**68 FLRA No. 84**

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
(Respondent)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
IFPTE, AFL-CIO
(Charging Party)

WA-CA-11-0302

_____

DECISION AND ORDER

April 27, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

## I. Statement of the Case

The Federal Labor Relations Authority's (FLRA's) General Counsel issued a complaint alleging that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute[*] by issuing a memo that unilaterally changed the Respondent's policy on the retention and destruction of documents containing personally identifiable information, without affording the Charging Party advance notice and an opportunity to bargain.

In the attached decision, an FLRA Administrative Law Judge (the Judge) found that the memo in dispute merely restated existing policy, and that, because the parties had not established past practices that deviated from that policy, the memo did not amount to a change in any such practices. Consequently, the Judge recommended that the Authority dismiss the complaint.

The Charging Party has filed exceptions that challenge the Judge's factual findings and legal analysis. After considering the decision and the entire record – including the exceptions and the Respondent's opposition to them – we find that a preponderance of the record evidence supports the Judge's challenged factual findings, and that the Judge's legal analysis is consistent with applicable precedent. Therefore, we adopt the Judge's findings, conclusions, and recommendations, and we dismiss the complaint accordingly.

## II. Order

We dismiss the complaint.

[*] 5 U.S.C. § 7116(a)(1), (5).

**Office of Administrative Law Judges**

SOCIAL SECURITY ADMINSTRATION
OFFICE OF DISABILITY ADJUDICATION
& REVIEW
Respondent

AND

ASSOCIATION OF ADMINISTRATIVE LAW
JUDGES, IFPTE, AFL-CIO
Charging Party

Case No. WA-CA-11-0302

Ryan H. White
Jessica S. Bartlett
For the General Counsel

Eric Garcia
De Famuyiwa
For the Respondent

Robert H. Stropp, Jr.
Diana M. Bardes
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

**DECISION**

To paraphrase an immortal line from "Cool Hand Luke," what we have here is a failure to communicate. Agency management sent a memo to employees "clarifying . . . existing" policies regarding the retention and disposal of records containing "personally identifiable information," which the government is required by law to safeguard closely. Rather than clarifying things, however, the memo stirred up a hornet's nest of questions and alarm among the Agency's administrative law judges. The judges' union believed the Agency was actually changing its policy, and it alleges that the Agency's unilateral action violated its obligation to negotiate with the Union first.

If indeed the Agency's memo represented a change in its records retention policy, the Agency would have committed an unfair labor practice. But since the evidence demonstrates that there was no change, the Agency did not violate the Statute.

**STATEMENT OF THE CASE**

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On April 7, 2011, the Association of Administrative Law Judges, IFPTE, AFL-CIO (Union or Charging Party) filed an unfair labor practice charge against the Social Security Administration (SSA). After investigating the charge, the Washington Regional Director of the Authority issued a Complaint and Notice of Hearing on August 26, 2011, on behalf of the FLRA's General Counsel (GC), alleging that the Social Security Administration, Office of Disability Adjudication & Review (Agency or Respondent) changed the conditions of employment of bargaining unit employees without providing the Union an opportunity to bargain to the extent required by law, in violation of § 7116(a)(1) and (5) of the Statute. The Respondent filed a timely Answer to the Complaint on September 8, 2011, denying that it had committed an unfair labor practice.

A hearing was held in this matter on November 8, 2011, in Washington, D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The GC, Charging Party, 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 make the following findings of fact, conclusions of law, and recommendations.

**FINDINGS OF FACT**

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Exs. 1(b), 1(c). The Office of Disability Adjudication & Review (ODAR) is the subdivision of SSA that conducts hearings and issues decisions on claims for disability and other types of benefits provided by SSA. Those hearings are conducted by approximately 1,450 administrative law judges (ALJs or judges) in about 160 hearing offices around the country. Tr. 91, 99. The Charging Party is a labor organization within the meaning of § 7103(a)(4) of the Statute, and it is the exclusive representative of a nationwide unit of the Respondent's ALJs.[1] GC Exs. 1(b), 1(c).

At ODAR hearing offices, prior to a hearing, ALJs review a claimant's official case file, which contains (among other things) the claimant's medical

[1] The Agency also has employees represented by two other unions, but those employees and unions are not involved in the current dispute. Tr. 267.

records and educational and work history. Tr. 17. In addition to these records, the judge will make notes regarding the medical and other evidence and often draft questions to ask the claimant and other witnesses at the hearing. The judge generally makes additional notes at the hearing and then writes instructions to a decision writer concerning the proposed decision. Tr. 17-18, 20-21. An average case file has about 400 or 500 pages, but can run to 1,000 pages in some cases. Tr. 22.

The official case file is divided into a variety of sections, each section for a different type of document. Tr. 17. The judge's notes and related working papers are retained in a separate section, variously called the "private section," the "private file," or the "ALJ file." Tr. 17, 18, 31-32, 99-101, 136, 188-89, 256. The documents in the private section of the case file have historically been kept in the hearing offices for the use of the judges and hearing office staff while the case is pending on appeal and in cases that are remanded to the ALJ.[2] Tr. 31, 96-97, 196-97, 228. Many judges retain their own hard copies of their notes and instructions, but the Agency in recent years has encouraged them to destroy their hard copies after the documents have been placed in the private section of the official file. Tr. 49-50, 121-22, 261. Nonetheless, some judges have not trusted the Agency to preserve the papers in the private file, because the hearing offices have not always "flagged" the files that were on appeal, and judges have sometimes discovered, after their cases were remanded, that their private files had been prematurely destroyed. Tr. 31-32, 35-36, 96-97, 116, 228. In such instances, when a case is remanded or a judge receives a bias complaint, and the private file has been destroyed, the judge's task is significantly more difficult and time consuming, because he has to review the entire file all over, without the benefit of his original impressions and instructions. Tr. 27, 30, 101-02.

The Agency's policy concerning the retention and destruction of documents containing personally identifiable information (such as an individual's name or Social Security number) is governed at least partly by federal law, including the Federal Records Act, 44 U.S.C. §§ 3101-3107 and 3301-3314; the Privacy Act, 5 U.S.C. § 552a; and the Federal Information Security Management Act, 44 U.S.C. § 3541. *See* R. Ex. 3 at 2; R. Ex. 4 at 1; R. Ex. 7. Since at least 1976, SSA has maintained several systems of records, including records kept at the SSA regional offices and ODAR (then called the Bureau of Hearings and Appeals) hearing offices. Tr. 160-61, 163, 175-76, 180; R. Ex. 1. In 1976, SSA requested (and received) approval from the National Archives and Records Service of the General Services Administration of a policy that required the destruction of "working files" (defined as "[n]onessential working papers retained for reference purposes by staff members[ ]") "after 2 years or when no longer needed for reference, whichever is earlier." R. Ex. 1 at 2. An Agency official testified that a similar request was filed by SSA at approximately the same time as Respondent Exhibit 1, except that it applied to SSA's hearing offices rather than its regional offices. Tr. 163, 172. The policy for hearing offices also required the destruction of nonessential working papers "after two years or when no longer needed for reference, whichever is earlier." Tr. 175-76, 180.[3]

When SSA began storing its records (including ODAR case files) on computer, it amended its Privacy Act regulations for the system of records known as the Administrative Law Judge Working File on Claimant Cases Systems, or the ALJ Working File. R. Ex. 6. The amended regulation, published in the Federal Register on October 17, 2005, stated that except for some "minor housekeeping changes" reflecting organizational changes within SSA, the purpose of the amendment was to permit SSA to store its records in both paper and electronic form. *Id.* at 2. Under the heading of "Retention and Disposal[,]" the rule leaves unchanged the prior policy that records in the ALJ Working File (now in both paper and electronic form) are to be destroyed "2 years after the final action is taken." *Id.* at 4. In its Administrative Instructions Manual System (AIMS), SSA assigned the Office of the Deputy Commissioner for Budget, Finance and Management the responsibilities for carrying out agency policies for records management, retention, and disposal. R. Ex. 3 at 3. A separate instruction in AIMS established the policy (based on OMB Memorandum M-07-16) requiring all components of SSA to review their holdings of records containing PII and to "reduce them to the minimum necessary for the proper performance of a documented agency function . . . ." R. Ex. 5 at 3-4. The same instruction also requires employees with access to PII to sign a document describing their responsibilities on an annual basis. *Id.* at 5; *see also* Tr. 204.

[2] The distinction between paper files and electronic files will be addressed later.

[3] The Respondent offered into evidence both of the records disposal requests submitted to GSA (that is, both for the SSA regional offices and the SSA hearing offices). Respondent had included only the document relating to the regional offices (R. Ex. 1) in its prehearing disclosure, and not the request relating to the hearing offices (R. Ex. 2). Tr. Tr. 171-73, 178. Because of this omission, I ruled that Respondent Exhibit 2 should not be admitted into evidence, but I indicated that the Respondent could elicit testimony from its witnesses as to their knowledge of the policy concerning disposal of hearing office records. Tr. 178-79. In that respect, the Special Projects Officer for the Agency's Chief Judge testified that the policies for the regional offices and for the hearing offices both required disposal of working files after two years. Tr. 175-76, 180-81.

Since at least 2004, SSA has been undertaking a transition of all its operations from a system based on paper records to one based on electronic records. Tr. 187-88, 208; R. Ex. 8 at 1, 3.[4] This transition is referred to as the Electronic Business Process. Tr. 33, 187-88. For judges and other employees in the hearing offices, the focus of the Electronic Business Process is the establishment of an Electronic Folder (also called the Certified Electronic Folder or the Electronic File) as the official record of a claim and any hearings held regarding that claim. Tr. 187-88, 223-24, 276; GC Ex. 2 at 1; R. Ex. 8 at 2, 9. A March 2008 MOU regarding the use of electronic files makes it clear that paper files will gradually be replaced by the electronic folder, that all judges will be expected to process cases using the electronic folder, and that all judges must follow Agency procedures concerning PII. R. Ex. 8 at 2, 4, 6; *see also* Tr. 121-22. The Letter of Intent accompanying the MOU further provides that the Agency "will create and maintain a separate ALJ file/private folder for each electronic folder case file." R. Ex. 8 at 11. The Letter also requires the Agency to "protect entries made by an ALJ in the private section of the EF from disclosure to anyone other than any ODAR hearing office with jurisdiction over the file." *Id.*

In November of 2009, the Agency experienced a serious breach of the confidentiality of a large volume of personally identifiable information, when a CD, used by a judge in a New York hearing office to store her hearing notes, draft decisions, and claimant medical information, was lost. Tr. 234-36. The CD contained PII for hundreds of claimants, and the loss of the information required the Agency to perform extensive (and expensive) remediation; it also caused the Agency to review its record-keeping procedures in order to prevent future breaches. Tr. 236-38. Consequently, over the next several months, ODAR's Associate Commissioner for Budget, Facilities and Security and the office of ODAR's Chief Administrative Law Judge researched the existing policies concerning PII and records retention, so that they could remind all staff what they are permitted and not permitted to do in this regard. Tr. 159-60, 237-39. Susan Gilbert, Special Projects Officer for the Chief Judge, was assigned the responsibility for researching the existing policies concerning records storage, retention, and disposal, with particular focus on records containing PII. Tr. 159-60. She testified that her job was "[t]o look up the Agency's current policy for documents held by employees[,]" not to develop a new or better policy. Tr. 160. As the Associate Commissioner described, "we spent a number of months . . . to review the documents, make sure they were reflecting policy that had previously been stated and it wasn't creating new policy." Tr. 238-39. Ms. Gilbert said they went back as far as the 1975 and 1976 records retention and disposal schedules filed with GSA (R. Ex. 1), as well as the policies that had been published in AIMS (R. Exs. 3, 4, 5) and in the Federal Register (R. Ex. 6). Tr. 160-61, 238.

The result of this research and intra-agency discussion was two memoranda that were issued by Associate Commissioner Bentley and distributed to all ODAR employees. The first, dated September 23, 2010, reviewed the safeguards and procedures that are required when employees work on flexiplace arrangements and take SSA files and computers home with them. Tr. 238; GC Ex. 3. The second, dated October 20, 2010, purported to summarize SSA's existing policy in order to comply with OMB's mandate "to reduce the volume of PII retained to the minimum necessary." GC Ex. 2 at 1. The October 20 Memo continued:

> Although the Certified Electronic Folder (CEF) serves as a claimant's official file, in the course of conducting our day-to-day work we may prepare working papers for reference. These may include extra copies of the official file material, supporting or background papers used in developing official files but not needed as part of the official file, studies or similar material not acted upon, papers used as administrative aids, and papers that do not serve as a basis for official action. To ensure ODAR personnel maintain only the minimum PII necessary, destroy these non-essential materials containing PII after 2 years, or when no longer needed for reference – whichever is earlier.

*Id.* The memo cites several existing directives, including three from AIMS and one from OMB, as authority. *Id.* at 1-2. Gilbert testified that she and the other drafters

[4] Respondent Exhibit 8 includes three documents: a Memorandum of Understanding (MOU), a Letter of Intent, and a cover letter from an Agency labor relations official to the Union dated March 4, 2008. As the cover letter indicates, the Union and the Agency engaged in negotiations between 2004 and 2008 regarding the implementation of the electronic folder, but they were unable to reach agreement on an MOU. R. Ex. 8 at 1. As a result, the Agency implemented its last best offer for the MOU, which is documented in Respondent Exhibit 8 at 2-7, on March 4, 2008. Tr. 268. Pages 8-12 of Respondent Exhibit 8 are a Letter of Intent that the Agency unilaterally drafted to further explain the MOU. Tr. 271; R. Ex. 8 at 2. (The page numbers listed here for Respondent Exhibit 8 are different from the numbers marked on the MOU and Letter of Intent, because Respondent Exhibit 8 also includes a cover letter.) Although the Union did not agree to the MOU, it became Agency policy when it was implemented and the Union did not pursue the dispute to the Federal Service Impasses Panel (FSIP).

used the definition of "Working Files" in the 1976 Records Retention and Disposal Schedule (R. Ex. 1 at 3) as the basis for the text of the October 20 Memo. Tr. 162-63. While Respondent Exhibit 1 covers SSA's regional offices, not its hearing offices, Gilbert stated that she reviewed the Records Retention and Disposal Schedules for both the regional and the hearing offices and felt that the definition of "non-essential working papers" in the regional policy was "more clear" and specific than the one for hearing offices, even though the underlying policy was the same; thus she used the former document's definition of non-essential working papers in drafting the October 20 Memo. Tr. 175-76, 180-81. The final text of the memo was written and rewritten with input from several different offices within SSA. Tr. 159, 213-15, 238-39.

The distribution of the October 20 Memo stirred considerable discussion and concern among the Agency's judges. Tr. 65-66, 73, 134-35, 139-40. The judges were primarily concerned that the Agency was now requiring the destruction of all ALJ notes and working files two years after a decision is issued, regardless of whether the case was still on appeal, and that those notes would therefore be unavailable to the judge if the case was remanded or a bias complaint or fee petition was filed. Tr. 27, 29-31, 34-35, 101-02, 135. After an ALJ issues a decision on a claim, it can be appealed by the claimant to ODAR's Appeals Council, and then to the federal courts. While most cases are decided by the Appeals Council within twelve to eighteen months, it is not uncommon for such cases to take over two years; and even if the Appeals Council affirms the judge's decision, almost all cases that are appealed to federal court will take longer than two years. Tr. 22-25, 87. While the judges who testified at the hearing conceded that the meaning of certain aspects of the October 20 Memo (such as the date that "2 years" is measured from, and the applicability of the phrase "extra copies") was open to varying interpretations, they had not received adequate answers to their questions from ODAR managers, and they were concerned that their notes were going to be destroyed when they were still needed. Tr. 16, 35, 64-66, 73, 117-19.

Several witnesses described the policies and practices in various ODAR hearing offices regarding the retention and disposal of records from the ALJ File. Judge McLaughlin, an ALJ in the Jacksonville hearing office, testified that a judge's notes and forms are kept in what he variously called the "private section" (Tr. 17) or the "ALJ file" (Tr. 31), which in the days of all-paper files was stored in its own folder – along with, but separate from, the public folder that contained all the other records of the case. Tr. 31. After the judge issued a decision, the ALJ File was kept in the hearing office, and the rest of the official file was sent to a central depository. *Id.* If the case was appealed, staff in the hearing office were to "flag" the file and keep it until the appeal was completed. If the case didn't get flagged, it would be destroyed after two years. Tr. 31, 58. When the Agency began to transition to electronic files, the ALJ File was scanned into the official electronic file after the hearing, and it was then kept in a separate, private, electronic tab of the case file. Tr. 18-19, 34, 73-74. Although some judges kept a paper copy of their notes in their own offices, because they didn't trust the Agency to preserve them for appeal[5] or to protect their confidentiality, the Agency discouraged judges from keeping copies of their notes and encouraged them to scan all paper records into the electronic file and destroy the paper copies. Tr. 19-20, 35, 50. Judge McLaughlin further stated, however, that Agency officials never clarified to the judges how long the electronic records would be kept. Tr. 34-35, 71.

Judge Brown, who works in and used to be the HOCALJ of the St. Louis hearing office, testified that his office manager explained to him that the practice there was to destroy the ALJ folders "roughly two years after a case was decided . . . . But the reason that was driving that was cabinet space . . . . we physically just didn't have room to keep them any longer." Tr. 96. An exception was made for cases that were appealed, in which case the ALJ File would be kept longer. Tr. 97. When the Agency began to implement the Electronic Business Process, either the judge or a staff member was required to scan the notes from the ALJ File into the private section of the electronic file. Tr. 121-22. Brown had "no idea" how long the electronic records are then kept. Tr. 120.

Judge Blaney, from the Kansas City hearing office, testified that from the time she began working in 1994 until 2010, the notes and related papers made by ALJs were kept in the office "for two years unless the case was appealed." Tr. 136. If the case was appealed, the judge's notes were kept in the ALJ File until the appeal was resolved. Tr. 136-37. Some judges would keep their files themselves, while others would not, in which case the notes were stored in the ALJ File in the hearing office. Tr. 136.

The HOCALJ of the Columbus, Ohio, hearing office, Judge Allen, testified as an Agency witness. Prior to 2010, he said, the policy in his office was to keep the ALJ Files in favorable cases for one year after the decision issued and in unfavorable cases for two years, after which the records were destroyed. Tr. 257, 258. He was not aware of any practice of keeping the ALJ Files

[5] Judge McLaughlin testified that the office staff sometimes failed to flag a case that was appealed, and the ALJ file would be destroyed prematurely. Tr. 31-32.

for longer than two years in cases that were appealed, but in his experience "it never happened[ ]" that an appeal lasted longer than two years. Tr. 259, 265. As the Electronic Business Process was implemented, Allen as HOCALJ has stressed to his judges "the importance of using the private section to keep their notes" and "cajoled" the more reluctant judges "into trying it out." Tr. 256, 260.

Ms. Gilbert, who worked in various non-judicial positions in hearing offices, including hearing office director, before assuming her current job, also described the practices used for retaining and destroying ALJ notes and related papers. For paper files, a staff member in the hearing office would write on the outside of the ALJ File folder a destruction date of two years from the judge's decision. Tr. 196. If additional documents related to the case were received subsequently, a staff member would cross off the original destruction date and write a new one, for two years after that date. Tr. 197-98. For electronic files, the ALJ's notes and related papers are scanned into the private section of the electronic folder, where they cannot be viewed by people outside the hearing office. The policy is to destroy the records two years after final action is taken in the case, but to her knowledge the Agency has not actually begun deleting documents from the private section of the electronic file. Tr. 199-202.

As the transition from a paper-based to an electronic system proceeded between 2005 and 2010, old cases continued to be kept in the traditional six-part modular folders, with a separate ALJ File; new cases, however, were entirely electronic, with tabs identifying the sections that are available to claimants and their representatives, and a separate tab for the ALJ section that is private. Tr. 18-19. While most judges continued to take notes and fill out other forms by hand, they were strongly encouraged to scan those papers after the hearing (either themselves or by a staff member), to be included in the private section of the electronic file. Tr. 18-19, 34, 121-22, 256. After the ALJ notes are scanned into the electronic file, the paper notes are destroyed, unless a judge insists on keeping them. Tr. 19-20, 35, 50, 187-90.

## DISCUSSION AND CONCLUSIONS

### Positions of the Parties

General Counsel

The General Counsel argues that the October 20 Memo changed the Agency's document retention policy for ALJs, and that the change had more than a de minimis impact on their working conditions. The GC further argues that the Respondent has not shown that the change in policy is covered by the 2008 MOU. Since it is undisputed that the Agency sent the October 20 Memo without giving the Union advance notice or an opportunity to negotiate, the Respondent violated § 7116(a)(1) and (5) of the Statute.

In support of its argument that the Agency changed its document retention policy by issuing the October 20 Memo, the GC insists that prior to the October 20 memo, a past practice existed among ALJs of retaining case notes for more than two years. The GC cites testimony from Judges McLaughlin, Brown, and Blaney that many judges retained their own hard copies of their notes and forms for longer than two years, and that the hearing office chief administrative law judges (HOCALJs) were aware of this practice and tolerated it. Tr. 35, 101, 136-37. Judge Brown had served as a HOCALJ from 1993 to 2000, and he said that during that time, Agency management never offered any guidance to employees regarding a document retention policy. Tr. 97-98. The testimony makes it clear (according to the GC) that there were widely varying practices among judges concerning retention of their notes and other papers, but that judges in offices throughout the nation frequently kept their notes for longer than two years, in order to ensure that they had the notes if a case was remanded or if a bias complaint or fee petition was filed. The evidence satisfies the case law's requirement that in order for a condition of employment to be established through a past practice, the practice must have been "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *SSA, Office of Hearings & Appeals, Mont., Ala.*, 60 FLRA 549, 554 (2005) (*SSA Montgomery*); *see also U.S. Dep't of the Air Force, U.S. Air Force Acad., Colo.*, 65 FLRA 756, 758 (2011).

The GC further argues that when the October 20 Memo was issued, it was announced as a change to the Agency's prior practice. The memo itself implied that it represented a change, in stating that it was "the second in a series of reminders clarifying how we will follow SSA's existing PII policies with the Office of Disability Adjudication and Review (ODAR)." GC Ex. 2 at 1. Moreover, Judge Blaney testified that after the October 20 Memo was issued, her HOCALJ met with the judges and "she said, you can't keep anything after two years now." Tr. 142. Blaney added that the HOCALJ announced this "as if it was a change." Tr. 143. The judges interpreted the memo as requiring the destruction of their hearing notes after two years, even if an appeal, remand, or bias complaint was ongoing. Thus, while Judge McLaughlin conceded that the meaning of some aspects of the memo was unclear, "the way I took it and the way most of the judges I know took it, it included everything electronic file [sic], including your own notes." Tr. 16; *see also* Tr. 51, 65-66, 73. Judge Brown echoed the view that while the meaning of the memo was

"murky[,]" judges were concerned that it meant that "the Agency could sanction judges for keeping their work product longer than, say, two years after the judge signed the decision[.]" Tr. 116-17. Moreover, Agency representatives never provided judges with an adequate explanation of the retention policy, despite repeated inquiries. Tr. 34-35, 65-66.

The GC asserts that this new policy will significantly hinder the judges' performance of their duties. Witnesses testified that almost all unfavorable decisions are appealed at least to the Appeals Council, and that such appeals frequently take more than two years to be resolved. Claimants also file a large number of bias complaints, and claimant representatives file many fee petitions, all of which may be handled by the ALJ more than two years after the judge's original decision. Thus, a rule requiring the destruction of notes two years after the decision will result in judges having to adjudicate the remand or petition without their notes and related papers. Not only will this slow down the adjudication process, but it will increase the likelihood of an inaccurate decision. It will add many hours to the judges' workload and interfere with their ability to defend against bias allegations, potentially subjecting the judges to discipline. Furthermore, these changes will affect the entire bargaining unit of over 1400 ALJs. Accordingly, the GC insists that the impact of the change is more than de minimis.

The General Counsel denies that the Agency's PII retention policy is covered by the 2008 MOU. The Respondent bears the burden of proving this affirmative defense, and the GC asserts that the Respondent failed to do so. While the Authority has held that the covered-by defense can apply to a last best offer that is unilaterally implemented (*U.S. Dep't of Labor, Wash., D.C.*, 60 FLRA 68, 70-71 (2004)), the Respondent must show that the parties bargained to impasse on the MOU and that it gave the Union a reasonable opportunity to seek the assistance of the FSIP before implementing the offer. According to the GC, the evidence submitted by the Respondent – Respondent's Exhibit 8 – does not prove that the MOU was implemented after it had satisfied its bargaining obligation. The GC further argues that the section of the MOU raised by the Respondent – Section 4(a) regarding procedures for the handling of PII – is not reasonably related to the remainder of the MOU, which involved the electronic folder, and that the destruction of documents containing PII is not inseparably bound up with the subject of the electronic folder.

As a remedy for the Agency's unfair labor practice, the General Counsel requests that the Respondent be ordered to bargain with the Union over the impact and implementation of the October 20 Memo, and that implementation of that memo be delayed until the parties have completed bargaining on the issue.

Respondent

The Respondent makes several procedural as well as substantive arguments in support of its position that it did not commit an unfair labor practice by distributing the October 20 Memo. Its first procedural objection is that the Union's ULP charge (GC Ex. 1(a)) was filed too late, pursuant to § 7118(a)(4)(A) of the Statute, which requires charges to be filed within six months of the allegedly unlawful conduct. Respondent asserts that its policy requiring destruction of records containing PII was implemented in the 1970s, and that the memo of October 20, 2010, merely reminded employees of the policy, which has remained unchanged for many years. R. Br. at 6-8. At the hearing, the Respondent also objected to any testimony regarding the impact of the "changed" policy on judges' working conditions, except insofar as the policy affected judges when cases were remanded to them. Tr. 28, 88-89. Citing paragraph 13 of the GC's Complaint (GC Ex. 1(b)), which refers to the Agency's prior policy of allowing judges to "store personal case notes to use in the event that a case was remanded to them on appeal[,]" Respondent urges that the GC should not be permitted to elicit testimony that the policy affected an ALJ's ability to handle fee petitions or bias complaints. R. Br. at 19. Finally, Respondent objects to my ruling excluding Respondent Exhibit 2 from admission into evidence. Tr. 128-32, 176-79. The excluded document is a "sister" document of Respondent Exhibit 1, which was admitted into evidence, in that both are requests to GSA for approval of SSA's records disposal policy; Respondent Exhibit 1 applies to "working files" maintained by staff in SSA's regional offices, while Respondent Exhibit 2 applies to "working files" in SSA's hearing offices. While I excluded Respondent Exhibit 2 because it had not been furnished to the other parties during prehearing disclosure, Respondent argues that this was an inadvertent oversight that had been corrected prior to the hearing, and that the oversight had not confused the Union or the GC as to the Agency's underlying theory of its case: that the October 20 Memo was consistent with longstanding Agency policy. R. Br. at 19-20.

As for substantive issues, the Respondent primarily argues that it did not change judges' conditions of employment when it issued the October 20 Memo, since that memo merely reminded judges and other ODAR employees of the Agency's existing policy on the retention and destruction of records containing PII. Respondent lists the many internal Agency documents and manuals, as well as government-wide policies, that describe the policy requiring disposal of records containing PII. R. Exs. 3-7. It argues that the October 20

Memo was intended only to restate the existing policy, not to create new policy. Moreover, the Respondent denies that the evidence establishes the existence of a past practice conflicting with the Agency policy. While citing the same case law principles concerning the establishment of a past practice as the GC and the Union, the Respondent insists that the testimony of the ALJ witnesses regarding their offices' practices in retaining and disposing of their notes failed to show that Agency management was aware of conflicting practices or that management knowingly acquiesced in such practices. *See U.S. DHS, Border & Transp. Directorate, Bureau of Customs & Border Prot*., 59 FLRA 910, 914 (2004) (*DHS*).

The Respondent further submits that even if there had been a change in Agency policy with the October 20 Memo, the impact of such a change on ALJs' working conditions was de minimis. The October 20 Memo required judges to destroy only those notes and papers that are "non-essential," which the Respondent insists only requires them to destroy extra copies of notes that are maintained outside the official paper or electronic file. R. Br. at 12-13. Respondent cites testimony that it provides a means for judges to store their notes and related papers in the private section of the electronic file, and those documents will not be destroyed until two years after the final action is taken in a case. Tr. 17, 36-38, 72, 108-09, 200-03; R. Ex. 6. Thus, Respondent insists that the October 20 Memo does not adversely affect the judges' ability to handle their cases in any significant way. Since judges can store their notes in the private section of the official case file, and since those papers will be retained long after any appeal has concluded, the risks described by some of the judges are either unrealistic or speculative.

The Respondent further asserts that the policy described in the October 20 Memo was covered by the 2008 MOU that was unilaterally implemented by the Agency after negotiations concerning the electronic folder reached impasse. Tr. 268-71; R. Ex. 8. Since section 4(A) of the MOU (R. Ex. 8 at 6) requires ALJs to "follow Agency procedures when they are using equipment or documents containing PII information[,]" the October 20 Memo's invocation of the two-year disposal rule for PII in judges' notes is expressly addressed in the MOU, and therefore additional bargaining is not required. *See U.S. Dep't of HHS, SSA*, 47 FLRA 1004, 1018 (1993). Finally, Respondent alleges that the conduct asserted here as an unfair labor practice is identical to conduct raised by the Union in a 2009 ULP charge (R. Ex. 9), which was resolved by a settlement agreement between the Agency and the Union in 2011 (R. Ex. 10).

Charging Party

The Union largely echoes the arguments made by the General Counsel, and to the extent that they do, I will not repeat them. The Union, however, emphasizes the judges' view that the October 20 Memo requires the destruction of all ALJ notes and related papers after two years, in contradiction to the interpretation expressed by Ms. Gilbert that the memo only requires the destruction of extra copies of those notes. CP Br. at 7-9. The Union asserts that the "plain language" of the October 20 Memo "clearly" applies to all papers used by or for the judge that "do not serve as a basis for official action." *Id*. at 7 (quoting from GC Ex. 2 at 1). This was how the ALJs understood the memo, and Judge Blaney testified that her HOCALJ also understood the memo as requiring them to destroy their notes no later than two years after a decision. Tr. 77-78, 134.

The Union also makes the point that prior to October of 2010, the Agency had no consistent policy regarding the destruction of papers prepared by or for the judges, despite the Agency's current insistence that it did. CP Br. at 11-15. The Union notes first that Respondent Exhibit 1 (the 1976 records retention policy filed with GSA) applies to SSA regional offices, not to hearing offices; further, it argues that the policy published in the Federal Register in 2005 (R. Ex. 6) applies to documents in the official case file, not to documents kept by the judges. Most importantly, however, the actual practices in the ODAR hearing offices for retaining judges' notes varied widely, and judges were never required to destroy their notes. Consequently, the practices of the individual judges and hearing offices had become a condition of employment, which was changed by the issuance of the October 20 Memo.

The Union argues that its failure to make a request to bargain concerning the records retention policy did not constitute a waiver of its right to bargain, because the Agency issued the new policy as *a fait accompli*. CP Br. at 16. Finally, it argues that the Agency's change in the records retention policy was not covered by the parties' bargaining in 2008 regarding the electronic folder or the subsequent settlement of an unfair labor practice charge relating to the Electronic Business Process. R. Exs. 8 & 10, respectively. The unsigned 2008 MOU simply required judges to follow Agency procedures concerning PII, but it didn't give the Agency the authority to change the existing policies or practices unilaterally.

**Analysis**

Since the earliest years of the Statute, the Authority has interpreted § 7116(a)(5) as prohibiting an agency from changing employees' conditions of employment without first notifying the employees' exclusive representative and providing it an opportunity to negotiate the proposed change, to the extent that the matter is negotiable. *U.S. Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9, 9-11 (1981). This principle has been invoked many times since then, as in *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr. Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*), where the Authority stated:

> It is well established that prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a *de minimis* effect on conditions of employment.

The extent to which an agency must bargain over changes in conditions of employment depends on the nature of the change. When the change is based on an agency's exercise of a management right under § 7106 of the Statute, the agency is not required to negotiate over the actual decision, but it is nonetheless obligated to bargain over the impact and implementation of the decision, if that impact is more than de minimis. *Fed. Bureau of Prisons, FCI, Bastrop, Tex.*, 55 FLRA 848, 852 (1999). Here, the Union conceded that the Agency could set PII policy based on the agency's 7106(a)(1) right to determine internal security practices (CP Br. at 17), and the GC appeared to concede this point by asking only that the Agency be ordered to negotiate over the impact and implementation of the PII policy (GC Br. at 15). I agree that the Agency's policy was an exercise of its management rights to assign work and to determine its internal security practices. I turn next to the question of whether the October 20 Memo changed conditions of employment for judges to an extent that is more than de minimis.

The Authority has also recognized that "parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining." *Dep't of the Navy, Naval Underwater Sys. Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980) (citing "well established" precedent under Executive Order 11491). In order for a condition of employment to be established by a past practice, the evidence must show that the practice "has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *SSA Montgomery*, 60 FLRA at 554. "Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time." *Id.*; *see also DHS*, 59 FLRA at 914. The parties agree on these principles but disagree on how they apply to the facts of our case.

Our case involves the retention and disposal of documents that contain personally identifiable information. From the perspective of the Agency and the general public, these are issues that affect their personal privacy and the security and confidentiality of sensitive personal information. From the perspective of the ALJs, the Agency's policy involves the retention and disposal of documents that they use to assist them in summarizing larger masses of information and in formulating a decision. The use of those documents is, without a doubt, directly connected to the work performed by the ALJs, and therefore it is a condition of their employment. *See Antilles Consol. Educ. Ass'n.*, 22 FLRA 235, 237 (1986). In order to determine whether the Agency changed the policy for retaining and disposing of such documents, we need to compare the practices and policies that existed immediately before and after October 20, 2010. *See U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 58 FLRA 699, 700 (2003); *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995).

1. Employee Practices Prior to October 20, 2010, Complied with Agency Policy

In support of its position that the October 20 Memo changed nothing, the Respondent focused primarily on its longstanding written policy requiring destruction of hearing office working files after two years. In support of their position that the actual practices of employees in the hearing offices bore no resemblance to the official policy, the General Counsel and the Union utilized the testimony of judges from different hearing offices. However, in order to properly understand the conditions of employment prior to 2010,

we need to understand both the written policy and how it was (or was not) carried out. When we look at both policy and practice, we find that the practices at the hearing offices were not as arbitrary or contradictory as the GC and Union insist, and that they closely resembled the official policy.

In the Findings of Fact, I have already traced the evolution of the Agency's records retention policy from the 1970s (when all records were kept on paper) to the present (as electronic records have almost completely replaced paper), and I have summarized the practices followed by hearing office staff to retain and dispose of records in the ALJ File. The policy first approved by GSA in the 1970s calls for destruction of nonessential working papers maintained in the hearing offices and in the regional offices after two years, or earlier if not needed for reference. R. Ex. 1; Tr. 175-76, 180-81. Although the exclusion of Respondent Exhibit 2 prevents us from seeing the exact language of the 1975 policy for hearing offices, neither the GC nor the Union offered any evidence to rebut Ms. Gilbert's testimony that the policy for ODAR's hearing offices was the same as that for the regional offices. But any doubt about the policy on retaining ALJ notes is eliminated by Respondent Exhibit 6, the Agency's modification of its records retention policy for the system of records known as the ALJ Working File, published in the Federal Register in 2005, when the Agency was just beginning its transition from paper to digital files. With regard to the "retention and disposal" of these records, the rule (substantively unchanged from the pre-electronic rule) requires both paper and electronic records to be "destroyed . . . 2 years after the final action is taken." *Id.* at 4.

The Union contends that Respondent Exhibit 6 is irrelevant to our dispute, based on Ms. Gilbert's testimony that Respondent Exhibit 6 and the October 20 Memo are "referring to two different types of records." Tr. 193; *see* CP Br. at 12. But this misconstrues Ms. Gilbert's testimony and the 2005 Federal Register issuance. Ms. Gilbert explained that "the Federal Register document is referring to the ALJ file" – in either its paper or electronic form -- while the October 20 Memo "is talking about non-essential working papers retained for reference purposes by employees," after the judge's notes and related papers have been scanned into the official file. Tr. 193-94. Her point was that both the 2005 Federal Register policy and the October 20 Memo relate to the same documents prepared by or for the ALJ, but the Federal Register rule applies to the official copy of the ALJ file, while the October 20 Memo applies to extra copies of those notes, if they are retained by the ALJ. The Federal Register policy ensures that the official ALJ file will be retained for two years after final action in the case (regardless of how long appeals may take); the October 20 Memo seeks to limit the time that judges can retain extra copies of their notes. Thus I consider Respondent Exhibit 6 highly relevant to an understanding of Agency policy concerning the retention and disposal of ALJ notes. By virtue of the 2005 rule, the Agency guaranteed that an ALJ's notes will be safe from destruction throughout an appeal, regardless of how long it takes.

Comparing the Agency's official policy with the hearing office practices, we see some common threads running through it all: in each of the hearing offices, the notes and related papers of the ALJ are kept in a private, ALJ folder, which is part of the official case file, although it is kept physically separate and it is not viewable by the public.[6] When the Agency began using electronic files (a process that began long before 2010), it strongly encouraged judges to scan their notes into the private electronic folder and destroy the paper copy of those notes, but it did not force judges to do so. And most importantly, for purposes of our dispute, the hearing offices had a general practice of destroying the ALJ Files after two years, unless the case was on appeal.[7] The precise mechanism for retaining the ALJ Files in cases pending appeal differed in some offices – they may have been "flagged," or staff may have written a destruction date on the folder, which was changed if new documents were filed – but all of the hearing offices sought to destroy the ALJ Files after two years unless the case was still active. In other words, the practice in the hearing offices was consistent with the written policy of destroying records containing PII after two years, unless they were needed for reference.

None of the ALJ witnesses appeared to have any knowledge of the legal or policy basis for their offices' practices of destroying unnecessary records after two years. One judge had been told that the destruction policy was based on the lack of storage space. Tr. 96. This may suggest that the Agency had not fully educated its employees concerning the need for such a policy, but it doesn't mean that the policy was irrational or nonexistent. Ms. Gilbert testified that the Agency sends annual reminders to all employees concerning the need to protect and dispose of PII in accordance with Agency policy, and two of the judges admitted that they received such reminders, although the exact text of the reminders was not established. Tr. 41-47, 105-06, 204. The fact

[6] There was conflicting testimony as to whether the staff at the Appeals Council could see the contents of the ALJ File. I will address that question later.

[7] In Judge Allen's office, ALJ Files were destroyed after two years if the case had an unfavorable decision and after one year if the case had a favorable decision. But this is a distinction without a real difference. Favorable decisions are rarely, if ever, going to be appealed, so the ALJ Files in those cases will not be needed for reference after one year; thus, the same general rule was being followed here.

that all of the offices generally disposed of their ALJ Files after two years, and that this practice conformed to the Agency's written policy dating back at least as far as the 1970s, is clearly not coincidence. Rather, it reflects an ingrained institutional understanding of the two-year disposal requirement among Agency employees, as well as an understanding of the need to preserve documents containing PII for longer than two years when a case is still active. In accordance with (albeit in some cases unaware of) the 2005 Federal Register issuance (R. Ex. 6), employees in the hearing offices understood and followed a policy of destroying records in the ALJ Working File "two years after the final action is taken."

2. The October 20 Memo Requires Only the Disposal of Extra Copies of ALJ Notes

The real dispute between the Union and the Agency focuses on the difference between the phrases "2 years after the final action is taken" and "after 2 years, or when no longer needed for reference – whichever is earlier." In the latter phrase (used in the October 20 Memo and in the 1976 GSA authorization), two years is the maximum time a document may be retained, even if the document is needed for reference; in the former phrase (used in the 2005 Federal Register rule), however, the use of the words "after final action" makes it clear that documents will be retained for as long as they are needed for reference. This is what alarmed the judges after the October 20 Memo was distributed (even though they seem to have been unaware of the existence of the 2005 Federal Register issuance), and it was a legitimate concern: if the policy announced in the memo were applied to all copies of an ALJ's working files, then the judge's notes would indeed be unavailable for them to use in many remands, fee petitions, and bias complaints, and this would seriously interfere with the judge's ability to resolve those cases.[8] But these concerns were, in their proper context, unwarranted, as the October 20 Memo was never intended, or applied, to require the destruction of all copies of the ALJ File; rather, it was to apply only to extra copies of those documents.

The Charging Party devotes the first section of its brief to the premise that "The October 20 Memo requires the destruction of judges' notes." CP Br. at 7. While I understand the tactical reason for making this argument, it is rather odd, and potentially counter-productive, for the Union to urge that the memo be given the most stringent possible interpretation, especially when the Respondent devoted considerable effort to arguing that this was not the meaning of the October 20 Memo. In his opening statement, Respondent's counsel said, "This is simply a case of misunderstanding." Tr. 155. He said the memo was not intended to change the Agency's policy on retention of records (Tr. 156), and Ms. Gilbert testified at length that the memo only required the destruction of extra copies of ALJ notes, and not the notes that are scanned or otherwise placed in the private section, or ALJ File, which are part of the official case file that is retained until after the case has been closed. Tr. 193-94, 211-13, 216-20. While the Union calls this interpretation "tortured" (CP Br. at 8), I think that word can more properly be applied to the Union's stance, which asks me to interpret the Agency's policy in precisely the way that would harm the judges the most – especially when the Agency insists that is not the meaning of its policy.

The Union also asserts that the "plain reading" of the October 20 Memo is that it requires the destruction of all electronic or paper notes made by an ALJ. CP Br. at 8. The key disputed part of the memo is the second sentence of the third paragraph of GC Exhibit 2, and the dispute centers on whether "extra copies" pertains only the phrase immediately thereafter ("of the official file material"), or whether it also applies to the subsequent clauses ("supporting or background papers", "studies . . .", etc.). Looking at this sentence in isolation, I believe that it could be understood either way. But looking at the sentence in the context of the entire memo, I believe that the memo cannot reasonably be interpreted to require the destruction of an ALJ's notes that are in the official case file.

A logical place to begin an analysis of the October 20 Memo is its first sentence: "This memorandum is the second in a series of reminders clarifying how we will follow SSA's existing Personally Identifiable Information (PII) policies within the Office of Disability Adjudication and Review (ODAR)." GC Ex. 2 at 1. Thus on its face, and from the outset, the memo says that it is stating the "existing" policy, not that it is changing anything. While I am quite aware, from long years of experience, that agencies can indeed "change" a policy when they profess to "apply" or "clarify" it, such misrepresentations must be demonstrated by proof, not by conjecture or theory, and the General Counsel bears this burden of proof. Both Ms. Gilbert and Mr. Bentley testified at length as to how

[8] I reject the Respondent's objection to evidence relating to how the records retention policy affects the judges in fee petition or bias complaint cases. The General Counsel's Complaint (GC Ex. 1(b)) alleges that the Respondent unilaterally changed its policy for retaining non-essential documents containing PII. Although the Complaint asserted that judges had previously been allowed to store personal case notes "to use in the event that a case was remanded to them on appeal[,]" (paragraph 13 of the Complaint), there is no reason to understand that assertion as anything other than an example of the possible uses of an ALJ's notes, and there is no evidence that the Respondent was misled to construe the Complaint more narrowly. By alleging that the Respondent unlawfully changed its policy regarding the retention and destruction of ALJ notes, the GC is entitled to show the full impact of that change.

the October 20 Memo was drafted, and they both emphasized that the express intent was to state the policy that already existed, and not to create a new or better policy. Tr. 159-60, 234, 238-39. The GC argues that the same sentence I quoted above "clearly implies that there will be changes (GC Br. at 8-9), but such an interpretation is not borne out by the evidence. While the testimony of Ms. Gilbert and Mr. Bentley reflects that there had been at least one egregious instance of a judge's notes (containing PII) being kept improperly, and that they sent the October 20 Memo to prevent future violations of the PII policy, it is also clear that they were only trying to prevent employees from keeping PII in violation of existing policy.

The October 20 Memo must further be understood in the context of the regulatory structure that was already in place at that time. Section 07.01.02.D of the Agency's AIMS manual (R. Ex. 3 at 1) states that an objective of the records management program is to "[c]ontrol the quantity of documents produced by SSA to avoid the creation of unnecessary records and systems of records." Section 15.07.07.1.a of AIMS (R. Ex. 5 at 3) provides that holdings of PII must be reduced "to the minimum necessary for the proper performance of a documented agency function." The AIMS policies were expressly referenced in the October 20 Memo. And, as already noted, the Agency's official policy for the system of records known as the ALJ Working File only requires disposal of paper and electronic records in the ALJ Working File "2 years after the final action is taken." This guarantees that ALJ notes will not be destroyed while the case is ongoing, as long as those notes are in the official case file. R. Ex. 6 at 4. While the Federal Register issuance was not expressly cited in the October 20 Memo, it was a public document and available to the Union, if it had researched the issue fully. It is not too much to ask judges who file legal action to research the case first.

With this in mind, the second and third paragraphs of the October 20 Memo can be understood better. The third paragraph of the memo reiterates the goal of the AIMS policy that "ODAR personnel maintain only the minimum PII necessary" and advises employees to destroy "these non-essential materials" after two years or when no longer needed for reference. GC Ex. 2 at 1. The key word here is "non-essential," and with the full context of the Agency's records management system in mind, "non-essential" is properly understood as Ms. Gilbert insisted – as extra copies of the judges' notes, not as all copies of the notes. This meaning is reinforced by the reference, at the start of the second paragraph of the memo, to the Certified Electronic Folder as the official case file. *Id.* The memo recognizes that judges may maintain personal copies of papers, outside of the Certified Electronic Folder, for personal reference, and it is only those extra copies that must be destroyed in two years or less.

The witnesses at the hearing recognized that when a judge's notes are scanned electronically into the electronic folder, or appended physically to the modular paper folder, those notes and related papers are part of the official case file. Tr. 17-19, 76, 119-20, 122, 188, 203. The October 20 Memo does not instruct judges or their staff, expressly or impliedly, to destroy portions of the official file in two years or less. To interpret the memo as requiring judges to destroy all copies of their notes is, therefore, the more tortured understanding of the memo.

Finally, there is no good reason not to accept the Agency's own interpretation of its own policy. Counsel for the Respondent insisted that the October 20 Memo requires the disposal only of extra copies of the ALJ File, and the Respondent's main witness, who helped draft the memo, reiterated this point. Referring to the Union's insistence that the memo requires the destruction of all copies of an ALJ's notes, the Union asserts in its brief, "If this were not the reading, there would be no dispute." CP Br. at 8. This is quite true. When the Agency asserted through counsel and testified that the October 20 Memo requires the destruction only of extra copies of the ALJ File, the Agency was interpreting the memo in precisely the way that the Union wants, and in precisely the way that results in no change in the judges' working conditions. In essence, the Union refuses to take "yes" for an answer. Although the judges obviously thought the memo meant something different in 2010, they should be pleased to obtain an interpretation of the memo that preserves a copy of their notes until the case is fully closed.

3. There was no Binding Past Practice of Retaining Extra Copies of ALJ Notes For More Than Two Years

The GC argues that "there was a past practice of retaining case notes for more than two years." GC Br. at 8. Nobody really disputes this fact, however. Ms. Gilbert, the Agency's main witness on this issue, agreed that hearing offices routinely kept the ALJ File in cases on appeal for as long as the appeal process lasted. The Agency insists, and I agree, that the October 20 Memo does not require the disposal of the official file copy of the ALJ File, but only of extra copies. Moreover, even extra copies of the ALJ File (such as those kept personally by a judge) need only be destroyed after two years. The only judges who might be forced by the October 20 Memo to change their behavior are those judges who refuse to allow their notes to be scanned into the electronic file, or those who scan the notes into the electronic file but retain a personal copy of their notes

and refuse to destroy them after two years. The evidence concerning this sub-group of judges is insufficient to show that this was a past practice which had become a condition of employment.

The Agency had been moving toward an all-electronic records system for some time prior to the October 20 Memo. It had begun negotiating a memorandum of understanding with the Union on aspects of this policy as early as August 2004, and it unilaterally implemented that MOU in March 2008, when negotiations broke down. R. Ex. 8 at 1. Regardless of whether the "covered by" defense applies to this MOU, the MOU and its accompanying Letter of Intent constituted binding Agency policy two years before the October 20 Memo was disseminated. The MOU provided that every ALJ was expected to process cases using the electronic folder, although judges would be allowed a reasonable time period to learn the process. *Id*. at 4. Every ALJ was expected to follow Agency procedures regarding the use of documents containing PII. *Id*. at 6. Additionally, the Letter of Intent provided: "The Agency will protect entries made by an ALJ in the private section of the EF from disclosure to anyone other than any ODAR hearing office with jurisdiction over the file." *Id*. at 11. This means that staff at the Appeals Council do not have access to the ALJ file.[9]

As part of the Agency's transition to an electronic system, the judges testifying at the hearing acknowledged that the Agency had been pushing them for years to scan their notes and related papers into the private section of the electronic file (either personally or by a staff member) and then to destroy the paper version of their notes. Tr. 19-20, 49-50, 121-22, 261. Some judges, however, do not comply with this policy, either because they don't believe that the private file is actually kept private and out of the view of the Appeals Council (as suggested by Judge Blaney at Tr. 138), or because they don't trust the Agency to preserve the notes throughout the appeal process (as described by Judge McLaughlin at Tr. 31-32). But these examples fail to shed any light on how prevalent this noncompliance was. To say, as Judge McLaughlin did, that while he himself puts his notes in the official file, "some" judges refuse to do so (Tr. 32), is hardly suggestive of a widespread practice that was well known to (much less accepted by) management. Judge Blaney's testimony shows little more than an isolated individual practice, not a general one. I do not find that the scattered practices of some ALJs regarding the refusal to have their notes scanned into the electronic file or their retention of those notes for longer than two years was widespread or consistent enough to constitute a condition of employment, nor was there sufficient evidence of management acquiescence to such practices to satisfy the requirements of the case law.

The *SSA Montgomery* case is a useful comparison. There, a magnetometer was given to the Montgomery hearing office to use to screen claimants and visitors for knives and other metal objects, and the HOCALJ and Hearing Office Director approved its installation. 60 FLRA at 549. It was installed at the entrance to the office and was used for over two years. *Id*. The evidence demonstrated explicit approval of the practice by management, and the Authority held that it had become a condition of employment that could not be unilaterally changed. *Id*. at 554. A similar result was warranted in *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind*., 36 FLRA 567 (1990), where union officials and supervisors jointly engaged in a practice of scheduling official time. The evidence in our case more closely resembles the evidence in *DHS*, where testimony that some employees carried personal cell phones was counterbalanced by evidence that this was contrary to nationwide agency policy, and that it was atypical of practices throughout the country. 59 FLRA at 914-15. There is no persuasive evidence that HOCALJs knew, on any kind of a frequent or widespread basis, how long individual judges kept their notes, or whether those notes had or had not been scanned into or physically appended to the official file. Instead, the evidence demonstrates that the paper ALJ File was routinely appended to the official file and kept as long as the appeal process might continue, and that HOCALJs widely encouraged judges to scan their notes into the electronic file and destroy their paper copies of those notes. The Agency sent employees annual reminders of the PII retention and disposal policy and made it known to judges that they were required to follow the Electronic Business Process, which includes the scanning of ALJ notes into the electronic file; indeed many (if not most) judges were complying with this practice prior to October 2010.

For the reasons stated above, I conclude that the Respondent did not change the conditions of employment of its ALJs by issuing the October 20 Memo. Therefore, it did not have an obligation to notify the Union in advance of the memo or to bargain with the Union over its impact and implementation. I understand, however, why the October 20 Memo may have raised questions among judges and triggered a concern that they were now being required to destroy notes that they previously had been permitted to keep. If, indeed, the Agency was going to destroy all copies of the ALJ files in two years or less, I would agree with the GC and the Union that this was a

[9] Notwithstanding Judge Blaney's testimony that when she served on the Appeals Council, members of the Council could read the ALJ File (Tr. 138), that does negate the fact that such a practice violates an Agency policy that has been in effect since at least the implementation of the MOU and Letter of Intent in 2008. It is not clear when the actions described by Judge Blaney occurred, and there is no evidence that the rule set forth in the Letter of Intent has been regularly violated since 2008.

change in Agency policy that would have a significant impact on a judge's ability to handle bias complaints, fee petitions, and cases on remand. But as I have already explained, the October 20 Memo was only requiring judges to destroy extra copies of their notes after two years. Better Agency communication with the Union regarding its PII retention policy, and how it implicated existing work habits of ALJs, might have prevented the "misunderstanding" that this case represents. *See* Tr. 155.

But the Union bears equal responsibility for this misunderstanding. There is no evidence in the record of any correspondence between the Union and the Agency inquiring about the meaning or details of the October 20 Memo. If the Union had asked the Agency whether all copies of the ALJ File needed to be destroyed after two years, or whether an official file copy would be retained throughout the appeal process, and if the Agency had responded that indeed all copies must be destroyed, then we would have clear evidence of a change in Agency policy. And if the Agency had responded that the ALJ File will continue to be retained in the Certified Electronic Folder for two years after the final action in the case, then (to quote the Union) "there would be no dispute." CP Br. at 8. It was up to the General Counsel to prove that the Agency changed its PII retention policy on October 20, 2010, but instead we have only conjecture from its witnesses as to whether a change was made. In the course of this proceeding, the Agency has declared that only extra copies of the ALJ File are to be destroyed within two years, and I am persuaded that this is the proper interpretation of the policy articulated in the October 20 Memo. I therefore conclude that the Respondent did not commit an unfair labor practice as alleged.

Accordingly, I recommend that the Authority issue the following Order:

**ORDER**

It is ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C., September 25, 2014

_____

RICHARD A. PEARSON
Administrative Law Judge