UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

PORTSMOUTH NAVAL SHIPYARD PORTSMOUTH, NEW HAMPSHIRE Respondent	
and	Case No. 1-CA-10268
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 4 Charging Party	

Marilyn H. Zuckerman, Esquire
For the General Counsel

Robert E. Campbell, Agency Representative
For the Respondent

Del Roberts, President, IFPTE Local 4
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The Respondent (Shipyard) took some work away from certain employees represented by the Charging Party (the Union). This case presents the issue of whether this constituted a change in a condition of employment that was more than de minimis and therefore subject to an obligation to negotiate over its impact and implementation.

A hearing was held in Portsmouth, New Hampshire on June 20, 1991. Counsel for the General Counsel and for the Shipyard filed post-hearing briefs.

Findings of Fact

Within the Shipyard is a Radiological Control Office containing organizational divisions including the Radiological Support Division. Within this division is the Radiation Worker Training Branch, which employs approximately 11 employees classified as instructors. These instructors are part of a bargaining unit of approximately 2,000 employees at the Shipyard represented by the Union. Some of the instructors are qualified to train other employees in safety practices for work involving radiologically contaminated materials within enclosed "containments." This training has been given the code designation, "N & P." "N & P" training is only one of several kinds of training that these instructors administer.

N & P training is required for all employees who are to be certified to work in "radiological containments." This training consists of 12 hours for initial certification evenly divided among lecture, hands-on practice, and an examination. The same training was given to employees who, every two years, had to be recertified to continue performing this work. Before November 1990, the five instructors who were then qualified to give this training taught the classes to both initial certification students and employees who sought recertification. Both could, and did, attend classes together, although the class size was limited to four students. The complete training package was offered between four and six times a month, so that (if I understand it correctly) each qualified instructor would have, on an average, given the 12-hour training package about once a month. (This finding moots the testimonial dispute as to whether any part of the training package was optional for recertification candidates.)

The official job description for instructors qualified to give N & P training (these instructors are called either "Senior Radiation Worker Instructor[s]" or "Health Physicist [RadCon] Instructor[s]") includes both initial and recertification training. They are evaluated on the preparation, teaching, and effectiveness, of their training sessions, although not separately for recertification training.

In 1988 or 1989, the Radiological Support Division began a quarterly refresher training program the purpose of which was, at least in part, to supplement the biennial N & P recertification training. This refresher training was prepared by the instructors in the Training Branch but given by employees known as "RADCON leaders" in the individual

"shops." In 1990, management decided that the eight hours of lecture and practical training given by the Training Branch instructors might no longer be necessary for employees who had to take the N & P examination for recertification purposes.

As of November 1, 1990, on a trial or pilot basis, candidates for N & P recertification were no longer given the biennial training. However, they continued to take the examination, administered by the N & P instructors from the Training Branch. This trial program was still in effect as of the date of the hearing in this case, in June 1991. The Shipyard did not give the Union advance notice or an opportunity to negotiate over the impact or implementation of this program.

As a result of the elimination of recertification candidates from the N & P training sessions, fewer instructor-hours have been needed for this aspect of employee training. The actual hour reduction resulting from this change is in dispute, as is the significance of the reduction. Both will be reserved for discussion below.

Earlier, in 1989, the instructors had lost the assignment of another type of recertification training which resulted in a total loss of hours to the branch of approximately 12 hours per month. In February or March 1990 the Union received notice of a proposed reduction-in-force (RIF) of then unknown proportions. The RIF was originally scheduled to go into effect in October 1990 and was rumored to be of a scale involving 2,000 to 3,000 of the Shipyard's 8,000 employees. The RIF had not yet occurred when the N & F recertification training was changed, and, in fact, did not occur until April 1991. Meanwhile, late in 1990, another 30-36 instructor-hours per month may have been lost to the Training Branch instructors. See Tr. 21, 26-27, 72, 88-91, and discussion below.

There were 11 instructors in the Training Branch as of February 1991. The record does not reveal whether any of them had been added since November 1, 1990. There was credible evidence, however, that new assignments were continually being added to the instructors' workloads, sufficient to take up any slack that the reduction in N & P training duties might otherwise have caused.

Discussion and Conclusions

> An agency must negotiate with the exclusive representative over changes in unit employees' conditions of employment, except as provided otherwise by Federal law, Government-wide rule or regulation, or agency regulations for which a compelling need exists. Even if the decision to effect the change in conditions of employment is outside the duty to bargain, an agency must bargain about the impact and implementation of a change that has more than a de minimis impact on unit employees.

U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA 875, 880 (1990). In the instant case there is no serious issue over the fact that the Shipyard made a unilateral change in a condition of employment: the assignment of N & P recertification classes to instructors represented by the Union. The issue is whether that change had more than a de minimis impact.

In determining whether a change has more than a de minimis impact, the Authority:

> will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 408 (1986)(SSA). Although SSA, which announced a revised de minimis standard, has been cited frequently as a lead case, great care must be taken in applying its revised standard. For one thing, while the phrase, "effect or reasonably foreseeable effect" might suggest two equally available bases for measuring impact, subsequent cases appear to make the first, actual "effect," dependent on the "reasonable foreseeab[ility]" element of the second. Thus, in U.S. Customs Service, Washington, D.C.; and U.S. Customs Service, Northeast Region, Boston, Massachusetts, 29 FLRA 891, 899 (1987), the Authority disavowed the judge's reliance on the actual effects of the changes involved. Instead, the Authority focused exclusively on the reasonably foreseeable effects as its

guide for applying the SSA standard, noting that the element of foreseeability was to be viewed from the time the change was proposed and implemented. See also U.S. Equal Employment Opportunity Commission, 40 FLRA 1147, 1154 (1991).

This does not appear to represent a conscious modification of the SSA standard. It does, however, suggest a nonliteral interpretation of the standard. Thus, what the Authority may have been driving at in Customs Service is that, since an agency normally must determine, before it implements a change, whether it is obligated to negotiate over any aspect of the change, the Authority will likewise consider only the circumstances existing at that time, and will not put agencies at the risk of lacking 20-20 hindsight. Under this approach, actual effects which were not reasonably foreseeable are not to be considered. Or, as Judge Oliver put it in EEOC, at 1167: "The appropriate inquiry involves an analysis of the reasonably foreseeable effect of the change in conditions of employment at the time the change was proposed and implemented. . . ." Stated another way, only reasonably foreseeable effects are relevant, but these effects may be either actual or potential. See Air Force Accounting and Financial Center, Denver, Colorado, 42 FLRA 1196, 1206 (1991) (adopting ALJ's rationale at 1218-19).

This focus on reasonable foreseeability at the time of the change suggests also that the bargaining obligation, if any, depends on the information available at that time to the agency. It follows that part of the General Counsel's burden in a subsequent unfair labor practice case is to show that the agency had (perhaps it would be sufficient to show that it should have had) before it facts that would reasonably lead it to foresee a substantial impact.

While a union might have legitimate concerns about the unknown future effects of the change, its speculation that the effects could be extensive is insufficient to create a bargaining obligation. See Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina, 20 FLRA 233, 235 (1985). Its concerns must be sufficiently well founded to warrant an objective finding that a substantial impact was reasonably likely. See U.S. Government Printing Office, 13 FLRA 203, 205-06 n.4, 224-27 (1983). Of course, if the union has information that is not available to the agency and that would help establish the reasonable foreseeability of a substantial impact, it must share such information with the agency if it (or the General Counsel) is to rely on it later to show that the agency was obligated to bargain.

In this case, the principal impact about which the Union was concerned and seeks to bargain is the increased risk that instructors, by losing the hours of work formerly devoted to N & P recertification training, would be included in the proposed RIF of then unknown proportions or a future RIF. The Shipyard argues, of course, that there was no increase in the risk and no substantial risk at all. Nearly all of the evidence presented here went to this point. The record is sparse, however, concerning the objective facts from which reasonable forecasts could have been made at the time of the change.

Although the Union feared that the proposed but then unimplemented 1990 RIF would reduce the Shipyard's work force by 2,000 to 3,000, representing 25 percent to 37.5 percent of the total work force and a completely unknown percentage of the Union's bargaining unit, the basis for that fear was nothing more than rumor. On the basis of this record, the reasonableness of such an estimate is purely speculative. I have no reason to doubt that the fear was real and of legitimate concern to every employee. The then available facts, however, must frame any inquiry into the reasonably foreseeable impact of the change at issue. Nor is there any evidence that, in November 1990, there was any objective basis for foreseeing a further impact as a result of future RIFs that might have followed the first.

The immediate effect of the N & P change was that the five instructors then affected lost a small part of their previous work assignment. This loss came on top of a smaller loss of instruction hours in 1989 and somewhat near in time to another small loss of instruction hours (although it is not clear whether this was before or after the loss of N & P training). The inquiry as to impact must focus on the reasonable probabilities viewed from the latter part of 1990, up to November 1, the date of the N & P change.

Assuming that candidates for N & P recertification had previously been required to attend the four hours of lectures and the four hours of practical training, the foreseeable loss of instruction hours resulting from the elimination of the requirement is difficult to estimate. (The evidence presented as to <u>actual</u> loss of hours is in conflict. None of it is of great probative value, to the extent that it is at all clear, and all of it is at least to some extent irrelevant.)

Since the lecture and practical training classes were formerly attended by both candidates for initial certification and candidates for recertification, it would

have been impossible to predict with very much justifiable confidence how many fewer classes would be taught. One way the change may have played out, for example, was that nearly as many classes would be given but with fewer in attendance, all being initial certification candidates. I shall attempt to assess the situation from the point of view of the agency officials in the autumn of 1990, in possession of the relevant information that the record indicates they should have had. The result is only illustrative and by its nature tentative. Recognizing, however, that more than one reasonable prediction is possible, I shall attempt to present the strongest reasonable case for a substantial reduction of hours.

According to the General Counsel's evidence, about 60 percent of the instructors' work was recertification training. This estimate did not isolate the N & P training, but it would be reasonable to assume that N & P training, which accounts for an unknown fraction of these instructors' total workload, follows the overall pattern. Whether this means that these instructors' N & P recertification students represent 60 percent of their total N & P students is another question, and one to which the record does not provide the basis for an answer.

Counsel for the General Counsel projects a loss of four to six 8-hour training packages a month to the whole group of N & P instructors. This projection is unacceptable. It assumes the elimination of all N & P lecture and practical training classes and ignores the continuation of such classes for candidates for initial certification. Using the general 60 percent figure for recertification training, one might reasonably foresee up to a 60 percent reduction in the number of these 8-hour training packages. These training packages formerly took up 32 to 48 hours per month of the time of this group of instructors. It might be reasonably foreseen, therefore, that the group's N & P hours would be reduced by between approximately 20 and 30 hours.

The General Counsel would divide the group's monthly loss by five to determine the impact on each N & P instructor. However, for RIF purposes, it is not reasonable to assume that these instructors, whose skills apply to many types of training, would be more vulnerable than the other instructors in the Training Branch simply because one of their training subjects was reduced in hours spent. (All of the instructors were officially classified as "health physicist" instructors and were in the same competitive level for RIF purposes. GC Exh. 4, Tr. 44.) The RIF risk

would increase, if at all, because it was thought that the Training Branch as a whole could withstand pruning. At that time the branch had, as I can best extrapolate, 11 instructors. Thus, a management official would have been looking at the situation as one where the 11-instructor Training Branch had arguably lost 20 to 30 hours of work, or less than two to three hours per employee, per month.

It is the General Counsel's position that whatever loss of hours is attributable to the change in N & P training must be viewed as cumulative with the other 1989 and 1990 losses of instruction hours. The 1989 loss of 12 hours a month for the whole branch, however, is inconsequential. The other asserted 1990 loss of hours is problematic. While the evidence concerning the loss of N & P instruction hours is somewhat confusing, it is almost a model of clarity compared with the evidence concerning this other asserted 30-36 hour loss per month. Assuming that these hours were in fact "lost," it is not clear whether this occurred before or after the N & P change, the only evidence being that it was "sometime in the latter part of 1990." Assuming further that it occurred before the N & P change or at about the same time, such loss is properly apportioned among all 11 instructors (Tr. 90-91) and would have had an impact of about three hours per employee, per month. Adding all three 1989-90 "losses," the result would have been a monthly loss to the branch of 62-78 hours, or 6-7 hours per employee.

Given a cumulative loss to the branch of somewhere between 32 (20 + 12) and 78 instruction hours per month, from 1989 to and including the N & P change, it will not do to view this "loss" simply as a subtraction from an otherwise static workload. For between late 1988 and the date of the N & P change, the branch had taken on about 480 hours of "instructor time" per year (or 40 hours per month) to prepare the quarterly refresher N & P courses that eventually replaced recertification N & P training. This new workload more than compensated for the loss of N & P training hours. It is apparently not a permanent addition to the workload, but illustrates that the Radiological Support Division's training programs are constantly changing, as the head of the division credibly testified. Evidence of changes occurring <u>after</u> the N & P change is entitled to little weight, but the division head's testimony is corroborated by the fact that, beginning in April 1991, the instructors were assigned to receive substantial amounts of additional training in order to retain their qualification to teach the courses that they were already teaching. Further, plans were in motion in June 1991 for expanding the

instructors' teaching duties. It is difficult, therefore, to isolate a definite "loss" of duties as of November 1990 and to project from that a reasonably foreseeable loss of positions within the branch, even under the shadow of a RIF of unknown proportions.

Counsel for the General Counsel argues also that the change had a potential impact on the N & P instructors' performance ratings, since they are rated on the instruction they "lost." However, they were still to perform the same N & P instruction, only there were to be fewer classes. Nor are they rated on N & P instruction alone. The critical elements on their performance evaluations relate to all of their duties. They retain sufficient instruction opportunities to enable them to demonstrate their performance as effectively now as before the change.

It is also contended that the change had an adverse impact on employees who had previously received the N & P recertification training, since the scores on the recertification examination decreased by an average of between four and five percent. The significance of this decrease is not self-evident, and there is no extrinsic evidence that it has any significance at all. Finally, one witness assented to the General Counsel's suggestion that the Union was concerned about the possible downgrading of the instructors' positions. There was, however, no evidence that such a result was reasonably foreseeable.

I conclude, in summary, that the General Counsel's case fails the reasonable foreseeability test. The final part of the SSA standard is the taking into account of "equitable considerations." None have been cited here, nor have I been able to determine what kinds of equitable considerations the Authority had in mind. I recommend, therefore, that the Authority issue the following order.

ORDER

The complaint is dismissed.

Issued, Washington, DC, November 19, 1991

JESSE ETELSON
Administrative Law Judge