70 FLRA No. 23

SOCIAL SECURITY ADMINISTRATION
REGION VII
KANSAS CITY, MISSOURI
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1336, AFL-CIO
(Charging Party/Union)

CH-CA-15-0349

_____

DECISION AND ORDER

December 21, 2016

_____

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

I. Statement of the Case

In the attached decision, Federal Labor Relations Authority (FLRA) Chief Administrative Law Judge Charles R. Center (Judge) determined that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing to provide the Union with notice and an opportunity to bargain before changing the conditions of employment for certain bargaining-unit employees when it assigned low-graded duties to higher-graded positions.

We must decide whether the Judge erred in his findings of fact and conclusions of law by determining that the Respondent made changes to conditions of employment and that those changes had more than a de minimis effect on the employees. Because the Judge based these conclusions on his findings that the Respondent reassigned lower-graded, new duties, to certain employees and that those employees' workloads and training requirements increased, and because the Respondent has not demonstrated that these findings were erroneous, the answer to this question is no.

II. Background and Judge's Decision

A. Background

The Respondent employed four service representatives (SRs) and eleven claims representatives (CRs) in its Jefferson City, Missouri field office. SR job duties are primarily administrative and include providing assistance to beneficiaries of programs administered by the Respondent, such as answering telephone calls, conducting initial interviews with beneficiaries to determine the nature of their situations, and processing social-security-number applications.

The principal duties of a CR include interviewing individuals to obtain information about initial and continued eligibility for benefits, assisting applicants with securing evidence necessary to determine entitlement, examining such evidence in making an entitlement determination, and determining the benefit amount payable to those qualified. In large part, CRs perform investigative duties and make adjudicatory determinations.

The starting grade for the SR position is GS-8, while the starting grade for the CR position is GS-11. CRs and SRs also have separate position descriptions, performance plans, and training programs.

In January 2015, the Respondent announced that all four SRs were being promoted to CR positions, and that the Jefferson City office would become an all-CR office. The Respondent then distributed the administrative work previously performed by SRs amongst the incumbent CR staff. The eleven incumbent CRs were scheduled to undergo approximately six months of training in order to learn their new duties that had previously been performed only by SRs.

A few months after the incumbent CRs began training for and performing their newly-acquired SR duties, the newly-promoted CRs were placed into a four-month-long training period to learn their new duties. During this four-month span, certain incumbent CRs were responsible for handling all of the duties that were previously handled by the four former SRs. Incumbent CRs testified that after the promotions went into effect, they were required to devote forty to sixty percent of their work time to duties that were previously performed by SRs.

[1] 5 U.S.C. § 7116(a)(1) & (5).

Following the promotions of the SRs, the Union filed an unfair-labor-practice (ULP) charge. After investigating the charge, the Regional Director of the FLRA's Chicago Regional Office issued a complaint on behalf of the FLRA's General Counsel (GC) asserting that the Respondent violated § 7116(a)(1) and (5) of the Statute by changing bargaining-unit employees' conditions of employment – namely, by assigning lower-graded duties to the incumbent CRs to perform – without giving the Union notice of, or an opportunity to bargain over, the change.[2]

B. Judge's Decision

Before the Judge, the GC argued that the assignment of lower-graded duties to the incumbent CRs adversely impacted the performance of their CR duties, which in turn would impact performance evaluations, awards, promotions, and step increases. Specifically, the GC alleged that, by requiring incumbent CRs to dedicate a sizeable portion of their work time to completing duties that SRs previously had performed, the Respondent reduced the amount of time that CRs were able to dedicate to CR work in order to meet performance goals and earn merit-based awards, pay increases, or promotions. Accordingly, the GC argued that the Respondent's action constituted a significant change that required the Respondent to provide the Union with notice and an opportunity to bargain.

The Respondent argued that the amount of work for incumbent CRs did not change, and that no conditions of employment were altered as a result of the promotions. On this point, the Respondent asserted that wages, office hours, lunches, breaks, leave approvals, leave procedures, performance appraisals, overtime opportunities, and operating procedures remained the same. Further, the Respondent argued that even if a change in conditions of employment did occur, the change was not more than de minimis.

The Judge determined that assigning lower-graded work, as previously done by SRs, to the incumbent CRs constituted a change in the conditions of their employment. In doing so, he noted that the two positions were substantially different, as evidenced by the fact that SRs and CRs are initially graded, respectively, as GS-8s and GS-11s. The Judge observed that the CR position is "investigative and adjudicative [in] nature," while SR work is "administrative [in] nature" – which he found to be a "glaring difference."[3] The Judge also credited witness testimony that, following the reassignment of duties, work previously performed by SRs occupied between forty and sixty percent of incumbent CRs' standard workday.

The Judge also determined that the effects of the changes on conditions of employment were more than de minimis. The Judge re-emphasized the significant differences between the types of work performed by SRs and CRs, as well as the fact that these new duties consumed forty to sixty percent of incumbent CRs' work days. The Judge also found that the incumbent CRs' workloads had increased following the addition of these new responsibilities, which impeded their ability to perform their normally-assigned duties. Accordingly, the Judge concluded that the Respondent violated § 7116(a)(1) and (5) of the Statute when it did not provide notice and an opportunity to bargain over these changes. The Judge ordered the Respondent to cease and desist from changing employees' conditions of employment without providing the Union with notice and an opportunity to bargain; to bargain, upon request, with the Union over the impact and implementation of the changes; and to post a notice to its employees regarding the outcome of his decision.

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to the Respondent's exceptions, which we do not consider for the reasons discussed below.

III. Preliminary Matters

A. We will not consider the GC's opposition.

The record in this case indicates that the Respondent served its exceptions on the GC by email on July 29, 2016.[4] Accordingly, in order to be considered timely filed, any opposition to the Respondent's exceptions had to be postmarked by the U.S. postal service, filed in person, deposited with a commercial delivery service, or filed electronically through the FLRA's eFiling system no later than August 18, 2016.[5] However, the GC did not file its opposition through the Authority's eFiling system until August 23, 2016.

As it appeared that the GC's opposition was untimely filed, the Authority issued an order directing the GC to show cause why its opposition should not be rejected as untimely. The order also stated that failure to respond to or comply with the Authority's order may result in the Authority not considering the opposition.

[2] *Id*.
[3] Judge's Decision at 6.
[4] Exceptions at 22.
[5] 5 C.F.R. §§ 2423.40(b), 2429.21, 2429.24.

The GC filed its response to the Authority's order electronically through the FLRA's eFiling system (the first response). However, documents that are not served or filed in accordance with the Authority's Regulations may not be considered by the Authority or may result in dismissal. The Authority's Regulations provide that "if you are filing documents with the FLRA, then you must file them in person, by commercial delivery, by first-class mail, or by certified mail."[6] As an alternative to those filing methods, the Regulations provide that a party may file *only* specified documents electronically through use of the FLRA's eFiling system.[7] Responses to Authority orders are not one of the specified documents that may be eFiled.[8] It is well-established that parties filing documents with the Authority are "responsible for being knowledgeable of the statutory and regulatory filing requirements."[9]

Because the first response was submitted through the eFiling system, the Authority then issued a second order on September 29, directing the GC to show cause why the Authority should consider its opposition because the response was filed in an unauthorized manner.[10] The GC responded to the second show-cause order. In that response, the GC argues that the exceptions and the opposition were properly filed using the eFiling system, and that it mistakenly assumed that responses to procedural orders concerning such filings could be eFiled as well.[11]

Consistent with its Regulations,[12] the Authority's practice is not to consider documents that are improperly filed,[13] including documents that are erroneously eFiled.[14] Accordingly, we will not consider the first response. Consequently, we reject the GC's opposition as untimely and will not consider it.

B. We will not consider the Respondent's "covered-by" defense.

In its exceptions, the Respondent argues that it had no obligation to bargain over any changes to conditions of employment because those changes are already covered by the parties' agreement.[15] An argument that a matter is "covered by" a collective-bargaining agreement is an affirmative defense that must be timely raised by a respondent, in order to put the opposing party on notice, or it will be deemed waived.[16] The Authority has previously held that the "covered-by" doctrine cannot be raised for the first time in post-hearing briefs, absent extenuating circumstances, such as previously unavailable evidence.[17]

Here, the Respondent argues that it timely raised its "covered-by" argument prior to its post-hearing brief because it stated in its theory of the case that any changes to conditions of employment were "already covered by the [parties' agreement]."[18] However, the Respondent did not specify which provisions of the parties' agreement covered the changes.[19] Further, though the Respondent introduced its entire collective-bargaining agreement as evidence during the hearing, the Respondent did not make any reference to the specific articles, nor did it raise a covered-by argument during its opening statement.[20] Indeed, no Respondent witness testified as to the terms of the parties' agreement. Under Authority precedent, merely referencing a collective-bargaining agreement in a respondent's theory of the case, without any further specificity or related testimony or argument during the hearing, is not sufficient to raise a "covered-by" defense in a ULP proceeding.[21]

Given this precedent and the absence of any extenuating circumstances, we find that the Respondent waived its "covered-by" defense by failing to raise it in a timely fashion, and we will not consider it.

[6] *Id.* § 2429.24(e).
[7] *Id*. § 2429.24(f).
[8] *Id*.
[9] *AFGE, Local 2065*, 50 FLRA 538, 539-40 (1995).
[10] *See* 5 C.F.R. § 2429.24(e).
[11] Resp. to Second Order to Show Cause at 2.
[12] 5 C.F.R. § 2429.24(e).
[13] *E.g.*, *Marine Eng'rs' Beneficial Ass'n, Dist. No. 1 – PCD*, 60 FLRA 828, 828-29 (2005) (Authority did not consider agency's statement of position filed by fax).
[14] *U.S. DOD, Dependents Sch.*, 70 FLRA 84, 86 (2016).
[15] Exceptions at 16-21.
[16] *U.S. Dep't of HUD*, 56 FLRA 592, 596 (2000) (*HUD*) (citing *SSA*, 55 FLRA 374, 377 (1999)); *see also* 5 C.F.R. § 2423.23(c).
[17] *See Pension Benefit Guar. Corp.*, 59 FLRA 48, 52 (2003) (*PBGC*).
[18] Exceptions, Attach. 1, Respondent's Pre-Hr'g Submissions, at 2.
[19] *See id*.
[20] *See generally* Exceptions, Attach. 2, Hr'g Tr. (Hr'g Tr.).
[21] *PBGC*, 59 FLRA at 52 (citing *HUD*, 56 FLRA at 596; *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 117 (D.C. Cir. 1996)). *See generally* FLRA, Office of the GC, Litigation Manual 2-6 to -7 (2000).

IV. Analysis and Conclusions: The Judge did not err in his conclusions of law or in his findings of fact by determining that changes were made to conditions of employment that had a more than de minimis effect.

A. The Judge did not err in his legal conclusions by determining that the Respondent made changes to conditions of employment that had more than a de minimis effect.

The Respondent argues that the Judge erred in his application of Authority precedent and in his conclusions of law when he determined that the Respondent made changes to conditions of employment that were greater than de minimis.[22]

In general, an agency is not required to provide notice of a change and an opportunity to bargain unless the change will have a greater than de minimis effect on employees' conditions of employment.[23] In assessing whether the effect of a change is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining-unit employees' conditions of employment.[24]

The Authority has found changes to have only a de minimis effect where they have little significance and impact, such as the reassignment of an employee from one position back to the employee's previous, substantially similar, position, or the discontinuation of an assignment involving only a small amount of work.[25] Conversely, the Authority has found a change to have a greater than de minimis effect when it involves a change in conditions of employment that is more significant, such as where employees are assigned additional tasks that they did not perform before, or employees' workloads are increased significantly.[26]

Here, the Judge found that the Respondent made changes to conditions of employment and that the effect of those changes was more than de minimis because they required incumbent CRs to dedicate forty to sixty percent of their normal workdays to performing what were formerly SR duties.[27] The Judge noted that the lower-graded SR duties, which are administrative in nature, are "not substantially similar" to the "investigative and adjudicative nature of the work performed by a CR."[28] The Judge observed that the significant difference between the duties is further evidenced by the fact that that the SR position is classified as starting as a GS-8, whereas the CR position is classified as starting as a GS-11.[29]

The Judge also found that, with the addition of these new responsibilities, the incumbent CRs underwent a training program that spanned from February to September and that the workload for the incumbent CRs increased.[30] The Judge noted that the incumbent CRs "received no reduction in their CR workload by virtue of the newly promoted CRs, but they now had to perform the traditional SR duties previously performed by those promoted."[31] The Judge concluded by noting that, under Authority precedent, "[a] change in conditions of employment that causes an employee to be assigned more work than that assigned prior to the change constitutes a greater than de minimis change for those employees whose duties are substantially increased."[32]

The Respondent has not shown that the Judge erred in this regard. The Respondent's argument hinges on the assertion that "increased workloads alone are insufficient" to conclude that a change has greater than de minimis impacts on conditions of employment.[33]

This argument is unavailing for two reasons. First, as the Judge correctly noted in his decision,[34] Authority precedent explicitly holds that a change in conditions of employment that results in the effect of an increased workload is more than de minimis.[35] The Respondent attempts to distinguish the cases relied upon by the Judge in his decision. Specifically, the Respondent notes that, in addition to the increased workloads seen in those cases, there were other factors (such as shortened lunch breaks, office relocations, and increased overtime) that led the Authority to find that the impact of the changes in conditions of employment was

[22] Exceptions at 9-16.
[23] *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*).
[24] *Id*. at 187-88 (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 240 (2011)).
[25] *NTEU*, 64 FLRA 462, 464 (2010) (citing *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574, 577-78 (1992)).
[26] *Id*. (citing *U.S. Dep't of HUD*, 58 FLRA 33, 34-35 (2002); *SSA, Malden Dist. Office, Malden, Mass.*, 54 FLRA 531, 536-37 (1998); *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358, 1369-70 (1998) (*SSA Gilroy*)).
[27] Judge's Decision at 8.
[28] *Id*. at 6.
[29] *Id*.
[30] *Id*. at 3, 6.
[31] *Id*. at 8 (citing Hr'g Tr. at 62).
[32] *Id*. (citing *Kirtland AFB*, 64 FLRA at 172-76; *SSA Gilroy*, 53 FLRA at 1369-70).
[33] Exceptions at 11.
[34] *See* Judge's Decision at 8 (citing *Kirtland AFB*, 64 FLRA at 176; *SSA Gilroy*, 53 FLRA at 1369-70).
[35] *Kirtland AFB*, 64 FLRA at 176 (citing *SSA Gilroy*, 53 FLRA at 1369-70).

more than de minimis.[36] However, the presence of these other factors in previous cases does not mean that their presence is *required* in order to conclude that the effect of the change in conditions of employment is more than de minimis in this case.

Secondly, in addition to the increased workload, the Judge found that the change made by the Respondent affected the incumbent CRs' conditions of employment in large part because the Respondent imposed *new duties* upon the CRs that consumed a sizeable amount of their work time.[37] It is well-established that changes have a more than de minimis impact if they cause employees to assume a significant portion of new duties.[38] For example, the Authority has found that new duties consuming one to three hours a day were more than de minimis,[39] and that new duties consuming fifteen percent of an employee's workday were more than de minimis.[40] Given this precedent, the Respondent does not demonstrate that the Judge erred in his legal conclusion that the effect of the increase in new duties for CRs was more than de minimis.

B. The Judge did not err in his findings of fact.

Additionally, the Respondent argues that the Judge erred in his findings of fact and relied on non-credible testimony in concluding that the Respondent made changes to the incumbent CRs' conditions of employment and that the effects of the changes were more than de minimis.[41] Specifically, the Respondent asserts that the Judge erred by relying on the testimony of a CR who testified that SR duties constituted forty to sixty percent of his work time following the SR promotions.[42] According to the Respondent, when he was questioned during cross-examination, this witness admitted that the new duties constituted only one to one-and-a-half days every two weeks, or ten to fifteen percent of his work time.[43]

The Respondent mischaracterizes the witness's testimony. On direct examination, the witness stated that, *encompassed within* the forty to sixty percent of work time dedicated to SR duties, he and the other CRs were required to spend one to one-and-a-half days every two weeks performing receptionist duties that were normally performed by SRs.[44] When the witness stated upon cross-examination that certain SR duties constituted one to one-and-a-half days every two weeks, he was clearly referring back to his earlier comments regarding *receptionist* duties, and not the entire scope of SR duties.[45] Despite the Respondent's attempt to characterize his testimony as otherwise, the witness never contradicted his statement that SR duties occupied forty to sixty percent of his worktime following the promotions.[46] Moreover, this witness was not the only CR who testified that SR duties consumed more than forty percent of work time following the reassignment.[47]

The Authority will not overrule a judge's credibility determination unless a clear preponderance of all relevant evidence demonstrates that the determination is incorrect.[48] Given that the Respondent mischaracterizes the witness's testimony, and that more than one witness testified that SR duties occupied forty to sixty percent of worktime following the promotions, we decline to do so here.

The Respondent also claims that the Judge "failed to make sufficient factual findings, as well as discuss 'evidence that appears to contradict the Judge[']s finding'" that the changes to conditions of employment were more than de minimis.[49] However, as explained above, the Judge made numerous factual findings to support his conclusion that the changes were more than de minimis. Specifically, the Judge found that SR duties consumed forty to sixty percent of the CRs' worktime, that those duties were substantially different from regular CR duties, that the incumbent CRs underwent a training schedule that ran from February to September, and that CRs' workload increased as a result of having to perform SR duties.[50] The Respondent does not demonstrate that these findings are not supported by a preponderance of the evidence.[51] Moreover, aside from the mischaracterized testimony discussed above, the

[36] *See* Exceptions at 13-16 (citing *Kirtland AFB*, 64 FLRA at 167-174; *SSA Gilroy*, 53 FLRA at 1358-69).
[37] Judge's Decision at 7-8.
[38] *See Kirtland AFB*, 64 FLRA at 176 (citing *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002)); *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 87, 90 (2009) (*Davis-Monthan AFB*); *U.S. DOJ, INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 35 FLRA 1039, 1047-48 (1990) (*San Diego Sector*).
[39] *Davis-Monthan AFB*, 64 FLRA at 87, 90.
[40] *San Diego Sector*, 35 FLRA at 1047-48.
[41] Exceptions at 10, 15.
[42] *Id*. at 15.
[43] *Id*. (quoting Hr'g Tr. at 104).
[44] *See* Hr'g Tr. at 86, 94.
[45] *See id*. at 104.
[46] *See id*. at 86, 94.
[47] *See id*. at 61, 71.
[48] *SSA*, 69 FLRA 363, 366 (2016) (*SSA*) (citing *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 68 FLRA 882, 885 (2015) (*VA*)).
[49] Exceptions at 10 (quoting *U.S. Dep't of the Air Force, 325th Mission Support Grp. Squadron, Tyndall Air Force Base, Fla.*, 65 FLRA 877, 881 n.4 (2011)).
[50] *See* Judge's Decision at 3, 5-8.
[51] *SSA*, 69 FLRA at 366 (citing *VA*, 68 FLRA at 885).

Respondent does not specify what evidence exists that "contradict[s] the Judge[']s finding[s],"[52] and therefore provides no basis for its claim that the Judge ignored evidence that did not support his conclusions.

Accordingly, the Respondent fails to demonstrate that the Judge erred by concluding that the Respondent made changes to the incumbent CRs' conditions of employment and that the effects of those changes were more than de minimis, and so, we deny this exception.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[53] and § 7118 of the Statute,[54] the Respondent shall:

1. Cease and desist from:

(a) Changing employees' conditions of employment without first providing the Union with notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Upon request, bargain with the Union to the extent required by the Statute over the impact and implementation of changes to the conditions of employment for bargaining-unit employees that resulted from CRs being assigned lower-graded SR duties.

(b) Post at its facilities where bargaining-unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Mike Kramer, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, notices shall be distributed electronically, on the same day as posting of the physical notices, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with bargaining-unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Regional Office, FLRA, in writing, within thirty days from the date of this order, as to the steps taken to comply.

[52] Exceptions at 10.
[53] 5 C.F.R. § 2423.41(c).
[54] 5 U.S.C. § 7118.

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

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

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to provide the American Federation of Government Employees, Local 1336 (Union) with notice and an opportunity to bargain changes to conditions of employment of bargaining-unit employees.

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

WE WILL, upon request, negotiate in good faith with the Union over the changes to conditions of employment of bargaining-unit employees resulting from assigning Claims Representatives lower-graded Service Representative duties.

_____
Social Security Administration, Region VII,
Kansas City, Missouri

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

This Notice must remain posted for sixty 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 Chicago Regional Office, Federal Labor Relations Authority, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL, 60604, and whose telephone number is: (312) 886-3465.

Office of Administrative Law Judges

SOCIAL SECURITY ADMINISTRATION
REGION VII
KANSAS CITY, MISSOURI
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1336, AFL-CIO
CHARGING PARTY

Case No. CH-CA-15-0349

Sarah F. Terman
Susanne S. Matlin
For the General Counsel

Jonathan Tabacoff
For the Respondent

Dana L. Freeman
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On May 19, 2015, the American Federation of Government Employees, Local 1336, AFL-CIO (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Social Security Administration, Region VII, Kansas City Office (SSA/Respondent), alleging the Respondent committed a ULP by changing the conditions of employment for bargaining unit employees when it changed the office structure to an all Claims Representative office without providing the Union with notice and refusing to bargain over the change. GC Ex. 1(a). After an investigation of the charge, the Chicago Regional Director issued a Complaint and Notice of Hearing on November 30, 2015, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing a change in the bargaining unit employees' conditions of employment when it implemented new duties for Claims Representatives by assigning those employees duties previously performed by Service Representatives without giving the Union notice of the change and an opportunity to bargain over the change to the extent required by Statute. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on December 28, 2015, denying that new duties not previously performed by Claims Representatives were assigned and denying that they failed and refused to bargain in good faith. GC Ex. 1(c).

A hearing on the matter was conducted on February 24, 2016, in Jefferson City, Missouri. All parties were represented and afforded an opportunity to be heard, introduce evidence, and examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when the Respondent failed and refused to bargain in good faith with the Union. I find that the Respondent changed conditions of employment for some bargaining unit employees and that the change had a greater than de minimis effect on those employees. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Ex. 1(b). At all material times, Ruth Taylor was the District Manager, Diane Mormann was the Assistant District Manager, and Matthew Haeffner was the Operations Supervisor. They are supervisors and/or management officials within the meaning of §§ 7103(a)(10) and (11) of the Statute. GC Ex. 1(b). The American Federation of Government Employees (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide unit of Social Security Administration employees, which includes employees at the Respondent's Jefferson City, Missouri field office. The Union is an agent of AFGE for the purpose of representing unit employees at the Respondent's offices in Kansas, Missouri, Nebraska, Iowa and Texas, including those at the Jefferson City office. *Id.*

Distinctions Between Positions

The primary duty of a Service Representative (SR) is to provide assistance to beneficiaries and the public regarding all programs administered by the SSA. GC Ex. 5. An SR is responsible for duties including, but not limited to: (1) conducting initial interviews with beneficiaries and/or representatives and the public to determine the nature of their problem or interest; (2) processing Title II or Title XVI post-entitlement workloads; (3) processing Social Security Number applications; (4) completing Title XVI applications, (5) processing payments; and (6) explaining overpayments and reconciling discrepancies that cause an interruption in the receipt of benefits. *Id.* Essentially, an SR primarily performs administrative duties before and after entitlement determinations are made by a Claims Representative. The official title on the SR position description is contact representative, which demonstrates the receptionist nature of the position. GC Ex. 5.

The principal duty of a Claims Representative (CR) is to perform duties related to either Title II or Title XVI, or as a generalist in both programs. GC Ex. 4. A CR is responsible for duties that include, but are not limited to: (1) interviewing to obtain information about an individual for initial and continued eligibility; (2) assisting applicants with securing the evidence needed to determine entitlement; (3) examining evidence to evaluate the validity and acceptability in establishing entitlement; (4) identifying the need for social services, (5) determining the benefit amount payable to those qualified, and (6) resolving field office jurisdictional questions. *Id.* In large part, a CR performs investigative duties and makes adjudicatory determinations.

The distinctions between the SR and CR duties are evidenced by the Respondent's own establishment of separate grades, classifications, position descriptions, performance plans and training programs for the positions. The initial grade for the SR position on the Federal General Schedule (GS) is GS-8, while the starting grade for the CR position is GS-11. GC Ex. 4, 5. Clearly, SSA and the Office of Personnel Management recognize a substantial difference in the difficulty of the duties required of the two positions.

The Office

In October of 2014, there were four Service Representatives and eleven Claims Representatives employed at the Jefferson City field office. Tr. 17. During the second week of that month, there was a staff meeting in which Ruth Taylor, District Manager, announced that there were going to be two or more inter-office promotions from SR to CR. *Id.* All four SRs applied for the CR positions and by December, all four SR applicants were notified of their promotion to the CR position. *Id.* at 18.

At a staff meeting in January 2015, it was disclosed that the Jefferson City office would become an all CR office because all the SRs within the office were promoted to CR positions. As a result, the administrative and receptionist type work previously performed by SRs would be distributed to the entire CR staff. Tr. 20-21.

Those CRs who had previously performed only CR work began training on the duties typically performed by SRs as they would be assigned that work under the office structure that consolidated the SR and CR duties. Tr. 50. The training calendar for the incumbent CRs ranged from February 2015 to September 2015. *Id.* at 51. The CRs watched videos related to a specific subject matter typically handled by an SR in a conventional field office. *Id.* at 50. The CRs would then be assigned the type of work covered by the training for completion. Tr. 59. For example, if a CR received training on how to process a request for an original Social Security number, at the completion of training they were expected to be able to perform the duty previously performed by a SR.

In May 2015, the newly promoted CRs were placed into a four month long training program covering the duties typically performed by a CR in a conventional field office. Tr. 33. This training provided the new promoted SRs with the knowledge and skills necessary to perform their new CR work. Tr. 32-33. During this training, the former SRs were engaged in training on a full time basis and the incumbent CRs were assigned the SR duties and responsibilities previously performed by the newly appointed CRs. *Id.* at 32, 61-62.

The incumbent CRs working in the Jefferson City field office before it was converted to an all CR office testified that after the promotions went into effect, between forty and sixty percent of their work was devoted to duties previously performed by a SR. Tr. 61, 94. Additionally, SR work was given priority over CR work because it involved direct interaction with applicants and the general public in-person or by telephone. *Id.* at 62-63.

POSITIONS OF THE PARTIES

General Counsel

Section 7116(a)(1) of the Statute states that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right and § 7116(a)(5) states that it is an unfair labor practice for an agency to refuse to consult or negotiate in good faith with a labor organization.

The General Counsel (GC) contends that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to provide notice and to bargain in good faith before consolidating the duties performed within the SR and CR positions. The GC argues that the imposition of SR duties upon the incumbent CRs within the office adversely impacted the performance of their CR duties, which impacts awards, promotions, and step increases, along with instilling worry and stress that the GS-11 CR position will be downgraded to a lower grade, because the duties of the GS-8 SR position were added to the position. Tr. 12.

The GC alleges that the action by the Respondent constituted a significant change that requires notice and bargaining if requested. Tr. 11. The GC argues that the promotion of all the SRs resulted in the CRs being required to perform lesser graded duties previously performed by the SRs. *Id.* Further, when the promoted employees completed training, all were designated as Title XVI CRs, which meant that the Title II CRs had none of their CR workload reduced, while they absorbed their share of SR duties. *Id.* at 12. The GC contends that the reassignment of SR work to the CRs within the office reduced the amount of CR work the employees can complete, which affects their cash awards, step increases, and promotion potential, and could result in a performance-based action. *Id.*

As a remedy, the GC seeks post-implementation bargaining and a notice posted at all field offices in Region VII, and distributed by email to all bargaining unit employees represented by the Union.

Respondent

The Respondent claims that the issue of the case is not about the violation of the Statute as a result of the change in duties. Instead, the Respondent frames the issue as an alleged violation of the Statute based upon the promotion of four Service Representatives to Claims Representative positions. Tr. 13. To this, the Respondent argues that there is no violation. *Id.*

Also, the Respondent asserts that the amount of work for the employees in the Jefferson City office was not changed. *Id.* The Respondent contends the original Claims Representatives have not had to perform new work because they were familiar with SR workloads, and that they were provided training on any new duties with which they needed assistance. *Id.*

Further, the Respondent alleges that not a single condition of employment changed as a result of the promotions. *Id.* at 14. The Respondent compiled a list of factors including: (1) wages; (2) office hours; (3) lunches and breaks; (4) leave approvals; (5) leave procedures; (6) performance appraisals; (7) overtime opportunities; and (8) operating procedures, which the Respondent contends remained the same. *Id.* Further, the Respondent argues that even if a condition was changed, the change was not greater than de minimis. *Id.*

Finally, the Respondent argues that the result of the General Counsel's position would require the SSA to bargain with the Union any time an office made staffing changes. *Id.* at 15. According to the Respondent, imposing a duty to bargain every time the SSA promotes an employee or when an employee retires, would create an "absurd" result that cannot be the purpose of the Statute. *Id.*

ANALYSIS AND DISCUSSION

Before discussing the change to conditions of employment and whether the change was greater than de minimis, I address the Respondent's mistaken assertion that this case is not about a change in duties, but instead concerns the bargaining burden placed upon an agency when promotions are made. Manufacturing a dispute you can win when facing adverse facts serves little purpose. It is a waste of government time and resources, along with taxpayer's money. The Complaint in this case did not allege that the Respondent violated the Statute by promoting Service Representatives to Claims Representative positions. The Complaint alleged that the Respondent implemented new duties for Claims Representatives by assigning them the lesser graded duties previously performed by Service Representatives.

While the need for CRs to perform new duties was precipitated by Respondent's promotion of all of the Service Representatives in the office, the crux of the Complaint was not that Service Representatives were given new duties pursuant to a promotion. The crux was that Claims Representatives now had to perform lesser graded Service Representative duties because there were no longer any Service Representatives assigned to the office. Had the Respondent replaced the Service Representatives it promoted and not altered the duties of Claims Representatives already working in the office, no change requiring bargaining would have

occurred. But alas, and perhaps in reliance upon misguided legal advice, the Respondent did not solve the problem of who would perform SR duties by hiring replacement SRs. Tr. 132. Instead, within this particular office, it consolidated the work of the SR and CR positions, creating a hybrid of the GS-8 SR position and the GS-11 CR position, and it is the new duties assigned to the CRs pursuant to the consolidation that is the matter at issue in this case. Put another way, had the Respondent permanently assigned lesser graded duties to CRs that constituted forty to sixty percent of their duty day, the change would have required notice and an opportunity to bargain even if no SRs were promoted, because that raises a legitimate question as to whether the duties performed within the position remains properly graded.

A Change in Working Conditions

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. *U.S. DHS, Border & Transp. Sec. Directorate, U.S. Customs & Border Prot., Border Patrol, Tucson Sector, Tucson, Az.*, 60 FLRA 169 (2004). The burden is on the General Counsel to prove the elements of the alleged violation by a preponderance of the evidence. *Air Force Flight Test Ctr., Edwards AFB, Cal.*, 55 FLRA 116, 121 (1999).

I find that the change in work performed by the CRs constituted a change in conditions of employment and that the two positions that were merged are not substantially similar. In fact, they are so dissimilar that the SR position is graded as a GS-8 position, while the CR position is graded as a GS-11. Although some CRs had prior experience as SRs, those employees do not represent the entire group of CRs impacted by the change. Moreover, the Respondent provided training to all CRs, even those with prior SR experience. While "usually about three that would automatically just go up without being prompted by management[]", there were a total of eleven CRs in the office prior to the promotion of all of the SRs. Tr. 123. Thus, not all of the CRs had sufficient knowledge or understanding of the job requirements necessary to perform the duties required of an SR. Further, the Respondent solicited ideas about what CRs would need to learn and conducted training to teach them how to perform SR duties after there were no SRs assigned within the office. Tr. 133-34.

The most glaring difference between the two positions is the investigative and adjudicative nature of the work performed by a CR, as opposed to the administrative nature of work performed by a SR. The fact that the newly promoted SRs believed that they would no longer be performing receptionist or telephone duties, combined with their belief that CR work was substantially different from that of an SR demonstrates that a change was implemented when CRs were required to perform those SR duties. After the office was converted to an all CR office, all CRs had to perform SR duties. The fact that the new duties may have been of a lesser grade and thus easier to grasp or perform, does not mean assigning those new duties was not a change to the CR's conditions of employment and I find that a change was unilaterally imposed without providing the Union notice or an opportunity to bargain.

The argument that there was no change in the conditions of the employment because the SRs were promoted is without merit. The Respondent's own witness conceded that prior to the change, SR duties were not typically performed by a CR. Tr. 132. Testimony that spoke of "we're an all-[claims representative] office, and everyone is going to be doing all of the work now[]" and "she [Ruth Taylor] stated that she was advised by the area director . . . to either convert us to an all-CR office or a generalist office, and she felt like the all-CR office was the best scenario . . . . " (Tr. 21, 48-49), all demonstrate that a conversion, consolidation, hybridization was unilaterally imposed upon the employees in the Jefferson City field office. While a few may have benefited from this change, the great majority of the employees in the office did not, and they were adversely affected by the restructuring that was implemented without notice or an opportunity to bargaining over the change. The laundry list of conditions of employment presented by the Respondent as things that were not changed for employees does not prove that no change occurred or that the change that was made was not more than de minimis.

The Change Was Greater Than De Minimis

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. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999). In determining whether a change is more than de minimis, the Authority places principal emphasis on general areas of consideration such as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. *Dep't of HHS, Soc. Sec. Admin.*, 24 FLRA 403, 408 (1986). When the duties and tasks of the two positions in question are substantially similar, there is no obligation to bargain with a union regarding implementation of

procedures or appropriate arrangements pertaining to the reassignment of the employee. *Id.* However, the duties and tasks assigned in this situation were not substantially similar, and this conclusion is evidenced by the distinct position descriptions and grade levels assigned. The Respondent's contention otherwise is the equivalent of declaring that all the employees do government work and that is close enough. Obviously, it was not close enough for those who established the grade levels assigned to the positions.

In this case, the nature of the change was foreseeable and directly affected employees as a whole. *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000). It can be reasonably inferred that the Respondent foresaw the change as the implementation of SR training for the CRs in the office demonstrates that management understood that some CRs lacked sufficient knowledge and skills necessary to perform SR duties. Additionally, the content of training between prior CRs and new CRs did not overlap. Tr. 34. The duties and responsibilities required of the two positions vary enough to merit two distinct grades under the GS system and incumbent CRs had to perform duties previously not required of them. For example, while an SR had to answer the phones and deal with the public at the front counter of the office, this was not required of CRs prior to the change. Prior to the office conversion and duty consolidation, CRs were not assigned front desk duties and rarely helped out with such duties. Tr. 18, 24. Since the conversion however, what was previously solely the province of an SR now occupies between forty and sixty percent of a CR's standard workday. *Id.* at 62, 94. Additionally, CRs rarely dealt with Division of Family Services workloads, representative payees' checks, Medicare, and initial applicant intake prior to the change. Tr. 21-24. Because of this, the change was more than de minimis and by imposing such change upon all CRs, even those incumbent to the position prior to the promotions, the Respondent directly affected bargaining unit employees as a whole.

Further evidence of more than a de minimis impact is demonstrated by the fact that the workload for some incumbent CRs increased with the addition of new responsibilities. All of the new CRs were trained as Title XVI representatives, thus, the incumbent Title II CRs maintained all of their prior CR workload. Tr. 62. They received no reduction in their CR workload by virtue of the newly promoted CRs, but they now had to perform the traditional SR duties previously performed by those promoted. *Id.* This impeded their ability to do the CR work already assigned to them. *Id.* at 63. While Ruth Taylor's refusal to bargain was in part based on her belief that the increased workload imposed by SR duties would be offset by decreases in CR duties, no reduction in CR workloads were experienced by the Title II CRs. GC Ex. 7. A change in conditions of employment that causes an employee to be assigned more work than that assigned prior to the change constitutes a greater than de minimis change for those employees whose duties are substantially increased. *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166 (2009); *SSA Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358 (1998).

CONCLUSION

I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to bargain in good faith after the conversion of the Jefferson City field office to a full Claims Representative office resulting in Claims Representatives having to perform lesser graded Service Representatives duties.

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

ORDER

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

1. Cease and desist from:

(a) Changing employees' conditions of employment without first providing the American Federation of Government Employees, Local 1336, AFL-CIO (Union) with notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Upon request, bargain with the Union to the extent required by the Statute over the impact and implementation of changes to the conditions of employment for bargaining unit employees that resulted from Claims Representatives being assigned lesser graded Service Representative duties.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such

forms, they shall be signed by the Regional Commissioner, Mike Kramer, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Disseminate a copy of the signed Notice through the Agency's email system to all bargaining unit employees represented by the Union, on the same day, that the Notice is physically posted.

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

Issued, Washington, D.C., June 30, 2016

_____
CHARLES R. CENTER
Chief Administrative Law Judge

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

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

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to provide the American Federation of Government Employees, Local 1336 (Union) with notice and an opportunity to bargain changes to conditions of employment of bargaining unit employees.

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

WE WILL, upon request, negotiate in good faith with the Union over the changes to conditions of employment of bargaining unit employees resulting from assigning Claims Representatives lesser graded Service Representatives duties.

_____
(Respondent/Agency)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Ave., Suite 445, Illinois 60604, and whose telephone number is: (312) 886-3465.