

67 FLRA No. 29

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY
CRANE, INDIANA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1415
AFL-CIO
(Charging Party)

CH-CA-10-0414

DECISION AND ORDER

December 18, 2013

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

I. Statement of the Case

The Federal Labor Relations Authority's (FLRA's) General Counsel (GC) issued a complaint alleging that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute by unilaterally changing the method for assigning overtime to firefighters represented by the Charging Party.

In the attached decision, the FLRA's Chief Administrative Law Judge (Judge) found that the Respondent did not change the method for assigning overtime,¹ and, alternatively, that the reasonably foreseeable effects of the alleged change on firefighters' conditions of employment were merely "de minimis."² Consequently, the Judge recommended that the Authority dismiss the complaint.

The GC has filed exceptions that challenge the Judge's factual findings and legal analysis. After considering the decision and the entire record – including the exceptions and the Respondent's opposition to them – we find that a preponderance of the record evidence supports the Judge's challenged factual findings, and that

the Judge's legal analysis is consistent with applicable precedent. Therefore, we adopt the Judge's findings, conclusions, and recommendations, and we dismiss the complaint accordingly.

II. Order

We dismiss the complaint.

¹ Judge's Decision at 8.

² *Id.* at 9.

Office of Administrative Law Judges

U.S. DEPARTMENT OF THE NAVY
 NAVAL SUPPORT ACTIVITY
 CRANE, INDIANA
 Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, LOCAL 1415, AFL-CIO
 Charging Party

Case No. CH-CA-10-0414

John F. Gallagher, Esq.
 For the General Counsel

Steven P. Stoer, Esq.
 For the Respondent

Louis Pruett
 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 (Authority), Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 1415, AFL-CIO (Union), a Complaint and Notice of Hearing was issued on May 31, 2011, by the Regional Director of the Chicago Regional Office. The complaint alleges that the U.S. Department of the Navy, Naval Support Activity, Crane, Indiana (Respondent) violated § 7116(a)(1) and (5) of the Statute by changing overtime assignment procedures without providing the Union notice and an opportunity to bargain over the change to the extent required by the Statute. (G.C. Ex. 1(b)). The Respondent timely filed an Answer in which it denied having violated the Statute. (G.C. Ex. 1(f)).

The General Counsel filed a motion to postpone the hearing based on a witness being unavailable. (G.C. Ex. 1(d)). The Respondent opposed the General Counsel's motion. (G.C. Ex. 1(h)). Upon consideration

of the parties' arguments, I granted the General Counsel's motion. (G.C. Ex. 1(j)). A hearing on the matter was conducted in Indianapolis, Indiana, on August 18, 2011. At the hearing, all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the 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 there was no change in conditions of employment, and that even if there was a change, it was not more than *de minimis*. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The American Federation of Government Employees, AFL-CIO, is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit, composed of general schedule and wage grade employees employed by the Respondent, appropriate for collective bargaining. (G.C. Ex. 1(b)(f)). The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (*Id.*).

The Respondent assigns overtime among two different rosters or pools, for two different types of firefighters: "white shirts" and "blue shirts." (Tr. at 59). The white shirt firefighters or "lead" firefighters, are all GS-8-level employees. (*Id.* at 35, 77). They oversee daily operations and occasionally perform hands-on duties. (*Id.* at 59). The blue shirt firefighters spend most of their time fighting fires and are the primary performers of hands-on duties. (*Id.* at 59). Additionally, the blue shirt firefighters provide EMT services (I therefore will refer to them as EMT firefighters). Historically, firefighters in the blue shirt pool have been EMT firefighters and thus, were employed at the GS-4 through GS-7 levels. (*Id.* at 35).

The Respondent's overtime procedure works as follows. When a blue shirt firefighter calls in sick, the Respondent looks at a list of blue shirt firefighters ranked in order from least to most overtime worked. (*Id.* at 36, 60, 86-87). The Respondent asks the blue shirt firefighter with the least amount of overtime worked if he would like to volunteer to work overtime. (*Id.* at 36). If that firefighter declines, then the Respondent asks the blue shirt firefighter with the second least amount of overtime worked, and continues on down the list. If there are no volunteers among the blue shirt firefighters, then the Respondent looks for volunteers among the white shirt firefighters again, in order of the least to the most overtime worked. (*Id.* at 51, 60). If there are no

volunteers among the white shirt firefighters, then the Respondent returns to the blue shirt pool. The Respondent again goes down the list in order of the least to the most overtime, but this time requires the firefighter at the top of the list to work overtime, so long as he is not otherwise unavailable. (*Id.* at 36, 54, 60).

In early 2010, the Respondent was seeking to upgrade its basic EMT services to paramedic services so that it could provide more advanced medical care. (*Id.* at 18, 63, 69-70). The first step in this process was for the Respondent to hire GS-8 paramedic trainees (paramedic-trainee firefighters), from internal candidates, specifically, GS-7 EMT firefighters and train those hired employees so that they would eventually become full-fledged GS-9 paramedic firefighters. (*Id.* at 64, 104). After undergoing a number of administrative steps, the Respondent would then be able to provide paramedic services. (*Id.* at 64). At the time of the hearing, it was uncertain whether or when the paramedic program would actually begin. (*Id.* at 69).

On February 18, 2010, the Respondent notified the Union that there would be a “change of EMT services” at the fire department. (G.C. Ex. 2 at 2). Specifically, the Respondent stated that it would hire two GS-7 EMT firefighters in the department to be GS-8 paramedic-trainee firefighters and, ultimately, GS-9 paramedic firefighters. (*Id.* at 3). The Union asked for, and received, an extension of time to respond. (*Id.* at 1-2). On March 18, 2010, the Union submitted its response. (*Id.* at 1). With regard to overtime, the Union asked the Respondent: (1) how the Respondent would handle overtime for the paramedic-trainee firefighters while in training; and (2) whether the Respondent would offer paramedics overtime that was “separate from the [EMT firefighters] on their shift[.]” (*Id.*). The Respondent did not immediately respond to the Union’s questions. (G.C. Ex. 3 at 1).

At some point in April 2010, the Respondent hired or promoted two GS-7 EMT firefighters from the blue shirt pool, William Raybern and Terry Pemberton, to the position of GS-8 paramedic-trainee firefighter. (Tr. at 63; G.C. Ex. 2 at 3; Resp. Ex. 9 at 2). After spending time in training, the two returned to work, where they performed the same duties that they had performed before their promotions. (Tr. at 44, 66, 103, 113; G.C. Ex. 4 at 2). For the purpose of assigning overtime, the Respondent kept Raybern and Pemberton in the blue shirt pool and there was no change in the number of firefighters in the blue shirt pool.¹ (Tr. at 44, 63).

On April 28, 2010, the Union informed the Respondent that it would “expect that all things will remain status quo . . . until [the Union] ha[s] been notified of proposed changes and [has] had the opportunity to bargain the [impact and implementation] of the appropriate subjects.” (G.C. Ex. 3).

On April 30, 2010, the Respondent replied and stated that “[o]vertime w[ould] be assigned in the usual manner.” (G.C. Ex. 4 at 1, 2). In this connection, the Respondent informed the Union that firefighter EMTs who were selected to be paramedics would not be in the overtime pool while in training, but would return to the “overtime list[.]” after their training had ended. (*Id.*). Additionally, the Respondent stated that “[c]ertified paramedics will be offered overtime separately from [EMT] firefighters only if the overtime is paramedic specific.” (*Id.*).

On May 4, 2010, an EMT firefighter in the blue shirt overtime pool called in sick, prompting the Respondent to look for a blue shirt firefighter to work overtime. (Tr. at 105). Assistant Fire Chief Lloyd Overton, who was responsible for filling the slot “started at the top” of the list of the blue shirt pool “just like we always do, and proceeded down in order.” (*Id.* at 85, 105). Moving down the list, Overton “got to [f]irefighter Raybern,” who was now a GS-8 paramedic-trainee firefighter and Raybern was offered the overtime assignment, and he accepted. (*Id.* at 105).

Shortly after Raybern was selected to work overtime, an EMT firefighter came to Union steward Louis Pruett complaining that a “GS-8 had received overtime in front of him” even though a GS-7 was the “one who caused the overtime.” (*Id.* at 40). A month later, the Union filed a charge with the General Counsel asserting that on or about May 4, 2010, the Respondent unilaterally implemented a new overtime assignment procedure. (G.C. Ex. 1(a))

At the hearing, Pruett testified that the Respondent changed its overtime procedures by “put[ting] the paramedics in with the EMT pool[.]” i.e., the blue shirt pool. (Tr. at 38). In this connection, Pruett stated that “our normal way of running” things entailed GS-8s being put in an overtime pool that was “separate.” (*Id.*). On cross-examination, Pruett acknowledged that Raybern and Pemberton were performing the same duties that they had performed before being promoted. (*Id.* at 44). Additionally, Pruett acknowledged that he was unsure if the number of employees in the blue shirt pool had changed when Raybern and Pemberton were promoted. (*Id.*). With regard to the impact of the alleged change, Pruett acknowledged that Raybern would have been offered the chance to work overtime ahead of the

¹ At the time of the hearing, there were four paramedic trainees and two paramedics. (Tr. at 41-42).

complaining EMT firefighter, even if Raybern had not been promoted. (*Id.* at 49-50).

Pruett also testified about an additional matter about which the Union was concerned. Specifically, the Union was worried that there would be “three pools” for overtime: one for all blue shirt firefighters, including paramedic-trainees and paramedics; one for white shirt firefighters; and one for paramedic-trainees and paramedic firefighters. (*Id.* at 37). Similarly, the Union’s other witness, Union President David Holtsclaw testified that the Union had “concerns” that the “selected paramedics get two shots at overtime because they have their own [pool] and they’re in the general pool, where everyone else who’s a firefighter EMT only gets one shot at it.” (Tr. at 23). When asked on cross-examination if a separate paramedic overtime pool had been created, Holtsclaw stated: “I do not know.” (*Id.* at 25). When asked the same question, Pruettt acknowledged that the Respondent has not yet created a separate overtime pool for paramedics. (*Id.* at 46).

The Respondent’s main witness was Barry Tedrow, who is the department’s fire chief. (*Id.* at 57). When asked why Raybern and Pemberton remained in the blue shirt pool after becoming GS-8 paramedic-trainee firefighters, instead of being transferred to the white shirt pool of GS-8 lead firefighters, Tedrow explained that the “lead firefighters are the white shirt captains,” which is a “different career path[]” with “different duties[]” from blue shirt firefighters. (*Id.* at 73). By contrast, Tedrow testified, “blue shirt firefighter EMT[s], or blue shirt firefighter paramedic[s] at this time, are firefighters. They are hands-on.” (*Id.*). In this connection, Tedrow testified that a firefighter’s GS level is not a factor the Respondent considers when assigning overtime. (*Id.* at 60-61). Tedrow also testified that paramedic-trainee firefighters performed the same duties as GS-7 EMT firefighters. (*Id.* at 71, 76). Tedrow acknowledged, however, that when the paramedic-trainee firefighters became full-fledged paramedics, they would be able to provide medical services that a paramedic-trainee could not perform on his own. (*Id.* at 76).

With regard to whether Raybern’s promotion had an impact on other blue shirt firefighters, Overton testified that the overtime assignment on May 4, 2010, would have been offered to Raybern before the complaining EMT firefighter even if Raybern had not been promoted. (*Id.* at 106). Overton testified that Raybern, would have been in the “exact same position on the overtime list and got the same opportunity” (*Id.*). More generally, Tedrow testified that, since Raybern and Pemberton both had been in the blue shirt pool prior to their promotions, the promotions did not add

to the number of firefighters in the blue shirt pool. (*Id.* at 63).

With regard to the Union’s concern about a paramedics-only overtime pool, Tedrow testified that the Respondent “ha[s] not stood up the paramedic program[,]” and that there was “no paramedic position” available where paramedics would earn paramedic-specific overtime. (*Id.* at 68-69). When asked if there would be a separate overtime pool for paramedic-trainee and paramedic firefighters, Tedrow testified that it was “possible there will be a separate pool, but not necessarily.” (*Id.* at 69).

DISCUSSION

Position of the Parties

General Counsel

The General Counsel asserts that the blue shirt pool “previously consisted of GS 4 to [GS] 7 EMTs.” (G.C. Br. at 10). As such, the General Counsel asserts, the Respondent “changed . . . conditions of employment in April 2010” by keeping the newly promoted Raybern and Pemberton in the blue shirt pool. (*Id.* at 9) (citing *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995)(*Fairchild*)). With regard to the Respondent’s argument that there has been no change, or that any change was *de minimis*, the General Counsel asserts that the “fact that the overall number of firefighters in the blue shirt pool remained the same is not determinative of whether there has been a change in . . . conditions of employment.” (G.C. Br. at 8). In this connection, the General Counsel asserts that “[t]he issue here is not the number of employees in the [blue shirt] pool but the composition of the pool.” (*Id.* at 10). Further, the General Counsel asserts that the “degree” of a change does not “determine whether there had been a change.” (*Id.* at 8) (citing *Dep’t of VA, Veterans Admin. Med. Ctr., Veterans Canteen Serv., Lexington, Ky.*, 44 FLRA 179, 190 (1992) (*Veterans*)).

Further, the General Counsel asserts the Respondent’s actions in April 2010 had effects that were greater than *de minimis*. (*Id.* at 9) (citing *U.S. Dep’t of Veterans Affairs Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004) (*VA Leavenworth*)); *Pension Benefit Guar. Corp.*, 59 FLRA 48, 51 (2003) (*PBGC*); *U.S. Customs Serv., Sw. Region. El Paso, Tex.*, 44 FLRA 1128, 1129 (1992) (*Customs*). In this regard, the General Counsel argues that because the blue shirt pool has historically consisted of GS-4s through GS-7s EMT firefighters, merely offering overtime to a GS-8 paramedic-trainee firefighter in the blue shirt pool resulted in the taking away of an opportunity to work overtime from an EMT firefighter. (G.C. Br. at 10). This

is so, the General Counsel argues, even if the paramedic-trainee who was offered overtime was previously a GS-7 EMT firefighter in the blue shirt pool, and even if the number of firefighters in the blue shirt pool remained the same. (*Id.*). With specific regard to May 4, 2010, the General Counsel argues that if Raybern had “not been included in the [blue shirt] pool,” then the complaining GS-7 EMT firefighter “would have been able to volunteer for the overtime.” (*Id.*). The General Counsel argues that there is an even greater impact now, because there are currently six firefighters, either paramedic-trainees or paramedics, in the blue shirt pool. (*Id.* at 9).

Additionally, the General Counsel argues that the Respondent “created a new overtime pool exclusively for” paramedic-trainees and paramedics. (*Id.* at 8, 9) (citing *Fairchild*, 50 FLRA at 704)). The effects of this change, the General Counsel argues, have been greater than *de minimis*. (*Id.* at 11). With regard to the Respondent’s argument that “full implementation of the separate paramedic pool and paramedic program had been delayed,” the General Counsel contends that the “appropriate focus is on the effects of the changes at the time they were proposed and implemented (April 2010), and not what has actually happened since that time.” (*Id.*) (citations omitted). In this connection, the General Counsel asserts that this change was “announced in April 2010” and the Respondent gave “no indication to the Union . . . that the implementation of the paramedic program itself and the separate pool for the paramedics would be delayed.” (*Id.* at 12).

The General Counsel asserts that the Respondent implemented these changes without providing the Union with notice and an opportunity to bargain over them. (*Id.*). As such, the General Counsel asks for a status quo ante remedy with back pay. (*Id.* at 14).

Respondent

The Respondent argues that offering overtime to Raybern on May 4, 2010 did not constitute a change in the way the fire department assigned overtime. (R. Br. at 13). In this connection, the Respondent argues that: (1) overtime was assigned without regard to pay grade; (2) all firefighters in the blue shirt pool, including the paramedic-trainees, performed essentially the same duties; and (3) the number of firefighters in the blue shirt pool did not change with the promotion of Raybern and Pemberton.

Even if the two promotions constituted a change, the Respondent argues, the change was not greater than *de minimis*. (*Id.* at 17). In this connection, the Respondent asserts that there was “no change to any bargaining unit employee’s ability to earn [overtime].”

(*Id.* at 18). Further, the Respondent argues that if Raybern and Pemberton had not been promoted,

they would “still have been in the same [overtime] pool as they were in after their promotions[.]” (*Id.* at 19).

With regard to the Union’s concern about a third, paramedics-only overtime pool, the Respondent argues that the alleged change “simply has not occurred.” (*Id.* at 15). Moreover, the Respondent argues, the “[p]aramedic services program [has] not [yet] been stood up,” the “details surrounding that program still have not been finalized,” and the “procedures for assigning [p]aramedic[-]specific [overtime] . . . have still not yet been determined.” (*Id.*).

Finally, the Respondent argues that if there was a greater than *de minimis* change, a remedy of back pay is not appropriate. (*Id.* at 20).

CONCLUSIONS OF LAW

The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and inquiry into the facts and circumstances regarding the agency’s conduct and the employee’s conditions of employment. *Fairchild*, 50 FLRA at 704. The General Counsel asserts that by changing the title and grade of Raybern and Pemberton, and keeping them in the blue shirt pool, the Respondent changed the procedure it used to assign overtime. (G.C. Br. at 8, 10). But, a comparison of the overtime procedure that the Respondent used before April 2010 with the overtime procedure the Respondent used after April 2010 reveals a stable, unchanging system. Before April 2010 and after, the Respondent: (1) placed firefighters with “hands-on” duties in the blue shirt pool; (2) ranked blue shirt firefighters from least to most overtime worked; (3) offered overtime to firefighters in order from least to most overtime worked; (4) assigned overtime without regard to a firefighter’s GS level; (5) kept the same number of firefighters in the blue shirt pool; and (6) kept Raybern and Pemberton in the blue shirt pool. These facts indicate that the promotions of Raybern and Pemberton, and their retention in the blue shirt pool, did not alter the Respondent’s procedure for assigning overtime.

The General Counsel nevertheless argues that keeping Raybern and Pemberton in the blue shirt pool after they had become GS-8 employees constituted a change in the way the Respondent assigned overtime. (*Id.* at 8, 10). While the Respondent would have changed the overtime assignment system if it had, for example, expelled Raybern and Pemberton from the blue shirt pool, merely keeping the two in the blue shirt pool did

not cause the overtime assignment system to change. And even if the definition of the blue shirt pool changed to include GS-8, and ultimately GS-9 firefighters, the Respondent's method of assigning overtime, which did not take an employee's GS level into account, did not change. *Cf., e.g., U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 58 FLRA 699, 700-01 (2003) (Chairman Cabaniss concurring; then-Member Pope dissenting) (finding that an agency did not change a condition of employment when assigning award-based leave).

Further, the decisions relied on by the General Counsel do not indicate that the Respondent changed its overtime procedures. In *Fairchild*, the agency introduced a sign-out board, an action that the agency admitted was a change in its procedures. *See Fairchild*, 50 FLRA at 702, 704. By contrast here, the overtime procedure the Respondent used did not change with the April 2010 promotions. In *Veterans*, the respondent removed a group of vending machines, partially replacing those machines with older machines. *See Veterans*, 44 FLRA at 188, 190. But as explained above, the Respondent did not change anything about its overtime procedure.

Based on the foregoing, I find that the April 2010 promotions of Raybern and Pemberton, and their continued presence in the blue shirt pool, did not constitute a change in the procedure the Respondent used to assign overtime.

Although I find that the Respondent did not change its overtime procedure, I nevertheless consider the General Counsel's claim that promoting Raybern and Pemberton, and keeping them in the blue shirt pool, constituted a change that had a greater than *de minimis* effect. In applying the *de minimis* doctrine, 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. *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 89 (2009).

The General Counsel argues that the change deprived the complaining GS-7 EMT firefighter of an opportunity to work overtime. (G.C. Br. at 10). But, as Pruett acknowledged, Raybern would have been first in line for overtime even if he had not been promoted. (Tr. at 49-50). Thus, even if Raybern's promotion and continued placement in the blue shirt pool constituted a change in the Respondent's overtime procedures, that change did not have more than a *de minimis* effect on the EMT firefighter's opportunity to work overtime. More broadly, because the number of firefighters in the blue shirt pool remained the same, and because the method of assigning overtime remained the same, the April 2010

promotions did not leave EMT firefighters any better or worse off than they were before the promotions. Further, while it is reasonably foreseeable that Raybern and Pemberton will one day become GS-9 paramedic firefighters, that would not cause anything to change, because a firefighter's grade level has not been, and is not, a factor the Respondent uses to assign overtime. I note, in this regard, that while there are now more GS-8s and GS-9s, there is no indication that the number of firefighters in the blue shirt pool has changed or will change. (Tr. at 41-42; G.C. Br. at 8).

The General Counsel cites several Authority decisions indicating that changes that affect an employee's ability to earn overtime are more than *de minimis*. (G.C. Br. at 9). None of these cases indicates that the Respondent's actions in April 2010 had more than a *de minimis* impact. In *VA Leavenworth*, an employee lost the opportunity to work on weekends and therefore, lost the opportunity to earn overtime pay. *VA Leavenworth*, 60 FLRA at 318. In this instance, however, the complaining EMT firefighter did not lose the opportunity to work overtime. In *PBGC*, the realities of the agency's budget made it almost certain that an employee would receive less overtime pay. Here, however, the number of employees in the blue shirt pool has not changed. As such, firefighters are not at risk of working fewer overtime hours than before. Similarly, in *Customs*, shift changes occurred that would have prevented some from earning overtime. *Customs*, 44 FLRA at 1129, 1140. As explained above, no shift changes occurred here, and there is no indication that firefighters will be prevented from earning overtime.

Based on the foregoing, I find that even if the Respondent changed the procedure it used to assign overtime by promoting Raybern and Pemberton while keeping them in the blue shirt pool, the effect of that change had only a *de minimis* impact that was reasonably foreseeable.

Finally, the General Counsel asserts that a change occurred when it "created a new overtime pool exclusively for" paramedic-trainees and paramedics. (G.C. Br. at 8). However, the record indicates that the Respondent has not created such a pool. (Tr. at 46, 68-69). Indeed, it is uncertain that such a pool will ever be created. (*Id.* at 69). As for the General Counsel's assertion that the "appropriate focus is on the effects of the changes at the time they were proposed and implemented" and the General Counsel is correct: A change occurs once it has been *implemented*. (G.C. Br. at 11). Based on my findings, the Respondent has not implemented a paramedics-only overtime pool. For these reasons, I reject the General Counsel's claim that such a change occurred.

CONCLUSION AND RECOMMENDATION

I find that the General Counsel failed to establish that the Respondent violated § 7116(a)(1) and (5) of the Statute as alleged. Accordingly, I recommend that the Authority issue the following Order:

ORDER

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

Issued, Washington, D.C., January 31, 2013

CHARLES R. CENTER
Chief Administrative Law Judge