing; therefore, they had to create their own reminders, check the file, and follow-up. Tr. 148.

The examiners also identified other problems presented when processing claims from Maine became part of their duties. The process for requesting consultative exams became more complicated. Tr. 146-47. Employees had to get permission, which could take two to three days, then send an email to the Maine office to schedule the examinations. Tr. 146. Also, Disability Examiners had difficulty locating a medical provider near the applicant to provide these exams because they were not familiar with Maine's geography. Tr. 161. Due to the transfer process, claims were already three to four months old when the examiners received them and in response, applicants and their attorneys were less cooperative. Tr. 104-05, 123. Also, some applicants refused to answer the phone or hung up because they were suspicious of a scam when they heard the examiner's Spanish accent or saw that the telephone call originated in Puerto Rico. Tr. 161. As a result of these issues, employees testified that it took longer to process the claims that came from Maine. Tr. 156, 172, 194.

The Respondent also had to assign clerical duties to examiners as a result of this change because the Puerto Rico DDS could not process the MER payments for claims from Maine. Therefore, the office clerks in the PR DPU had to process these payments. Tr. 109, 121, 160. This took a significant amount of the clerks' time, so examiners were assigned clerical duties. Tr. 110, 121. For example, examiners now take turns answering phone calls to the general office telephone number once every one to two weeks. Tr. 108, 159, 174, 196. The examiners testified that such telephone calls come in as often as every fifteen minutes on a regular day, and distracts them from processing claims. Tr. 108, 159.

Caceres and Martinez testified that examiners also take turns processing incoming and outgoing mail because the office clerks were processing MER payments. Tr. 108, 174. When claims from the state of Maine started arriving, the Respondent increased the number of claims assigned to each examiner. Previously, they were assigned five to eight claims per week. Tr. 125-26, 171-72, 195. After the change, examiners were assigned eight to twelve claims per week. Caceres and Martinez testified that the number of overage claims is the highest they could remember. Tr. 105, 153. Martinez indicated that prior to the change she had a total of two or three overage claims since she started working at the PR DPU in 2013. Tr. 153, 165. However, after the change, she had five or six overage claims in one month. Tr. 153. Caceres testified that he did not have any overage claims. Tr. 101.

At the time of the hearing, employees had not received their annual performance evaluation. Tr. 201-02. However, Martinez stated that she expected that her performance evaluation would be lower based on her mid-year performance assessment discussion with her supervisor. Tr. 170. She stated that her supervisor told her that her production was lower than last year. Tr. 171. Martinez also stated that she was concerned about her ability to “excel” at everything her supervisor asked her to do during the mid-year evaluation. Tr. 170. According to her assessment, Martinez was processing claims in a timely manner, meeting “productivity standards”, and successfully learned how to use the MIDAS data system to process claims under Title XVI. R. Ex. 1. Her supervisor indicated that there were several things that Martinez needed to do to “excel” including identifying barriers to timely completion of work, developing reference materials, and getting involved in solving problems in the office.

Jack Leiby, a senior labor advisor for the Respondent, participated in the negotiations that led to the parties’ CBA. Tr. 210-11. He explained that the CBA does not address transfers of work because “the transfer of cases, in my view, is an assignment of work under [the] Statute. We would not negotiate that in the contract.” Tr. 223. However, he acknowledged that the Respondent had a duty to bargain the impact of its decision to assign work if it’s not something an employee has done in the past, something the employee was hired to perform, or in the employee’s position description. Tr. 231.

Leiby testified that Article 21 covers the performance evaluation system called “PACS.” Tr. 217. He explained that it provides for a three-tiered rating system instead of the previous pass-fail system. It also allows the Union to be more involved in the evaluation process and requires supervisors to notify employees of their expectations. Next, Leiby stated that Article 16 of the CBA states that the Respondent is responsible for providing training and that employees may notify supervisors if they need additional training. Tr. 214-15. He suggested that Article 16 would cover changes to computer programs because it requires the Respondent to provide training. Tr. 223. Furthermore, he stated that the assignment of new clerical duties would not have been negotiated because it is an assignment of work. Tr. 225.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) contends that the Respondent violated the Statute by failing to bargain before transferring claims from the Maine DDS to the PR DPU for disability examinations.

The GC stated that the transfer of work had a more than de minimis impact on the working conditions of bargaining unit employees. In support, it argues that the employees’ performance will suffer because they had never processed Title XVI claims or used the MIDAS data system and the Respondent did not provide proper training. GC Br. at 43. Also, the MIDAS data system procured from the Virgin Islands office did not have addresses for the medical providers in Maine; therefore, the employees had to spend time researching addresses and inputting them into the system. *Id.* at 44. Employees also had to perform

other tasks, such as writing letters and preparing reminders, that were previously automated. *Id.* at 43-44. As a result, it took longer to process claims and mistakes increased. The GC notes that the significant training scheduled by the Respondent demonstrates that it understood this was going to be a major change in the way examiners performed their daily duties. *Id.* at 42. The GC states that the employees had to perform clerical duties, such as answering phone calls to the general office and processing mail, tasks that were previously performed by the office clerks. *Id.* at 45-46. Also, the GC asserts that the Respondent increased the number of claims from approximately seven claims per week to ten claims per week. *Id.* at 16. Further, the GC notes that the number of overage claims has increased. *Id.* at 48. While the GC acknowledges that the position description includes processing claims under Title XVI, it argues that the PR DPU examiners have not performed such duties in the past; therefore, the inclusion of such duties in the position description is not determinative.

The GC also denies that the matter is covered by the CBA. It notes that the CBA does not specifically mention transferring work to other offices. *Id.* at 53. Furthermore, Article 16, Section 7 of the CBA states that neither party waived their statutory rights regarding IVT; therefore, the Respondent should have negotiated before giving the training over IVT because the Union had a right to bargain upon that issue. *Id.* at 54. Furthermore, the GC contends that negotiation over the training would also have addressed the new clerical duties and the impact such changes would have on examiner performance. *Id.* at 54.

As a remedy, the GC seeks an order directing the Respondent to post a notice on bulletin boards and to send the notice by email. *Id.* at 55. The GC asserts that the notice should be signed by Joseph Cafaro, the Director of Human Resources, since he was the person who decided to transfer claims from Maine to the PR DPU. Finally, the GC states that the Respondent stopped transferring the work in June or July; however, it argues that the Respondent should be ordered to bargain post-implementation because it may transfer additional work from other locations in the future. *Id.* at 54.

Respondent

The Respondent contends that the Complaint should be dismissed because it failed to identify the facts that support an unfair labor practice as required by the Authority's regulations. R. Br. at 24. In particular, Respondent argues that the Complaint only alleged that the Respondent assigned Title XVI claims to the PR DPU but it did not mention anything about the MIDAS data system or additional clerical duties.

Next, the Respondent argues that the impact of the change was de minimis. Although the Respondent acknowledges that the PR DPU had not processed claims under Title XVI previously, it contends that Disability Examiners are still making disability determinations. *Id.* at 11-12. Further, the employees' position descriptions state that they are responsible for making Title II and Title XVI determinations and the five-step process used to make disability determinations is the same under Title II and Title XVI. Tr. 9; R. Br. at 13.

Finally, the Respondent claims that the MIDAS data system was only “slightly” different from the Iron Data system so it did not require any bargaining. R. Br. at 3, 18. Respondent acknowledges that the MIDAS system does not automatically create letters; however, it asserts that there is no evidence that this is a significant burden for employees. The Respondent states that the employees’ complaints about training do not constitute a change in conditions of employment; instead, the employees should have filed a grievance. *Id.* at 14. Furthermore, the Respondent claims that there is no evidence that employees were counseled because of overage claims or for any other reason related to the change, and asserted that Martinez’s mid-term performance discussion was positive. *Id.* at 15-16. Also, the Respondent states that Arroyo failed to explain how these duties would harm employees’ promotion potential. *Id.*

The Respondent denies that the clerical duties had a more than de minimis impact on working conditions. *Id.* at 17. Respondent notes that the employees previously had to answer their own telephone; therefore, answering the telephone for the general office is not a new duty. Also, the Respondent claims that “occasional[ly]” having to answer a telephone is “simply a fact of office life” and argues that this new procedure is better because the “alleged distraction” is “condensed” to one day every week or two instead of having to answer telephone calls to their own phone every day. Additionally, none of the employees that are required to handle mail testified about the impact on their working conditions. *Id.* at 17-18.

Finally, the Respondent initially asserted that it had no duty to bargain because all procedures and appropriate accommodations regarding assignments of work are covered by the CBA. *Id.* at 25. However, it acknowledges that it would have a duty to bargain if there was a fundamental change that impacted working conditions that were not considered by the parties. *Id.* at 25-26. Furthermore, the Respondent argues that the CBA covers the only concerns raised by the General Counsel, training and evaluation; therefore, it was not required to bargain over this change. *Id.* at 27-28.²

ANALYSIS

The Complaint Was Not Deficient

With respect to the adequacy of a complaint, the Authority has held that “its sole purpose is to put the employer on notice of the basis of the charges against it.” *Dep’t of HHS, Health Care Fin. Admin.*, 35 FLRA 491, 494 (1990). The complaint is not judged on “rigid pleading rules.” *Id.* In this case, the complaint alleged that, on January 5, 2016, Maldonado notified the Union that the Respondent would change the work assignments of bargaining unit employees by requiring them to process Title XVI claims. GC Ex. 1(e). Also, the complaint alleged that the Respondent failed to bargain with the Union over that change. The Respondent claims that the Complaint is deficient because it fails to specifically mention the MIDAS data system or the new clerical duties instituted as a result of processing

² While the Respondent also argued that it should not be required to return to status quo ante, a status quo ante remedy was not requested.

Title XVI claims from the state of Maine. However, it is clear that use of the MIDAS data system and new clerical duties were integral parts of the transfer of work described by the Maldonado in her January 5, 2016, notice. Therefore, the Respondent should have understood that these issues were part of the allegation and the Complaint put the Respondent on adequate notice of the alleged violation.

The Respondent Violated the Statute by Refusing to Bargain

An agency has a duty to bargain any change in conditions of employment that has a more than de minimis impact on the working conditions of bargaining unit employees unless the change is covered by a negotiated agreement or the union waived its right to bargain. *U.S. Dep't of the Air Force, 355th MSG/CC Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 89 (2009) (*Davis-Monthan AFB*); *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018-19 (1993). Although an agency has a right to assign work, it must bargain over the procedures it uses to exercise that right and appropriate arrangements for employees adversely impacted by its actions. 5 U.S.C. § 7106; *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003). In this case, the Respondent violated the Statute because it refused to bargain over a change in working conditions precipitated by a transfer of work that had a more than de minimis impact on working conditions of bargaining unit employees, and that was not covered by the CBA.

De Minimis

To determine whether a change is de minimis, the Authority considers the nature and extent of the effect, or the reasonable foreseeable effect, of the change on working conditions of bargaining unit employees. *Davis-Monthan AFB*, 64 FLRA at 89. The impact is reasonably foreseeable if the agency knew, or should have known, that it would impact employees when it made the change. *Id.* In this case, it was reasonably foreseeable that the Respondent's decision to transfer Title XVI claims from the Maine DDS to the PR DPU would have a significant adverse impact on the working conditions of disability examiners in the PR DPU.

Before the transfer of work, examiners in the PR DPU only processed Title II claims from Puerto Rico. After the change, examiners in the office were required to process Title II and XVI claims from Maine. The fact that the Title XVI duties were included in the employees' position descriptions did not excuse the Respondent from negotiating over the transfer of work because examiners in that office had never processed a high volume of claims originating from somewhere other than Puerto Rico. In assessing a change in conditions of employment, the Authority considers whether the employees actually performed the duties, not whether they were part of a position description. *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 174-75 (2009). While the analysis used to determine whether an applicant is disabled is the same under Title II and Title XVI, the processing of claims from a different state or territory involves more than rote application of a disability analysis. In this case, the Respondent did more than assign Title XVI claims to Disability Examiners who had previously processed claims under Title II. Respondent dramatically changed the way the

examiners performed their duties and those changes would have been more than de minimis even if only claims made under Title II were transferred from Maine. In short, this case is about how the processing of claims and other office operations changed as a result of the claims transferred from Maine, than it is the Title under which the claims were filed.

First, the PR DPU examiners had to learn how to use the MIDAS data system, a computer system they had never used before. The four days of training, 99-page training guide, and 50 pages of instructions strongly supports the conclusion that the MIDAS system was not the "slight" change suggested by the Respondent in its brief and the testimony of Melissa Bruckner to that effect, is not credible. One does not provide four days of training for a "slight" change in a computer data system. The fact that the Respondent saw a need for extensive training should have been a clear indication that this was a change that required bargaining. In fact, the decision to invite the Union to the meeting and to provide written notice of the change that was coming, further demonstrates the folly of the Respondent's argument that this was a change that did not require impact and implementation bargaining.

Several examiners testified that the training on the use of the MIDAS data system was inadequate because they did not have enough hands-on time and they were not able to experiment with the system because actual claims were used as the instruction medium. When the examiners complained about the inadequacy of training, the Respondent referred them to another office in New York and initiated the change. As a result of the inadequate training, examiners experienced difficulty using the MIDAS data system for several months.

Examiners testified that there were several problems with the new MIDAS data system. Whereas the Iron Data system they used to process cases from Puerto Rico automatically prepared ready to mail letters, the MIDAS system required examiners to edit and modify letters before they could be sent. Also, unlike the Iron Data system, the MIDAS system did not monitor whether medical evidence was received or automatically remind employees to follow-up with applicants; instead, employees had to prepare their own reminders and check the files for evidence. Further, the MIDAS system did not have an address list for medical providers in Maine, so employees had to spend as much as one to two hours a week locating proper addresses until they developed a database of medical contacts in the state of Maine. When incorrect addresses were used, the letters were returned undeliverable, which further delayed processing of the claim and required the examiners to spend more time researching the correct address. As a result, it took longer to process a claim using the MIDAS system and there was a greater likelihood of errors being made in the processing of the claim.

Aside from the absence of data in the MIDAS data system, there were other reasons it took examiners longer to process claims from Maine. It was more difficult to order consultative examinations because they had to be coordinated with the Maine DDS. Further, because the cases transferred by the Maine DDS were already old, applicants and attorneys were either upset and less cooperative, or suspicious of calls originating from Puerto Rico with speakers who had an unfamiliar accent.

Because the office clerical staff was occupied with the new duty of processing payments for medical evidence, the Respondent began requiring examiners to answer phone calls to the general phone number one day every one to two weeks. Although they had previously answered calls to their personal telephone line, they did not have to answer the general office telephone until the office staff was overwhelmed by payment processing and this was an entirely new duty. This was not, as the Respondent suggested, an "occasional interruption" One witness testified that the general telephone line received calls as often as every fifteen minutes on a regular day and greatly distracts them from conducting disability examinations which results in more errors, and longer processing times.

In addition, because of the increased workload presented by the claims from the Maine DDS, the Respondent began assigning more claims to the examiners each week. The number of claims assigned to each examiner increased from five to eight claims per week to eight to twelve claims per week. Although the Respondent may not have explicitly told examiners that they needed to complete more claims each week, meeting the 120 day target meant that more claims had to be processed in the same amount of time.

The Respondent suggests that any impact of increased processing times upon performance assessment is speculative because no assessments had been issued prior to the hearing and no one had been counseled regarding their performance. However, the Authority considers whether the reasonably foreseeable effect of the change is more than de minimis. Since examiners are evaluated based on the number of claims processed within the 120 day target and the number of processing errors they make, an increase in the number of claims assigned within a 120 day period, in conjunction with transferred claims taking longer to process, presents a situation where an adverse impact on performance is reasonably foreseeable. In fact, two employees testified that the number of overage claims was the highest they have seen since they started working at the PR DPU. Furthermore, errors will likely increase due to the employees' inexperience with the MIDAS data system, inadequate training, the absence of address data in the system, and the increase in distractions imposed by additional clerical duties. Given all of the factors presented by the changes caused by the influx of cases from Maine, the Respondent knew, or should have known, that transferring work from the Maine DDS to the PR DPU would have a more than de minimis adverse impact on examiner performance and dealing with that reality is something impact and implementation bargaining could have addressed.

It is quite revealing that the email which invited the Union to attend the meeting at which the assignment of work from the Maine DDS would be discussed, the Respondent indicated that there would be no change to the "Expectations of the Disability Examiners." GC Ex. 3. While consistent with the Respondent's contention that no negotiation was required because only de minimis changes were made, given the likelihood of an adverse impact on productivity arising from disability examiners in the PR DPU processing claims from the Maine DDS, the Respondent's failure to reduce performance expectations is the kind of issue for which impact and implementation bargaining is appropriate.

Covered By

The Respondent has the burden to prove that it is not required to bargain over the transfer of work because it is covered by the CBA. *See U.S. DOJ, Fed. BOP, FCC, Coleman, Fla.*, 69 FLRA 447, 449 (2016). The Authority has developed a two-part test to determine whether a matter is “covered by” a negotiated agreement. *Id.* First, it will consider whether the matter is explicitly covered by the negotiated agreement. *Id.* Exact congruence of language is not required. *Id.* Second, it will consider whether the “subject matter is so commonly considered to be an aspect of the matter set forth in the agreement that the negotiations are presumed to have foreclosed further bargaining.” *Id.* Put another way, the Authority will determine whether, “based on the circumstances of the case, the parties reasonably should have contemplated that their agreement would foreclose further bargaining over the allegedly covered subject.” *Id.* (footnote omitted). Even if the subject matter of the change is not covered by, an agency may implement a change if all the union’s proposals are non-negotiable. *U.S. DOJ, INS*, 55 FLRA 892, 904 (1999). However, a union is not required to submit proposals if the agency refuses to bargain. *Dep’t of HHS, SSA*, 26 FLRA 865, 881-82 (1987).

The General Counsel alleges that the Respondent failed to bargain over the transfer of work from the Maine DDS to the PR DPU. The Respondent did not offer any evidence that it had previously negotiated over workload transfers. While the Respondent called a witness who participated in contract negotiations, he did not offer any testimony regarding the bargaining history. When asked why the parties negotiated certain provisions, he cited the language of the CBA and opined that the parties would not negotiate over workload transfers because assignment of work is a management right and the Agency is not required to negotiate over management rights. However, he acknowledged that the parties could negotiate over the impact of an assignment of work. Critically, he did not give any indication that the parties contemplated work transfers of work during negotiations. Thus, procedures and appropriate accommodations for workload transfers were not covered by the CBA.

Rather than addressing procedures and appropriate accommodations for workload transfers, the Respondent asserts that it had no duty to bargain because the concerns cited by the General Counsel, i.e., training and performance, are covered by Articles 17 and 21 of the CBA. In support, the Respondent relies on D.C. Circuit Court’s decision in *Fed. Bureau of Prisons*, 654 F.3d 91 (2011) (*BOP*). In *BOP*, the parties’ collective bargaining agreement included a provision that addressed how the agency would create rosters and assign specific officers to positions on the roster. *Id.* at 95. The union sought to bargain over the agency’s decision to reduce the number of positions on the roster. *Id.* However, the Circuit Court held that the agency did not have a duty to bargain over the “outcome” of the assignment process. *Id.* However, in this case, there is no evidence that the parties ever discussed, much less negotiated, the procedures for transferring work to other offices involving claims that required a different process. Therefore, *BOP* is not applicable.

The fact that the General Counsel raised concerns about training and evaluations to demonstrate that workload transfer created changes for which negotiation was proper does not mean that the Union was only entitled to negotiate over those issues. The Union could have submitted proposals on other issues related to transferring work to the PR DPU from outside of Puerto Rico that required examiners to use a new data system and resulted in them being assigned new clerical duties previously performed by office staff not in the bargaining unit. Of course, knowing exactly what the Union might have proposed is not possible because the Respondent insisted from the beginning that it had no duty to bargain. While the Respondent is entitled to challenge the negotiability of the Union's proposals after it gives the Union an opportunity to submit them, it cannot deny any obligation to accept them and then use the absence of proposals to contend that all possible proposals were covered by the CBA.

In summary, the CBA does not expressly address procedures and appropriate accommodations for workload transfers, and Articles 17 and 21 do not foreclose bargaining over all of the potential proposals that could arise from the changes to conditions of employment that occur when claims typically processed by disability examiners at the Maine DDS are transferred to a DPU located in Puerto Rico. Therefore, the Respondent has failed to demonstrate that changes caused by a transfer of work from a stateside DDS to a DPU in the territory of Puerto Rico were covered by the previously negotiated CBA.

CONCLUSION

The General Counsel established that the Respondent had a duty to bargain over the transfer of work because the reasonably foreseeable impact on bargaining unit employees' conditions of employment was more than de minimis. Furthermore, the Respondent failed to prove that the CBA covered such transfers. Therefore, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to bargain with the Union over transferring claim files from the Maine DDS to be processed by disability examiners located at the PR DPU.

A notice must be signed by the highest official of the agency or activity responsible for violating the Statute. *SSA*, 64 FLRA 293, 297 (2009). Although Joseph Cafaro made the decision to transfer the work, there is no evidence that he was the official who refused to negotiate over the reasonably foreseeable changes that were more than de minimis. Tr. 258. Therefore, I find that the Area IV Director is the appropriate person to sign the notice. In accordance with the Authority's decision that ULP notices should be posted on bulletin boards and distributed to employees electronically, I order both methods of distribution. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014). Finally, because additional transfers of work may be made in the future, the Respondent is ordered to bargain with the Union prospectively upon the impact and implementation proposals related to the exercise of management's right to assign work.

Accordingly, it is recommended that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Social Security Administration, Region II, New York, New York, shall:

1. Cease and desist from:

(a) Implementing changes in conditions of employment of bargaining unit employees without providing the American Federation of Government Employees, Local 2608, AFL-CIO (Union) with advance 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 bargaining unit employees in the exercise of the rights assured by the Statute.

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

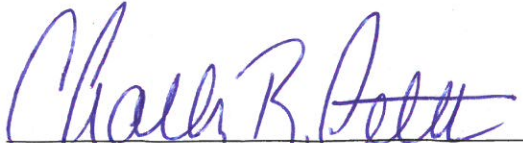
(a) Bargain with the Union over its decision to change working conditions for Disability Examiners in the Puerto Rico Disability Processing Unit.

(b) Post at the Puerto Rico Disability Processing Unit 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 Area Director, and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, the Notice shall be distributed electronically, on the same day, as the physical posting, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

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

Issued, Washington, D.C., March 8, 2017


CHARLES R. CENTER
Chief Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Social Security Administration, Region II, New York, New York, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate with the American Federation of Government Employees, Local 2608, AFL-CIO (Union) over assigning claims from the Maine Disability Determination Service to the Puerto Rico Disability Processing Unit.

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

WE WILL negotiate with the Union regarding the assignment of claims from the Maine Disability Determination Service to the Puerto Rico Disability Processing Unit.

(Agency/Activity)

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

This Notice must remain posted for sixty (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 Region, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222 and whose telephone number is: (617)565-5100.