

**74 FLRA No. 69**

SOCIAL SECURITY ADMINISTRATION  
BALTIMORE, MARYLAND  
(Respondent)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL 215, AFL-CIO  
(Charging Party)

WA-CA-20-0257

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DECISION AND ORDER

June 16, 2026

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Before the Authority: Colleen Duffy Kiko, Chairman,  
and Anne Wagner and Charles O. Arrington, Members  
(Member Wagner concurring in part and  
dissenting in part)

**I. Statement of the Case**

The Federal Labor Relations Authority’s Acting General Counsel (the GC) issued a complaint alleging the Respondent (the Agency) violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>1</sup> by failing to give the Charging Party (the Union) notice and an opportunity to bargain before implementing a policy that employees maintain an accurate Skype status while at their official duty station (ODS). In the attached, recommended decision (decision), Administrative Law Judge Richard A. Pearson (the Judge) recommended dismissing the complaint on the merits, finding the Agency had no duty to bargain over the policy because its effects on bargaining-unit employees’ conditions of employment were *de minimis*.

The Union filed an exception, arguing the Judge erred in his *de minimis* finding. For the following reasons, we adopt the Judge’s findings, conclusions, and recommendations, and we dismiss the complaint.

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<sup>1</sup> 5 U.S.C. § 7116(a)(1) and (5).

<sup>2</sup> Judge’s Decision (Decision) at 4 (quoting Article 41, Section 6E).

<sup>3</sup> *Id.*

<sup>4</sup> All dates are from 2020 unless otherwise noted.

<sup>5</sup> Decision at 11.

<sup>6</sup> *Id.*

**II. Background and Judge’s Decision**

We summarize the relevant facts only briefly here, as they are set out in more detail in the Judge’s decision.

Article 41 of the parties’ agreement concerns telework. Article 41, Section 6.E. authorizes management to “require that employees use instant messaging, video, or similar technology” while working at their alternative duty station (ADS).<sup>2</sup> It also requires employees to “ensure that the instant message or similar technology accurately reflects their work status,” but does not specify whether this rule applies to employees when they are at their ADS, at their ODS – which is an Agency office – or at both the ADS and the ODS.<sup>3</sup>

The Agency uses Skype for its instant-messaging service on employees’ computers. When an employee turns on their laptop, Skype automatically loads and displays the employee’s work status – showing, for example, whether the employee is active, away, or in a meeting – and is connected to the employee’s calendar and to Microsoft Teams. However, employees may manually change their Skype status.

In January 2020,<sup>4</sup> a case manager who also served as a Union steward (the case manager) met with her second-line supervisor (the supervisor) and “questioned whether she was required to maintain her Skype status while working at her ODS.”<sup>5</sup> The supervisor informed her that employees are required to use Skype and maintain an accurate Skype status at not only their ADS, but also their ODS. On January 15, the supervisor emailed employees in her unit a memo (the memo), which “explicitly requir[ed] them to maintain an updated Skype status at both their ADS and ODS.”<sup>6</sup> In response, the case manager set her Skype status to “do not disturb” while working at both her ADS and ODS – making herself unavailable for communication with supervisors and coworkers.<sup>7</sup> The supervisor subsequently disciplined the case manager for failing to follow agency policies and directives by, among other things, failing to maintain an accurate Skype status on twenty-seven occasions, some of which occurred while the case manager was at her ODS.<sup>8</sup>

The Union filed an unfair-labor-practice (ULP) charge – and the GC issued a complaint – alleging the requirement that employees maintain an accurate Skype status at their ODS was a change in employees’ conditions

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *See id.* at 8 (recounting Agency’s assertions that (1) case manager’s misconduct “involved her affirmative failure to respond to emails and phone calls, not merely a failure to maintain an accurate Skype status,” and (2) only eight of the twenty-seven cited Skype violations involved days the case manager was working at her ODS).

of employment, and that the Agency violated § 7116(a)(1) and (5) of the Statute by failing to give the Union notice and an opportunity to bargain before implementing the change.

The Judge found that the use of Skype concerns employees' conditions of employment. The Judge further found that the Agency changed the Skype policy in January, "but only in the most technical sense; in practice, [the supervisor] was simply making explicit a rule that had previously been implicit, but widely understood and practiced by employees for years."<sup>9</sup> In this connection, the Judge determined that, since before 2019, "employees utilized Skype regardless of where they were working and understood that it was necessary for everyday communications, even though it was apparently not explicitly required."<sup>10</sup> The Judge also found that, when the supervisor sent the memo, she "was articulating an Agency-wide policy" because she "consult[ed] with the Agency's labor[-]relations staff" before sending it, and she sent it "only a few days after the [Agency's] Associate Commissioner had advised the President of [the Union] that employees were required to use Skype at their ADS and ODS."<sup>11</sup> The Judge concluded that, "to the extent that the memo . . . made explicit and mandatory a policy that had been implicit yet widely followed, . . . it constituted a management-initiated change in a condition of employment."<sup>12</sup>

In determining the threshold at which a change to conditions of employment triggers a duty to bargain, the Authority has applied both a "de minimis" test and a "substantial impact" test. In *U.S. Department of Education (Education)*, the Authority issued a policy statement replacing the de minimis standard with a test under which an agency's bargaining obligation would extend only to changes having a "substantial impact on a condition of employment."<sup>13</sup> In *AFGE, AFL-CIO v. FLRA (AFGE)*,<sup>14</sup> the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated that policy statement. Referencing *AFGE*, the Judge noted "the Authority has yet to advise the federal labor relations community whether it will return to the de minimis test or the substantial impact test, or whether it will articulate a new standard."<sup>15</sup> However, the Judge determined that it was "[un]necessary to choose between the de minimis and the substantial impact test[s]" because the ULP charge did not satisfy "even the lower standard of proof to require bargaining."<sup>16</sup>

As to the extent of the change's effects, the Judge found that employees have been using Skype, including at their ODS, for years. The Judge found that the Skype policy "require[d] no action or effort on the employees' part," as employees complied by "[s]imply . . . logging on to [their] computer" and letting "the system automatically change [their] status."<sup>17</sup> Elaborating on this point, the Judge noted that the Skype policy does not "require[] any affirmative effort on the employee's part," but "[o]n the other hand . . . the employee must affirmatively change [their] Skype status to 'do not disturb' or some similar status" to violate the policy.<sup>18</sup> He also stated that, "[a]ssuming managers were micromanaging employees through Skype, they would just as easily have been doing it" before the change.<sup>19</sup> Additionally, the Judge found there was no evidence of the Agency using the new policy in performance evaluations.

Addressing the GC's argument that the Agency relied on the Skype policy to create a new ground for discipline, the Judge determined the case manager "had to make a concerted, daily effort to totally ignore communications from her managers – twenty-seven days in a two-month period, most of them when she was working at her ADS – in order to warrant her suspension."<sup>20</sup> The Judge emphasized that the case manager "had to affirmatively take action . . . to *not comply* with the [Skype] directive," but "would have been *entirely* compliant . . . had she taken no action whatsoever."<sup>21</sup> Evaluating the Agency's basis for discipline, the Judge found the case manager "did not violate simply the policy of using Skype at her ODS, but every aspect of the Agency's rules for responding to emails, telephone calls, and other communications."<sup>22</sup> Noting that she "refus[ed] to answer phone calls and emails, refus[ed] to appear for scheduled Weingarten meetings, and failed to use Skype at her ADS," the Judge determined that it was "impossible to say that [the case manager] was disciplined for refusing to use Skype at her ODS."<sup>23</sup>

In addition, the Judge found no "evidence of other employees having disciplinary or other problems with the Skype policy," which indicated that "the policy was applied and followed by other employees with little or no difficulty."<sup>24</sup> In this regard, the Judge found that employees "used Skype at their ODS in the same manner as they did when teleworking," and "when employees would occasionally forget to update their Skype status,

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 13 n.12.

<sup>12</sup> *Id.* at 13.

<sup>13</sup> 71 FLRA 968, 971 (2020) (Member DuBester dissenting).

<sup>14</sup> 25 F.4th 1 (D.C. Cir. 2022).

<sup>15</sup> Decision at 13.

<sup>16</sup> *Id.* at 14-15.

<sup>17</sup> *Id.* at 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 16.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 15.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

they would immediately correct it after a routine reminder from their supervisor,” and “[s]uch occasional violations did not result in their being disciplined.”<sup>25</sup> Further, the Judge reiterated that “[t]he ‘change’ was in making explicit a policy that had been implicit,” and that the change did not “result in significant impacts on how employees conduct their work.”<sup>26</sup> Consequently, the Judge concluded that the change’s effects were de minimis, and that the Agency did not violate the Statute as alleged. Accordingly, he recommended dismissing the complaint.

The Union filed exceptions to the Judge’s decision on March 4, 2024. The Agency filed an opposition to the Union’s exceptions on March 22, 2024.

### III. Analysis and Conclusion: The Union does not demonstrate that the Judge’s decision is contrary to law.

The Union argues the Judge erred, as a matter of law, by finding that the change was de minimis.<sup>27</sup> According to the Union, the Skype policy formed part of the basis for the case manager’s discipline,<sup>28</sup> and could foreseeably result in discipline to other unit employees in the future.<sup>29</sup> The Union contends that, even assuming the policy existed for years but was unenforced, the Agency “only announced its enforcement of the Skype policy in January 2020 and disciplined at least one employee based on that enforcement.”<sup>30</sup>

In his decision, the Judge correctly noted that the Authority has not clarified – since *AFGE* – what standard it will apply to determine whether the impact of a change to a condition of employment necessitates bargaining. Prior to *Education*, the Authority applied the de minimis

standard. As *AFGE* vacated *Education*,<sup>31</sup> we apply the de minimis standard here.<sup>32</sup>

Under the de minimis standard, before implementing a change in employees’ conditions of employment, agencies are required to give the employees’ exclusive representative notice 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 the employees’ conditions of employment.<sup>33</sup> In assessing whether the effect of a change is more than de minimis, the Authority looks primarily to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on conditions of employment.<sup>34</sup>

The Judge found that, before the Skype policy, the requirement that employees use Skype regardless of where they were working was “implicit, but widely understood and practiced by employees.”<sup>35</sup> According to the Judge, the policy simply made that requirement “explicit and mandatory.”<sup>36</sup> The Judge found “the policy was applied and followed by other employees with little or no difficulty,” and employees “used Skype at their ODS in the same manner as they did when teleworking.”<sup>37</sup> These findings, which the Union does not dispute, support the Judge’s conclusion that the policy “had no appreciable impact on employee working conditions, and that the Agency had no obligation to negotiate regarding it.”<sup>38</sup> The Union’s mere disagreement with these findings and conclusions does not demonstrate error.<sup>39</sup>

Although the Union asserts that the Agency’s imposition of discipline “demonstrates actual impact” of the Skype policy,<sup>40</sup> the Judge concluded that it was “impossible to say” the Agency suspended the case

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 15 n.14.

<sup>27</sup> Exceptions Br. at 5.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *AFGE*, 25 F.4th at 12.

<sup>32</sup> Because the de minimis standard governed whether a change triggered a statutory duty to bargain prior to *Education*, and the D.C. Circuit vacated *Education*, we agree with the Judge that the de minimis test applies unless and until “the Authority fills the vacuum and adopts a new standard for when bargaining over a change is required.” Decision at 14. Although we are not opposed to revisiting the standard the Authority applies in such situations, we find it unnecessary to do so in this case.

<sup>33</sup> *U.S. Dep’t of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009).

<sup>34</sup> *Id.*

<sup>35</sup> Decision at 11; *see also id.* at 12 (stating that “[i]t would be absurd to conclude that employees working at their ODS are *not* required to be accessible by telephone, or that employees are *not* required to respond to instant messages from management” simply because they are working at their ODS, and that it would be “similarly absurd to impose such a meaning on the requirements to use Skype and maintain an accurate Skype status”).

<sup>36</sup> *Id.* at 13.

<sup>37</sup> *Id.* at 16.

<sup>38</sup> *Id.*

<sup>39</sup> *See U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 175 (2004) (Chairman Cabaniss concurring; Member Pope dissenting) (finding no change to conditions of employment because, among other reasons, employees “were not assigned *new duties*, nor were they required to perform any duties not previously required of them”); *Dep’t of the Air Force, 63rd Civil Eng’rs Squadron, Norton Air Force Base, Cal.*, 22 FLRA 843, 847 (1986) (mere disagreement with a judge’s factual analysis does not demonstrate error).

<sup>40</sup> Exception Br. at 6.

manager for violating that policy.<sup>41</sup> Moreover, the Judge's conclusion is consistent with his unchallenged findings that the case manager "refus[ed] to answer phone calls and emails, refus[ed] to appear for scheduled Weingarten meetings . . . fail[ed] to use Skype at her ADS," and violated "every aspect of the Agency's rules for responding to emails, telephone calls, and other communications."<sup>42</sup> The dissent claims that the change was meaningful because no employees were disciplined for violating the implicit Skype policy, but "after the Agency made th[e] policy explicit, the [case manager] was disciplined, in part, for violating it."<sup>43</sup> According to the dissent, it is "immaterial" that the case manager's "discipline was *also* based on other alleged violations."<sup>44</sup> We disagree. The Judge found that, even when employees failed to maintain an accurate Skype status, *no* employees were disciplined simply for violating the policy.<sup>45</sup> The Judge found, and the record reflects, that the case manager was disciplined "not [for] violat[ing] simply the policy of using Skype at her ODS, but [for violating] *every aspect of the Agency's rules for responding to emails, telephone calls, and other communications.*"<sup>46</sup> In this regard, the record suggests that even when the Skype policy was only "implicit yet widely followed,"<sup>47</sup> the case manager would still have been subject to discipline for making "a concerted, daily effort to totally ignore communications from her managers," including her refusal to "answer phone calls and emails."<sup>48</sup> As stated above, the Judge found that "by refusing to answer phone calls and emails, refusing to appear for scheduled Weingarten meetings, and failing to use Skype at her ADS, [the case manager] made it impossible to say that she was disciplined for refusing to use Skype at her ODS."<sup>49</sup> Accordingly, we do not find the Union's assertion that the ODS Skype policy could result in future

discipline sufficient to demonstrate that the Judge legally erred in evaluating the change's impact.

Moreover, the Skype policy did not meaningfully change the employees' job duties. The Authority has found that changes to an employee's conditions of employment are de minimis when there is no more than a minimal change to the employee's job duties.<sup>50</sup> For example, in *SSA*, the Authority held the installation of a new call-routing system – which required employees to either answer a telephone call, or to change their status to "bypass calls and complete other work" – did not have a reasonably foreseeable impact on the employees' conditions of employment that was more than de minimis.<sup>51</sup> Specifically, the Authority noted the judge found "the amount of time employees are assigned to answer general-inquiry calls did not change and that employees could" change their "status to bypass calls and complete other work."<sup>52</sup> As such, the Authority concluded that the judge in *SSA* did not err by concluding that the new call-routing system had a de minimis impact on how the agency would evaluate the employees.<sup>53</sup> The change in this case is even less consequential than the call-routing system in *SSA* because it requires no action on the employee's part. According to the Judge, an employee "personally does not need to do anything" in order to maintain an accurate Skype status – they merely perform their job duties as normal and the system *automatically* adjusts their work status.<sup>54</sup> As such, it would be irrational – and contrary to Authority precedent – to find this change is more than de minimis.<sup>55</sup>

In support of its exceptions, the Union cites Authority decisions that are distinguishable from the instant dispute.<sup>56</sup> In *U.S. Department of the Treasury*,

<sup>41</sup> Decision at 16.

<sup>42</sup> *Id.*

<sup>43</sup> Dissent at 22.

<sup>44</sup> *Id.*

<sup>45</sup> Decision at 16 ("[W]hen employees would occasionally forget to update their Skype status . . . [s]uch occasional violations did not result in their being disciplined."); *id.* (finding no "evidence of other employees having disciplinary or other problems with the Skype policy").

<sup>46</sup> *Id.* (emphasis added) (finding that, after "expressing her skepticism to [her supervisor] about the Skype policy, [the case manager] seems to have [been] determined to shut herself off from all communications from her managers until they would discipline her"); Joint Ex. 10 (final disciplinary decision).

<sup>47</sup> Decision at 13.

<sup>48</sup> *Id.* at 16; *see also* Joint Ex. 6 (proposed disciplinary decision); Joint Ex. 10 (final disciplinary decision).

<sup>49</sup> Decision at 16.

<sup>50</sup> *See AFGE, Loc. 1164, AFL-CIO*, 63 FLRA 292, 292 (2009) (*Loc. 1164*) (affirming a change to a condition of employment is de minimis when there is a minimal modification to employees' workload); *SSA, Off. of Hearings & Appeals, Nash., Tenn.*, 58 FLRA 363, 364 (2003) (*SSA Nashville*) (finding a change to employee's file procedures to be de minimis).

<sup>51</sup> *See SSA*, 69 FLRA 363, 367 (2016) (*SSA*) (Member Pizzella concurring).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See* Decision at 3 ("When an employee turns on his or her laptop, Skype loads automatically and immediately displays the employee's work status, which Skype determines based on the employee's keyboard and mouse activity."); *id.* ("The employee personally does not need to do anything for the appropriate status to show, and that status is visible to other employees and supervisors."); *id.* at 4 ("The system is also connected to the employee's calendar and to Microsoft Teams, so that the employee's Skype status will update to 'busy' or 'do not disturb' if he [or she] is in a meeting or videoconference.").

<sup>55</sup> *See SSA*, 69 FLRA at 367 (finding installation of new call-routing system was de minimis); *Loc. 1164*, 63 FLRA at 292 (finding change is de minimis when there is minimal modification to employee's workload).

<sup>56</sup> Exceptions Br. at 5 (citing *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875 (1990); *Dep't of HHS, SSA, Balt. Md.*, 34 FLRA 765 (1990)).

*Customs Service, Washington, D.C.*,<sup>57</sup> the Authority found that a new policy would make employees “subject to possible discipline” that did not exist prior to the new policy.<sup>58</sup> In *Department of HHS, SSA, Baltimore, Maryland*,<sup>59</sup> the Authority found that the agency “shifted from a practice of ‘benign neglect’ [of a personnel policy] to one of strict observance” and, therefore, changed its policy so that discipline was more likely for employees.<sup>60</sup> However, as noted above, the Judge made numerous findings which demonstrate that the case manager violated existing disciplinary policies<sup>61</sup> and that the Skype policy will not have a reasonably foreseeable impact on how the Agency supervises employees or administers discipline.<sup>62</sup> The Union has not established that the Judge’s findings are inconsistent with the record, or are otherwise deficient. And consistent with the case law cited above, we agree that the impact of the Agency’s merely “technical” change to<sup>63</sup> policy was *de minimis*.<sup>64</sup> Therefore, the Union has not demonstrated that the Judge erred by finding that the Skype policy had a *de minimis* impact on the employees’ conditions of employment.

Accordingly, the Judge did not err in concluding that the Respondent did not violate § 7116(a)(1) and (5) of the Statute by implementing the Skype policy without first giving the Union notice and an opportunity to bargain over the aspects of the policy. Thus, we affirm the Judge’s decision.

#### IV. Order

We affirm the Judge’s decision and dismiss the complaint.

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<sup>57</sup> 38 FLRA 875.

<sup>58</sup> *Id.* at 882 (“As the [r]espondent changed employees’ working conditions by expanding the matters for which employees would be subject to possible discipline, we conclude that the change in unit employees’ conditions of employment is more than *de minimis*.”).

<sup>59</sup> 34 FLRA 765.

<sup>60</sup> *Id.* at 770-71 (finding that shift from a practice of benign neglect of a personnel policy to one of strict enforcement constitutes a more than *de minimis* change in conditions of employment).

<sup>61</sup> Decision at 16 (finding it was “impossible to say that [the case manager] was disciplined for refusing to use Skype at her ODS” because she “refus[ed] to answer phone calls and emails, refus[ed] to appear for scheduled Weingarten meetings, and failed to use Skype at her ADS”); *id.* (finding case manager violated “every aspect of the Agency’s rules for responding to emails, telephone calls, and other communications”).

<sup>62</sup> *Id.* (finding no “evidence of other employees having disciplinary or other problems with the Skype policy,” and “the policy was applied and followed by other employees with little or no difficulty”); *id.* at 15 (finding Skype policy “require[d] no action or effort on the employees’ part” as “the system will automatically change [their] status”); *id.* at 15 n.14 (“The ‘change’ was in making explicit a policy that had been implicit,” but the change did not “result in significant impacts on how employees conduct their work.”); *id.* at 16 (finding employees “used Skype at their ODS in the same manner as they did when teleworking” and would correct any failures to maintain an accurate Skype status “after a routine reminder from their supervisor,” which “did not result in their being disciplined”).

<sup>63</sup> *Id.* at 11.

<sup>64</sup> See *SSA*, 69 FLRA at 367; see also *Loc. 1164*, 63 FLRA at 292; *SSA Nashville*, 58 FLRA at 364.

**Member Wagner, concurring in part and dissenting in part:**

I agree with the Judge and the majority that, because the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit's) decision in *AFGE, AFL-CIO v. FLRA (AFGE)*<sup>1</sup> vacated the Authority's general statement of policy or guidance (policy statement) in *U.S. Department of Education (Education)*,<sup>2</sup> the "de minimis" standard applies here. However, while the majority invokes that standard in this case, it leaves open the possibility that it may not do so in future cases.<sup>3</sup> As the Judge articulated, the Authority's failure to affirm what standard it will apply, post-*AFGE*, has left "the federal labor[-]relations community in considerable doubt as to where to draw the line in requiring bargaining."<sup>4</sup> For that reason, I believe that it is important to reaffirm that the de minimis standard is the appropriate standard. And, given the court's decision in *AFGE*, I also believe that it is important to fully explain the development of, and rationale for, that standard.

Accordingly, I start with some history. The Federal Service Labor-Management Relations Statute (the Statute)<sup>5</sup> requires that, before implementing a change in bargaining-unit employees' (unit employees') conditions of employment, an agency must provide their 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.<sup>6</sup> Since its earliest days, the Authority has held that, when an agency-initiated change to unit employees' conditions of employment involves the exercise of a management right under § 7106 of the Statute, the Statute does not require the agency to bargain unless the change's effects on unit employees are of a certain magnitude. Initially, the Authority – applying a standard that applied under Executive Order (EO) 11,491<sup>7</sup> – assessed whether the pertinent change had a "substantial impact" on unit employees.<sup>8</sup> Then, in *U.S. GPO (GPO)*,<sup>9</sup> the Authority stated that, "where the

exercise of a management right has not changed conditions of employment so as to have an impact on . . . unit employees and such impact cannot reasonably be foreseen, management's failure to have provided prior notice thereof to the exclusive representative will not be found to have violated [§] 7116(a)(1) and (5) of the Statute."<sup>10</sup> In *Department of HHS, SSA, Chicago Region (SSA Chicago)*,<sup>11</sup> the Authority characterized *GPO* as "reject[ing] the 'substantial[-]impact' test" and "indicat[ing] . . . that no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on . . . unit employees which is no more than *de minimis*" – a principle that the Authority "specifically reiterate[d]" in *SSA Chicago*.<sup>12</sup>

Then, in *Department of HHS, SSA, Region V Chicago, Illinois (SSA Region V)*,<sup>13</sup> the Authority issued a decision in the form of two opinions written by the two Members at the time. In his opinion, Acting Chairman Frazier set forth five factors that the Authority would consider in conducting a "de minimis" assessment,<sup>14</sup> while also saying that "[t]he application of these factors is not intended to be mechanistic," and that "the totality of facts and circumstances must be examined in each case and other or additional considerations may be applicable in other factual situations and will be applied where they are appropriate and relevant to the disposition of those cases."<sup>15</sup> In his opinion, Member McGinnis "concur[red] in the rationale and result reached in Acting Chairman Frazier's opinion," but "add[ed] additional points."<sup>16</sup> Specifically, while noting that he and Acting Chairman Frazier "mutually agreed to use" the five factors listed in the Acting Chairman's opinion, "as appropriate,"<sup>17</sup> Member McGinnis also proposed that parties and the Authority's Administrative Law Judges "should address, in future cases," whether a sixth factor should also be used.<sup>18</sup>

<sup>1</sup> 25 F.4th 1 (D.C. Cir. 2022).

<sup>2</sup> 71 FLRA 968, 971 (2020) (Member DuBester dissenting).

<sup>3</sup> Majority at 5 n.32 (noting that the majority is "not opposed to revisiting the standard the Authority applies" in a future case).

<sup>4</sup> Judge's Decision at 13.

<sup>5</sup> 5 U.S.C. §§ 7101-7135.

<sup>6</sup> *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999).

<sup>7</sup> Exec. Order 11,491, *Labor-Management Relations in the Federal Service*, 34 Fed. Reg. 17,605 (Oct. 29, 1969).

<sup>8</sup> See *SSA, Bureau of Hearings & Appeals*, 2 FLRA 238, 239 (1979) ("[The change] did not have any substantial impact on personnel policies, practices, or general working conditions.").

<sup>9</sup> 13 FLRA 203 (1983).

<sup>10</sup> *Id.* at 205 n.4.

<sup>11</sup> 15 FLRA 922 (1984).

<sup>12</sup> *Id.* at 924.

<sup>13</sup> 19 FLRA 827 (1985).

<sup>14</sup> *Id.* at 830 (describing the five factors as: "the nature of the change (e.g., the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (i.e., the duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established through negotiation or past practice procedures and appropriate arrangements concerning analogous changes in the past").

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 834.

<sup>18</sup> *Id.* at 835 (expressing belief that de minimis test should additionally consider "[w]hen would the implementation of the change involve or adversely affect unit employees").

In *Department of HHS, SSA (HHS, SSA)*,<sup>19</sup> the Authority reassessed the de minimis criteria set forth in *SSA Region V*, and elaborated on the rationale behind the de minimis test. As an initial matter, the Authority noted that the National Labor Relations Board (NLRB) “similarly makes a threshold determination in deciding whether an employer has a duty to bargain.”<sup>20</sup> The Authority then stated:

The use of a standard to distinguish between changes which require bargaining and those which do not is fully supported by the Statute and its purposes and policies. Section 7101 of the Statute reflects Congress’ finding that collective bargaining is in the public interest, as well as the direction that the Statute be interpreted in a manner which is consistent with the requirement of an effective and efficient [g]overnment. In cases such as these, the Authority must accommodate Congress’ provisions both for consultation and negotiation concerning working conditions of [f]ederal employees, and for the effective and efficient operation of [g]overnment agencies through the exercise of management rights or through other actions required or permitted by law.

Further, [§] 7105(a)(1) [of the Statute] requires the Authority to provide “leadership in establishing policies and guidance” relating to labor relations in the [f]ederal sector. In fulfilling this responsibility, the Authority must take care that its adjudicative processes not be unnecessarily burdened with cases that do not serve to bring meaning and purpose to the [f]ederal labor-management[-]relations program. While we seek to ensure that the rights of agencies, unions, and employees under the Statute are protected in situations involving changes in conditions of employment, we must also seek to discharge our responsibilities in a fashion that promotes meaningful bilateral negotiations. Interpreting the Statute to require bargaining over every

single management action, no matter how slight the impact of that action, does not serve those aims.<sup>21</sup>

Additionally, citing Black’s Law Dictionary, the Authority noted that “[t]he term de minimis is derived from the Latin phrase ‘De minimis non curat lex,’ which is translated to mean that the law does not care for, or take notice of, very small or trifling matters; the law does not concern itself about trifles.”<sup>22</sup> At the same time, however, the Authority emphasized that “[t]he limited scope of [f]ederal[-]sector bargaining caused by external laws, rules, and regulations also demands that the Authority not impose further limitations unless they are based on clear statutory authority and are buttressed by sound policy considerations.”<sup>23</sup>

The Authority then noted that “[t]wo standards have been used . . . to identify those changes which require bargaining”: the “old” substantial-impact test and the “more recent” de minimis test.<sup>24</sup> The Authority acknowledged that *SSA Region V* set forth five factors to consider in applying the de minimis standard, but the Authority “reassessed and modified” that standard.<sup>25</sup> Specifically, the Authority stated:

In order to determine whether a change in conditions of employment requires bargaining in this and future cases, the pertinent facts and circumstances presented in each case will be carefully examined. In examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining[-]unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

As to the number of employees involved, this factor will not be a controlling consideration. It will be applied primarily to expand rather than limit the number of situations where bargaining will be required. For example, we may find that a change does not require bargaining. However, a similar change involving hundreds of

<sup>19</sup> 24 FLRA 403 (1986).

<sup>20</sup> *Id.* at 406 n.1.

<sup>21</sup> *Id.* at 406.

<sup>22</sup> *Id.* at 407 n.2 (quoting Black’s Law Dictionary 388 (5th Ed. 1979)).

<sup>23</sup> *Id.* at 406-07.

<sup>24</sup> *Id.* at 407.

<sup>25</sup> *Id.*

employees could, in appropriate circumstances, give rise to a bargaining obligation. The parties' bargaining history will be subject to similar limited application. As to the size of the bargaining unit, this factor will no longer be applied.<sup>26</sup>

For over seventeen years, the Authority applied this articulation of the de minimis standard in cases involving the obligation to bargain over the impact and implementation of management-initiated changes.<sup>27</sup> Then, in *SSA, Office of Hearings and Appeals, Charleston, South Carolina (SSA, OHA)*,<sup>28</sup> the Authority expanded the use of the de minimis standard to cases involving the obligation to bargain over the *substance* of management-initiated changes.<sup>29</sup> In this regard, the Authority determined that the rationale for the de minimis standard, set forth in *SSA Region V*,

applies equally as well to changes in conditions of employment that are substantively negotiable. No interests are served by requiring "bargaining over every single management action, no matter how slight the impact of that action[.]" . . . The furtherance of meaningful bilateral negotiations in support of the efficient accomplishment of the operations of the [g]overnment is best served by applying the same standard irrespective of whether a management change concerns the exercise of a management right or the exercise of a substantively negotiable matter. The application of the same standard is warranted in both circumstances and is consistent with the requirement in § 7101(b) that the provisions of the Statute "be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment."<sup>30</sup>

The Authority further determined that "the appropriate threshold standard to apply in both circumstances is the *de minimis* standard that the Authority has developed and

applied over the years."<sup>31</sup> In this regard, the Authority stated that the de minimis standard "provides ample guidance to the parties to determine when a bargaining obligation is incurred and ensures that bargaining takes place in a manner that furthers the purposes set forth in § 7101 of the Statute."<sup>32</sup> Further, the Authority stated that "[t]he consistent application of the de minimis standard in all instances in which an agency seeks to change unit employees' conditions of employment will assist parties in conducting their collective[-]bargaining relationship effectively so as to 'facilitate[] and encourage[] the amicable settlements of disputes between employees and their employers involving conditions of employment' and to 'facilitate and improve employee performance and the efficient accomplishment of the operations of the [g]overnment.'"<sup>33</sup>

On appeal, in *Association of Administrative Law Judges v. FLRA (AALJ)*,<sup>34</sup> the D.C. Circuit affirmed the Authority's decision. As relevant here, the court stated that "[a] de minimis change is not a proper subject of bargaining . . . because it has no appreciable effect upon working conditions."<sup>35</sup> The court also stated that it had "repeatedly recognized that a de minimis exception is generally not express; rather, it is 'inherent in most statutory schemes,' by implication."<sup>36</sup> Further, the court stated that

Congress took the unusual step of prescribing a practical and flexible rule of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment' . . . —that clearly invites the Authority to exercise its judgment, as it [did in *SSA, OHA*]. Effectiveness and efficiency in government can hardly be thought to require bargaining over truly insignificant conditions of employment.<sup>37</sup>

In addition, the court stated that § 7102(2) of the Statute, "which governs so-called substantive bargaining, invokes a cognate by referencing 'conditions of employment,' defined in . . . 7103(a)(14) [of the Statute] as 'personnel policies, practices, and matters . . . affecting

<sup>26</sup> *Id.* at 407-08.

<sup>27</sup> See, e.g., *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Rsv. Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002) (*Willow Grove*); *GSA, Region 9, S.F., Cal.*, 52 FLRA 1107, 1111-12 (1997) (*GSA*) (Chair Segal dissenting); *U.S. Dep't of HHS, SSA, Balt., Md.*, 36 FLRA 655, 688 (1990) (*SSA Balt.*).

<sup>28</sup> 59 FLRA 646 (2004) (Member Armendariz concurring; Member Pope dissenting), *pet. for review denied sub nom.*, *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957 (D.C. Cir. 2005).

<sup>29</sup> *Id.* at 653-54.

<sup>30</sup> *Id.* at 653.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 654.

<sup>33</sup> *Id.* (quoting 5 U.S.C. § 7101(b)).

<sup>34</sup> 397 F.3d 957 (D.C. Cir. 2005).

<sup>35</sup> *Id.* at 962.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (quoting 5 U.S.C. § 7101(b)).

working conditions.”<sup>38</sup> Thus, the court found that Congress “predicated the duty to bargain . . . under § 7102(2) upon the . . . notion [of] . . . an *effect* upon employees.”<sup>39</sup> “Indeed,” the court stated, “the [u]nion’s argument that ‘some level of impact’—that is, ‘effect’—‘is a sine qua non of a union’s right to engage in . . . bargaining’ provides a persuasive defense of the Authority’s uniform de minimis exception.”<sup>40</sup>

The court acknowledged the union’s concerns that expanding the de minimis exception to the context of substantive bargaining would “upset[ ] the balance at the bargaining table” and “seriously damage[ ] the union’s collective[-]bargaining efforts.”<sup>41</sup> However, the court found those concerns “misplaced in view of the *narrow limits* of the de minimis doctrine, for the Authority will bear the burden before this court of showing that any particular application of the de minimis exception is reasonable.”<sup>42</sup> The court further rejected the union’s claim that the Authority’s decision would “spawn significant confusion and extensive litigation.”<sup>43</sup> In this regard, the court found there was “little indication the de minimis exception for ‘impact bargaining’ has had such an untoward effect,” but found that, in any event, it “trust[ed] that if administration of the de minimis exception for substantive bargaining becomes more burdensome than would be the alternative of bargaining over trivia, then the Authority will conclude the interests of ‘effective and efficient [g]overnment’ are better served by dispensing with the exception.”<sup>44</sup>

After *SSA, OHA*, the Authority continued to apply the de minimis test for another sixteen-and-a-half years, until 2020, when a majority of the Authority issued the policy statement in *Education*.<sup>45</sup> In that policy statement, the Authority replaced the de minimis test with a substantial-impact test.<sup>46</sup> The Authority noted that a substantial-impact test applied under EO 11,491,<sup>47</sup> and found that the Authority had not adequately explained why it abandoned that test in favor of a de minimis test.<sup>48</sup>

Further, the Authority found that “the application of the de minimis test resulted in vast differences of opinion among arbitrators, judges, and the Authority as to what matters affect conditions of employment sufficiently to require bargaining” – and that, “[a]s a consequence, the answers have been unpredictable, thereby creating uncertainty that negatively impacted labor-management relations.”<sup>49</sup> For support, the Authority cited several decisions where the Authority had found effects to be de minimis, and several decisions where the Authority found effects to be greater than de minimis.<sup>50</sup> At the same time, the Authority stated that the de minimis test was “drained of any determinative meaning.”<sup>51</sup>

Additionally, the Authority noted that, for private-sector labor relations, the NLRB applies a “material or substantial impact” standard to assess whether a change is within the duty to bargain.<sup>52</sup> The Authority found that “collective bargaining in the public sector must be narrower” than in the private sector, in order “to meet the special requirements and needs of the [g]overnment” and to be “consistent with the requirement of an effective and efficient [g]overnment.”<sup>53</sup> “Because the Authority never provided a rationale for departing from the substantial[-]impact standard (which was applied under EO 11,491) and because the de minimis standard is inconsistent with the purposes of the Statute,” the Authority concluded that the substantial-impact standard, not the de minimis standard, was the appropriate standard to apply.<sup>54</sup>

On appeal, in *AFGE*,<sup>55</sup> the D.C. Circuit reversed, holding that the Authority’s “decision to abandon its de minimis exception in favor of a substantial-impact threshold was not sufficiently reasoned, and thus [was] arbitrary and capricious in violation of” the Administrative Procedure Act.<sup>56</sup> The court found that, in *Education*, the Authority failed to adequately explain “the purported flaws of the de minimis standard.”<sup>57</sup> According to the court, the Authority’s rationale was “inconsistent,” finding

<sup>38</sup> *Id.* at 963.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (emphasis added).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 71 FLRA 968.

<sup>46</sup> *Id.* at 971.

<sup>47</sup> *Id.* at 970.

<sup>48</sup> *Id.* at 970-71.

<sup>49</sup> *Id.* at 969.

<sup>50</sup> *Id.* at 969 n.14 (citing *U.S. DOL*, 70 FLRA 27, 30-31 (2016) (*DOL*) (Member Pizzella dissenting); *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 732-33 (2015) (*BOP*); *NTEU, Chapter 26*, 66 FLRA 650, 653 (2012) (*Chapter 26*); *U.S. Dep’t of the Treasury, IRS*, 64 FLRA 972, 977 (2010) (*IRS*); *U.S. Dep’t of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173-74 (2009) (*Kirtland AFB*); *Willow Grove*, 57 FLRA at 857; *GSA*, 52 FLRA at 1111-12; *SSA Balt.*, 36 FLRA at 688).

<sup>51</sup> *Id.* at 969.

<sup>52</sup> *Id.* at 970 (citing *YP Advert. & Publ’g LLC*, 366 NLRB No. 89 (2018) (internal citations omitted)).

<sup>53</sup> *Id.* (quoting 5 U.S.C. § 7101(b)).

<sup>54</sup> *Id.*

<sup>55</sup> 25 F.4th 1.

<sup>56</sup> *Id.* at 2-3.

<sup>57</sup> *Id.* at 5.

“[i]t is not at all clear how the de minimis standard could both lead inexorably to the conclusion that all management decisions ‘no matter how small or trivial’ must be subject to bargaining and at the same time yield unpredictable results, including, by the [Authority’s] own telling, many instances in which the duty to bargain was *not* triggered.”<sup>58</sup> The court further found the Authority’s “claim that the de minimis standard’s unpredictability has ‘created uncertainty that has negatively impacted labor-management relations’ [was] unconvincing on its own terms.”<sup>59</sup> Quoting its prior decision in *AALJ*, the court found “‘there is little indication that the de minimis exception’ has created the sort of ‘confusion’ the [Authority] now claims.”<sup>60</sup> The court determined that the different results reached in the decisions the Authority cited were “readily explained by distinguishable contexts,”<sup>61</sup> and, “[r]ather than demonstrate . . . confusion,” they appeared “to demonstrate rigorous application by the [Authority] of a fact-intensive standard to varying factual contexts.”<sup>62</sup> “Put another way,” the court stated, “far from demonstrating the de minimis standard is unworkable, the [Authority’s] policy statement simply appears to demonstrate how it works.”<sup>63</sup>

The court also found the policy statement “fail[ed] to grapple with the [Authority’s] own past policy choices and th[e] court’s decisions upholding them.”<sup>64</sup> As for the Authority’s past policy choices, the court stated, “the mere fact that the [Authority] briefly used a substantial-impact standard soon after the [Authority’s] creation does not provide inherent support for the . . . decision to discard thirty-five years of intervening precedent and return to that past policy.”<sup>65</sup> “Indeed,” the court stated, EO 11,491 “did not require bargaining at all” – it merely “directed agencies to ‘meet . . . and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate,’<sup>66</sup> . . . which is in marked contrast to the . . . Statute’s requirement that agencies bargain over ‘any condition of employment.’”<sup>67</sup> The court also found the Authority’s “characterization of its earlier decisions as lacking explanation for its adoption of the de minimis exception [was] misleading.”<sup>68</sup> The court acknowledged that the Authority’s “reasons for replacing the substantial-

impact standard with the de minimis exception back in the mid-1980s were not tidily arranged in a single decision.”<sup>69</sup> However, the court stated, the Authority’s claim that the Authority previously “‘offered no ‘explanation or rationale to support the change’ from the substantial-impact test to the de minimis standard . . . [was] simply incorrect.”<sup>70</sup> Moreover, the court found that, “even if the [Authority] had failed to provide an adequate explanation for its adoption of the de minimis standard more than thirty-five years ago, any such failure would not absolve the agency of its present-day responsibility to *explain* its decision to jettison the precedents that apply the de minimis threshold.”<sup>71</sup> According to the court, the Authority’s “decision to adopt a new policy must be sufficiently explained on its own terms.”<sup>72</sup>

Further, the court determined that, “to the extent that the [Authority] now asserts that the de minimis standard must go because it is categorically ‘inconsistent with the purposes of the . . . Statute,’ . . . *that* contention is plainly contrary to this court’s past interpretation of the [S]tatute.”<sup>73</sup> In this connection, the court stated that its “holding in *AALJ* is a clear recognition of the appropriateness of a de minimis exception to the duty to bargain, as a matter of law.”<sup>74</sup> As such, the court found that the Authority “‘departed from precedent’ that had expressly decided that the de minimis exception is consistent with the . . . Statute.”<sup>75</sup>

Additionally, the court found the policy statement did not sufficiently explain why it preferred the substantial-impact standard to the de minimis standard. Although the Authority argued that the former standard was more predictable and administrable than the latter, the court found that neither the policy statement nor the Authority’s brief to the court “analyze[d] the relative administrability” of those standards, which the court found to be “a critical ‘gap in [the Authority’s] reasoning[.]’”<sup>76</sup> *Additionally, the court found it* “especially striking” that the Authority did not do so, or even argue that the NLRB’s substantial-impact standard has led to more predictable results, given that the Authority “frame[d] inconsistent application as the principal problem the new standard is designed to fix.”<sup>77</sup> Further, the court found “no obvious

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.* at 7.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (quoting EO 11,491, § 11(a)).

<sup>67</sup> *Id.* (quoting 5 U.S.C. § 7114(b)(2); citing *NFFE, FD-1, IMAW, Loc. 1442 v. FLRA*, 369 F.3d 548, 554 (D.C. Cir. 2004) (“Congress passed the [Statute] to encourage collective bargaining between federal employees and their employers.”)).

<sup>68</sup> *Id.* at 7-8.

<sup>69</sup> *Id.* at 8.

<sup>70</sup> *Id.* (quoting *Education*, 71 FLRA at 970).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (quoting *Education*, 71 FLRA at 971).

<sup>74</sup> *Id.* at 9.

<sup>75</sup> *Id.* (quoting *AFGE, AFL-CIO, Loc. 1929 v. FLRA*, 961 F.3d 452, 459 (D.C. Cir. 2020) (*Local 1929*)).

<sup>76</sup> *Id.* (quoting *Local 1929*, 961 F.3d at 459).

<sup>77</sup> *Id.*

reason to expect that labor unions and employers will disagree less frequently about whether any given management decision has a ‘substantial impact’ on conditions of employment than they previously did over whether such a decision had a more than de minimis effect.”<sup>78</sup> “Indeed,” the court stated, “these two standards share many characteristics that might lead one to expect just as much disagreement—and, for that matter, just as many ‘differences of opinion among arbitrators, judges, and the [Authority] as to what matters affect conditions of employment sufficiently to require bargaining’ . . . —when the substantial-impact threshold is applied.”<sup>79</sup> The court concluded that the newly adopted standard was “not the sort of ‘common sense’ measure for ‘advanc[ing] the decision’s stated] goals’—here, predictability and streamlined administration—that we have found adequate to withstand arbitrary and capricious review.”<sup>80</sup>

The court also rejected an Authority claim that the substantial-impact standard would have more predictable results because the Authority would be able to draw on fifty years of NLRB decisions applying that standard.<sup>81</sup> The court noted the Authority did not explain “why the NLRB’s substantial-impact decisions would be easier to apply than the [Authority’s] own thirty-five years of precedents using the de minimis test.”<sup>82</sup> In any event, the court found the Authority’s claim forfeited because it was raised for the first time in the Authority’s brief to the court, and was not contained in the policy statement itself.<sup>83</sup>

Further, the court rejected the Authority’s “bald assertion” that its own “determination that the substantial[-]impact test would draw a line that is [more] meaningful and determinative” than the de minimis test was entitled to heightened deference.<sup>84</sup> In this regard, the court found that it was “not bound by the [Authority’s] conclusory and counterintuitive assertions about the consistency with which its new standard is likely to be applied in subsequent adjudications, especially when the record contains no factual basis for making such a forecast.”<sup>85</sup>

With regard to the Authority’s reliance on NLRB precedent, as an initial matter, the court stated that it was “not being called upon to review a decision to part ways with NLRB precedent in the first instance,” but was “evaluating the [Authority’s] recent departure from its own longstanding precedents that since the 1980s have

struck a balance that is different from the NLRB’s decisions.”<sup>86</sup> “In other words,” the court found, “the baseline for our review is the [Authority’s] longstanding and repeatedly reaffirmed decision to diverge from NLRB policy.”<sup>87</sup> The court stated:

The [Authority’s] decision to adopt the NLRB’s substantial-impact test also fails to account for the [Authority’s] own past assessments of how the differences between the public-sector and private-sector bargaining contexts inform the appropriate bargaining threshold. We have previously cautioned that the [Authority] must “be careful to appreciate fully those distinctions between the private and public sectors that might necessitate a different legal analysis and conclusion” with respect to collective bargaining, since “the bargaining status of any given subject is determined by different statutory provisions and by different policy considerations.”<sup>88</sup>

The court found that the Authority

apparently took those distinctions into account in its 1986 decision in [*HHS, SSA*], when it acknowledged the NLRB’s substantial-impact standard was “similar[ ]” to the FLRA’s de minimis exception, . . . but nevertheless opted to apply the de minimis standard. Critically, that decision highlighted “[t]he limited scope of [f]ederal[-]sector bargaining caused by external laws, rules, and regulations[,]” and observed that this context “demands that the [FLRA] not impose *further* limitations unless they are based on clear statutory authority and are buttressed by sound policy considerations.”<sup>89</sup>

Thus, the court determined, the Authority

has held in the past that the relative substantive narrowness of the

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (quoting *Education*, 71 FLRA at 969 (internal quotation marks omitted)).

<sup>80</sup> *Id.* at 10 (quoting *Free Access & Broad. Telemedia, LLC v. FCC*, 865 F.3d 615, 618 (D.C. Cir. 2017)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 11.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (quoting *Libr. of Cong. v. FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983)).

<sup>89</sup> *Id.* (quoting *HHS, SSA*, 24 FLRA at 406 n.2, 406-07 (emphasis added)).

public-sector bargaining mandated under the . . . Statute in fact *supports* the de minimis standard notwithstanding the NLRB's more stringent bargaining threshold. . . . That conclusion is precisely the opposite of the one that the [Authority] reached here. The [Authority] now ignores its earlier balancing of the factors unique to public-sector bargaining and fails to address the reasons that it previously found persuasive when it decided to select a test that differs from the one that pertains to private-sector bargaining.<sup>90</sup>

The court found that this was “yet another indication” that the Authority had not “engage[d] in reasoned decisionmaking.”<sup>91</sup>

In sum, the court found that “[t]he cursory policy statement that the [Authority] issued to justify its choice to abandon thirty-five years of precedent promoting and applying the de minimis standard and to adopt the previously rejected substantial-impact test” was arbitrary and capricious.<sup>92</sup> Thus, the court vacated the policy statement in *Education*.<sup>93</sup>

As discussed above, since the court's decision in *AFGE*, the Authority has not clarified what standard it will apply, going forward, in determining whether a change's effects on conditions of employment are significant enough to require bargaining under the Statute. For the following three reasons, I believe that the de minimis standard is the appropriate one.

First, as the Authority stated in *HHS, SSA*, “[t]he limited scope of [f]ederal[-]sector bargaining caused by external laws, rules, and regulations . . . demands that the Authority not impose further limitations [on the scope of bargaining] unless they are based on clear statutory authority and are buttressed by sound policy considerations.”<sup>94</sup> As the D.C. Circuit stated in *AFGE*, it has “cautioned that the [Authority] must ‘be careful to appreciate fully those distinctions between the private and

public sectors that might necessitate a different legal analysis and conclusion’ with respect to collective bargaining, since ‘the bargaining status of any given subject is determined by different statutory provisions and by different policy considerations.’”<sup>95</sup> Giving those distinctions their proper due, I believe that the more limited scope of bargaining in the federal sector supports a conclusion that any Authority-made exclusions from the scope of mandatory bargaining should be limited – and should not require bargaining only when a change's impacts on unit employees are “substantial,” as is the case in the private sector.<sup>96</sup> This approach also is consistent with the D.C. Circuit's determination that, with certain limited exceptions, “Congress intended the bargaining obligation [under the Statute] to be construed broadly.”<sup>97</sup>

Second, prior to *Education*, the Authority applied the de minimis standard for approximately thirty-five years, with little or no difficulty.<sup>98</sup> Thus, parties and decisionmakers have extensive precedent to look to when assessing whether a particular change requires bargaining. Further, as the D.C. Circuit stated in *AFGE*, different results in Authority decisions applying the de minimis test are easily explainable, and “‘there is little indication that the de minimis exception’ has created . . . ‘confusion.’”<sup>99</sup> As the court also found, it is unclear why a substantial-impact standard would be any more administrable than the de minimis standard.<sup>100</sup> Relatedly, because the policy statement in *Education* was in place for only slightly longer than one year before the D.C. Circuit vacated it – and there have been no subsequent Authority decisions applying a substantial-impact standard – reaffirming the de minimis standard would have little, if any, disruptive effects on the state of the law.

Third, the D.C. Circuit has expressly found that “the de minimis exception is consistent with the . . . Statute,”<sup>101</sup> and no other courts have disapproved it. By contrast, there is no court precedent upholding the Authority's adoption of the substantial-impact standard in *Education* – and the only relevant court decision is *AFGE*, which set aside the Authority's policy statement adopting that standard.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 12 (quoting *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017) (internal quotation marks omitted)).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *HHS, SSA*, 24 FLRA at 406-07.

<sup>95</sup> 25 F.4th at 11 (quoting *Libr. of Cong.*, 699 F.2d at 1287).

<sup>96</sup> See, e.g., *Ead Motors E. Air Devices, Inc.*, 346 NLRB 1060, 1065 (2006) (“[I]n order to constitute a unilateral change that violates the [National Labor Relations] Act, an employer's action must effect a material, substantial, and significant change in terms and conditions of employment.”).

<sup>97</sup> *Libr. of Cong.*, 699 F.2d at 1286.

<sup>98</sup> See, e.g., *DOL*, 70 FLRA at 30-31; *BOP*, 68 FLRA at 732-33; *Chapter 26*, 66 FLRA at 653; *IRS*, 64 FLRA at 977; *Kirtland FB*, 64 FLRA at 173-74; *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89-90 (2009) (*Davis-Monthan AFB*); *U.S. Dep't of VA, Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004) (Member Armendariz dissenting in part); *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 59 FLRA 728, 728-29 (2004); *SSA, OHA*, 59 FLRA at 654-55; *Willow Grove*, 57 FLRA at 857; *GSA*, 52 FLRA at 1111-12; *U.S. Dep't of HHS, SSA, Balt., Md.*, 36 FLRA 655, 688 (1990).

<sup>99</sup> 25 F.4th at 7.

<sup>100</sup> *Id.* at 9-10.

<sup>101</sup> *Id.* at 9.

In short, I believe that the de minimis standard, as articulated in *HHS, SSA*, and applied in countless Authority decisions, is the appropriate standard to apply in assessing whether an agency has a statutory obligation to bargain over a change or its effects. And, for the following reasons, I disagree with the majority's and the Judge's conclusion that the change at issue here was only de minimis.

The Charging Party (the Union) argues the Judge erred, as a matter of law, by finding that the change was only de minimis.<sup>102</sup> According to the Union, the Respondent's (the Agency's) new Skype policy was part of the basis of a Union steward's (the steward's) discipline,<sup>103</sup> and could foreseeably result in discipline to other unit employees in the future<sup>104</sup> – specifically, the more than 40,000 unit employees who are subject to the new policy.<sup>105</sup> The Union contends that, even assuming the policy existed for years but was unenforced, the Agency “only announced its enforcement of the Skype policy in January 2020 and disciplined at least one employee based on that enforcement.”<sup>106</sup>

In assessing whether the effect of a change is more than de minimis, the Authority looks primarily to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on unit employees' conditions of employment.<sup>107</sup> The number of employees involved is not a controlling consideration, and “will be applied primarily to expand rather than limit the number of situations where bargaining will be required.”<sup>108</sup> The Authority has held that, when an agency implements a new policy or practice that could subject employees to discipline – or the agency even begins strictly enforcing such a policy or practice that had not previously been enforced – the actual or reasonably foreseeable effects on unit employees' conditions of employment are more than de minimis.<sup>109</sup>

The Judge found that, before the new policy, the requirement that employees use Skype regardless of where they were working was “implicit, but widely understood and practiced by employees.”<sup>110</sup> According to the Judge, the new policy simply made that requirement “explicit and mandatory.”<sup>111</sup> In other words, before the new policy, there was no written (or otherwise explicit) policy requiring unit employees to use Skype and show their

status when they worked at their official duty stations; after the change, there was such a written, explicit policy requiring employees to do so, under threat of discipline. Further, there is no claim that, before the change, any employees were disciplined for failing to follow the “implicit” policy;<sup>112</sup> however, after the Agency made that policy explicit, the steward was disciplined, in part, for violating it. The fact that the steward's discipline was *also* based on other alleged violations is immaterial. In addition to this actual impact on a unit employee, when the Agency implemented the change, it either knew or should have known that all of the other unit employees required to follow the new policy could be disciplined if they failed to follow it. Consequently, it also was reasonably foreseeable that the other unit employees could be disciplined if they fail to follow the new policy.<sup>113</sup> For these reasons, I would find that the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on unit employees' conditions of employment was greater than de minimis. Therefore, I would find that the Judge erred, and the majority errs, by finding to the contrary.

Given these actual and reasonably foreseeable effects on unit employees' conditions of employment, the Judge's findings regarding the lack of *other* effects on employees – such as the facts that managers could easily “micromanag[e]” employees both before and after the change,<sup>114</sup> that unit employees could easily follow the new policy, and that there is no evidence of the Agency relying on the new policy in performance evaluations (yet) – do not support a conclusion that the change's effects were de minimis.

Based on the foregoing, I would find that the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing the new policy without first giving the Union notice and an opportunity to bargain over the aspects of the policy that were within the duty to bargain. Thus, I would reverse the Judge's decision to the contrary. Accordingly, I concur in part and dissent in part.

<sup>102</sup> Exceptions Br. at 5.

<sup>103</sup> *Id.* at 6.

<sup>104</sup> *Id.* at 4.

<sup>105</sup> *Id.* at 6.

<sup>106</sup> *Id.*

<sup>107</sup> *Kirtland AFB*, 64 FLRA at 173.

<sup>108</sup> *Dep't of HHS, SSA*, 24 FLRA at 407-08.

<sup>109</sup> *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875, 881-82 (1990); *Dep't of HHS, SSA, Balt., Md.*, 34 FLRA 765, 770-71 (1990).

<sup>110</sup> Judge's Decision at 11.

<sup>111</sup> *Id.* at 13.

<sup>112</sup> *Id.* at 11.

<sup>113</sup> *Veterans Admin. Med. Ctr., Phx., Ariz.*, 47 FLRA 419, 423 (1993) (an analysis of the reasonably foreseeable effects of a change “is based on what [an agency] knew, or should have known, at the time of the change”) (citing *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574 (1992)).

<sup>114</sup> Judge's Decision at 16.

**Office of Administrative Law Judges**

SOCIAL SECURITY ADMINISTRATION  
BALTIMORE, MD  
(RESPONDENT)

AND

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, COUNCIL 215, AFL-CIO  
(CHARGING PARTY)

Case No. WA-CA-20-0257

Sarah J. Kurfis  
For the General Counsel

Eddie Taylor  
For the Respondent

Richard Couture  
For the Charging Party

Before: RICHARD A. PEARSON  
Administrative Law Judge

**DECISION**

For most of its history, the Federal Labor Relations Authority has required agencies to negotiate with their unions when they make changes in conditions of employment that are “more than de minimis.” In 2020, the Authority abandoned that standard, finding that it had been “drained of any determinative meaning,” to the point that agencies were being required to bargain over “any decision, no matter how small or trivial.”<sup>1</sup> Today’s case, however, illustrates that there are indeed instances in which an agency’s policy change is de minimis, and thus does not require bargaining.

The parties’ dispute focuses on a newly-negotiated contractual requirement that employees utilize the Agency’s instant messaging system (Skype) and ensure that their IM status, displayed on their laptops, accurately reflects their work status. The Union insisted that these requirements applied only when employees were teleworking, but the Agency insisted that they also applied when employees were working at their official duty station. One employee challenged this policy, and after ignoring several warnings from her managers to maintain her IM status accurately, she was suspended for three days. The Union filed a grievance challenging the suspension,

and it also filed an unfair labor practice (ULP) charge, alleging that the Agency should have notified the Union and negotiated with it before changing its IM policy.

The case now before me presents two main issues: first, whether the previously-filed grievance bars the Union’s ULP charge under Section 7116(d) of the Statute; and second, whether the Agency unlawfully changed conditions of employment by requiring employees to log into and maintain an updated IM status while working at their ODS.

On the first question, § 7116(d) does not preclude the ULP charge, because the aggrieved party in the grievance (an employee) was not the aggrieved party in the ULP (her union). Section 7116(d) prohibits an aggrieved party from (metaphorically) “taking two bites out of the apple” by litigating the same issue in two different forums, but it does not bar the Union here from invoking the ULP process to vindicate its institutional interests, which are separate from the employee’s personal interests that were addressed in the grievance procedure.

On the second question, I find that any change in work procedures implemented by the Agency regarding the use of Skype IM technology did not have more than a de minimis impact on employees’ conditions of employment. Thus it did not violate § 7116(a)(1) or (5) of the Statute.

**STATEMENT OF THE CASE**

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On May 28, 2020, the American Federation of Government Employees, Council 215, AFL-CIO (the Union or Charging Party) filed a ULP charge against the Social Security Administration, Baltimore, Maryland (the Agency, SSA, or Respondent), alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union over a new requirement that employees maintain an updated Skype status while working at their official duty stations. GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA’s Washington Region issued a Complaint and Notice of Hearing on October 18, 2022, on behalf of the Acting General Counsel (GC), similarly alleging that the Agency violated § 7116(a)(1) and (5). GC Ex. 1(c). The Agency filed its Answer to the Complaint on

<sup>1</sup> U.S. Dep’t of Education and U.S. Dep’t of Agriculture, 71 FLRA 968, 969 (2020) (*Education*).

November 14, 2022, denying that it violated the Statute. GC Ex. 1(e).

On January 19, 2023, a hearing was held in this matter, with parties participating on the MS Teams platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses; a court reporter prepared a transcript of the hearing. The GC and the Respondent filed post-hearing briefs, which I have fully considered. Because the Respondent raised an issue in its post-hearing brief that it had not previously addressed, I granted the GC's Second Motion to File a Reply Brief, as well the Respondent's Motion for Leave to File Other Documents and to respond to the GC's Reply Brief. Upon receipt of the Respondent's Response to the General Counsel's Reply Brief on March 29, 2023, the record was closed.

Based on the entire record, including my observations 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 section 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of section 7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees. The Union, Council 215, is an agent of AFGE for the purpose of representing bargaining unit employees of the Agency, and it too is a labor organization within the meaning of the Statute. SSA and AFGE have been parties to a series of collective bargaining agreements (CBAs), the most recent of which took effect on October 27, 2019. Jt. Ex. 1.

In early 2020, Crystal McDade was a case manager assigned to the Case Pulling Unit (CPU) of the Agency's National Case Assistance Center (NCAC) in Baltimore; she was also a Union steward. Tr. 62, 140. The Agency's several NCACs provide remote support, including case preparation and decision writing, to SSA hearing offices around the country. Employees in the CPU perform prehearing development of disability case files for the Agency's administrative law judges, including obtaining medical records and other evidence and ensuring that the exhibits are properly filed in the case folders. Tr. 26, 140. McDade and other CPU employees in Baltimore were directly supervised by Gina Altidor, who was on a compassionate detail and working from Miami.

Tr. 138-39. McDade's second-line supervisor, Gloria Richardson, worked in Baltimore and managed the Baltimore NCAC's CPU. Tr. 155-56.

The Social Security Administration has been using an instant messaging program on all its employees' computers since 2011. Tr. 125. The current program, Skype, was installed in 2018 and functions in much the same way as earlier programs did, allowing employees to communicate through instant messaging, audio calls, and video conferencing, as well as email. Tr. 31-32, 125-26. When an employee turns on his or her laptop, Skype loads automatically and immediately displays the employee's work status, which Skype determines based on the employee's keyboard and mouse activity: for example, green for available, yellow for inactive or away, red for busy or in a meeting. Tr. 31-32, 129, 131. The employee personally does not need to do anything for the appropriate status to show, and that status is visible to other employees and supervisors. Tr. 33, 129-31. The employee similarly does not need to do anything for the appropriate status to be updated, based on the employee's work activity. Tr. 32. The system is also connected to the employee's calendar and to Microsoft Teams, so that the employee's Skype status will update to "busy" or "do not disturb" if he is in a meeting or videoconference. Tr. 32, 132. An employee also can manually change his status, such as by setting it to "do not disturb," or by logging off Skype, in which case the employee will not receive messages or calls until he resumes Skype activity. Tr. 88, 119.

In recent years, even before the Covid pandemic, SSA employees had begun teleworking in increasing numbers, and when the Agency negotiated a new CBA with its AFGE-represented employees in 2019, the parties added Article 41, devoted to teleworking.<sup>2</sup> Among other things, Article 41 authorizes management to "require that employees use instant messaging, video, or similar technology while working at the ADS." Article 41, Section 6E.<sup>3</sup> It also requires employees to "ensure that the instant message or similar technology accurately reflects their work status," but this rule did not specify whether it applied to employees at their ADS, their ODS, or both. *Id.* The Union understood Section 6E to apply only when employees are working at their ADS, but it began hearing rumors in late 2019 from different parts of the country that management was applying it to both the ODS and ADS. Tr. 36. In January of 2020, these reports were confirmed, when Ms. McDade returned from extended leave: she met with her second-line supervisor Ms. Richardson, inquired about using Skype, and was told that employees were required to use Skype and to maintain an accurate Skype work status at both their ADS and ODS. Jt. Ex. 5.

<sup>2</sup> When teleworking, employees work at an Alternate Duty Station (ADS), which is usually their home; at other times, they work at their Official Duty Station (ODS), an SSA office. Tr. 28.

<sup>3</sup> The Collective Bargaining Agreement, effective from October 2019 to October 2025, is Joint Exhibit 1; Article 41, Section 6E is at page 219.

Both Ms. McDade and the Union believed that management was improperly and unilaterally expanding the Skype requirement (*See* Jt. Exs. 2, 3), and McDade proceeded to ignore it. For the most part, unless her managers forced the issue, she kept her Skype status on “do not disturb” or “off” or similar functions that prevented other people from communicating with her, either by instant message, by voice mail, or by email – not only when working at her ODS but also when teleworking. Ultimately, she was suspended for this conduct. Jt. Exs. 6, 10. The Union filed a grievance on her behalf on May 20, 2020, challenging McDade’s suspension,<sup>4</sup> but it ultimately decided not to arbitrate the grievance. Tr. 79. Then on May 28, 2020, the Union filed this ULP charge, alleging that the Agency should have notified the Union and negotiated before implementing this change in the Skype policy. GC Ex. 1(a).

## POSITIONS OF THE PARTIES

### General Counsel

Because the Respondent did not assert – either prior to or during the hearing – a defense based on § 7116(d) of the Statute, the GC did not address that issue in its post-hearing brief. Instead, it focused on the substantive allegation of its Complaint: that on January 15, 2020, the Agency implemented a new Skype policy for employees in the Case Pulling Unit of the Baltimore National Case Assistance Center by requiring them to maintain an updated Skype status while they are working at their official duty stations.

In support of its contention that the Skype policy was new, the GC points to the telework article of the newly-negotiated October 2019 CBA, Article 41. *See* GC Brief at 7. Section 6E of that article authorizes management to require employees to use Skype or other forms of instant messaging while working at their ADS, but it does not explicitly refer to the use of Skype at employees’ ODS; thus the GC asserts that since this is the “teleworking” article of the CBA, it “only applies when an employee is teleworking at their ADS.” *Id.* The GC further insists that no provision of the CBA or Agency policy addresses the use of IM at employees’ ODS. *Id.* Ms. Richardson’s January 15, 2020 memo to her CPU employees crossed this boundary, however: it explicitly instructed employees to sign into Skype and to ensure that it accurately reflects their availability status for their entire workday, “regardless of your duty station.” Jt. Ex. 5; GC Brief at 9.

The GC further notes that Richardson recognized that her instructions represented a change in NCAC policy. GC Brief at 9-10. At the hearing, she testified that supervisors and employees represented by other unions had already been required to stay on Skype, “but it just didn’t reflect apparently the AFGE employees. . . . So when I actually sent this particular email, from my understanding, this is what had basically changed, and it was for our office to require them . . . we could actually require them to also be on Skype at their ODS.” Tr. 173-74.

The General Counsel goes on to argue that the impact of this change on bargaining unit employees is substantial. The most obvious impact was that it was used as a basis for suspending Ms. McDade, and the GC cites *U.S. Dep’t of Justice, U.S. INS, El Paso Dist. Office*, 34 FLRA 1035 (1990) (*INS El Paso*), for the principle that a change subjecting employees to discipline affects conditions of employment. Similarly, it cites cases such as *Defense Mapping Agency Aerospace Center, St. Louis, Mo.*, 40 FLRA 244, 245 (1991) (*Defense Mapping*), as holding that policies affecting means of employee communication cannot be changed without notice and bargaining. GC Brief at 13-14. The GC further argues that the new Skype policy is likely to affect employee performance appraisals. *Id.* at 16, citing *U.S. EEOC*, 40 FLRA 1147, 1155 (1991). Therefore, since the new Skype policy substantially affected employees’ conditions of employment, the Agency was required to notify the Union and bargain before implementing it.

In order to remedy the Respondent’s ULP, the GC requests that the Agency be ordered to rescind the Skype policy as well as any discipline imposed on employees for violating it, along with backpay. GC Brief at 17-18.

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<sup>4</sup> The grievance is Attachment 1 to the Respondent’s Motion for Leave to File Other Documents.

After the Respondent asserted in its Post-Hearing Brief that § 7116(d) barred the Union's ULP charge, the General Counsel sought to rebut this argument in its Reply Brief. Applying the oft-cited three-pronged analytical framework outlined in *U.S. Dep't of the Air Force, 62<sup>nd</sup> Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677, 679 (2009) (*McChord*),<sup>5</sup> the GC asserts that the charge and the grievance here do not involve the same set of facts and do not involve the same issues. Reply Brief at 4.

Regarding the factual circumstances of the grievance and the ULP charge, the GC notes that the grievance was filed to challenge McDade's April 30, 2020 suspension, while the charge was filed to protest the Agency's failure to notify the Union and bargain before implementing the January 15, 2020 Skype policy. *Id.* The precipitating event for the charge occurred three months prior to McDade's suspension. Similarly, it argues that the legal theories behind the grievance and charge were quite different: the grievance alleged that the Agency had retaliated against McDade for her protected activity, in violation of Article 3 of the CBA and § 7116(a)(1) and (2) of the Statute, while the ULP charge alleged that the Agency had violated the Union's bargaining rights under § 7116(a)(1) and (5). *Id.* at 4-5. Counsel for the GC and the Respondent agreed at the hearing that the merits of McDade's suspension were not at issue here. Tr. 17-18. Moreover, the Union's efforts in the grievance were solely on McDade's behalf to overturn her suspension, while the Union and the GC are seeking in this ULP proceeding to vindicate the Union's right to notice and the opportunity to bargain, on behalf of the entire bargaining unit, before changes in conditions of employment are implemented. Reply Brief at 5-6. Therefore, the General Counsel insists that the ULP charge and complaint are not barred by 7116(d).

### Respondent

The Respondent asserts that the ULP charge is barred by 7116(d) because all three prongs of the

analytical framework have been satisfied: the grievance was filed before the charge; it arose from the same set of facts and raised at least some of the legal theories asserted in the ULP case; and both actions were initiated at the discretion of the same party. Response Brief at 1.<sup>6</sup> Respondent focuses its attention on the second of these points: that the factual and legal bases of the two actions are substantially the same, and it refers me to *AFGE Local 420 Council of Prison Locals, C-33*, 70 FLRA 742, 743 (2018), which emphasizes that the issues do not need to be identical, but merely "substantially similar." Response Brief at 2.

Respondent disputes the GC's allegation that the grievance focused on retaliation against McDade's protected activity, while the ULP charge focused on the Agency's unilateral implementation of the Skype policy. Although Respondent agrees that the ULP charge objected only to the alleged unilateral change, it insists that the grievance alleged and discussed both the alleged retaliation against McDade and the unilateral change to the Skype policy. *Id.* at 2. It cites two separate places in the grievance where the Union argued the Agency had violated the Statute by changing the Skype policy without notice or an opportunity to bargain. First, at page 4 of the grievance, the Union stated, "The Baltimore NCAC managers did not give notice to the Union and they did not bargain changes concerning the use of Skype. As a result the Baltimore NCAC communications policy [which McDade was charged with violating] is not applicable or appropriate." Second, at page 5 of the grievance the Union asserted, "Article 1. Sections 1. and 2. of the Contract between SSA and AFGE was violated as well as 5 USC 7116, in part, because the NCAC managers attempted to changed [sic] conditions of employment related to the use of Skype without bargaining." In other words, while the GC sought to litigate only the issue of unilateral change, the Union and McDade had already made that argument as part of the grievance's challenge to McDade's suspension. Response Brief at 2-3. Although some of the facts concerning McDade's suspension may have differed from

<sup>5</sup> In *McChord*, the Authority stated that in order for a ULP charge to be barred by an earlier-filed grievance, all three of the following conditions must be met: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the charge; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same. 63 FLRA at 679. These requirements actually date back at least as far as *Federal Bureau of Prisons*, 18 FLRA 314, 315 (1985) (*Prisons*). The 7116(d) analysis is the same for grievances that are filed after a ULP charge. See, e.g., *U.S. Dep't of the Army, Army Finance & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1350 (1991) (*Army Finance*). The Authority also explained in *Army Finance* that in order to determine whether the issues are the same in the grievance and the charge, it examines whether they arise from the same set of factual circumstances and whether they advance substantially similar theories. *Id.* at 1350-51.

<sup>6</sup> Counsel for the Respondent asserted that he first became aware at the hearing that a grievance had been filed on the same issue as the ULP complaint. Motion for Leave to File Other Documents at 1-2. After learning of the grievance, Respondent sought permission to offer the grievance into evidence. Since the issue of § 7116(d) goes to our jurisdiction to hear the ULP complaint, I granted the Respondent's motion. *Lowry AFB, Denver, Co.*, 29 FLRA 566, 569-70 (1987). The grievance, marked as Attachment 1 to the Respondent's Motion for Leave to File Other Documents, is admitted into evidence and will be referred to as "the grievance."

the facts alleged in the ULP charge, “the material facts at the heart of the General Counsel’s case are the same as the material facts alleged in the grievance” concerning the unilateral change in the Skype policy. Response Brief at 3. Similarly, one of the legal theories underlying the grievance (unilateral change in the Skype policy) is the same as the GC’s allegation in the ULP complaint. *Id.* at 3-4.

Regarding the substantive allegations of the complaint, the Respondent insists that the January 15, 2020 directive to employees at the Baltimore CPU to log into Skype and maintain an updated status did not trigger a bargaining obligation. This requirement does not require employees to take any action or extend any effort; therefore it did not constitute a change for employees. Similarly, the directive had no impact on employees’ performance of their jobs. *Id.* at 16. The Agency takes issue with the GC’s assertion that employees are affirmatively required to “log into Skype,” because Skype automatically loads when an employee turns on his or her computer. *Id.* at 17. Similarly, as employees go through the workday, Skype automatically adjusts their status if they go into a meeting, go idle, or resume working on their computer. By contrast, it required conscious action for Ms. McDade to adjust her status to “Do Not Disturb” or to log off Skype. *Id.*

Respondent then asserts that any evidence of an impact on employees was purely speculative. Union officials who testified at the hearing offered second-hand, anecdotal evidence regarding potential disciplinary actions and productivity and rumors of employees’ work being monitored, but nothing here was specific. *Id.* at 21-23. The Agency likens the facts of this case to those in *Soc. Sec. Admin.*, 69 FLRA 363 (2015), where the Authority found that the installation of a new call-routing system did not result in an obligation to bargain. Resp. Brief at 18.

As for the one employee who indisputably was disciplined – McDade -- the Respondent insists that her violation of the January 15 directive was the least of the several reasons she was suspended. *Id.* at 19-20. Only eight of McDade’s twenty-seven cited violations of that policy involved days that she was working at her ODS, and even on those days her conduct involved her affirmative failure to respond to emails and phone calls, not merely a failure to maintain an accurate Skype status. The Agency notes that in Ms. Richardson’s decision upholding McDade’s suspension, she said that the suspension was justified even if employees could not be required to use Skype at their ODS. *Id.* at 20 (citing Jt. Ex. 10). There was no evidence that any other employee has been disciplined for violating the Skype policy, even though employees have resumed working regularly at their ODS since March of 2022. *Id.*

Although the Respondent insists it did not commit an unfair labor practice, it argues that a status quo ante remedy would not be appropriate even if a ULP were found, and that McDade’s suspension should not be rescinded. *Id.* at 24-27.

## ANALYSIS AND CONCLUSIONS

### Section 7116(d) does not bar the Union’s ULP charge.

The second sentence of § 7116(d) of the Statute provides, in pertinent part, that “issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.” 5 U.S.C. § 7116(d). Dating back at least to the *Prisons* decision in 1985, the Authority has explained that “the clear purpose and effect of section 7116(d) is to prevent relitigation of an issue in another forum after a choice of procedures in which to raise the issue has been made by the aggrieved party.” 18 FLRA at 316. As the Authority noted in *U.S. Dep’t of the Navy, Navy Region Mid-Atlantic, Norfolk, Va.*, 70 FLRA 512, 515 (2018) (*Navy Mid-Atlantic*), 7116(d) is meant to prevent parties from forum-shopping or getting “two bites at the apple.”

In applying this statutory rule, the Authority has long utilized the three-pronged analytical framework that I described earlier, and which both parties cite. Disputes regarding the second prong of the test are rare, because it is generally clear whether the grievance or the ULP charge was filed first. By contrast, our case law is replete with disputes over the first prong, because litigants (and Members of the Authority) frequently disagree as to whether “the issues that are the subject” of the charge and the grievance are the same, or at least substantially similar. In making this determination, “the Authority looks at whether the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar.” *Army Finance*, 38 FLRA at 1351. This determination remains the source of bitter dispute, as illustrated by the Authority’s decision in *Navy Mid-Atlantic*, where one party’s choices of forums is another party’s “exercise in technical hair-splitting and artful pleading.” 70 FLRA at 514-15.

Because most of the reported 7116(d) cases focus on the first prong of the test, the third prong sometimes seems to fall between the cracks, and that seems to have occurred in our case. Ironically, however, it is the identity of the aggrieved parties, or lack thereof, which is the determinative factor here, even though it received short shrift from both Respondent and General Counsel. Under the third prong, the aggrieved parties in the grievance and the ULP charge must be the same. *McChord*, 63 FLRA

at 679.<sup>7</sup> Since it is the aggrieved party who has the choice of utilizing either the ULP process or the grievance procedure, 7116(d) cannot be invoked when the party asserting a grievance is not the same as the party asserting the ULP. See *Local 547*, 73 FLRA at 582, quoting *Cornelius v. Nutt*, 472 U.S. 648, 665 n.20 (1985). And as I will explain, § 7116(d) does not bar the charge here, because Ms. McDade was the aggrieved party in the grievance and the Union was the aggrieved party in the ULP.

In its Response Brief, the Respondent states, “There is no dispute that the grievance was filed before the ULP charge, and that the grievance and the ULP were initiated at the discretion of the Charging Party.” Response at 1. It then moves on to address what it perceives as the main dispute -- whether the issue in the grievance was the same as in the ULP charge. In its Reply Brief, the GC does not even address the third prong; it simply asserts that since “the complaint and the grievance do not involve the same set of facts and do not involve the same legal theory . . . the complaint is not barred under section 7116(d).” Reply Brief at 4. Although technically Respondent is correct that the GC didn’t dispute the identity of the aggrieved parties, that doesn’t mean that the aggrieved parties are indeed identical.

Turning to the facts of our case, we see that the grievance, filed May 20, 2020, was filed by Greg Senden, Secretary of AFGC Council 215. Grievance at 1. It immediately referenced Ms. Altidor’s proposal to suspend McDade and Ms. Richardson’s affirmance of the suspension, and its entire thrust was toward demonstrating that the suspension was improper. It argued that there was no Agency policy requiring employees to use Skype at their ODS; that Article 41, Section 6 of the CBA does not address work at an employee’s ODS; and that since the parties had not negotiated any policy changes regarding the use of Skype, the Baltimore NCAC policy was not applicable to McDade. *Id.* at 3-4. Since employees in other offices had not been disciplined for such conduct, the grievance argued that McDade was being treated unfairly and that the Agency failed to employ progressive discipline; finally, it alleged the discipline was retaliation for McDade’s work on behalf of the Union. *Id.* at 5-6. While the grievance also alleged (as the subsequent ULP charge did) that the implementation of the Skype policy without bargaining violated § 7116 of the Statute, this was barely touched on in the grievance, and it was clearly overshadowed by the arguments relating directly to McDade and her allegedly unfair discipline. *Id.* at 5. At the end of the grievance, Senden requested that McDade “be made whole in every way possible, including

back pay and the removal of any documents relating to the suspension.” *Id.* at 6. Notably, the grievance does not request that the NCAC Skype policy be rescinded.

In contrast, the ULP charge was filed eight days later by Richard Couture, President of Council 215, and Council 215 was named as the Charging Party. GC Ex. 1(a) at 1, 2, 5. It focused entirely on the Agency’s apparent policy of requiring employees to keep their Skype status updated at their ODS, which Couture insisted was a change in conditions of employment and could not be implemented without notice and bargaining. *Id.* at 3. Among several adverse impacts that this change would have on employees, the charge indicated that at least two employees had faced disciplinary action for violating the new policy,<sup>8</sup> but no employees were named. *Id.*

Given these facts, it is clear to me that although the grievance was filed by the Union, it was initiated on behalf of, and explicitly in the interest of, Ms. McDade. Its purpose was to overturn her suspension and make her whole. The charge, however – also filed by the Union – was initiated to pursue the institutional interests of the Union (the right to notice of a significant policy change and the opportunity to bargain over it) and only referenced McDade’s suspension indirectly.

The Authority has addressed this question on a number of occasions, most recently and most pertinently in *Local 547*, where the facts closely parallel those in our own case, except that in *Local 547* the ULP charge preceded the grievance. As the agency conducted promotion interviews for a position, the union filed a ULP charge alleging that management had unilaterally changed a past practice, in violation of § 7116(a)(1) and (5); subsequently the union filed a grievance on behalf of several employees who were not promoted, alleging again that management had changed a past practice, among other things. Quoting from *Army Finance*, 38 FLRA at 1353, the Authority noted that in 7116(d) cases, the *aggrieved* party is not necessarily the *filing* party. 73 FLRA at 582 (emphasis in original). It then cited precedent demonstrating that “where a union filed a grievance alleging harm to a bargaining-unit employee, the employee, not the union, was the aggrieved party.” *Id.*, citing *Army Finance*, 38 FLRA at 1354; *U.S. DOJ, INS*, 20 FLRA 743, 745 (1985); and *AFGE, Local 3475*, 55 FLRA 417, 419 (1999)). Just as in our case, the ULP charge in *Local 547* didn’t name any individual employees or allege the violation of any individual rights, but instead focused on the union’s institutional rights to notice and to bargain. 73 FLRA at 582. The grievance, by contrast, identified several employees and alleged that their rights

<sup>7</sup> Alternatively, this has been phrased as requiring that “the selection of the ULP procedure must have been in the discretion of the aggrieved party.” *Am. Fed’n of Gov’t Emp. Local 547*, 73 FLRA 581, 582 (2023) (*Local 547*).

<sup>8</sup> Notwithstanding this reference to two employees being disciplined, there is no evidence in the record of anyone other than McDade being disciplined.

in the promotion process had been violated, and it sought remedies specific to the employees. Accordingly, the Authority concluded that the employees were the aggrieved parties in the grievance, even though the union had filed it, but the union was the aggrieved party in the ULP charge. *Id.* at 583. Similarly, in our case, McDade was the aggrieved party in the grievance, while the Union was the aggrieved party in the charge.

Since I have concluded that the lack of identity of the aggrieved parties precludes the application of the 7116(d) bar, it is not necessary to determine whether the issues that were the subject of the grievance were substantially the same as the issues in the ULP charge. Instead, I will proceed to analyze whether the Agency was obligated to give the Union notice of the NCAC Skype policy and an opportunity to bargain over it.

**The Respondent was not obligated to bargain over the Skype policy.**

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. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland AFB., N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland*); *Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9, 9-11 (1981). Even when the change involves the exercise of a management right under § 7106(a) of the Statute, the agency still must bargain with the union over procedures for implementing the change and appropriate arrangements for employees adversely affected by the change. *Kirtland*, 64 FLRA at 173; *Soc. Sec. Admin., Office of Hearings & Appeals, Region II, N.Y., N.Y.*, 19 FLRA 328, 328-29 (1985) (*OHA Region II*).

When an agency is alleged to have unlawfully changed a condition of employment, the ULP analysis involves three questions: Does the alleged change involve a condition of employment? Was there a management-initiated change in that condition? And was the impact of that change significant enough to require bargaining? *See U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 58 FLRA 699, 700 (2003); *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*,

50 FLRA 701, 704 (1995) (*Fairchild AFB*). The answer to the first question is clearly “yes,” but the latter two questions are more complicated.

In applying § 7103(a)(14)'s definition of “conditions of employment” to the duty to negotiate changes therein, the Authority has looked to two basic factors: whether the subject matter of the purported change pertains to bargaining unit employees, and whether there is a direct connection between the subject matter and the work situation or employment relationship of unit employees. *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Baltimore, Md.*, 36 FLRA 655, 668 (1990) (citing *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 236-37 (1986)). The Agency's policy regarding the use of Skype clearly meets these specifications, as it applies specifically to unit employees, and it relates directly to how those employees perform their jobs. Skype is a basic application on the computer operating systems of all employees; thus any policy concerning how employees are to utilize the application will affect how they perform their jobs. The use of Skype is a condition of employment for these employees.

As for whether the Agency changed its Skype policy in January of 2020, I believe the answer is “yes,” but only in the most technical sense; in practice, Ms. Richardson was simply making explicit a rule that had previously been implicit, but widely understood and practiced by employees for years. One employee (Ms. McDade) questioned whether she was required to maintain her Skype status while working at her ODS, and this prompted Ms. Richardson to send the January 15 email (Jt. Ex. 5) to employees in her unit, explicitly requiring them to maintain an updated Skype status at both their ADS and ODS.<sup>9</sup> Prior to October of 2019, the CBA did not contain a telework article at all, and it did not address Skype or instant messaging technology at all, either for employees working at their ODS or at their ADS. Tr. 34-35. While the new CBA authorized management to require employees to use Skype when they worked at their ADS, it didn't explicitly require this of employees working at their ODS. Nonetheless, Skype had been the basic platform for employee communications at the Agency, regardless of whether an employee was teleworking or not, prior to 2019, and it remained so afterward. The need to communicate with other employees does not meaningfully change, whether one is working at home or at an office,<sup>10</sup>

<sup>9</sup> In her email to McDade, Richardson attached the October 28, 2019 email from NCAC management, which advised employees that with the new collective bargaining agreement, they were required to use Skype while teleworking, to maintain an accurate Skype status, and to respond timely to instant messages. Jt. Ex. 6a at 2. Richardson's email reiterated what Associate Commissioner Julian had stated to Council 215 President Couture on January 6, 2020 – that employees were required to use Skype both at their ODS and their ADS. Jt. Ex. 4.

<sup>10</sup> But when employees are teleworking, their supervisors cannot simply walk to their office to communicate. This likely was one of the reasons for adding an explicit Skype requirement in the new Telework article of the CBA, but it does not lessen the need to use Skype to communicate at a spread-out agency such as SSA, where employees such as McDade work hundreds of miles away from their supervisors and from the judges they assist.

and Skype had been the primary means of enabling such communication for years throughout the Agency. I find that prior to October 2019, employees utilized Skype regardless of where they were working and understood that it was necessary for everyday communications, even though it was apparently not explicitly required.

At the hearing and in its brief, the GC placed considerable emphasis on the text of Article 41 of the CBA, but the full context of that article undercuts the meaning ascribed to it by the Union and the GC. Article 41 is titled *Telework*, and it adds a variety of rules for employees to follow while working at their ADS, but the fact that the text refers explicitly to “working at the ADS” (as in the second line of Section 6E) doesn’t necessarily mean that those rules are **inapplicable** at the employee’s ODS. Rather, it is clear to me that the full article is intended to apply the same basic rules and procedures for teleworking employees that applied when they worked at their ODS. Thus, Section 6D of Article 41 requires employees “working at the ADS” to be accessible by telephone and to retrieve and timely respond to voice mail. Section 6E contains three requirements and uses slightly different language in each one: it first requires employees to read and respond to emails “as if they were at the ODS;” it then says management “may require” employees to use instant messaging or similar technology “while working at the ADS;” and finally it requires employees to ensure that Skype accurately reflects their work status, without referring explicitly either to ADS or ODS. Section 9 of Article 41 provides that all policies relating to employee conduct at their ODS also apply at their ADS. In total, these provisions can only be reasonably understood as making the ADS as similar as possible to the ODS. It would be absurd to conclude that employees working at their ODS are **not** required to be accessible by telephone, or that employees are **not** required to respond to instant messages from management, simply because Sections 6D and 6E only cite such a requirement in the *Telework* article. It is similarly absurd to impose such a meaning on the requirements to use Skype and maintain an accurate Skype status. Employees throughout the Agency had been using Skype as their basic communications interface for years at their ODS, even though it was not explicitly required. Ms. Richardson’s memo of January 15 simply made explicit what had long been understood and followed by employees.<sup>11</sup>

Thus, to the extent that the memo issued by Ms. Richardson on January 15 made explicit and

mandatory a policy that had been implicit yet widely followed, I find that it constituted a management-initiated change in a condition of employment.<sup>12</sup> The final question, then, is whether the change affected employees to a degree that it triggered a bargaining obligation on management’s part. *Fairchild AFB*, 50 FLRA at 704.

For the past three years, the threshold at which a change triggers a duty to bargain has been in limbo. For most of the FLRA’s history, the Authority has held that a change is negotiable “if the change will have more than a de minimis effect on conditions of employment.” *Kirtland*, 64 FLRA at 173; *OHA Region II*, 19 FLRA at 328-29. But in *Education*, the Authority issued a General Statement of Policy which discarded the “more than de minimis” test in favor of a “substantial impact” test; in other words, an agency is not required to bargain over a change in conditions of employment unless that change has a substantial impact on a condition of employment. 71 FLRA at 971. However, in *AFGE v. FLRA*, 25 F.4th 1 (D.C. Cir. 2022) (*AFGE v. FLRA*), the U.S. Court of Appeals for the District of Columbia Circuit held that the Authority’s rejection of the de minimis standard was arbitrary and capricious, and it vacated the decision. Since the court’s decision, the Authority has yet to advise the federal labor relations community whether it will return to the de minimis test or the substantial impact test, or whether it will articulate a new standard -- leaving the federal labor relations community in considerable doubt as to where to draw the line in requiring bargaining.

Somewhat surprisingly, the parties in this case actually agree that, at least for the time being, a change must be substantial in order to require bargaining. The GC, who I might have assumed would argue for a lower threshold – i.e., the de minimis standard – since the *Education* decision is no longer binding, continues to assert in its brief that a substantial impact is required. GC Brief at 12-13 & n.2. This is consistent with the GC’s allegation in the Complaint that the Skype policy had a substantial impact on conditions of employment. G.C. Ex. 1(c). Nevertheless, the GC insists that even using the higher threshold of “substantial impact,” the Agency’s change to its Skype policy had a substantial impact on employee working conditions. GC Brief at 14-16. For its part, the Respondent insists that since the Authority has not explicitly abandoned the substantial impact standard, and since the events of this case occurred outside the jurisdiction of the D.C. Circuit, the Authority’s

<sup>11</sup> Richardson testified that she sent the January 15 email to her CPU employees in response to McDade’s inquiry about Skype on January 13; she decided to send it to all her employees, rather than just to McDade, so that McDade would not appear to be singled out. Tr. 170-71.

<sup>12</sup> Richardson did not initiate this policy on her own. She testified that she sent the January 15 memo after consulting with the

Agency’s labor relations staff. Tr. 171. It was sent only a few days after the Associate Commissioner had advised the President of Council 215 that employees were required to use Skype at their ADS and ODS (Jt. Ex. 4). Accordingly, Richardson was articulating an Agency-wide policy.

non-acquiescence policy should apply, and the substantial impact standard should be utilized here. Resp. Brief at 15.

I do not agree with either party on this point. Although I think it is admirable that the GC, having asserted in its Complaint that the Skype change was substantial, has not sought to shirk that heavier burden of proof, I do not believe that the law requires me to continue to apply a bargaining standard if it is unsupported by the case law. I also do not see any justification for me to assume (as the Respondent suggests) that the Authority would choose to continue to apply its substantial impact standard in the face of the D.C. Circuit's decision in *AFGE v. FLRA*. "Vacated" means vacated: poof – it's gone. The *Education* decision now has no greater legal standing than the cases it overruled. In the absence of a binding standard for the threshold for bargaining, the best course of action for me is to apply the standard that I believe to be correct, as I understand the full scope of our Statute and FLRA case law.<sup>13</sup>

My understanding is that the Statute requires an agency to provide notice to a union and to bargain when it makes a change in a condition of employment that is more than de minimis. This is the rule that the Authority has applied for most of its four-plus decades of existence, and that has been endorsed and enforced by those Circuit Courts of Appeal that have examined the issue. *AFGE v. FLRA*, 25 F.4<sup>th</sup> at 9; *AFGE, Nat'l Border Patrol Council v. FLRA*, 446 F.3d 162, 165 (D.C. Cir. 2006); *Ass'n of Administrative Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) (*AALJ v. FLRA*). Indeed, in its recent decision in *AFGE v. FLRA*, the court did not simply reject the Authority's adoption of the substantial impact test; rather, it recognized "the clear appropriateness of a de minimis exception to the duty to bargain, as a matter of law." 25 F.4<sup>th</sup> at 9.

When the de minimis standard was first articulated by the Authority, it was framed as a narrow exception to § 7114(b)(2)'s unqualified language that parties have a duty to "negotiate on any condition of employment." *Dep't of Health & Human Servs., Soc. Sec. Admin.*, 24 FLRA 403, 406-07 (1986) (*SSA*), cited in *AFGE v. FLRA*, 25 F.4<sup>th</sup> at 8; see also *Dep't of Health & Human Servs., Soc. Sec. Admin. Region V*, 19 FLRA 827, 834 (1985) (Member McGinnis concurring) (*Region V*). The Authority reasoned that since the Statute and other federal laws already narrowed the scope of bargaining considerably for federal employees and unions, the Authority should "not impose further limitations unless they are based on clear statutory authority and are

buttressed by sound policy considerations." *SSA*, 24 FLRA at 406-07. Nonetheless, it stated that government could not properly function if management were "required to bargain over every decision it makes, regardless of the impact on unit employees." *Region V*, 19 FLRA at 834. Thus the default position in the statutory analysis is to require notice and bargaining over changes, unless the change "has no appreciable effect upon working conditions." *AALJ v. FLRA*, 397 F.3d at 962. And for nearly the entirety of the FLRA's history, the Authority struck that balance by applying the de minimis standard. Therefore, until the Authority fills the vacuum and adopts a new standard for when bargaining over a change is required, I will utilize the de minimis test.

In the case at hand, however, it is not actually necessary to choose between the de minimis and the substantial impact test. Examining the evidence regarding the Agency's requirement that employees use Skype while working at their ODS, I conclude that the impact of the policy on employees' work is so small that bargaining was not required, regardless of which test is used. Thus the General Counsel has not met even the lower standard of proof to require bargaining here. Accordingly, regardless of whether the Authority ultimately endorses a de minimis test or a substantial impact test, SSA's Skype policy did not require notice or bargaining.

As I have already noted, Skype is the basic office communication infrastructure used by all SSA employees, whether they are working at home or at their office. Skype, or earlier versions of it, have been on Agency computers since 2011. It coordinates with employees' telephone, video, instant messaging, calendars, and other forms of communication, and it shows users the availability of other employees. As soon as an employee opens his computer, Skype is activated and shows other users the employee's status. If one employee wants to contact another, she can look on her laptop screen and see if he is available; if a CPU supervisor needs to assign work to a customer service specialist, she can immediately see who in her unit is available. Tr. 172-74.

As the Respondent and some witnesses noted, complying with the Skype rule requires no action or effort on the employees' part. Tr. 13, 127. Simply by logging onto his computer, an employee is complying with the policy requiring him to sign into Skype and ensure that it accurately reflects his work status. If the employee goes into a pre-arranged meeting or goes out to lunch, the system will automatically change his status accordingly; moreover, if someone else sends a text message or email

<sup>13</sup> By undertaking this task, perhaps I have demonstrated the truth of the maxim that nature abhors a vacuum. While I have sought to apply the statutory and case law as I understand it, I would hope that the Authority will fill this legal vacuum by adopting – as quickly as possible – a standard for when bargaining is

required. Unions and agencies alike are floundering without necessary guidance on an issue that is fundamental to their daily relationships, even as the Senate neglects its duty to fill the current vacancy in the Authority's membership.

to the employee or phones him, the system will show the employee the message, and the caller or sender will see that the message was received or that the employee was unavailable. None of this requires any affirmative effort on the employee's part. On the other hand, in order for an employee to block communication from a supervisor or another employee, the employee must affirmatively change his Skype status to "do not disturb" or some similar status. Tr. 132-33. As the Respondent notes in its brief, "Ms. McDade had to affirmatively take action in the Skype application to *not comply* with the directive, while she would have been *entirely compliant* with the directive had she taken no action whatsoever." Resp. Brief at 18 (emphasis in original). Moreover, employees throughout the Agency had been using Skype and its predecessors for years, even when almost all employees worked at their ODS, and even when its use was not mandatory in any location. Employees understood that they had to respond to email and other communications, and Skype was the basic operating system for doing so.<sup>14</sup>

The General Counsel offered evidence regarding the impact, or potential impact, of the mandatory Skype policy on employees. Mr. Couture testified that the Union wanted clarification, for instance, as to what constitutes an accurate Skype status, since employees may be actively working even though they are not using their computer, causing their status to show they are inactive. Tr. 46-47. Moreover, the Agency's policy could, and did, result in an employee being disciplined for violating it. *Id.* Mr. Senden said employees were concerned that managers were using Skype to keep track of employees' work activities. Tr. 76.

I am not persuaded that the GC's evidence shows any appreciable impact on employee working conditions. As I have repeatedly noted, employees had been utilizing Skype, both while teleworking and while at their ODS, for years. Assuming managers were micromanaging employees through Skype, they would just as easily have been doing it prior to the 2019 CBA and prior to the use of Skype becoming mandatory. There was no evidence of the policy being utilized in employee performance evaluations, and such a possibility is too speculative to consider here. And while Ms. McDade was certainly suspended for violating the Skype policy (among other things), the evidence shows that she had to make a concerted, daily effort to totally ignore communications from her managers – twenty-seven days in a two-month period, most of them when she was working at her ADS – in order to warrant her suspension. She did not violate simply the policy of using Skype at her

ODS, but every aspect of the Agency's rules for responding to emails, telephone calls, and other communications. After returning from leave in January and expressing her skepticism to Richardson about the Skype policy, she seems to have determined to shut herself off from all communications from her managers until they would discipline her. But by refusing to answer phone calls and emails, refusing to appear for scheduled Weingarten meetings, and failing to use Skype at her ADS, she has made it impossible to say that she was disciplined for refusing to use Skype at her ODS. And as a practical matter, in light of the absence of evidence of other employees having disciplinary or other problems with the Skype policy, it appears that the policy was applied and followed by other employees with little or no difficulty. They used Skype at their ODS in the same manner as they did when teleworking, and when employees would occasionally forget to update their Skype status, they would immediately correct it after a routine reminder from their supervisor. *See, e.g.*, Tr. 171-72. Such occasional violations did not result in their being disciplined. I therefore find that the Agency's Skype policy had no appreciable impact on employee working conditions, and that the Agency had no obligation to negotiate regarding it.

Since I have concluded that the Respondent did not commit an unfair labor practice, I recommend that the Authority adopt the following Order:

### ORDER

IT IS ORDERED that the Complaint in Case No. WA-CA-20-0257 be, and hereby is, dismissed.

Issued, Washington, D.C., January 30, 2024

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RICHARD A. PEARSON  
Administrative Law Judge

<sup>14</sup> It is for this reason that I earlier concluded that the January 15 memo changed Agency policy in only the most technical sense. Although employees may not have been explicitly required to use and update Skype when working at their ODS, this was the widespread practice. The "change" was in making explicit a

policy that had been implicit. And while such a change may in some cases result in significant impacts on how employees conduct their work (as in *Defense Mapping*, 40 FLRA at 256-57, and *INS El Paso*, 34 FLRA at 1044-45), that did not occur here.