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

OALJ 15-26

DEPARTMENT OF VETERANS AFFAIRS
VA NORTHERN CALIFORNIA HEALTH CARE SYSTEM, MATHER, CALIFORNIA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1206, AFL-CIO

CHARGING PARTY

Case No. SF-CA-12-0398

Vanessa G. Lim
For the General Counsel

Robert Brewer
For the Respondent

Gloria Salter
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 (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On December 4, 2012, the American Federation of Government Employees, Local 1206, AFL-CIO (Charging Party/Union), filed an amended unfair labor practice (ULP) charge against the VA Northern California Health Care System, Mather, California (Respondent). (Jt. Ex. 1(b)). On December 21, 2012, the Regional Director of the San Francisco Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by changing a bargaining unit member's conditions of

employment without providing the Union notice and an opportunity to bargain. (Jt. Ex. 1(c)). The Respondent timely filed an Answer to the complaint in which it admitted certain allegations and denied others, including the allegation that it violated the Statute. (Jt. Ex. 1(d)).

A hearing in this matter was held on April 9, 2013, in Sacramento, California. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent timely filed post-hearing briefs, which have been considered.[1]

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 under § 7103(a)(3) of the Statute. (Jt. Exs. 1(c) & (d)). At all material times, Janet Patterson held the position of Chief of Audiology and Speech Pathology Service at the Respondent. (Jt. Ex. 1(d)). At all material times, Dr. Patterson, as a supervisor and/or management official under § 7103(a)(10) and/or (11) of the Statute, acted on behalf of the Respondent. (Jt. Exs. 1(c) & (d)).

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under § 7103(a)(4) of the Statute, and is the exclusive representative of a consolidated unit of employees appropriate for collective bargaining at the Respondent. (Jt. Exs. 1(c) & (d)). The Union is an agent of the AFGE for purposes of representing bargaining unit employees at the Respondent. (Jt. Exs. 1(c) & (d)).

In December 2010, the Respondent posted a job vacancy announcement for a full-time and permanent audiologist at its McClellan Outpatient Clinic in California. (Jt. Ex. 11; Tr. 71). The vacancy announcement listed the full performance level at GS-12. (Jt. Ex. 11; Tr. 71). To qualify as a GS-12, the announcement mandated that the incumbent "hold a full, current, and unrestricted license to practice audiology." (Jt. Ex. 11). The announcement also indicated that "[n]on-licensed audiologists," who otherwise qualify for appointment as a GS-12, "may be given a temporary appointment as a GS-11 audiologist." (Jt. Ex. 11). An audiologist hired as a GS-11 "may not be promoted to the GS-12 level without being fully licensed." (Jt. Ex. 11).

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[1] The GC filed an unopposed Motion to Strike, requesting that I strike the first full paragraph on page four of the Respondent's brief. In that paragraph, the Respondent argues that its decision to convert Dr. Frecedes Letcher from a permanent to temporary employee is "covered by" Article 33, § 2(A) of the parties' agreement. (Jt. Ex. 8). Under Authority precedent, the covered-by defense is an affirmative defense that cannot be raised for the first time in post-hearing briefs, absent extenuating circumstances. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 52 (2003) (*PBGC*). In this case, the Respondent raised the defense for the first time in its post-hearing brief. Because the Respondent did not file an opposing motion, I am unaware of any extenuating circumstances warranting a denial of the motion. Thus, the Motion to Strike is granted.

Dr. Frecedes Letcher applied for the position and was interviewed by Dr. Patterson and Dr. Jane Sliheet, the Chief of Audiology at the McClellan Outpatient Clinic. (Tr. 19). The parties dispute whether Dr. Patterson informed Dr. Letcher that she would be hired as a permanent or temporary employee. (Tr. 19, 47). Regardless, on April 28, 2011, Dr. Letcher received an email from the Respondent's human resources department stating that she was "tentatively selected for the position of Audiologist (Full-time/*Permanent*)." (Jt. Ex. 13; Tr. 19-20) (emphasis added). Then, on July 6, 2011, Dr. Letcher was officially offered the audiologist position at the GS-11 level. (Jt. Ex. 15; Tr. 20). The offer letter indicated that the position was permanent. (Jt. Ex. 15). Dr. Letcher accepted the offer and shortly after she began, she received an SF-50, coding her hire as an "excepted appointment under 38 U.S.C. § 7401(3), which is a permanent, without time limit" appointment. (Jt. Ex. 16; Tr. 22, 75).

Dr. Letcher began work on August 14, 2011, serving a one-year probationary period. (Jt. Ex. 16; Tr. 17, 28). Originally, Dr. Letcher's duties included "see[ing] patients independently," performing "audiological assessments and hearing aid modifications," ordering "hearing aids," conducting hearing aid fittings and evaluations, and counseling patients and their families regarding the "correct maintenance and care of hearing aids." (Tr. 21-22). As an unlicensed audiologist, Dr. Letcher was directed to work under the supervision of a licensed audiologist. (Jt. Ex. 10; Tr. 35-36, 48). Generally, two audiologists – Dr. Williams and Dr. Wigglesworth – reviewed and signed Dr. Letcher's work notes at the end of the workday. (Tr. 21). "[S]ometimes," Dr. Letcher was directly "observed" by licensed audiologists while performing her duties. (Tr. 66).

In December 2011, Dr. Letcher intentionally misrepresented to her "mentor/supervisor[]" that she passed the state licensing examination for audiologists. (Tr. 37-38, 50). Once Dr. Letcher's direct supervisors discovered that she "was less than candid" about her examination results, they refused to continue supervision. (Tr. 49-50). As an unlicensed audiologist, Dr. Letcher could not independently examine patients without some form of supervision. (Tr. 50). In January 2012, the Respondent discontinued Dr. Letcher's patient care duties "until further notice" and assigned her to "shadow" licensed audiologists "to watch their practice [and] to have discussions with them." (Tr. 22, 51). Prior to January, Dr. Letcher "was not shadowed." (Tr. 66).

In February 2012, Dr. Sliheet conducted Dr. Letcher's performance assessment, but was unable to rate Dr. Letcher on the "critical elements" because she was not conducting patient care duties. (Jt. Ex. 19; Tr. 24). The following month, in March, Dr. Sliheet recommended that Dr. Letcher be removed during the probationary period. (Tr. 76). While reviewing Dr. Letcher's file, Christopher Howell–the Respondent's human resources officer – "recognized that [Dr. Letcher] was placed under the wrong appointment." (*Id.*). Instead of removing Dr. Letcher, Howell directed another human resource officer to inform Letcher that her status would be changed from permanent to temporary. (*Id.*). On April 20, 2012, Dr. Letcher received a revised offer of employment specifying her appointment as temporary. (Jt. Exs. 20 & 21; Tr. 27). At some point, the Respondent also changed Dr. Letcher's SF-50 to reflect the change from permanent to temporary. (Jt. Ex. 22).

In May 2012, the Respondent again revised Dr. Letcher's workload. (Tr. 29). Dr. Sliheet sent Letcher a "revised work assigned" schedule mandating that Letcher "work ½ day shadowing an audiologist and the other ½ day[] doing clinic tasks." (Jt. Ex. 23 at 2). Dr. Sliheet provided Dr. Letcher with a list of seventeen approved clinic tasks and nine approved "[i]deas for growing professionally." (Jt. Ex. 23 at 3). The lists included tasks such as putting in work orders for equipment, purging work orders, clearing answering machines, organizing drawers, reading journals, and creating templates for note taking. (*Id.*). Dr. Patterson testified that licensed audiologists at the VA routinely perform the duties that were assigned to Dr. Letcher, but she never observed Letcher performing such duties prior to May 2012. (Tr. 57, 68).

The audiologist "functional statement" provides a range of duties a GS-11 audiologist is expected to perform. (Jt. Ex. 10). It includes, among other tasks, interacting "with patients, families, and other health care professionals"; providing "audiology evaluation[s], assessment[s], and treatment services"; and maintaining "supplies, equipment[,] and clinical areas." ((*Id.*).

In September 2012, the Respondent permitted Dr. Letcher to resume her patient care duties under the observation of a licensed audiologist. (Tr. 32). In October 2012, Dr. Letcher became a full-time union official and, in November 2012, she passed the audiologist licensing examination. (Tr. 33, 42).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) contends that the Respondent violated § 7116(a)(1) and (5) of the Statute by changing Dr. Letcher's duties and status, thereby changing a bargaining unit employee's conditions of employment, without providing the Union notice and an opportunity to bargain. The GC concedes that the Respondent exercised reserved management rights under § 7106 of the Statute in making the alleged changes. As such, it maintains that the Respondent was obligated to bargain over the impact and implementation of the changes.

The GC asserts that there are three changes warranting impact and implementation bargaining: (1) the temporary discontinuation of Dr. Letcher's patient care duties, (2) the addition of administrative tasks to Letcher's workload, and (3) the conversion of Letcher's employment status from permanent to temporary.

First, the GC contends that the Respondent changed Dr. Letcher's conditions of employment by suspending her patient load. According to the GC, the change had a greater than de minimis effect because it impacted Dr. Letcher's morale, *IRS, Wash., D.C., & Fresno Serv. Ctr., Fresno, Cal.*, 16 FLRA 98, 127 (1984) (*Fresno*), and her performance appraisal. The Respondent could not rate Dr. Letcher during her midyear performance appraisal because she was not performing patient care duties. In turn, this impacted Dr. Letcher's ability to improve or

correct work related deficiencies. Although the Respondent returned Dr. Letcher's patient care duties in September 2012, the GC maintains that the temporary nature of the change does not mitigate its impact because it lasted for a significant period of time–approximately eight months–and was originally indefinite.

Second, the GC asserts that the assignment of new administrative duties had a greater than de minimis impact. *U.S. DOL, OSHA*, 24 FLRA 743, 746 (1986) (*OSHA*). The Respondent assigned Dr. Letcher duties that she had not previously performed. While the audiologist functional statement includes some of those tasks, it does not include the majority of the assigned duties. Even if the assigned administrative duties are included in the audiologist job description, it is not dispositive of the Respondent's duty to bargain. *Dep't of HHS, Family Support Admin.*, 30 FLRA 346, 349 (1987) (*HHS*).

Third, the GC argues that the conversion of Dr. Letcher's employment from permanent to temporary was more than de minimis. The change from permanent to temporary had a significant impact on Dr. Letcher's future job status, benefits, and compensation. By changing Dr. Letcher's status to temporary, the Respondent made it easier and faster to terminate Dr. Letcher.

As a remedy, the GC requests that the Respondent be ordered to cease and desist from its conduct, post a Notice signed by the Director of the Respondent, and post the Notice electronically in accordance with the parties' agreement. (Jt. Ex. 2). The GC also requests that the Respondent be ordered to engage in post-implementation impact and implementation bargaining over the change to Dr. Letcher's duties. Finally, the GC seeks status quo ante relief, requesting that the Respondent return Dr. Letcher's duties as they were prior to January 2012, if Dr. Letcher returns from 100% official time.

Charging Party

The Charging Party/Union also seeks status quo ante relief. Specifically, the Union requests that Dr. Letcher be promoted from a GS-11 to a GS-12 employee, and receive back pay at the GS-12 level from the time she received her state license in November 2012.

Respondent

The Respondent asserts that it did not violate the Statute as alleged. It argues that it did not incur a duty to bargain when it changed Dr. Letcher's status from permanent to temporary because it did not change her conditions of employment. In support of this argument, the Respondent contends that unlicensed audiologists cannot be hired as permanent employees under 38 U.S.C. §§ 7401 and 7405. According to the Respondent, the Authority must accord the Respondent's interpretation of §§ 7401 and 7405 considerable deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*). The Respondent also maintains that the "VA handbook" prohibits the hiring of unlicensed audiologists to permanent positions. (Jt. Ex. 5). Thus, in the Respondent's view, correcting Dr. Letcher's appointment status from permanent to temporary was not a change to her conditions of employment.

The Respondent next argues that Dr. Letcher's conditions of employment were not changed when it increased her administrative duties. The duties assigned to Dr. Letcher are within the position description for a GS-11 audiologist, and were often completed by other audiologists. Citing *U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169 (2004) (*Border Patrol*), the Respondent appears to argue that it was merely increasing the amount of Dr. Letcher's duties, not changing them.

In the alternative, the Respondent maintains that the changes were de minimis. The duties assigned to Dr. Letcher were substantially similar to duties she previously performed and were performed by other audiologists. *See Dep't of HHS, SSA*, 24 FLRA 403 (1986) (*SSA*). The Respondent notes that Dr. Letcher's work location was not changed and she maintained the ability to become a licensed audiologist and work overtime.

ANALYSIS AND CONCLUSIONS

It is well settled that an agency may not change a condition of employment without fulfilling its bargaining obligations. *E.g., Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1527 (1994) (*Portsmouth*). Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over the change, if the change will have more than a de minimis effect on conditions of employment. *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*). When an agency exercises a reserved management right under § 7106 of the Statute, it need not bargain the substance of the change, but must bargain over the impact and implementation of the decision, if it has more than a de minimis effect. *PBGC*, 59 FLRA at 50.

To determine if a change is greater than de minimis, the Authority looks to the "nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment." *E.g., OSHA*, 24 FLRA at 745. Equitable considerations should also be taken into account in balancing the interests involved. *Id.*

Before reaching the de minimis analysis, there must first be a finding that the Respondent changed an employee's conditions of employment. *Border Patrol*, 60 FLRA at 173. Determining whether a change in conditions of employment occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employee's conditions of employment. *Id.*

Considering first the Respondent's change to Dr. Letcher's duties, including her patient care duties, I find that the Respondent changed Letcher's conditions of employment.

The Respondent correctly asserts that an increase in the volume of work, by itself, does not change conditions of employment. *Id.* However, the Respondent's attempt to shroud the change to Dr. Letcher's duties as such an increase is strained. Prior to January 2012, Dr. Letcher's duties included "see[ing] patients independently," performing "audiological assessments and hearing aid modifications," ordering "hearing aid[s]," conducting hearing

aid fittings and evaluations, and counseling patients and their families regarding the "care of hearing aids." (Tr. 21-22). Thereafter, Dr. Letcher was designated to a merely observational role, spending half of each day shadowing other audiologists, and the other half performing administrative duties. (Jt. Ex. 23). According to Dr. Letcher's uncontested testimony, she never performed the assigned duties before May 2012. (Tr. 30). Dr. Patterson's testimony reinforces that the change was in type, rather than volume: she testified that she never witnessed Dr. Letcher perform clinic tasks prior to May 2012. (Tr. 57); *see e.g. U.S. DOJ, INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 35 FLRA 1039, 1047-48 (1990) (*INS*) (adding "new duties" constitutes a change to conditions of employment).

Contrary to the Respondent's contention, I find it immaterial that the additional duties assigned to Dr. Letcher are arguably contained in the audiologist "functional statement," or were performed by other audiologists. *E.g., Kirtland*, 64 FLRA at 174-75 ("That given duties are within an employee's position description does not prevent the assignment of those duties from constituting a change in conditions of employment, if the employee had not been performing those duties before a change."). As demonstrated, Dr. Letcher did not perform the assigned duties before the change.

Accordingly, I find that the Respondent "imposed a practice that was different from what previously existed and, consequently, constituted a change in conditions of employment" when it suspended Dr. Letcher's patient care duties and assigned her tasks that she had not previously performed. *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995).

I also find that the changes were greater than de minimis. As demonstrated above, it is clear that the Respondent changed the nature of Dr. Letcher's duties. *See e.g., OSHA*, 24 FLRA at 746 (assignment of "new duties" found greater than de minimis). The extent of those changes further substantiates its significance. The evidence indicates that, prior to the alleged change, Dr. Letcher devoted nearly her entire workday to independent patient care duties. (Tr. 21-22). However, after March 2012, Dr. Letcher did not conduct any independent patient care duties, and instead spent *half* of each day completing "clinic tasks" that she had not previously performed. (Tr. 30); *see INS*, 35 FLRA at 1047 (assignment of new duties consuming fifteen percent of employee workload found greater than de minimis).

The Respondent asserts that the addition of clinic duties was de minimis because other audiologists routinely performed similar tasks. However, there is no evidence demonstrating that any other audiologist spent fifty percent of each workday performing clinic tasks. In fact, the record establishes that other audiologists performed similar duties "at some point" in their career or sporadically, in the course of conducting patient care duties. (Jt. Ex. 23; Tr. 68). Most of the duties assigned to Dr. Letcher were regularly performed by "health technicians and clerks," not audiologists. *SSA*, 24 FLRA at 408 (agency did not have a duty to bargain over an employee's reassignment because the duties performed were substantially similar). In short, the nature and extent of the changes were neither minor nor normal.

I agree with the GC that the temporary nature of the change does not mitigate its significance. *See OSHA*, 24 FLRA at 746 (change found greater than de minimis in part due to the "initially indefinite" duration of the change); *INS*, 35 FLRA at 1047 (changes found greater than de minimis where employees were required to engage in new duties for an "unspecified time"). Initially, and throughout the suspension of Dr. Letcher's patient load, the duration of the changes were indefinite. (Jt. Ex. 19; Tr. 22, 25, 29).

I also agree that the changes had a significant impact on Dr. Letcher's performance appraisal. Dr. Letcher was appraised under a performance plan consisting of critical elements related to her patient care duties. (Jt. Ex. 19). Because the Respondent discontinued those duties, Dr. Sliheet could not rate Dr. Letcher during her mid-year performance appraisal, (Jt. Ex. 19; Tr. 24), and one month later, Dr. Sliheet recommended that Dr. Letcher be terminated. (Tr. 76). Given the impact that an employee's performance appraisal can have on promotions, removals, within-grade increases, and awards, it was reasonably foreseeable that the discontinuation of Dr. Letcher's patient care duties would significantly impact her employment, as it did. *See HHS*, 30 FLRA at 349 (adverse effect on performance rating found more than de minimis).

However, with respect to the GC's contention that Dr. Letcher's morale was significantly impacted, I find the GC's cited precedent inapplicable. *See Fresno*, 16 FLRA at 127. In *Fresno*, the Authority found that an agency's change was more than de minimis even though it was "largely a matter of [employee] morale . . . ." *Id.* The Authority was concerned that poor morale could "seriously impact upon the effective and efficient conduct of the public business." *Id.* Here, the record indicates that, "in one instance," Dr. Letcher was "embarrassed" because another audiologist referred to her as Frecedes and not as Doctor. (Tr. 23-24). Although employee morale "is not a matter to be lightly treated," it cannot be used *carte blanche* to establish the significance of a change. *Id.* In this case, there is no evidence suggesting that this "one instance" of embarrassment seriously impacted the "public business." *See Fresno*, 16 FLRA at 127.

Furthermore, the equitable considerations do not support a conclusion that the effect of the move was de minimis. The record indicates that the Respondent discontinued Dr. Letcher's patient care duties because she lied about passing the audiologist state licensing examination. Even so, as demonstrated above, it was reasonably foreseeable that the addition of new duties to fifty percent of Dr. Letcher's workload would have a greater than de minimis effect; it was also reasonably foreseeable that the discontinuation of Dr. Letcher's patient care duties would significantly and negatively impact her performance rating, which is what occurred.

Because the GC concedes that the Respondent exercised a reserved management right under § 7106 of the Statute, and I agree, I find that the Respondent was obligated to bargain over the impact and implementation of the changes to Dr. Letcher's duties. The Respondent failure to do so constitutes a violation of § 7116(a)(1) and (5) of the Statute.

Turning to the alleged change to Dr. Letcher's employment status, I must first determine whether the Respondent changed Letcher's conditions of employment. *Border Patrol*, 60 FLRA at 173. The Authority utilizes a two-prong test to determine whether a matter concerns a condition of employment: (1) whether the matter pertains to a bargaining unit employee and (2) whether there is a direct connection between the matter and the bargaining unit employee's "employment relationship." *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 236-37 (1986).

Here, the Respondent converted Dr. Letcher, who was a bargaining unit employee, to temporary status. As more fully discussed below, this change altered her "employment relationship" with the Respondent. Accordingly, Dr. Letcher's status as a temporary or permanent employee is a condition of employment. Further, it is clear that the Respondent implemented a change to that condition. Dr. Letcher's tentative offer of employment, official offer of employment, and original SF-50, specified that she was a permanent employee. (Jt. Exs. 13, 15, 16; Tr. 75). The evidence proves that approximately seven months into Dr. Letcher's appointment, the Respondent changed Letcher's employment status from permanent to temporary. (Jt. Exs. 20, 21, 22; Tr. 26-27, 76).

As for the significance of the change, I find that the effects of the change were greater than de minimis.

The parties' collective bargaining agreement (CBA) sets forth the different provisions applicable to temporary and permanent-probationary employees. (Jt. Ex. 8). Under the CBA, temporary employees are at-will employees that may be terminated "at any time." (*Id.*). However, the Respondent is obligated to "counsel" a probationary employee over matters that "may affect the employee's continued employment" and do so in a "timely manner and document the meeting." (*Id.*). Once the Respondent changed Dr. Letcher's status, she lost her right to the timely and documented meeting, and the Respondent was free to terminate her employment.

Furthermore, as a permanent-probationary employee, Dr. Letcher was afforded statutory protections not bestowed on temporary employees. The Respondent was statutorily obligated to "utilize [Dr. Letcher's] probationary period as fully as possible to determine [her] fitness" for the position. 5 C.F.R. § 315.803(a). If terminated for unsatisfactory performance, Dr. Letcher would have been entitled to a written explanation as to "why" she was being separated, "the effective date of the action," and "the agency's conclusions as to the inadequacies of [her] performance or conduct." *Id.* at § 315.804(a). Moreover, if the Respondent failed to provide such notice, Dr. Letcher would have the right to appeal the removal. *Id.* at § 315.806(c). Conversely, as a temporary employee, Dr. Letcher was terminable simply "upon notice in writing." (Jt. Ex. 8).

Lastly, as a probationary employee, Dr. Letcher was entitled to certain safeguards if the Respondent proposed to remove her for reasons arising before her appointment. The Respondent would have been obligated to provide: (1) advanced written notice of the reasons for removal; (2) a reasonable time for Dr. Letcher to file a written answer and supporting affidavits, which the

Respondent must have considered; and (3) written notification of its final decision, at the earliest practicable date, but no later than the effective date of the action. 5 C.F.R. § 315.805. The Respondent would also be obligated to notify Dr. Letcher of her appeal rights to the Merit System Protection Board. *Id.* at § 315.805(c). Once the Respondent converted Dr. Letcher to temporary, she lost these statutory rights.

Clearly, permanent-probationary employees enjoy far greater protections, under the parties CBA and before the law. Accordingly, I find that the foreseeable impact of the Respondent's change to Dr. Letcher's employment status was greater than de minimis.

The Respondent asserts that it did not provide the Union with notice and an opportunity to bargain because Dr. Letcher could not have legally been hired as a permanent employee. Under Authority precedent, an agency may implement a change to correct an unlawful practice without first bargaining over the change, subject only to post-implementation impact and implementation bargaining. *Portsmouth*, 49 FLRA at 1527-28. The Respondent relies on 38 U.S.C. §§ 7401 and 7405 to argue that it was correcting an unlawful practice when it converted Dr. Letcher to temporary status.

In pertinent part, § 7401 states that the Secretary of the VA may appoint "such personnel as the Secretary may find necessary," including "audiologists." 38 U.S.C. § 7401. Section 7405 permits the Secretary to employ unlicensed audiologists on a temporary basis, but not for "a period in excess of two years . . . ." *Id.* at § 7405(c)(2). The Respondent argues that this language prohibits it from hiring unlicensed audiologists on a permanent basis. The Respondent also maintains that its interpretation is due considerable weight under *Chevron*, 467 U.S. at 844-45.

The Authority has noted that "*Chevron* deference is due only if an agency reached its interpretations in a notice-and-comment rulemaking, a formal agency adjudication, or in some other procedure meeting the prerequisites for Chevron deference." *AFGE, Local 1547*, 67 FLRA 523, 526 (2014) (*Local 1547*) (internal quotations omitted). Here, the Respondent advanced its interpretation in its post-hearing brief, based on testimony elicited at the ULP hearing and from the VA employment handbook provided as a joint exhibit. Accordingly, *Chevron* deference does not apply. *See Id.*

However, the Respondent's interpretation is due the level of deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (*Skidmore*), for agency interpretations advanced in the course of litigation. *See Local 1547*, 67 FLRA at 526. Under *Skidmore*, the deference due depends "upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* (quoting *Skidmore*, 323 U.S. at 140).

Having considered the thoroughness of the Respondent's consideration and the validity of its reasoning, I find that the Respondent failed to persuasively establish that it was prohibited from hiring unlicensed audiologists as permanent employees. The plain language of §§ 7401 and

7405 permit the Secretary of the VA to hire audiologists on a permanent or temporary basis. While the statute directly prohibits the hiring of unlicensed audiologists on a temporary basis for longer than two years, 38 U.S.C. § 7405(c)(2), nowhere does it directly or implicitly prohibit the Respondent from hiring an unlicensed audiologist to a permanent position. (Tr. 83). The Respondent failed to provide legislative history or any other evidence indicating otherwise.

The Respondent relies on the VA employee handbook and the testimony of one of its human resource officers as authority for its interpretation. (Jt. Ex. 5; Tr. 80). While such evidence is potentially telling of the Respondent's past practice when hiring audiologists, it provides zero insight into the *legality* of hiring unlicensed audiologists on a permanent basis. *See Portsmouth*, 49 FLRA at 1527-28 ("[T]here is no obligation to bargain over a decision to change a past practice which is *unlawful*.") (emphasis added). Thus, I find that the Respondent failed to persuasively demonstrate that it was unlawful to hire Dr. Letcher in a permanent capacity. The Respondent was not privileged to change Dr. Letcher's employment status from permanent to temporary, subject only to post-implementation impact and implementation bargaining.

The GC concedes that the conversion of Dr. Letcher's employment status was a reserved management right under § 7106 of the Statute, subject to impact and implementation bargaining. I do not agree. The language of § 7106 of the Statute does not plainly encompass the ability of an agency to change an employee's status from permanent to temporary. *See* 5 U.S.C. § 7106. I have not been presented with, nor have I found, any Authority precedent leading to such a conclusion.

Based on the foregoing, I hold that the Respondent was obligated to provide the Union with advanced notice and an opportunity to bargain over the change to Dr. Letcher's employment status. The Respondent failed in its statutory obligations and violated § 7116(a)(1) and (5) of the Statute.

REMEDY

The purpose of a status quo ante remedy is to place the parties in the position they would have been absent the Respondent's impermissible conduct. Unless special circumstances exist, a status quo ante remedy is appropriate where, as here, an agency has refused to bargain over the substance of a matter that is within its duty to bargain. *U.S. DOL, Wash., D.C.*, 38 FLRA 899, 913 (1990).

In regards to Dr. Letcher's duties, I find that a status quo ante remedy is not appropriate. The record indicates that the Respondent returned Dr. Letcher's patient care duties in September 2012, proportionately reducing her administrative tasks. (Tr. 32-33). Thus, a prospective bargaining order should fully remedy the violation.

As for the conversion of Dr. Letcher's employment status, I find that a status quo ante remedy is appropriate. The Authority has held that it will not order a status quo ante remedy that would result in the reinstitution of an illegal practice. *E.g., GSA, Nat'l Capital Region, FPS Div., Wash., D.C.*, 52 FLRA 563, 568 (1996). In this case, the Respondent failed to demonstrate that it is unlawful to hire an unlicensed audiologist to a permanent position. Even if the Respondent established such illegality, Dr. Letcher became a licensed audiologist in November 2012. (Tr. 42). Consequently, a status quo ante remedy restoring Dr. Letcher to her permanent position will not result in the reinstitution of an illegal practice.

The Union, as charging party, further requests that Dr. Letcher be granted a promotion to a GS-12, and recover back pay at the GS-12 level from the time she obtained her state license in November 2012. Under the Back Pay Act, 5 U.S.C. § 5596(b)(1), an award of back pay is authorized where: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action, and (2) the personnel action resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.

While Dr. Letcher was most certainly subjected to an unjustified personnel action, there is no evidence demonstrating that the personnel action "resulted in" a reduction or withdrawal of pay. Dr. Letcher's pay and benefits remained the same after she was converted to temporary. Further, there is no evidence to support the conclusion that the Respondent was obligated to promote Dr. Letcher once she obtained her license. According to the job announcement and VA handbook, licensure is a prerequisite to promotion. (Jt. Exs. 5, 11). Moreover, the Respondent had serious concerns about Dr. Letcher's ability to perform. (Tr. 76). Given the facts, I must deny the Union's speculative remedy request.

The Respondent is ordered to cease and desist from changing conditions of employment without satisfying its bargaining obligations. The Respondent is directed to bargain, upon the request of the Union, over the impact and implementation of the changes to Dr. Letcher's duties. I will incorporate the electronic dissemination into the Order in accordance with the parties' joint stipulation (Jt. Ex. 2), and the Authority's decision that unfair labor practice notices should, as a matter of course, be posted both on bulletin boards and electronically. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

CONCLUSION

The Respondent was obligated to notify the Union of the changes to Dr. Letcher's duties and to negotiate with the Union, upon request, over the impact and implementation of its decision. The Respondent's failure to do so constitutes a violation of § 7116(a)(1) and (5) of the Statute. I also hold that the Respondent violated § 7116(a)(1) and (5) of the Statute when it converted Dr. Letcher's employment status from permanent to temporary without first notifying the Union and affording it an opportunity to bargain.

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

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, VA Northern California Health Care System, Mather, California, shall:

1. Cease and desist from:

(a) Unilaterally making significant changes to bargaining unit employees' duties, such as discontinuing patient care duties and/or assigning new duties, without notifying the American Federation of Government Employees, Local 1206, AFL-CIO (Union) and providing it with an opportunity to negotiate, upon request, concerning the impact and implementation of such changes.

(b) Unilaterally changing employees' employment status from permanent to temporary without providing prior notice to the Union and providing it with an opportunity to bargain concerning the change.

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

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

(a) Notify and, upon request, bargain with the Union over the impact and implementation of any significant changes to Dr. Frecedes Letcher's duties.

(b) Restore Dr. Frecedes Letcher's employment status to permanent-probationary, as it was prior to the change.

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

(d) Post a copy of the Notice, signed by the Director, on the Respondent's Intranet site and disseminate a copy through the Respondent's e-mail system to all bargaining unit employees at the Respondent's facilities. This Notice will be sent on the same day that the Notice is physically posted.

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

Issued, Washington, D.C., April 20, 2015

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, VA Northern California Health Care System, Mather, California, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally make significant changes to bargaining unit employees' duties, such as discontinuing patient care duties and/or assigning new duties, without notifying the American Federation of Government Employees, Local 1206, AFL-CIO (Union) and providing it with an opportunity to negotiate, upon request, concerning the impact and implementation of such changes.

WE WILL NOT unilaterally change employees' employment status from permanent to temporary without providing prior notice to the Union and providing it with an opportunity to bargain concerning the change.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our bargaining unit employees in the exercise of the rights assured to them by the Federal Service Labor-Management Relations Statute.

WE WILL notify and, upon request, bargain with the Union over the impact and implementation of any significant changes to Dr. Frecedes Letcher's duties.

WE WILL restore Dr. Frecedes Letcher's employment status to permanent-probationary, as it was prior to the change.

_____
(Agency/Activity)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 470 San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.