63 FLRA No. 98

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1164
AFL-CIO
(Charging Party/Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
PORTLAND, MAINE
(Respondent)

BN-CA-05-0254

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DECISION AND ORDER

April 30, 2009

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Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC). The Respondent filed an opposition to the GC's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by assigning new duties to bargaining unit employees without providing the Union with notice and an opportunity to bargain over the change. The Judge determined that the Respondent did not violate the Statute as alleged because the change did not have more than a *de minimis* effect on the employees' conditions of employment.

Upon consideration of the decision and the entire record, we adopt the Judge's findings, conclusions, and recommended order and deny the GC's exceptions.

II. Order

The complaint is dismissed.

Office of Administrative Law Judges

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
PORTLAND, MAINE
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1164
Charging Party

Case No. BN-CA-05-0254

Gerard M. Greene, Esquire
For the General Counsel

Marybeth Pepper
For the Respondent

Andrew Krall
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (hereinafter FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, AFL-CIO, Local 1164 (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Boston Regional Office of the Authority. The complaint alleges that the Social Security Administration, Office of Hearings and Appeals, Portland, Maine (Respondent), violated section 7116(a)(1) and (5) of the Statute when it implemented a practice of assigning legal assistants/senior case technicians certain work in connection with the processing of bench decisions without providing the Union prior notice and an opportunity to bargain. G.C. Exh. 1(c). Respondent timely filed an Answer denying that it violated the Statute. G.C. Exh. 1(e).

A hearing was held in Portland, Maine, on March 14, 2006, at which time all parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and argue orally. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

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

Findings of Fact

The Social Security Administration, Office of Hearings and Appeals, Portland, Maine, is an agency within the meaning of 5 U.S.C. § 7103(a)(3). G.C. Exh. 1(c) and (e).

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a consolidated unit of employees appropriate for collective bargaining that includes employees of the Respondent. G.C. Exh. 1(c) and (e). The Charging Party is an agent of AFGE for purposes of representing employees of the Respondent who are included in that bargaining unit. G.C. Exh. 1 (c) and (e).

Bench Decision Procedures within Social Security Administration

The Social Security Administration (SSA) is responsible for deciding claims under Title II and Title XVI of the Social Security Act. G.C. Exh. 2. The administrative process by which such claims are decided provides the option of a hearing before an Administrative Law Judge (ALJ) of the Office of Hearings and Appeals (OHA) and issuance of a written decision by the ALJ. *Id.* In an effort to improve the process for determining disability claims under the Social Security Act, SSA adopted a number of initiatives in approximately 2002. *Id.* One of those initiatives allowed ALJs discretion to announce wholly favorable, oral decisions at hearings and then issue a "short-form" written decision following the hearing. *Id.* The oral decisions were referred to as bench decisions. R. Exh. 1. The "short-form" decision essentially set forth the findings of fact and reasons for the decision. G.C. Exh. 2. On October 20, 2004, SSA published regulations that amended its requirements regarding the written decision. *Id.* Specifically, the amendment authorized the issuance of a Notice of Decision that simply incorporated by reference the findings of fact and reasons that were stated orally at the hearing. *Id.* Under the bench decision process as revised by the October 2004 regulation, the ALJ was required to complete a checksheet that entailed filling in blanks and checking boxes to identify the claimant, the claims and various findings related thereto, as well as the reasons for the ALJ's decision. R. Exh. 1. The checksheet was entered into the record and the information thereon could be used in generating the Notice of Decision. *Id.* There was, however, no requirement that a specific checksheet be used and ALJs were free to adopt different or modified checksheets as long as they were properly formatted. *Id.*, Tr. 104.

The Implementation of Bench Decision Procedures in Portland, Maine.

The staff of the OHA office in Portland, Maine, consists primarily of three groups of employees: (1) ALJs; (2) attorney-advisors and paralegals, who draft decisions for the ALJs; and (3) Legal Assistants, Senior Case Technicians, and Case Technicians.[1/] Tr. 13-14, 82. It is the latter group that is the focus of the controversy in this case.[2/]

The Case Technicians are responsible for performing a variety of tasks in conjunction with the hearing process. Prior to hearings, the Case Technicians prepare and maintain case files and exhibit lists; prepare and issue notices; schedule cases and contact attorneys, claimants, and vocational and medical experts; and set up the video equipment for hearings done by video teleconference. Tr. 30-31. After the hearing, the Case Technicians are responsible for placing new evidence in files; updating exhibit lists; coding the post hearing action necessary and routing the case accordingly; and, ultimately, mailing out decisions. Tr. 32. Case Technicians are responsible for entering information regarding the case into the case tracking system. Tr. 89. Case Technicians are also responsible for preparing dismissals in circumstances and cases where the level of complexity does not warrant referral to a decision writer. In those cases in which the Case Technician prepares the dismissal, it is largely a matter of adding a minimal amount of

[1/] Legal Assistants, Senior Case Technicians and Case Technicians are essentially the same position. Tr. 14. However, the Case Technicians are a lower grade than the Senior Case Technicians. Tr. 14-15.

[2/] For simplicity sake, I will refer to the group as Case Technicians in this decision.

information to a form letter that is generated electronically by the Document Generation System (DGS) that is available on their word processing system. Tr. 113-16.

In March 2005, the Case Technicians at the Portland office, were called into a meeting with Hearing Office Chief Judge Russell and a group supervisor. Tr. 36. At the meeting, Judge Russell told the Case Technicians that they would begin preparing notices of decisions in instances where an ALJ issued a bench decision, gave them copies of a decision, and instructed them in how to do the notices. Tr. 36-37. According to Linda Helm, who was the Hearing Office Director at the time of the hearing in this case, the Case Technicians do not prepare the bench decision itself but, rather, a notice of the decision. Tr. 98, 154. The bench decision itself is what the ALJ reads into the record at the hearing. Tr. 154.

To generate a Notice of Decision following a bench decision, the Case Technician must select bench decision from the menu items available on the DGS and then prepare the document, in part, by inputting data provided by the ALJ on the checksheet and, in part, by retrieving information that is already in the electronic information system.[13/] Tr. 51, 108-09. In addition to that, the Case Technician must regularly make one revision in the text provided by the DGS and respace the document to ensure that the signature is not left standing by itself, or "orphaned," on the last page.[14/] Tr. 45, 52-53, 111.

According to the Case Technician who testified at the hearing, Judie Couture, if all goes smoothly, it takes her about 10 to 15 minutes to prepare the Notice of Decision for a bench decision.[15/] Tr. 59-62. According to Couture, the worst case scenario was that it would take about 45 minutes to complete the notice. Tr. 61-62. Typical complications cited by Couture that extended the amount of time involved were illegible handwriting, acronyms, and abbreviations on the checksheet that she did not understand. Tr. 49, 59. Couture also asserted that the lack of uniformity in the checksheets used by the various ALJs doing bench decisions can be another source of confusion in doing the Notice of Decision. Tr. 47, 50-51. In particular, Couture testified that one judge had changed his checksheet seven times in the past year. Tr. 44, 73.

In the interests of accomplishing prompt payment to the claimant, the Notices of Decision are viewed as a priority item in the workload of Case Technicians. Tr. 140-41. Although there is not a specific time requirement for issuing the notices, the expectation is that the task will be accomplished the day after the hearing involved. Tr. 141.

According to Helm, bench decisions require a tremendous amount of work on the part of the ALJ and are "not well received" by the ALJs. Tr. 135. Of the six to seven ALJs assigned to the Portland office during the period relevant to this case, only two did bench decisions regularly and a third did them "rarely." Tr. 58-59, 104. Evidence submitted at the hearing showed that during an 11-month period spanning March 2005 through January 2006, the Portland office issued a total of 305 bench decisions--ranging from a low of 7 issued in January 2006 to a high of 58 issued in April 2005.[16/] R. Exh. 3. During the relevant period, there were approximately 7 Case Technicians and 2-3 lead technicians. Tr. 125-26.

Prior to Helm's arrival in the Portland office in November 2005, Case Technicians processed cases belonging to a number of different ALJs at any one time. Tr. 132-33. Helm instituted a system in which

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[3/] Retrieval is a largely automated process–once a claimant's social security number is typed in and a "retrieve button" clicked, relevant information is pulled into the document being prepared from records already in the information system. Tr. 109-10.

[4/] As to the revision, a phrase that appears in the pre-established text, "disabled on," must be changed to "disabled as of." Tr. 45.

[5/] According to Helm, it took her 3 minutes to generate and print a Notice of Decision. Tr. 139. At the same time, Helm acknowledged that Couture's description of what was involved in processing cases after hearings was valid. Tr. 139. I find it more likely that the typical amount of time involved in preparing a Notice of Decision in a bench decision is closer to the estimate offered by Couture than Helm. It does not seem likely that someone could accomplish the combined tasks of pulling up the correct item in the DGS menu, inputting and retrieving even a relatively small amount of data mostly by clicking on buttons or appropriate choices, locating and replacing the word "on," respacing the document, checking for accuracy, and printing the document in as little as 3 minutes. Also, Helm had an interest in doing the task very quickly for purposes of making a point and did it on an extremely limited basis. Couture, on the other hand, performed the task on a more routine basis. Consequently, I credit Couture's estimate of 10-15 minutes over that of Helm as a more accurate reflection of everyday reality.

[6/] For a period beginning in November 2004 and running through February 2005, the Portland office issued 55 bench decisions.

the Case Technicians were assigned to work the cases of a single ALJ and rotated through the ALJs on a monthly basis. Tr. 133. Thus, the Case Technician would work exclusively with cases assigned to a single ALJ for a month and then rotate to those of another ALJ.

In terms of training provided to the Case Technicians with respect to processing the Notice of Decision, they were provided instructions and a demonstration at the March 2005 meeting at which they were informed that they would begin doing the notices. Tr. 36, 43-44. There is no estimate in the record of how long that took. A few months prior to the hearing in this case approximately 20 minutes was devoted at a "regular" meeting to what Couture characterized as "training" in doing the notices. Tr. 48-49.

The Case Technicians are not subject to performance standards that are based on the number of cases that they complete. Tr. 127. Although Case Technicians are expected to complete their tasks efficiently and timely, there are no specific time limits imposed for accomplishing their job. Tr. 128-29.

It is undisputed that no notice was given to the Union when the practice of having the Case Technicians prepare Notices of Decision for Bench Decisions was announced and implemented. Once Andrew Krall, the President of the Charging Party, learned of the work assignment, he sent a letter to Russell demanding to bargain. G.C. Exh. 4. Russell denied Krall's request contending that the work assignment did not constitute a change in working conditions and, if it did, it was *de minimis*. G.C. Exh. 5.

ISSUE

Whether or not the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing the practice of having Case Technicians prepare Notices of Decisions in conjunction with bench decisions without providing the Union notice and an opportunity to bargain.

POSITIONS OF THE PARTIES

GENERAL COUNSEL

The General Counsel contends the assignment of the task of preparing the Notice of Decision in connection with bench decisions constituted a change in the conditions of employment of the Case Technicians that was more than *de minimis*. The General Counsel argues the circumstances in this case are distinguishable from those present in *U.S. Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, Border Patrol, Tucson Sector, Arizona*, 60 FLRA 169 (2004) (*CBP, Tucson*). In this regard, the General Counsel asserts that in contrast to the circumstances in *CBP, Tucson*, the work assignment involved in this case was the result of action by the Respondent in promulgating a new policy relating to bench decisions. Additional distinctions claimed by the General Counsel are that the Case Technicians had to learn a new process and the work was given priority in terms of when it was to be accomplished. The General Counsel asserts that the fact the change has more than a *de minimis* effect on the Case Technicians was demonstrated by the Respondent's action in providing training to the Case Technicians. Also, the General Counsel maintains the additional duty was imposed at a time when the Case Technicians were overworked and understaffed and required 10 to 15 minutes, or more, to complete each notice.[7/]

As remedy, the General Counsel requests an order be issued requiring the Respondent to return to the *status quo ante*, cease and desist and post a notice to employees. The General Counsel argues *status quo ante* relief is warranted under the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*). In applying the *FCI* criteria, the General Counsel avers although the Respondent did not provide notice to the Charging Party, the latter promptly requested bargaining once it learned of the change only to have its request rejected by the Respondent. As to adverse impact on the employees, the General Counsel contends the employees are expected to complete the notices on an expedited basis and their performance in this regard can be tracked. Additionally, the General Counsel alleges employees have had to deal with learning new forms and processes as well as with modifications in the instructions they receive from ALJs and in the

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[7/] In his brief, in addition to arguing the work assignment constituted a change that had a more than *de minimis* effect on the Case Technicians, the General Counsel presents arguments regarding the Charging Party's right to designate its representative for purposes of receiving notice of the alleged change. Although Respondent made claims in its answer to the complaint that Krall was not the appropriate union official to receive notice, it did not pursue the claim either at the hearing or in its post-hearing brief. Consequently, I will not address the General Counsel's argument further in this decision.

manner in which they are assigned to ALJs. The General Counsel argues there is no evidence that a *status quo ante* remedy would disrupt the agency's operations and cites, in support, evidence that bench decisions were being issued during the period prior to when the task was assigned to the Case Technicians.

RESPONDENT

The Respondent contends assigning the task of preparing Notices of Decision to Case Technicians did not constitute a change in their conditions of employment. The Respondent asserts the process involved in preparing that particular notice is no different than that employed in preparing Notices of Dismissal, a task Case Technicians have performed for a number of years. Moreover, the Respondent claims generating the Notice of Decision is largely a matter of relying on computer software to create a document and retrieve data already in the information system and requires a minimal amount of time and effort on the part of the Case Technician. The Respondent argues the circumstances present in this case are sufficiently similar to those in *CBP, Tucson*, in which the Authority found there was no change in working conditions, to warrant the same result.

Alternatively, the Respondent contends even if the assignment of the duty did constitute a change in working conditions, it had no more than a *de minimis* impact on bargaining unit employees. In support of this contention, the Respondent maintains the duties entailed in preparing the Notice of Decision are substantially the same as other post-hearing duties Case Technicians have historically performed and reiterates its claim that, in terms of the work involved, generating the Notice of Decision is essentially the same as the Notice of Dismissal. Additionally, the Respondent asserts Notices of Decision make up a relatively small portion of the Case Technicians' workload and have no impact on their performance ratings.

The Respondent argues a *status quo ante* remedy is not appropriate in this case. It contends that it did not notify the Union prior to assigning the work of preparing Notices of Decision to the Case Technicians because the assignment had no reasonably foreseeable impact on Case Technicians. The Respondent further asserts the extent of the adverse impact on Case Technicians was minimal at most.[18/]

Analysis and Conclusion

As a general matter, prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative of the affected employees with notice of the change and an opportunity to bargain, if the change will have more than a *de minimis* effect on conditions of employment. *See, e.g., United States Department of Veterans Affairs Medical Center, Leavenworth, Kansas*, 60 FLRA 315, 318 (2004) (*VA, Leavenworth*). The determination of whether a change in conditions of employment occurred requires a case-by-case analysis and inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment. *E.g., CBP, Tucson*, 60 FLRA at 173. Assuming a change occurred, application of the *de minimis* doctrine involves evaluation of the nature and extent of the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *See, e.g., VA, Leavenworth*, 60 FLRA at 318.

I find the assignment of the duty of preparing Notices of Decision to Case Technicians constituted a change in their conditions of employment. Although the preparation utilized information systems and document generation processes used by the Case Technicians in performing other tasks already assigned to them, it was sufficiently different from those tasks to constitute a change. More specifically, although similar to the process for generating a Notice of Dismissal, the evidence shows preparation of the decision notice requires relying on a checksheet not used in the dismissal notices and that brings with it problems with respect to deciphering handwriting, acronyms and abbreviations to a greater degree than experienced in preparing dismissal notices. Also, the Notice of Decision entails inputting and retrieval of different information than the dismissal notices. Assigning the task of preparing

[8/] The General Counsel filed a motion to strike a paragraph in the Respondent's brief in which the Respondent presented an argument that a *status quo ante* remedy would adversely affect the implementation of SSA's "Disability Service Initiative (DSI)." In support of its motion, the General Counsel asserts that in the paragraph the Respondent relies on information not in the record. I grant the General Counsel's motion to strike. There was testimony the Portland office was involved in a pilot project relating to a transition to electronic files and Case Technicians were receiving training in electronic files. There was, however, no evidence submitted tying this transition, pilot project or the training to "DSI" or offering any details regarding "DSI" or its implementation other than the bare facts that some sort of pilot project and transition were underway and the Case Technicians were receiving training.

the Notices of Decision to the Case Technicians placed greater responsibility on them for accomplishing a priority work item. That the assignment involved a change is also demonstrated by the fact the Case Technicians were provided with some, albeit fairly minimal, instruction in how to perform the task. The record here shows the preparation of the Notice of Decision is not a matter of Case Technicians merely doing more of the same work and, in this regard, the circumstances are distinguishable from those present in *CBP, Tucson*, and *United States Department of Veterans Affairs Medical Center, Sheridan, Wyoming*, 59 FLRA 93 (2003) (*VA, Sheridan*). Moreover, unlike the situation in *CBP, Tucson*, the change here was a matter of the Respondent taking action to adopt practices and policies with respect to the type of written decision that would accompany bench decisions and which group of employees would prepare them and not simply a workload expansion resulting from fluctuations in operational demands.

I find, however, that the change did not have more than *de minimis* impact on bargaining unit employees. Although somewhat different from the work that Case Technicians had previously done, it was very similar. As noted, the work involved applying the same document generation processes and data systems as used in other work the Case Technicians did. The most reliable estimate as to the amount of time normally required to prepare a Notice of Decision was 10 to 15 minutes. That estimate, however, does not appear to take into account that the time Case Technicians were required to expend in preparing the notices was off-set, in part, by the fact the task replaced duties they would otherwise have to perform in post-hearing processing of the particular case. For example, in the past, the Case Technician would have had to code the case and route it for appropriate post-hearing action. Nevertheless, based on the evidence in the record, it appears there was a net increase in the amount of time required of Case Technicians for processing of bench decisions relative to the tasks they would otherwise have had to perform vis-a-vis the case post-hearing. One effect of the rotation system instituted by Helm was that the assignment of bench decisions to any particular Case Technician was concentrated in the months they were assigned to the particular ALJs who did them. The distribution of the workload was, however, distributed across the group of six or so Case Technicians. Thus, although the Case Technicians might experience "crunch" periods with respect to the number of Notices of Decisions that they were responsible for in the months that they were assigned to an ALJ who did bench decisions, there would be several other months during the year when the Case Technician would have none to do. If viewed in the context of the annual and average experience, the impact of the additional time entailed in doing the Notice of Decisions becomes less significant than if viewed in the limited context of peak months. Based on the figures for the 11 month period that began in March 2005, which were placed in evidence, it appears the average was in the vicinity of 55 bench decisions per Case Technician per year.[19/] Viewed in this perspective, the increase in workload was relatively small.

I also find significant that the Case Technicians did not have numeric performance standards in terms of timeliness or quantity of production. This would likely minimize the potential that the responsibility for preparing the Notices of Decision would adversely affect their performance ratings.

I find the circumstances present in this case are distinguishable from those involved in *Social Security Administration, Malden District Office, Malden, Massachusetts*, 54 FLRA 531 (1998) (*SSA, Malden*). In *SSA, Malden*, the Authority found the reassignment of duties to a group of employees constituted a change in their conditions of employment that was more than *de minimis*. In reaching that finding, the Authority relied on the facts that the employees to whom the duties were reassigned had never done them before and each employee, on the average, would have to do 1 or 2 cases involving the duties per day and spend approximately 10 minutes per case performing the duties. 54 FLRA at 536-37. Here, although the time consumed in performing the task of preparing the Notice of Decision is comparable to that for the duties involved in *SSA, Malden*, the average number of cases in which the duties must be performed is considerably less. Based on the figures I have discussed above, the average frequency of the cases equated to a fraction over once a week per Case Technician. Another distinction is that the duties involved here were similar to those previously performed by the Case Technicians.

[9/] This estimate is based on 6 Case Technicians doing bench decisions. It is not clear from the record, how many Case Technicians were actually involved in processing Notices of Decision during the year. Among other things, there were references to vacancies in the Case Technician ranks. To the extent there were more than 6 Case Technicians assigned to the task, the average number of notices per employee would drop.

I find that when viewed in the context of the skills required for the task and the average workload, the impact of the assignment to prepare Notices of Decision on the Case Technicians was minimal. *Compare U.S. Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 35 FLRA 1039 (1990) (Authority found the assignment of collateral intelligence duties, which consisted of new duties and old duties to an extent not previously performed, that consumed about 15 percent of employees' work time was more than *de minimis*) *with U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Chicago, Illinois*, 30 FLRA 572 (1987) (Authority found that reassignment of employee to a position that was essentially the same as her prior position with the exception of additional typing of very simple correspondence and did not require learning a new skill was *de minimis*).

Additionally, there is no evidence that the assignment of the decision preparation duties had any impact on the number of working hours required of the employees.[10/]

As the change was no more than *de minimis*, I find there was no obligation to provide notice and an opportunity to bargain to the Union. Consequently, I find the Respondent did not violate the Statute as alleged.

Having found that the evidence does not support the allegation that the Respondent violated the Statute, it is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, June 30, 2006.

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SUSAN E. JELEN
Administrative Law Judge

[10]/ In this regard, Couture testified that her custom has been and continues to be that she limits her workday to 8 hours and only works overtime, or earns credit hours, when it serves her personal desire to conserve her leave. Tr. 74-75.