69 FLRA No. 53

SOCIAL SECURITY ADMINISTRATION
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 220, AFL-CIO
(Charging Party)

AT-CA-12-0544
CH-CA-14-0369

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DECISION AND ORDER

May 13, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

The Federal Labor Relations Authority's (FLRA's) Atlanta Regional Office issued a consolidated complaint alleging that the Respondent (the Agency) violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by refusing to bargain with the Charging Party (the Union) before implementing a call-routing system in its Atlanta Region, and by failing to notify and bargain with the Union before implementing the system nationwide. In the attached decision, an FLRA Administrative Law Judge (the Judge) concluded that the Agency did not commit the unfair labor practices (ULPs) alleged in the complaint. Specifically, the Judge found that the FLRA's General Counsel (the GC) did not establish that the Agency's implementation of the call-routing system had a more than de minimis actual, or reasonably foreseeable, effect on bargaining-unit employees' conditions of employment. Accordingly, the Judge recommended that the Authority dismiss the complaint.

The main question before us is whether the Judge erred in her findings of fact, credibility determinations, or conclusions of law when she found that the GC did not establish that the Agency's implementation of the call-routing system had a more than de minimis actual, or reasonably foreseeable, effect on bargaining-unit employees' conditions of employment. Because a preponderance of the record evidence supports the Judge's factual findings and credibility determinations, and her legal conclusions accord with Authority precedent, the answer is no.

II. Background and Judge's Decision

A. Background

The Agency operates a telephone line (the general-inquiry line) that allows the public to call and obtain general information about Agency services. In an effort to reduce hold times for callers and balance telephone workloads for employees, the Agency developed the call-routing system, which routes incoming general-inquiry calls to various offices based on the availability of personnel to answer the call.

The Agency implemented the call-routing system on a trial basis in its Atlanta Region. The Union filed a ULP charge with the FLRA, and the GC issued a complaint alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by failing to bargain with the Union before implementing the call-routing system. Thereafter, the Agency implemented the call-routing system in all of its offices. The Union then filed a second ULP charge, and the GC issued a second complaint alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by failing to notify and bargain with the Union before implementing the call-routing system on a nationwide basis. The complaints were consolidated for hearing before the Judge.

B. Judge's Decision

Before the Judge, the GC argued that the Agency's implementation of the call-routing system changed bargaining-unit employees' conditions of employment and that this change had an actual, or reasonably foreseeable, effect that was more than de minimis. Specifically, the GC argued that the "most significant effect" of the change was the "loss of downtime between phone calls and its consequent reduction of time" for employees to complete other tasks.[2] In this regard, the GC argued that after the implementation of the call-routing system, employees have less time between calls to complete other work because employees receive more general-inquiry calls, and those calls take longer to complete. Further, the GC argued that because employees have less time to complete other work, it is reasonably foreseeable that employees may receive counseling or negative performance appraisals for failing to complete their work. The GC also maintained that the change negatively

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] Judge's Decision at 7.

affected employees' stress levels and their ability to take breaks. For support, the GC cited the Authority's decision in *SSA, Gilroy Branch Office, Gilroy, California* (*Gilroy*).[3]

First, the Judge found that the Agency's implementation of the call-routing system changed employees' conditions of employment because it "imposed a new system and procedure for answering [general-inquiry] calls."[4]

In assessing whether the change had a more than de minimis effect on employees' conditions of employment, the Judge considered the "attempts by the GC's witnesses to link [the call-routing system] to increased workloads and backlogs."[5] Specifically, she noted the testimony of GC witnesses that: before the change, there was a smaller backlog of work and employees had some time between calls to work on other tasks; but after the change, the walk-in traffic in one office doubled and employees in that office did not take breaks.

But the Judge found the GC witnesses' testimony to be "entirely anecdotal and speculative."[6] Specifically, the Judge found that while the GC's witnesses testified that they had less time between calls to complete other work, there was no dispute that the Agency did not change the amount of time that it assigned employees to answer general-inquiry calls. The Judge also found that employees were able to bypass calls and complete other work by putting their phone in a "not[-]ready" status.[7] In addition, the Judge found unpersuasive an employee's testimony that the implementation of the call-routing system had doubled walk-in traffic in her office because the witness "offered no statistics or other reliable, objective evidence to support her suggestion that callers are not getting answers on the [general-inquiry] line so they opt to come into the office."[8] As for the testimony that employees were not taking breaks because of the call-routing system, the Judge found that testimony "simply not credible."[9]

The Judge concluded that the GC failed to establish that the call-routing system affected employees' workloads, stress levels, or ability to take breaks. In this regard, the Judge distinguished *Gilroy* because, in that case, the agency added six appointments to employees' daily workloads, which "had an impact or reasonably foreseeable impact [on] employees' workload[s], workflow, [breaks], and leave patterns [that] was more than de minimis."[10] Here, in contrast, the Judge found that there was a "complete absence of credible evidence that [the call-routing system] increased the time employees [were] assigned to answer [general-inquiry] calls, reduced the time available to perform other work[,] or . . . [was] otherwise responsible for the increased volume of work."[11]

The Judge also credited the Union second vice president's testimony that "in the best of all possible worlds, there would be no added work," but "that doesn't happen, especially when you're losing staff, . . . the number of retirees are going up, and [there are] more claims and more people to handle."[12] In this regard, the Judge found that the second vice president "readily acknowledged that there [were] multiple factors unrelated to [the call-routing system] that [could] explain increased workloads and employee stress."[13] A district manager also testified that while walk-in traffic increased in his office, he was not sure whether the increase was attributable to the call-routing system.

The Judge rejected the GC's claim that the change had a reasonably foreseeable effect on employees' performance appraisals. In particular, she declined to rely on a GC witness's testimony that the Agency counseled her for spending too much time in a "not[-]ready" status,[14] because the Judge found that the circumstances leading to that employee's counseling "were clearly aberrational."[15] In this connection, the Judge found it "significant" that one year after the Agency implemented the call-routing system nationwide, "the GC only produced one employee whose performance was even arguably impacted."[16]

Based on the foregoing, the Judge concluded that the GC failed to establish that the call-routing system "had any effect or reasonably foreseeable effect on the conditions of employment of bargaining[-]unit employees that was greater than de minimis."[17] Accordingly, the Judge concluded that the Agency did not violate § 7116(a)(1) and (5) of the Statute, and recommended that the Authority dismiss the complaint.

[3] 53 FLRA 1358 (1998).
[4] Judge's Decision at 13.
[5] *Id.* at 14.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 14 n.8.
[10] *Id.* at 14 (citing *Gilroy*, 53 FLRA at 1369-70).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 15.

The GC and the Union filed exceptions to the Judge's decision, and the Agency filed an opposition to those exceptions.

III. Preliminary Matter: Section 2429.5 of the Authority's Regulations does not bar the Union's exceptions.

The Agency contends that the Authority should not consider the arguments that the Union advances in its exceptions because the Union did not raise those arguments before the Judge.[18] Under § 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, raised in the proceedings before a judge.[19] But when a party's exceptions are in response to a judge's findings and, thus, could not have been presented to the judge, § 2429.5 does not preclude a party from raising those exceptions.[20]

In its exceptions, the Union argues that the Judge erred by: (1) ignoring record evidence demonstrating that the call-routing system had a more than de minimis effect on employees' conditions of employment;[21] (2) failing to discuss record evidence that proved it was reasonably foreseeable that the implementation of the call-routing system would affect employees' conditions of employment;[22] and (3) "improperly us[ing] the reasoning" in *Gilroy* to conclude that the change had only a de minimis impact on employees' conditions of employment.[23] The Union's arguments are in response to the Judge's findings and, thus, could not have been raised prior to the Judge's decision. Therefore, we find that § 2429.5 of the Authority's Regulations do not provide a basis for dismissing the Union's arguments.[24]

IV. Analysis and Conclusions

A. The Judge did not err in her findings of fact.

The GC and the Union argue that the Judge erred in her findings of fact in several respects.[25]

First, the GC argues that the Judge erred by failing to mention, in her analysis, statistics and testimony that allegedly demonstrate that the Agency's implementation of the call-routing system increased: (1) the number of general-inquiry calls;[26] and (2) employees' workloads and backlogs.[27] However, contrary to the GC's argument, the Judge considered "attempts by the GC's witnesses to link the [call-routing system] to increased workloads and backlogs," but found their testimony to be "entirely anecdotal and speculative."[28] The Judge also found that there was a "complete absence of credible evidence" to support the claim that the call-routing system "increased the time employees are assigned to answer [general-inquiry] calls, reduced the time available to perform other work[,] or . . . [was] otherwise responsible for the increased volume of work."[29] Additionally, the Authority has held that a judge's failure to cite evidence does not establish that the judge did not consider it;[30] and a judge is not required to comment on every piece of evidence presented.[31]

Here, a preponderance of the evidence supports the Judge's finding that the implementation of the call-routing system did not have any actual, or reasonably foreseeable, effect on employees' conditions of employment that was greater than de minimis.[32] Therefore, the Judge did not err by failing to discuss the statistics and testimony identified by the GC.[33]

Next, the GC argues that the record evidence does not support the Judge's "conclusion that employees have the ability to use the 'not[-]ready'[-status] feature at their pleasure."[34] In support of this argument, the GC cites the testimony of an employee who claims that she was counseled for spending too much time in a "not[-]ready" status.[35] The GC argues that the Judge erred by concluding, "without any explanation, that the counseling . . . was 'clearly aberrational.'"[36] The Judge found that when an employee needs to complete other

[18] *See* Agency's Opp'n at 8.
[19] 5 C.F.R. § 2429.5; *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 632, 634 (2014).
[20] *E.g.*, *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 11 (1995) (*Grissom*).
[21] Union's Exceptions at 8.
[22] *Id.* at 11.
[23] *Id.* at 12 n.5; *see also id.* at 6 n.2.
[24] *See, e.g.*, *Grissom*, 51 FLRA at 11.
[25] *See* GC's Exceptions at 9-14; Union's Exceptions at 5-15.
[26] GC's Exceptions at 9-10.
[27] *Id.* at 10-14.
[28] Judge's Decision at 14.
[29] *Id.*
[30] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 63 FLRA 280, 283 (2009) (*Elkton*) (citing *U.S. Small Bus. Admin., Wash., D.C.*, 54 FLRA 837, 850-51 (1998)).
[31] *U.S. Dep't of Transp., FAA*, 59 FLRA 491, 493 (2003) (*FAA*) (citing *State of Wyo. v. Alexander*, 971 F.2d 531, 538 (10th Cir. 1992) (where evidence provides cumulative support for decision, failure to comment on every piece of evidence is not fatal)).
[32] *See, e.g.*, Tr. at 166-67 (witness testified that although employees initially expressed concern that they would be "flooded with calls" because of the change, those concerns were "alleviated" when they "saw that the impact was minimal"); 227-28 (witness testified that the change did not impact employees' ability to take breaks or personal leave).
[33] *See FAA*, 59 FLRA at 493.
[34] GC's Exceptions at 14; *see also id.* at 3.
[35] *Id.* at 13.
[36] *Id.*

work, the call-routing system allows employees to go into "not[-]ready" status and bypass general-inquiry calls,[37] a finding that the GC does not dispute. And, contrary to the GC's argument, the Judge *did* explain that she found the circumstances leading to the employee's counseling "clearly aberrational" because, one year after the Agency implemented the call-routing system nationwide, "the GC only produced one employee whose performance was even arguably impacted."[38]

For these reasons, we conclude that the GC has not demonstrated that the Judge erred in her findings regarding employees' ability to place their phones in "not[-]ready" status.[39]

Like the GC, the Union argues that the Judge erred by ignoring evidence that demonstrates that the implementation of the call-routing system had a more than de minimis effect on employees' conditions of employment.[40] Additionally, the Union argues that the Judge's legal and factual findings were in error "when she failed to . . . discuss much of the [record] evidence . . . that proved it was reasonably foreseeable that the implementation . . . of the [call-routing system] would cause a more than de minimis" effect on employees' conditions of employment.[41] But, as discussed above, a judge's failure to cite evidence does not show that she did not consider it.[42] Although the Union cites evidence that the Judge did not discuss, the Union does not demonstrate that the Judge's legal or factual findings were in error.

In response to the concurrence, we note that, *in addition to* finding that the actual effects of the implementation of the call-routing system were not more than de minimis, the Judge *also* considered whether the change had reasonably foreseeable effects that were more than de minimis,[43] and she concluded that it did not. This approach is consistent with what the Authority held that the arbitrator should have done in *AFGE, National Council 118*.[44]

B. The Judge did not err in her credibility determination.

In concluding that the call-routing system did not increase employees' workloads, the Judge credited the testimony of a GC witness – the Union's second vice president.[45] The GC contends that the Judge erred in this regard because she relied on "an isolated quote" from the second vice president while failing to discuss testimony from other GC witnesses who, according to the GC, had direct knowledge of the effect of the call-routing system on employees' conditions of employment.[46]

The Authority will not overrule a judge's credibility determination unless a clear preponderance of all relevant evidence demonstrates that the determination is incorrect.[47] Here, the Judge found that the Union's second vice president "readily acknowledged that there [were] multiple factors unrelated to [the call-routing system] that [could] explain increased workloads and employee stress."[48] The Judge's statement is consistent with the second vice president's testimony that "in the best of all possible worlds, there would be no added work," but "that doesn't happen, especially when you're losing staff, . . . the number of retirees are going up, and [there are] more claims and more people to handle."[49] It also is consistent with another witness's testimony that although walk-in traffic increased after the implementation of the call-routing system, it was unclear whether the increase was attributable to the call-routing system.[50] And regarding the GC's witnesses who testified to the contrary, as noted above, the Judge found that testimony to be "entirely anecdotal and speculative."[51]

Thus, after examining the record, we find that the GC has provided no basis for reversing the Judge's credibility determination.

C. The Judge did not err in her conclusions of law.

The GC and the Union argue that, by failing to rely on applicable Authority precedent, the Judge erroneously concluded that the implementation of the call-routing system did not have a reasonably foreseeable effect on employees' conditions of employment that was

[37] Judge's Decision at 14.
[38] *Id.*
[39] GC's Exceptions at 13.
[40] Union's Exceptions at 5.
[41] *Id.* at 11.
[42] *Elkton*, 63 FLRA at 283; *see also FAA*, 59 FLRA at 493 (a judge is "not required to comment on every piece of evidence presented" to him or her).
[43] Judge's Decision at 14 (finding the proffered evidence "in no way indicative that [the call-routing system] had a reasonably foreseeable impact on performance appraisals that is more than de minimis"); *see also id.* at 15 (holding that the GC had "not met its burden of proving that [the call-routing system] . . . had any effect *or* reasonably foreseeable effect on the conditions of employment of bargaining[-]unit employees that was greater than de minimis" (emphasis added)).
[44] 69 FLRA 183, 187-90 (2016) (Member Pizzella dissenting).
[45] *See* Judge's Decision at 14.
[46] GC's Exceptions at 12.
[47] *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 68 FLRA 882, 885 (2015).
[48] Judge's Decision at 14.
[49] *Id.*
[50] Tr. at 232-33.
[51] Judge's Decision at 14.

more than de minimis.[52] Specifically, the Union argues that the Judge should not have applied *Gilroy*,[53] and the GC argues[54] that the Judge erred by not considering the Authority's decision in *Department of HHS, SSA* (*SSA*).[55]

The Union argues that the Judge erred in relying on *Gilroy*.[56] In *Gilroy*, the Authority held that the addition of six appointments to seven employees' workloads had an impact or reasonably foreseeable impact involving their workloads, workflow, personal lunch periods, and leave patterns that was more than de minimis.[57] In this case, the Judge distinguished *Gilroy* by finding that there was a "complete absence of credible evidence" that the change increased employees' workloads.[58] The Union argues that *Gilroy* was not an "appropriate" decision for the Judge to consider in her de minimis analysis because the change in *Gilroy* affected substantially fewer employees.[59] However, the Authority has held that the number of employees affected by a change is not dispositive of whether the change is de minimis.[60] Moreover, even if the Union disagrees with *how* the Judge distinguished *Gilroy*, that argument does not undermine the conclusion that *Gilroy* is distinguishable. Nothing in the Union's argument – or in *Gilroy* – supports finding that the Judge erred in her legal conclusions.

Finally, the GC argues that the Judge erred by failing to consider *SSA*.[61] In *SSA*, the Authority found that where an agency rated employees on how quickly they completed cases, it was reasonably foreseeable that requiring employees to gather and record additional information in some cases would affect their performance on other cases, their performance evaluations, and related personnel actions.[62] According to the GC, *SSA* applies here because the Agency evaluates employees on how quickly they complete their non-telephone work.[63] But this argument does not demonstrate that the Judge's factual findings – including her findings that the amount of time employees are assigned to answer general-inquiry calls did not change and that employees could use the "not[-]ready" status to bypass calls and complete other work[64] – are erroneous. Relatedly, the Judge did not credit any evidence that the call-routing system reduced the time that employees could spend performing other work, and the GC provides no basis for finding that the Judge erred in that regard.

Accordingly, *SSA* is distinguishable, and the GC's reliance on that decision does not provide a basis for finding that the Judge erred.

V. Order

We dismiss the complaint.

[52] Union's Exceptions at 12 n.5; GC's Exceptions at 14-15.
[53] Union's Exceptions at 12 n.5.
[54] GC's Exceptions at 14-15.
[55] 26 FLRA 344 (1987).
[56] Union's Exceptions at 12 n.5.
[57] *Gilroy*, 53 FLRA at 1369-70.
[58] Judge's Decision at 14.
[59] Union's Exceptions at 12 n.5.
[60] *See U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002) (citing *VA Med. Ctr., Phx., Ariz.*, 47 FLRA 419, 424 (1993)).
[61] GC's Exceptions at 14-15.
[62] 26 FLRA at 347.
[63] GC's Exceptions at 14-15.
[64] Judge's Decision at 14.

Member Pizzella, concurring:

I agree with Administrative Law Judge Susan Jelen and the majority that the Social Security Administration (SSA) was not obligated to bargain with the American Federation of Government Employees, Council 220, AFL-CIO (AFGE) when it implemented a new digital telephone call-routing system. So, let me be clear – Judge Jelen gave a precise account of the Authority's precedent, properly applied that precedent to the facts of this case, and correctly concluded that the General Counsel's complaint should be dismissed. Therefore, I join the majority in dismissing the complaint.

But I find it necessary to write separately because I am concerned that today's decision will generate unnecessary confusion for the labor-management-relations community as parties and factfinders are called upon to determine whether a purported change to a condition of employment obligates the agency to bargain with the union.

The majority fails to distinguish today's oppositional result from, or explain the majority's abrupt departure from longstanding Authority precedent which it interjected in, *AFGE, National Council 118* (*Council 118*).[1]

In *Council 118* (decided just three months ago), I noted that the Authority had for decades left to the discretion of "the factfinder ([i.e.,] an arbitrator or administrative law judge. . .)[,] after considering the unique 'facts and circumstances' of each case," whether it was more appropriate to "consider *actual* effects ***or*** *reasonably foreseeable* effects" when called upon to determine whether a purported change in conditions of employment required the agency to bargain.[2] Therefore, it was unremarkable that the arbitrator would find that "any adverse effects were entirely 'speculati[ve]' or never occurred" and that "any impact . . . was no more than de minimis."[3]

But in *Council 118*, the majority, without any warning or explanation[4] to the labor-management-relations community, suddenly decided that it needed to establish "an entirely new two-pronged framework"[5] which required "a factfinder to examine ***both*** the actual effects ***and*** the reasonably foreseeable effects."[6] And even though the arbitrator found that "no adverse effects actually occurred" and the Authority had never before required a factfinder to examine ***both*** actual ***and*** reasonably foreseeable effects, the majority nonetheless, applying its new framework, determined that the arbitrator erred because she did not consider both. The majority thus remanded the case back for the arbitrator to re-examine the case just to see if any of the union's fears (which the evidence showed had "[n]ever materialized in any form or fashion")[7] were "reasonable" and required the agency to bargain.[8]

As I noted therein, I could not agree that we should change the Authority's precedent any more than I could agree that the arbitrator erred or that a remand was warranted.

But, here, I am glad to see that my colleagues agree that Judge Jelen properly applied the law[9] because Judge Jelen recited and applied the same decades-long Authority precedent upon which my dissent in *Council 118* was premised – that "a statutory obligation to bargain concerning the impact of [a change to a condition of employment] exists only if the change either results in more than a de minimis *impact* on unit employees ***or*** such impact is *reasonably foreseeable*."[10] In other words, Judge Jelen applied the *actual-**or**-reasonably foreseeable* framework that Authority administrative law judges have consistently followed before the majority tried to change that framework in *Council 118*[11] in order to justify its remand.

It is worth noting that, in *Council 118*, the arbitrator found that the union's fears, which were "unpersuasive"[12] and "speculati[ve]"[13] could not have been "reasonably foreseeable" because no evidence was presented that these fears actually occurred. Despite that reasonable conclusion, the majority determined that the arbitrator erred because she did not address separately whether or not the union's concerns were "reasonably

[1] 69 FLRA 183, 193 (2016) (Dissenting Opinion of Member Pizzella).
[2] *Id.* (citing *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704 (1995) (*Fairchild AFB*)).
[3] *Id.* at 192-93 (citing award at 11-12, 16).
[4] *See id*. at 195-96 (citing *Home Care Ass'n of America v. Weil*, 799 F.3d 1084, 1094-95 (D.C. Cir. 2015)) (administrative agency may depart from precedent and establish new policy if it first provides a "reasoned explanation" for the departure and the agency "display[s] awareness that it *is* changing position" and "show[s] that there are good reasons for the new policy").
[5] *Id.* at 193.
[6] *Id*.
[7] *Id.*
[8] *Id*. at 196.
[9] Majority at 7-8.
[10] Judge's Decision at 13 (emphasis added) (quoting *Fairchild AFB*, 50 FLRA at 704).
[11] *Council 118*, 69 FLRA at 195 (citing *Veterans Admin. Med. Ctr., Prescott, Ariz.*, 46 FLRA 471, 476 (1992); *U.S. DHS, U.S. CBP, El Paso, Tex.*, 67 FLRA 46, 47 (2012)).
[12] *Id.* at 196.
[13] *Id.* at 192 (quoting award at 12).

foreseeable" "*at the time of the change*."[14] In this case, Judge Jelen similarly found, after considering the evidence brought before her at hearing, that the union's fears were "entirely anecdotal and speculative" and could not have been "reasonably foreseeable" because "they were clearly aberrational."[15]

Despite the obvious parallels between the arbitrator's analysis in *Council 118* and Judge Jelen's decision in this case (both applied the Authority's decades-long pre-*Council 118 actual-**or**-reasonably foreseeable* framework), the majority does not remand this case back for a separate "reasonably foreseeable" analysis.

Don't get me wrong. I am delighted that my colleagues reach the same conclusion that I did in *Council 118*. I can only presume that the majority now realizes that the Authority's longstanding *actual-**or**-reasonably foreseeable* precedent should not be abandoned and that the *actual-**and**-reasonably foreseeable* approach tested in *Council 118* should be acknowledged for what it was – an aberration that should be rejected.

All of this, however, leaves the entire labor-management-relations community uncertain as to which standard the majority will finally adopt. I wish that the majority would have taken the opportunity to do so here.

Thank you.

[14] *Id*. at 188.
[15] Judge's Decision at 14.

Office of Administrative Law Judges

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SOCIAL SECURITY ADMINISTRATION
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL 220
CHARGING PARTY

Case Nos. AT-CA-12-0544
CH-CA-14-0369

Patricia J. Kush
For the General Counsel

Eddie Taylor
Sheila Bello-Class
For the Respondent

James L. Campana
Peter Harris
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On July 25, 2012, the American Federation of Government Employees, Council 220, Atlanta Region (Union) filed an unfair labor practice (ULP) charge against the Social Security Administration (SSA/Respondent). After investigating the charge, the Regional Director of the FLRA's Atlanta Region issued a Complaint and Notice of Hearing on May 23, 2013, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to bargain with the Union prior to implementing the Network Skill-Based Routing (NSBR) pilot program. (G.C. Ex. 1(a)). The Respondent timely filed an Answer to the Complaint admitting some factual allegations, but denied that it violated the Statute. (GC Ex. 1(c)). Thereafter, on April 14, 2014, the Union filed a second ULP charge against the Respondent with the Chicago Region of the FLRA. The charge was transferred to the Atlanta Region, and on April 24, 2015, the Atlanta Regional Director consolidated the two charges, and issued a Consolidated Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union before implementing the NSBR pilot program and by failing to notify and bargain with the Union prior to permanently implementing the NSBR program nationwide. (G.C. Ex. 1(i)). The Respondent timely filed an Answer to the Complaint admitting some factual allegations, but denied that it violated the Statute. (GC Ex. 1(c)).

A hearing in this matter was held on June 24, 2015, in Atlanta, Georgia. The parties were afforded an opportunity to be represented and heard, to examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel (GC) and Respondent filed timely post-hearing briefs which have been fully considered.

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

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Exs. 1(i) & (j)). At all times material to this matter, Amy Roberts was the Assistant Regional Commissioner, Barry Nelson was the Project Manager, Labor and Employee Relations, and Celene Colburn Wilson was the Center Director, Labor Relations, and these individuals were supervisors, management officials and/or agents of SSA within the meaning of § 7103(a) (10) and (11) of the Statute. (G.C. Exs. 1(i) & (j)).

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive collective bargaining representative of a unit of employees appropriate for collective bargaining at SSA. (G.C. Exs. 1(i) & (j)). The Union (AFGE Council 220) is an agent of AFGE for purposes of representing bargaining unit employees at SSA. (G.C. Exs. 1(i) & (j)).

SSA operates two telephone networks which provide the public with access to SSA offices and employees – a national "800" network and a field office network. (Tr. 98). Telephone calls from the public on the field office network generally fall into two categories – the "callback" line which is available to callers who already have a claim in progress with a particular SSA employee and who call that employee's extension and the General Inquiry or "GI" line which is used by callers seeking information about SSA's services. (Tr. 131-132). Approximately 70 percent of calls to field

offices are on the GI line. (Tr. 131). SSA measures the effectiveness of its telephone delivery service based on four metrics: (1) the "answer rate" which is how many calls are actually answered; (2) the "busy rate" which represents the number of calls that do not get through; (3) the "overflow rate" which is the number of callers who are waiting in queue for 15 minutes at which point they "go over to an overflow disposition," meaning that the call is terminated; and (4) the "abandon rate" which represents the number of calls that go unanswered because the caller tires of waiting and hangs up. (Tr. 101-02, 107, 135). Prior to NSBR, field offices had no ability to transfer an incoming call to another office. (Tr. 135). However, employees were able before NSBR to log into another office's phone system to assist that office with answering calls. (Tr. 161-62). Under that system, which was not used frequently, the employee was, in effect, electronically detailed to the other office and, thus, was unavailable to answer calls coming in to his / her own office. (Tr. 176-77).

Between 2008 and 2012, the field office network underwent a Telephone System Replacement Project (TSRP) which converted SSA's "analog" phone system to a "voice and data" network that provided greater functionality and information oversight. (Tr. 98-99). Based on suggestions of field managers that the new phone system allow for inter-office sharing of telephone workloads, SSA and its telecommunications vendor, Avaya Government Solutions (Avaya), developed NSBR to provide local SSA field offices with the capability to share resources by routing incoming telephone calls from office to office. (Tr. 100-01). As developed by SSA and Avaya, NSBR allows calls placed on the GI line to one office to be routed to another office based on the availability of personnel to answer the call. (Jt. Ex. 5; Tr. 100, 135). The objectives of NSBR are to reduce hold times and balance workloads. (Jt. Ex. 5 at 1).

NSBR is designed as an optional system which means that an office must be logged in to route its unanswered incoming GI calls to another office and to accept unanswered incoming GI calls from other offices. (Tr. 112-13, 124, 158). The decision to utilize NSBR lies with managers at the office, area and regional levels. (Jt. Ex. 5 at 3). Under NSBR, once an incoming GI call has been waiting in queue for three minutes, the system begins searching for an available employee in another office in the district (Tier One). (*Id.* at 2). After eight minutes, the system widens the search to include other districts in the area (Tier Two), and after 12 minutes the search expands to other areas within the region (Tier Three). (*Id.*). After 15 minutes, the call goes to "overflow" status; that is, the caller is disconnected after being instructed to call back later or to try the national 800 number. (*Id.*; Tr. 107-08).

SSA decided to implement NSBR on a pilot basis in its Atlanta Region in 2012. (Tr. 101). By e-mail dated May 30, 2012, Assistant Regional Commissioner Amy Roberts advised Union Regional Vice President Jackie Burke that beginning on June 11, 2012, SSA would be conducting a pilot in the North Florida and Tennessee Area field office of "new telephone systems programming that will allow field offices (FO) to answer calls for other FOs as need, which will greatly enhance public service for those who choose to conduct their business by telephone." (Jt. Ex. 1).[1] Ms. Roberts's email stated that she was providing the Union with "courtesy informational notice" rather than "formal notice" under the parties' expired collective bargaining agreement "since there is no statutory duty to bargain." (*Id.*). On this point, Ms. Roberts explained that "we see no foreseeable adverse impact on the working conditions of bargaining unit employees beyond that of a speculative or de minimis nature." (*Id.*). Ms. Burke responded by sending an e-mail on May 30, 2012, to Barry Nelson, LMERT Project Manager for SSA's Atlanta Region in which she demanded to bargain over the impact and implementation of the pilot program, a briefing on the program, and a revised notice with information on all planned phases of the program. (Jt. Ex 2). Ms. Burke also stated that "[n]o aspect of this pilot may be implemented until all bargaining obligations have been met." (*Id.*). Mr. Nelson responded on June 1, 2012, that SSA had determined there had been no changes in a policy, practice or procedure affecting conditions of employment "which would trigger a duty to give formal notice and bargain consistent with 5 USC 71." (Jt. Ex. 3). The NSBR pilot program was implemented in the Atlanta Region beginning on June 11, 2012, and it continues to be in use. (Tr. 78-79, 100-01, 157-58, 224).

Based on its evaluation of the pilot program, SSA determined that NSBR was successful in reducing abandoned call and busy rates. (Tr. 109). Training on NSBR was provided by slide presentation and conference call to every manager in the country, and a decision was made to implement the program nationwide in 2014. (Resp't Ex. 2; Tr. 103, 110-14). No training was provided to bargaining unit employees as SSA "didn't find a need to train them because they were doing the same things that they were doing before, which was answer calls." (Tr. 116). NSBR was implemented in SSA field offices around the country between January and July of 2014. (Jt. Ex. 7; G.C. Ex. 2; Tr. 24-27).[2] Statistics compiled by SSA comparing pre-NSBR and

[1] The May 30, 2012 e-mail did not use the acronym "NSBR."

[2] Implementation of NSBR was delayed in 45 field offices out of a total of approximately 1,200 because those offices lacked the technology to support the program. (Jt. Ex. 7; G.C. Ex. 2; Tr. 123-24).

post-NSBR call answer rates in a sample of ten field offices around the country reflect that NSBR has been successful in reducing the number of unanswered GI calls. (G.C. Ex. 4). In nine of the ten offices measured, the number of answered calls increased after implementation of NSBR by 12 to 211 per cent. (*Id.*).[3] In addition, the average "talk time" in seven of the ten offices studied increased by an average of 58 seconds after implementation of NSBR. (*Id.*). Witnesses called by both parties at the hearing generally confirmed these statistics with testimony that employees are handling significantly more calls since implementation of NSBR. (Tr. 55-56, 80, 82, 137, 226). Two field office managers who were called by SSA also testified that, at least initially, employees expressed concern over the increased number of calls that they were handling from other offices and their frustration over being unable to handle such calls to completion. (Tr. 200, 227).

The NSBR system primarily affects Service Representatives (SRs) who are responsible for answering calls placed on the GI line, but other employees, including Claims Representatives (CRs), also answer calls on the GI line. (Tr. 17, 28, 44). When a call is routed to another office by NSBR, the answering employee is expected to complete the call if possible or fill out an electronic Modernized Development Worksheet (MDW) form with the caller's name and the reason for the call. (Tr. 32, 48-52, 227). Completing the MDW form can take from five to seven minutes. (Tr. 54). The MDW is then sent to the office where the call originated from, and a manager in the originating office assigns the MDW to an employee for any necessary action. (Tr. 52-54, 180-81). Prior to NSBR, employees only completed a MDW when sending information for a processing center and not for the occasional GI calls that originated with another office. (Tr. 41, 50, 54-56, 90). The process of answering a GI call that originated in another office can be more time-consuming because the employee may have to redevelop issues that the caller initially raised with the originating office and may have to spend time identifying the employee in the originating office to whom the caller should be referred. (Tr. 28-30, 56-57, 83-84). The increased time spent answering calls reduces employees' "downtime" between calls that they use to complete other work such as post-entitlement development which is a duty that SRs are evaluated on. (Tr. 60-61, 85-86). SRs called by the GC at the hearing also attributed increasing paperwork backlogs to decreased "downtime" since implementation of NSBR. (Tr. 61, 85). And one SR implicated NSBR as a factor contributing to an ever-increasing workload which causes employees to work through lunches and break time:

> A. None of the employees in my office take breaks. A lot of them will eat their lunch at their desk just to try to finish paperwork.
> Q. Do you have any other particular concerns or problems with NSBR, other than what you've already been . . .
> A. I don't think so, just the increase in foot traffic and increase in volume of calls and not enough time to get anything done.

(Tr. 86-87). She also testified that "walk-in" traffic in her office had "doubled" under NSBR, a development that she attributed to callers not getting their inquiries answered over the phone. (Tr. 89). Another SR was advised by her manager during the week before the hearing that she was not performing up to standards because she was not answering enough calls and was spending too much phone time in a "not ready" status.[4] (Tr. 58-59, 65-66).[5] This SR estimated that the number of calls that she answers during her four-hour GI telephone duty time has doubled under NSBR from 30 to 60, although the time that she is assigned to answer GI calls has not changed. (Tr. 55, 63).

Upon learning from bargaining unit employees of SSA's plan to implement NSBR nationwide, Union President Witold Skwierczysnki sent a letter dated January 15, 2014, to Celene Coburn Wilson, Center Director of SSA's Office of Labor-Management and Employee Relations (OLMER), requesting formal notice pursuant to the collective bargaining agreement by January 24, 2014. (Jt. Ex. 4). Mr. Skwierczysnki acknowledged that SSA has the right to make work assignments, but he added that the Union has the right to negotiate over the impact and implementation of the assignment. (*Id.*). He then went on to outline the Union's concerns with NSBR that it wished to address in

[3] The tenth office in Quincy, Illinois, experienced a four per cent decline in answered calls after implementation of NSBR. (G.C. Ex. 4).

[4] When an employee logs onto the SSA phone system, their status is shown "not ready" which is the "default" setting. (Tr. 145). The employee has to switch to ready status in order to receive calls, and they have the discretion during the workday to revert to "not ready" status. (Tr. 144-45).

[5] A statistical performance report for this SR shows that during the month of April 2015, she was logged into the phone system for 34:02 hours, 8:02 hours of which was in a "not ready" status. (Resp't Ex. 1 at 1; Tr. 120). Similarly, the SR was logged in for 35:45 hours in May with a total of 8:26 hours recorded as "not ready." (Resp't Ex. 1 at 4; Tr. 122-23). This report also shows that the SR returned 179 calls "to queue" in April and another 195 in May, either by hanging up on the caller or not answering within five seconds, which a SSA witness described as abnormally high numbers. (Tr. 121-22).

negotiations:

> The bulk of GI calls relate to pending Claims Representative (CR) actions, both initial claims and Post Entitlement (PE) actions. The Union intends to negotiate over the procedure for the phone answering office to obtain information from the original office in order to answer the caller's question(s). This includes but is not limited to negotiating a procedure that does not entail the sending of MDWs to the original office. The Union also intends to negotiate over the implementation and impact of creating a new telephone position in the phone answering office. This includes but is not limited to addressing issues arising from management's decision to decrease the number of employees available to interview, to take teleclaims, to answer their own GI line, and from being able to have down time.

(*Id.*). Mr. Skwierczysnki concluded his letter with a demand that SSA hold implementation of NSBR in abeyance until completion of the requested negotiations. (*Id.* at 2). Ms. Wilson responded by letter dated March 11, 2014, in which she denied the Union's bargaining request, asserting that "this issue is an assignment of work and there is no change in the general duties or responsibilities for bargaining unit employees because of the implementation of NSBR." (Jt. Ex. 6). Ms. Wilson further stated that even assuming that NSBR involved a change, "we have been unable to identify any reasonable adverse impact on unit employees' conditions of employment beyond that of a speculative or de minimis nature." (*Id.*).

POSITIONS OF THE PARTIES

General Counsel

The GC alleges that SSA violated § 7116(a)(1) and (5) of the Statute by: (1) failing to bargain with the Union before implementing the pilot NSBR program in the Atlanta Region; and (2) by failing to notify and bargain with the Union before implementing NSBR nationally. (G.C. Br. at 8). In the GC's view of the case, NSBR constituted a change in the conditions of employment for bargaining unit employees because it implemented an entirely new system for answering telephone calls with new procedures (*e.g.*, filling out a MDW form for call originating from another office) that were not required in the past. (*Id.* at 8-9). The GC argues that while NSBR has the *effect* of increasing workloads, the case does not simply involve an increased workload but rather a new call-routing system that changed the way in which GI calls are answered. (*Id.* at 10). Thus, the GC submits that the cases cited by SSA in its denial of the Union's bargaining request where the Authority found no duty to bargain over increases in workload are distinguishable. (*Id.* at 10-11).

The GC further asserts that the implementation of NSBR had more than a de minimis effect on employee working conditions and, therefore, generated a statutory duty to bargain. (G.C. Br. at 12). Specifically, the GC identifies the loss of downtime between phone calls and its consequent reduction of time for completing other tasks as the most significant effect of NSBR on bargaining unit employees. (*Id.)* (citing *SSA, Gilroy Branch Office, Gilroy, Cal*., 53 FLRA 1358 (1998) (*SSA*) where the Authority held that the addition of six interviews to employees' schedules had more than de minimis impact in terms of lost adjudication time and reduced ability to manage workloads even though work duties, locations, breaks, benefits and wages were unchanged). As evidence of adverse impact, the GC points to the testimony of SRs that their backlogs of post-entitlement work have increased, causing stress because SR's are evaluated on the timeliness of their post-entitlement work. (*Id.* at 12-13). The GC also contends that its evidence shows that due to the increased number of phone calls and decreased downtime, some employees skip their breaks. (*Id.* at 13). And, citing the testimony of the SR that she was counseled by her manager for not answering enough calls and spending too much phone time in a "not ready" status, the GC states that "[a]t least one employee's performance has been negatively affected by the implementation of NSBR." (*Id.*). It is reasonably foreseeable, the GC argues, that other employees may be counseled or receive negative performance appraisals "due to the increase in their number of short calls." (*Id.*).

Lastly, based on the testimony at the hearing from a SSA negotiator regarding provisions in the parties' collective bargaining agreement dealing with stress and job-related training, the GC anticipates a "covered by" defense. (G.C. Br. at 14). The GC acknowledges that an agency may be excused from bargaining over change if that change is "covered by" a collective bargaining agreement, and it concedes that Union proposals addressing stress, assuming the Union had been given the opportunity to bargain, might be covered by the parties' agreement. (*Id.* at 14-15). However, the GC contends that the fact that some potential proposals may be covered by the parties' agreement does not mean that the change itself is covered, and the GC notes that the SSA negotiator agreed

that there is nothing in the agreement addressing inter-office transfer of telephone calls and that the parties did not discuss NSBR in their negotiations. (*Id.* at 15). For these reasons, the GC urges rejection of any "covered by" defense if raised by SSA.

To remedy the alleged violation, the GC requests an order requiring SSA to return to the status quo that existed before June 2012 when the NSBR pilot was implemented in the Atlanta Region. (G.C. Br. at 16-18). The GC also requests that SSA be required to post a notice signed by the SSA Commissioner nationwide and to email the notice to all bargaining unit employees in SSA field offices. (*Id.* at 18).

Respondent

SSA denies violating the Statute because NSBR did not change or have more than a de minimis effect on the conditions of employment of bargaining unit employees. SSA grounds its defense on five basic claims: (1) NSBR did not result in additional or new duties; (2) NSBR did not create any new performance standards or otherwise affect appraisals; (3) NSBR did not impact adjudication time, lunch, breaks, leave or overtime opportunities; (4) NSBR did not otherwise have any impact greater than de minimis; and (5) assuming for argument's sake that NSBR had an impact on employee stress levels, that issue in relation to shifting workloads is covered by the parties' collective bargaining agreement. (Resp't Br. at 8-9). For these reasons, SSA requests dismissal of the consolidated complaint in its entirety.

As for whether NSBR changed or added duties, SSA states that there is nothing new about answering GI calls or using the MDW form when the employee answering the call is not able to fully resolve the caller's inquiry and, while it concedes that some of the rerouted calls may take longer, it emphasizes that there is no evidence that the amount of time employees are assigned to answer GI calls has changed. (*Id.* at 9-12). SSA discounts as "unpersuasive" and "hyperbolic" the testimony of the GC's witnesses that NSBR has doubled both call and walk-in traffic, and it asserts that regardless of whether there has been an increase in work volume, the Authority held in *U.S. DHS, Border & Transp. Sec. Directorate, U.S. Customs & Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169 (2004) (*Border Patrol*) that an increase in the same type of work due to an agency's transfer of work is not a change in conditions of employment that is subject to bargaining. (*Id.* at 12-13).

SSA states that NSBR has not changed performance standards of bargaining unit employees, and it urges rejection of the SR's testimony that she was counseled for unacceptable performance as insufficient to establish any nexus between NSBR and adverse effect on employee appraisals. (Resp't Br. at 14-16). In this regard, SSA avers that the evidence shows that the SR in question was counseled over multiple concerns relating to her performance in answering GI calls, especially her sending hundreds of calls "back to queue" which is indicative of individual performance problems that cannot be reasonably connected to implementation of NSBR. (*Id.*).

SSA next argues that NSBR did not impact adjudication time, lunch, breaks or overtime opportunities, which distinguishes this case from *SSA*. (Resp't Br. at 16). In particular, SSA points out that there is no evidence that it changed the amount of time employees are assigned to answer GI calls, and it contends that the SRs testimony that they now have less downtime between calls to complete other tasks does not establish that their adjudication time as been reduced in contrast to *SSA* where interview time was increased and adjudication time decreased. (*Id.* at 17-18). SSA further states that no evidence was presented to show that NSBR had any impact on overtime, and it asserts that the attempts by the GC witnesses to causally link NSBR to increased workloads and pressure on employees to work through lunch and breaks is unconvincing. (*Id.* at 18-21). SSA also points out that, unlike *SSA*, there is no evidence in this case that NSBR has had any impact on leave which is the final *SSA* factor that the Authority relied on in finding a change requiring bargaining. (*Id.* at 21).

With regard to any other impact on conditions of employment, SSA points out that there is no evidence that NSBR has affected wages, office hours including flextime, or any other condition of employment beyond that of a speculative or de minimis nature. (Resp't Br. at 21-22). Finally, SSA argues, as anticipated by the GC, that assuming that NSBR has increased employee stress, "stress in the workplace" and "job-related stress" are both covered by the parties' collective bargaining agreement. (*Id.* at 22-23). Consequently, even if NSBR is viewed as a change that caused an increase in stress, SSA maintains that it is relieved of any duty to bargain because stress has already been negotiated and is contained in and covered by the parties' agreement. (*Id.*).

ANALYSIS AND CONCLUSION

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 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); *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000). In assessing whether the effect of a decision 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. *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*). Where, at the time of the change, the identified effects are speculative, rather than reasonably foreseeable, the Authority will not find that the respondent violated the Statute. *See Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574, 576 (1992). The burden rests with the General Counsel to prove the elements of the alleged violation by a preponderance of the evidence. *See Air Force Flight Test Ctr., Edwards AFB, Cal.*, 55 FLRA 116, 121 (1999).

The record shows that SSA conceived, designed, tested and eventually implemented NSBR to address concerns over callers on its GI lines experiencing long wait times and disconnections. As both parties recognize, the initial issue to be addressed in determining whether implementation of NSBR, either as a pilot program in the Atlanta Region or later as a nationwide program affecting virtually all SSA field offices, is whether the program changed the conditions of employment of bargaining unit employees. The parties recognize that the Authority's *Border Patrol* decision establishes that an agency's action that increases the workload of employees does not *per se* constitute a change in conditions of employment that gives rise to bargaining obligations under the Statute, though they disagree on the applicability of that decision to the instant case. In *Border Patrol*, the agency, facing a dramatic increase in the number of aliens apprehended, decided to reroute the detained aliens from the border station where they had been detained to the Tucson Station for processing. A majority of the Authority concluded that the agency's actions, while altering the station at which apprehended aliens were processed and thereby increasing the workload of employees at the Tucson Station, did not change conditions of employment, explaining,

> It is undisputed that processing is one of the tasks that Tucson Station agents perform as a part of their normal, rotational duties. It is also undisputed that the procedure for processing aliens is the same at each of the various stations within Tucson Sector. Although the record demonstrates that the number of aliens processed at Tucson Station further increased in March, as a result of the transport of some of the Casa Grande apprehensions, there was no change to the type of duties that the Tucson Station agents were required to perform. That is, the Tucson Station agents continued to perform the same processing procedures when processing aliens apprehended by Casa Grande Station that they performed when processing aliens that were apprehended by Tucson Station. In addition, the Judge made no finding, and there is no evidence in the record, to show that Tucson Station agents were required to process apprehensions more expeditiously, with greater frequency, or, as noted above, in any changed manner.

60 FLRA at 173-74.[6] The Authority also held that the GC had not established that the agency had changed its policies or practices relating to the processing of apprehended aliens:

> Even if we were to assume that, on most occasions, aliens were processed by the apprehending office, the General Counsel has not established that this was the policy during unusual circumstances, such as that occasioned by an enormous across-the-board increase in alien apprehensions.
>
> In this connection, there is no evidence that the Respondent had previously faced the type of influx of aliens that occurred here and no evidence of a policy or past practice for responding to the type of situation with which the Respondent was presented in this case. As such, there is no basis on which to find that the Respondent had established a policy or past practice concerning a large influx of aliens from which it deviated.

(Id. at 174). In reaching the conclusion that there was no change in conditions of employment, the Authority found the facts and circumstances analogous to *U.S. Dep't of VA Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93 (2003) (Chairman Cabaniss concurring) (*VAMC*) and *U.S. Dep't of the Air Force, Headquarters, 96th Air Base Wing,*

[6] Then Authority Member Pope dissented from the majority's conclusions that the GC failed to establish that the agency changed its policy with respect to the processing of apprehended aliens.
(*Id.* at 177-79).

Eglin AFB, Fla., 58 FLRA 626 (2003) (Chairman Cabaniss concurring) (*Eglin*). (*Id.*). *VAMC* involved an increase in the number and type of acute psychiatric patients being admitted after the medical center "marketed" its ability to accept such patients. 59 FLRA at 93. The Authority found that nothing changed about the "type" of patients admitted to the unit and that although the evidence demonstrated that there "more admissions of the type of patients . . . historically admitted[,]" it did not establish that there was a change in the agency's "admissions policy, practice, or standards concerning the acuity of patients admitted to [the unit]." (*Id*. at 94). Drawing on *VAMC Sheridan*, the Authority stated in *Border Patrol Tucson* that,

> Similarly, in this case, the General Counsel's evidence and arguments support a finding that there was an increase in the number of aliens processed at Tucson Station. However, nothing in the record establishes that the Respondent changed the "type" of aliens that were being processed, the type of work that bargaining unit employees performed or, in any manner, the processing of alien apprehensions. As with the preceding case, the increase in the amount of work (*i.e.*, individuals to be treated or processed) did not constitute a change in conditions of employment.

60 FLRA at 174. The Authority similarly drew on *Eglin* to support its conclusion that there was no change in conditions of employment when the agency rerouted apprehended aliens for processing:

> In *Eglin*, employees were assigned to perform duties on specific aircraft and worked on those aircraft unless called away to assist on other aircraft, which did not occur very often. The agency issued an instruction in which the employees were assigned to their aircraft only when workload and mission allowed. As more active duty personnel were assigned to that location, employees had more work on aircraft other than the one to which they were assigned. The Authority agreed with the judge that the instruction did not change the nature of the employees' assignments. In that regard, the judge noted that the agency had an established practice of modifying work assignments in response to mission and workload fluctuations, and the fact that employees spent more time on assignments other than their assigned aircraft "was merely a variation of existing assignment practices[.]" *Id.* Similarly, here, the increase in workload was due to an increase in operational demands, not some change effected by the Respondent.

(*Id.*). The Authority additionally concluded in *Border Patrol* that even assuming that the decision to reroute apprehended aliens for processing did amount to a change in conditions of employment, the evidence did not establish that the "nature and extent of either the effect, or the reasonably foreseeable effect, of such a change was more than *de minimis*." (*Id.* at 175). In this regard, the Authority noted that since the ALJ found that the affected employees processed apprehended aliens as part of their normal, rotational duties, the rerouting of additional aliens from other stations did "not involve the assignment of either new duties, or duties that were not previously performed." (*Id.*). The Authority further noted that there was "ample record evidence that the Respondent took measures to manage the additional processing workload" (*e.g.*, by recruiting volunteers to augment the *Border Patrol* workforce and requiring the Casa Grande Station to process its own apprehensions or to transfer them to another station when the Tucson Station became backlogged), and it determined "the dedication of additional resources to alleviate the increased workload, as well as actions taken to eliminate any backlog at Tucson Station," militated against a finding that the effect of the change was more than de minimis. (*Id.).* Finally, the Authority concluded that overcrowding, which created sanitary, safety and health concerns for agents in the Tucson Station, did not demonstrate more than de minimis impact since the evidence showed that "exposure to disease, risk of assault by aliens, and other such risks are an inherent part of an agent's job" and not something new associated with the decision to reroute additional apprehended aliens to the Tucson Station. (*Id*.).

The instant case presents some obvious similarities to *Border Patrol*. In both cases, employing agencies attempted to address workload problems by implementing processes that allowed for workload to be redistributed to other locations. In *Border Patrol*, the agency redirected apprehended aliens from the apprehending station where they were historically processed under existing agency policy and practice to another station for processing, and in this case SSA implemented NSBR to allow for GI line calls to one office to be rerouted to other offices when not answered within specified time frames. In both cases, while the

volume of work may have increased, employees' duties were not changed. That is, the border patrol agents continued to process aliens, albeit in greater numbers and from stations outside of the Tucson Station, and the SSA employees answered GI calls before NSBR though generally not from other offices. Some comparisons can also be made to *VAMC* where the medical center marketed its services and admitted more patients but did not alter the type of patient admitted. NSBR similarly broadened the geographic range of GI calls answered by employees but did not change the nature of GI calls themselves. The GC acknowledges these similarities but argues that there is a more important difference in that NSBR does not simply involve an increased workload but rather an entirely new call-routing system that fundamentally changed the way in which GI calls are answered. I find that this argument has merit.

In my view, the *Border Patrol*, *VAMC* and *Eglin* cases involved unique and exceptional circumstances that suggest caution must be taken to avoid extending their holdings to inapposite situations. *Border Patrol* arose from the agency's response to a temporary and unprecedented spike in alien apprehensions that resulted in no change in conditions of employment other than dramatically increased workloads and attendant health and safety concerns at a single station. In *VAMC*, the only change was in the *number* of patients admitted; the type of patients and the medical center's policy regarding the acuity of patients admitted remained unchanged. And, in *Eglin*, the ALJ determined that the agency's actions in requiring employees to perform more work on aircraft other than the one to which they were assigned was consistent with an established practice of modifying work assignments in response to mission and workload fluctuations. Contrastingly, NSBR was not simply a measure to readjust workloads to accommodate a sudden and unforeseen increase in work. SSA states in its brief that NSBR was implemented "in order to address the well-documented problem of unacceptable excessive waiting times for claimants calling field offices." (Resp't Br. at 8). Nor did it simply entail more of exactly the same type of work or a realignment of work assignments consistent with existing SSA practice. Rather, NSBR represented a significant modification of SSA's telephone capabilities and functions as evidenced by the fact that every manager in the country underwent training on the system. (Tr. 103, 110-14; Resp't Ex. 2). The proper inquiry for evaluating alleged changes was outlined by the Authority in *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701 (1995) (*Fairchild AFB*):

> The determination of whether a change in conditions of employment occurred involves an inquiry into the facts and circumstances regarding the Respondent's conduct and employees' conditions of employment. *U.S. Dep't of Transp., FAA, Wash., D.C. & Michigan Airway Facilities Sector, Belleville, Mich.*, 44 FLRA 482, 493 n.3 (1992). Here, the Respondent acknowledges that the sign-out board was "a change in a procedure with regard to providing information about the whereabouts of employees." Regardless of whether the institution of the sign-out board supplanted or augmented Triplett's previous practice of notifying her supervisor of her departures from her office, we find that the institution of the sign-out board imposed a practice that was different from what previously existed and, consequently, constituted a change in conditions of employment. *Cf. Dep't of VA, Veterans Admin. Med. Ctr., Veterans Canteen Serv., Lexington, Ky.*, 44 FLRA 179, 190 (1992) (in rejecting the judge's finding that the replacement of newer vending machines with older ones did not constitute a change in conditions of employment because the older machines provided substantially the same services and products as the newer ones, the Authority found that the degree to which Respondent's actions changed the vending room did not determine whether there had been a change).

50 FLRA at 704. Since NSBR imposed a new system and procedure for answering GI calls that was different from what previously existed, I conclude, consistent with *Fairchild AFB*, that the GC has proved by a preponderance of the evidence that SSA changed employees' conditions of employment when it implemented NSBR as a pilot study in the Atlanta Region and when it subsequently expanded NSBR to all field offices.

Since it is undisputed that NSBR involved an exercise of the management right under § 7106 of the Statute to assign work, the next issue to be addressed is whether NSBR had any impact on bargaining unit employees. *Fairchild AFB*, 50 FLRA at 704 ("where an agency in exercising a management right under § 7106 of the Statute changes a condition of employment of bargaining unit employees, a statutory obligation to bargain concerning the impact of such change exists only if the change either results in more than a de minimis impact on unit employees or such impact is

reasonably foreseeable.").

The GC's case for impact focuses on the claimed loss of "downtime" between calls under NSBR that: (1) reduces available time to complete other work which potentially impacts on performance appraisals; and (2) increases employee stress and influences them to work through breaks and lunch. While these assertions certainly appear to implicate more than minimal impact, the supporting evidence is unpersuasive. Granted, the GC witnesses did testify that there was "some" down time between calls prior to NSBR, that there was a smaller backlog of work so that one had more time to work on other tasks, that walk-in traffic had "doubled" in one office since NSBR was implemented, and that no one in that office takes lunch or breaks. (Tr. 60; 85-89). However, it is undisputed that the time employees are assigned to answer GI calls has not changed, and the evidence establishes that when an employee needs to complete work, such as filling out a MDW form between calls, NSBR allows them to go into "not ready" status and bypass calls. (Tr. 59-60).[7] Moreover, the attempts by the GC's witnesses to link NSBR to increased workloads and backlogs is entirely anecdotal and speculative. The SR who testified that the walk-in traffic in her office had "doubled" since NSBR offered no statistics or other reliable, objective evidence to support her suggestion that callers are not getting answers on the GI line so they opt to come into the office.[8] Indeed, James Campana, a second vice president of the Union, readily acknowledged that there are multiple factors unrelated to NSBR that can explain increased workloads and employee stress:

> And so in the best of all possible worlds, there would be no added work. But that doesn't happen, especially when you're losing staff, and the number of retirees are going up, and you've got more claims and more people to handle.

(Tr. 39). Given the complete absence of credible evidence that NSBR increased the time employees are assigned to answer GI calls, reduced the time available to perform other work or that it is otherwise responsible for the increased volume of work in the field offices, I find that the GC has not established that NSBR has impacted employee workloads, stress or their ability to take breaks. *Cf. SSA*, 53 FLRA at 1369-70 (*adding* six nationwide 800 number appointments to the workload of CRs on Fridays had an impact or reasonably foreseeable impact involving employees' workload, workflow, personal lunch periods, and leave patterns which was more than de minimis). As for the claimed impact on performance appraisals, the only evidence introduced by the GC was the testimony of a single SR that she was counseled during the week before the June 24, 2015, hearing for spending too much telephone time in a "not ready" status. As noted above, the record shows that this SR spent more than 20 percent of her phone time in a "not ready" status during April and May of 2015, and she returned "abnormally high" numbers of calls (179 in April and 195 in May) to queue. (Resp't Ex. 1; Tr. 121-22). Since NSBR was implemented across the country in approximately 1,200 field offices between January and July of 2014, I find it significant that one year later the GC only produced one employee whose performance was even arguably impacted by NSBR. In my view, the particular circumstances leading to this SR being counseled were clearly aberrational and in no way indicative that NSBR had a reasonably foreseeable impact on performance appraisals that is more than de minimis. For these reasons, I conclude that the GC has not met its burden of proving that NSBR, either as a pilot program in the Atlanta Region or a national program, had any effect or reasonably foreseeable effect on the conditions of employment of bargaining unit employees that was greater than de minimis. Therefore implementation of NSBR did not give rise to any bargaining obligations under the Statute.

CONCLUSION

I conclude that the Respondent did not violate § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union before implementing the NSBR pilot program or by failing to notify and bargain with the Union prior to permanently implementing the NSBR program on a permanent, nationwide basis.

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

ORDER

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

Issued, Washington, D.C., September 30, 2015

SUSAN E. JELEN
Administrative Law Judge

[7] For the reasons discussed below, I do not find that the testimony of one SR that she was counseled, in part, for too much "not ready" time demonstrates that such time is not reasonably available to employees during time periods when they are assigned to answer calls on the GI line.

[8] The SR's testimony regarding employees in her office not taking lunch and breaks as a result of NSBR was simply not credible.