Office of Administrative Law Judges

SOCIAL SECURITY ADMINISTRATION
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3448, AFL-CIO
Charging Party

Case No. CH-CA-04-0351

John F. Gallagher
For the General Counsel

Wilson Schuerholz
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On April 26, 2004, the American Federation of Government Employees, Local 3448, AFL-CIO (Union) filed an unfair labor practice charge against Eric Stransky; the Union filed an amended charge on June 22, 2004. [1] On July 30, 2004, the Acting Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Social Security Administration (Respondent or SSA) committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by notifying employees assigned to the Painesville, Ohio office who are members of the collective bargaining unit represented by the Union that they could no longer work after 5:45 p.m. each day and by failing to provide the Union with notice or an opportunity to bargain over the change in conditions of employment.

A hearing was held in Cleveland, Ohio on November 4, 2004. Each of the parties were present with counsel and were afforded the opportunity to submit evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

1. The only change in the amended charge was the identification of the charged activity or agency as "Eric Stransky, Social Security Admin."

Positions of the Parties

The General Counsel

The General Counsel maintains that the Respondent failed in its statutory duty to bargain by unilaterally changing the closing time of the Painesville, Ohio office from 7:00 p.m. to 5:45 p.m. without affording the Union advance notice or an opportunity to bargain over the change. The Respondent's action was contrary to a past practice that had been in effect since 1996 or before. Two successive managers of the office were aware of the practice because they signed time sheets showing employees' hours of work. Neither of the managers challenged the practice. The General Counsel further maintains that the existence of a binding past practice at the Painesville office is not inconsistent with the existence of a nationwide bargaining unit because the knowledge and acquiescence of local management officials was binding on the Respondent.

According to the General Counsel the collective bargaining agreement (CBA) between the parties specifically provides for the continuation of past practices, including those on a local level, which do not detract from the CBA. Since there is nothing in the CBA covering the closing time of a district office such as the one in Painesville, the past practice cannot be contrary to the CBA. Even if contractual language precludes employees from working credit hours beyond 5:45 p.m., there is nothing in the CBA to prevent overtime after 5:45 p.m.

The General Counsel argues that the change in the closing time of the office had a more than *de minimis* effect on bargaining unit employees because they would have been able to work more credit and overtime hours had the change not occurred. This translates into an adverse impact on employees' personal time because of the decreased opportunity to work credit hours as well as a monetary loss resulting from a reduction in overtime.

The General Counsel seeks a *status quo ante* remedy whereby the Respondent would be ordered to refrain from implementing a change in the closing time of the Painesville office without giving the Union notice and an opportunity to bargain. The General Counsel also seeks an order directing the Respondent to provide back pay with interest and credit hours to employees who would have worked overtime and accrued credit hours if the closing time of the office had not been changed to 5:45 p.m.

The Respondent

The Respondent maintains that the General Counsel has not established the existence of a past practice at the Painesville office whereby employees were allowed to work credit hours until 7:00 p.m. According to the Respondent, the alleged practice was not exercised consistently for an extended period of time, nor did SSA have knowledge of the practice or acquiesce at the national level. Furthermore, the CBA specifically provides only for the maintenance of past practices which are not specifically covered by the contract. In this case, the alleged practice runs counter to language in the CBA which limits credit hours to a period ending one hour after the end of the normal workday. Since the normal workday at the Painesville office ends at 4:45 p.m., the contract prohibits the working of credit hours beyond 5:45 p.m. Additionally, the CBA expressly incorporates all existing laws and government-wide rules and regulations. This includes the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. §6121 (Act). The Act defines "credit hours" as time in excess of an employee's basic work requirement during which the employee elects to work so as to vary the length of his or her workday or workweek. As stated above, the CBA limits credit hours to a time period ending at 5:45 p.m. Therefore, the allowance of credit hours beyond that time would be in violation of the Act.

The Respondent also argues that, even if there was a past practice as alleged by the General Counsel, the practice was inconsistent with the CBA. Therefore, the Respondent should not be required to bargain over a change to the past practice.

The Respondent further maintains that, since the alleged past practice is contrary to the Act, it should not be required to bargain over a change to an unlawful practice.

The Respondent argues that the change of which the General Counsel complains did not have either the actual or foreseeable effect of changing the ability of employees to work overtime past 5:45 p.m.

Finally, the Respondent maintains that, even if it were found to have committed an unfair labor practice as alleged, any posting should only be signed by the local manager. Furthermore, a *status quo ante* remedy would not be appropriate.

Findings of Fact

The Respondent is an "agency" as defined in §7103(a)(3) of the Statute. The Union is a "labor organization" under the terms of §7103(a)(4) of the Statute. The Union is an agent of the American Federation of Government Employees, AFL-CIO (AFGE) which is the exclusive representative of a nationwide unit of certain employees of the Respondent which is appropriate for collective bargaining.

The Language of the CBA

At all times pertinent to this case, the Respondent and the Union, through AFGE, were party to a CBA (GC Ex. 2) which went into effect on April 6, 2000, and, while expired, was still binding. The CBA states, in pertinent part:

Article 1

Governing Laws and Regulations

Section 1—Relationships to Laws and Government-Wide Rules and Regulations

In the administration of all matters covered by this agreement, officials and employees shall be governed by existing or future laws and existing government-wide rules and regulations, as defined in 5 U.S.C. 71, and by subsequently enacted government-wide rules and regulations implementing 5 U.S.C. 2302.

Section 2—Past Practices

It is agreed and understood that any prior benefits and practices and understandings which were in effect on the effective date of this Agreement at any level (national, council, regional and local) and which are not specifically covered by this Agreement [and] do not detract from it shall not be changed except in accordance with 5 U.S.C. 71.

* * * * *

ARTICLE 10

HOURS OF WORK, FLEXTIME, ALTERNATIVE WORK ARRANGEMENTS AND CREDIT HOURS

Section 5 — Scheduling Overtime-Field Organization [2] , including OHA and OQA (Field Organizations)

A. When the Administration decides to use overtime, qualified volunteers will be used before using non-volunteers.

2. It is undisputed that the Painesville office is a field office.

B. All qualified employees, whose performance is at least fully successful, will be notified of the availability of overtime.

C. Overtime will be assigned fairly and equitably.

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Appendix A [to Article 10]

Flexible Work Arrangements (FWA) for Field Offices

* * * * *

Section 5–Flextime in Small Offices [3]

* * * * *

C. Flexible Band

The flexible band for small offices is a 1-hour and 45-minute period starting 45 minutes before the normal start time and ending one hour after the normal start time. It will also be 45 minutes prior to the normal end of the workday to one hour after the end of the normal workday.

The Change to the Office Closing Time

Mark Denman, the Regional Vice President of the Chicago Region of AFGE Council 220 [4] and the President of the Union, testified that, on January 30, 2004 [5], he was informed by the local Union representative that, effective immediately, the Painesville office would close at 5:45 p.m. That decision was apparently made by Hector Lamourt, [6] the manager of the office. [7]

Denman contacted Lamourt and requested bargaining. Lamourt told him that he had been directed to make the change and that he could not bargain. Denman subsequently made a written request to bargain (GC Ex. 4, undated) [8] and the request was again refused.

According to Denman, employees in the Painesville office had previously been allowed to work credit hours and overtime between 5:45 p.m. and 7:00 p.m. This practice had allegedly prevailed since before the effective date of the prior CBA on March 5, 1996 (GC Ex. 3). [9] On cross-examination Denman acknowledged that the office was not open until 7:00 p.m. every night of the week and that it might have been open until that time on one night a week (Tr. 21, 22). Denman himself never worked until 7:00 p.m.

Victoria Carter, a claims representative assigned to the Painesville office, testified that, during calendar year 2003, she worked until 7:00 p.m. about eight or nine times. She also acknowledged during cross-examination that the prohibition against working beyond 5:45 p.m. did not affect the amount of overtime which she could work, but only when she could work it (Tr. 35). Carter further testified that during 2003 she would work beyond 5:45 p.m. about three or four days a week and that there would typically be as many as four other employees in the office at that time (Tr. 36). She did not specify whether or how often she would work overtime after 5:45 p.m. Carter identified Lamourt's memorandum of January 30 as the method by which she learned of the change in closing time. If there was a meeting on the subject she did not attend. The memorandum was either on her desk or in her mailbox. Carter confirmed that, as of January 30, employees at the Painesville office could not work credit hours or overtime after 5:45 p.m. (Tr. 40). [10]

Rosalie Artman, another claims representative assigned to the Painesville office, testified that, prior to January 30, she worked credit hours beyond 5:45 p.m. about four days a week. She is working fewer credit hours since January 30 (Tr. 47). Artman identified Lamourt's memorandum as the method by which she learned of the change. She stated that there was no meeting to discuss the matter. Artman further testified

3. It has been stipulated that the Painesville office is a small office within the meaning of the CBA.

4. AFGE Council 220 is a subdivision of AFGE which represents the bargaining unit members assigned to the Respondent's field offices including the Painesville office.

5. This date will subsequently be referred to as January 30.

6. Lamourt apparently retired in or around March of 2004.

7. It is unclear exactly how the change in closing time was communicated to the Union and to employees at the Painesville office. The only written communication in evidence regarding a change in working hours is a memorandum from Lamourt to the staff of the Painesville District Office dated January 30 (Resp. Ex. 1), stating that, "Starting today you may work credit hours only during core hours 7:15-5:45." There is no specific mention of the closing time of the office. Subsequent testimony indicates that Lamourt also called a staff meeting on January 30 during which he only mentioned credit hours.

8. In his memorandum Denman demanded bargaining and then stated that the change could not be implemented until the Union had been given the "opportunity to consult/bargain."

9. There are no differences between the 1996 and the 2000 CBA which are pertinent to this case.

10. It is undisputed that Lamourt and the previous office manager signed the daily time sheets and therefore were aware of the hours that employees worked.

that, although the memorandum does not refer to overtime, the office began closing at 5:45 p.m. on January 30 and that, since that time, neither credit hours nor overtime can be worked beyond 5:45 p.m. This change has reduced the number of credit hours that Artman works. She made no mention of whether or when she worked overtime.

On cross-examination Artman acknowledged that the change did not affect the amount of available overtime, but only when it could be earned. She is able to work credit hours on Saturday but has been informed that the option is only available when the office is open for overtime (Tr. 49).

In view of the foregoing evidence, I find as a fact that, for at least a year prior to January 30, the Painesville office was open on most weekdays beyond 5:45 p.m. and as late as 7:00 p.m. and that members of the bargaining unit represented by the Union were able to work credit hours and overtime, if available, until 7:00 p.m. on weekdays. I further find as a fact that this practice occurred with the knowledge of the office manager who signed the daily time sheets.

The Change in the Hours of the Painesville Office and the Effect of the Change

Donna Vesely is a Human Resources Specialist in the SSA Office of Personnel Policy. As such, she works in SSA headquarters in Baltimore. Her work involves the interpretation of personnel-related laws and regulations and the formulation of agency-wide personnel policies. According to Vesely, the SSA has a number of flexible work programs as well as compressed work schedules. Its authority to create those programs is derived from the Act, 5 U.S.C. §6101 *et seq.* (Resp. Ex. 3).

Vesely testified that a "flex-time" schedule is one in which employees are allowed to vary their times of arrival and departure so long as their work days include certain specified core hours. Employees on flex-time are also allowed to work credit hours in addition to their daily work requirements within the core hours. Arrival and departure times, as well as credit hours, must fall within a flexible band that includes, but is in addition to, core hours (Tr. 58, 59). There is a uniform flex-time program for the field offices which is set forth in Article 10 of the CBA (Tr. 62). The Respondent offered a written summary of the flex-time program in small field offices which was admitted without objection (Resp. Ex. 2). Vesely acknowledged that, although the CBA allows for field office employees to work as many as two and a half credit hours per day, it is not possible during the flexible band established by the CBA for small field offices (Tr. 65).

Vesely also testified that SSA only uses irregular overtime, *i.e.*, overtime which is scheduled as needed rather than as a permanent part of any employee's work schedule. Such overtime is available solely at management's discretion and is available during hours which are determined by management (Tr. 71-74).

Lionel J. Hall is the Director of the Center for Operations of the Office of Labor Management Employee Relations. He works at SSA headquarters in Baltimore and was actively involved in the negotiations of the most recent CBA which was in effect in January 30 of 2004. According to Hall, the Union insisted on the language applying the two and a half hour daily limit on credit hours to all employees in the bargaining unit in spite of the fact that the application of that limit would not be possible in view of the flexible band in field offices. Hall testified that the Union was fully aware of that fact and hoped that the parties could eventually agree on an arrangement which would allow field office employees to work as much as two and a half credit hours per day. Such an arrangement has not yet been made (Tr. 93-96).

Hall further testified that Article 10 of the CBA requires that overtime be distributed fairly and equitably. This means that, when overtime is available, it may be worked by all employees with the necessary skills who have achieved ratings of "fully successful" on their periodic evaluations (Tr. 97-99). Hall does not believe that managers are free to use other methods of assigning overtime (Tr. 100). If he learned that an individual office was allowing employees to work credit hours beyond 5:45 p.m. he would advise the manager that the practice was illegal and in violation of the CBA (Tr. 103, 104). Headquarters personnel do not visit field offices to look for violations. When they do learn of such violations, they expect that the offices would terminate the improper practices (Tr. 104).

Joyce A. Zak is the Area Administrative Assistant for the Chicago Region of SSA of which the Painesville office is a part. Zak testified that, in October of 2003, she was part of a team which conducted reviews of all of the field offices; the review was completed in January 30 of 2004. At or around January 30, Al Karis, [11] the manager of the SSA office in Sandusky, Ohio and a member of the review team, visited the Painesville office and reported to Zak that there were

11. The spelling of Karis' name was transcribed phonetically by the court reporter and may be incorrect.

instances of employees working credit hours as late as 7:00 p.m. Lamourt, who was the manager of the Painesville office, was informed that the practice was not permissible and that he needed to bring the office into compliance. Zak stated that overtime was not mentioned in the review. Lamourt was not told what corrective action to take. He went on disability leave shortly after the audit and subsequently retired due to disability (Tr. 107-111).

Dona Sukis is an operations specialist in the Painesville office. She testified that, when Lamourt began allowing employees to work credit hours after 5:45 p.m., it was on an occasional basis whenever anyone would ask him. Sukis further stated that the latest that anyone would stay would be "about" 7:00 p.m. although it was usually until between 6:00 p.m. and 6:30 p.m. According to Sukis, the practice occurred sporadically and would only involve one or two people (Tr. 119, 120). When Lamourt began to allow people to work beyond 5:45 p.m. she told him that the flexible band only extended to 5:45 p.m.. Lamourt told her that there was no problem. Lamourt was Sukis' supervisor and she did not report the practice to higher authority (Tr. 123). When overtime was available there would be a posting on a bulletin board in the lunch room. The notice would state the amount of overtime which was available for each employee that could be worked during the flexible band and whether the work could be performed on a Saturday (Tr. 120).

After the audit in January of 2004 Lamourt called a staff meeting and announced that employees could only work during the flexible band from 7:15 a.m. to 5:45 p.m. Lamourt only mentioned credit hours; he said nothing about overtime (Tr. 122).

Eric Stransky has been the manager of the Painesville office since March of 2004 and succeeded Lamourt in that position. He testified that overtime can be worked after 5:45 p.m. and during a five hour period on Saturdays. He does not currently see the need to schedule overtime after 5:45 p.m. on weekdays because of the limited amount of overtime that is available (Tr. 128-130).

Upon review of the evidence, I find as a fact that, since January 30, 2004, bargaining unit employees at the Painesville office are no longer allowed to work credit hours after 5:45 p.m. Furthermore, available overtime may no longer be worked by bargaining unit employees after 5:45 p.m. as a matter of course, but is subject to a management determination as to whether the amount of available overtime justifies keeping the office open beyond 5:45 p.m. Although the only formal change involved credit hours, the evidence indicates that the enforcement of the flexible band had a direct effect on overtime.

Discussion and Analysis

The Allowance of Credit Hours After 5:45 p.m. Was Not a Binding Past Practice [12]

The Act, in 5 U.S.C. §6121(4), defines credit hours as falling within a "flexible schedule established under section 6122 of this title." §6122 of the Act states, in pertinent part that:

> (a) Notwithstanding section 6101 of this title, each agency may establish, in accordance with this subchapter, programs which allow the use of flexible schedules which include—
>
> > (1) designated hours and days during which an employee on such a schedule must be present for work; and
> >
> > (2) designated hours during which an employee on such a schedule may elect the time of such employee's arrival at and departure from work, solely for such purpose or, if and to the extent permitted, for the purpose of accumulating credit hours to reduce the length of the workweek or another workday.

The nationwide CBA provides that the flexible band for a small field office such as Painesville runs from 7:15 a.m. to 5:45 p.m. It is undisputed that both recognition and bargaining occurs only at the nationwide level. Since the alleged past practice is contrary to the Act, there can be no duty to bargain over a change, *Navajo Area Indian Health Service, Winslow Service Unit, Winslow, Arizona*, 55 FLRA 186, 188 (1999).

In *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 17 FLRA 1011, 1021 (1985), the Authority held that a past practice of a departure from national policy cannot be shown in the absence of evidence that national management knew of and condoned the practice. The evi-

12. In footnote 1 of his post hearing brief the General Counsel states that the sole issue in this case is the change in the closing time of the Painesville office rather than any changes involving overtime, credit hours or tours of duty. Yet, the General Counsel has presented no evidence to show that the change in the closing time had any effect other than with regard to when employees are allowed to work credit hours or overtime. If the General Counsel's statement were to be taken literally and the evidence as to credit hours and overtime were disregarded, the change in closing time would have no effect on conditions of employment.

dence unequivocally shows that the practice of allowing employees to work credit hours beyond the expiration of the flexible band at 5:45 p.m. was initiated by Lamourt. National management first learned of the practice during the course of an audit in January of 2004 and the practice was promptly terminated. Therefore, the practice of allowing employees to work credit hours after 5:45 p.m. was not a past practice over which the Respondent had an obligation to bargain with the Union. Rather, it amounted to an *ad hoc* decision by Lamourt which was not binding on the Respondent, *U.S. Department of Labor, Office of Workers Compensation Programs, Boston, Massachusetts*, 56 FLRA 598, 603 (2000).

The position of the General Counsel is not improved by the language of the CBA which adopts existing past practices. Clearly, in the words of Article 2, Section 2 of the CBA, the alleged past practice as to credit hours is, "specifically covered by [the] Agreement" and, if allowed to stand, would detract from it.

Accordingly, the allowance of credit hours after the expiration of the flexible band at 5:45 p.m. was not a past practice. The Respondent was under no obligation to bargain over its termination.

The Allowance of Overtime After 5:45 p.m. Was a Binding Past Practice

Unlike the change with regard to credit hours, the hours within which overtime may be worked is not covered either by statute, regulations or the CBA. The evidence is undisputed that, for several years prior to January 30, employees at the Painesville office were allowed to work overtime, if available, beyond 5:45 p.m. and as late as 7:00 p.m. at their own volition. Beginning on January 30 the employees at the Painesville office could only work overtime until 5:45 p.m. unless specifically authorized by the office manager. [13] Those facts, in and of themselves, support the existence of a binding past practice which affected conditions of employment. The practice meets the criteria set forth in *U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001) in that it was consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. It is of no consequence whether Lamourt's knowledge of the practice is attributable to the Respondent. By entering into a CBA which adopts practices at the local level, the Respondent implicitly acknowledged the existence of such practices and assumed the risk of its lack of knowledge of specific practices. It is similarly of no consequence whether the practice occurred on a daily basis or even every week or whether relatively few employees took advantage of the practice. The fact remains that it occurred regularly over a significant period of time and that all employees at the Painesville office presumably were aware that they could work overtime after 5:45 p.m. if they so chose.

The Respondent maintains that the effect of Lamourt's action on overtime was not foreseeable because he was only directed to bring the Painesville office into compliance with the prohibition against the working of credit hours outside of the flexible band. According to the Respondent, it had no way of knowing that Lamourt would in any way limit the time within which overtime could be worked and further maintains that the action of January 30 had no effect on the policy which allows overtime to be worked after 5:45 p.m. That argument is unpersuasive. To be sure, Lamourt's memorandum of January 30 (Resp. Ex. 1) referred only to credit hours. Yet, approximately two months later when Stransky became the office manager he automatically continued the practice of restricting overtime to the flexible band which ended at 5:45 p.m. This suggests that the practice of limiting overtime to the flexible band, other than at the discretion of the office manager, was a common practice and that, consequently, the effect of the action of January 30 on overtime was reasonably foreseeable. [14] If, as the Respondent maintains, there is now no prohibition against the working of overtime beyond 5:45 p.m., there is at least a practice in Painesville of requiring the manager's approval. That practice did not exist before January 30.

The Change Affected Conditions of Employment

In determining whether a matter involves a condition of employment the Authority will consider (a) whether it pertains to bargaining unit employees, and (b) whether there is a direct connection between the matter and the work situation of bargaining unit employees, *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*). The change in the hours when overtime could be worked meets both of the *Antilles* cri-

13. There is no evidence as to how often, if ever, employees asked to work overtime beyond 5:45 p.m. or how often such requests were granted.

14. It is unclear how soon after January 30 there was overtime available which some employees would have preferred to work after 5:45 p.m. Nevertheless, Stransky's testimony indicates that the actual impact of the change occurred no more than a few weeks after it went into effect. This minimizes the importance of the foreseeability issue in view of the evidence of a direct impact.

teria. It is undisputed that bargaining unit employees were affected by the change on January 30. It is also clear that the hours within which employees may work has a direct connection with their work situation. [15]

In summary, the practice of allowing employees to work available overtime until 7:00 p.m. on weekdays was a binding past practice which affected conditions of employment. Accordingly, the Respondent should not have terminated the past practice without providing the Union with notice and the opportunity to bargain.

The Extent of the Respondent's Duty to Bargain

§7106(a) of the Statute provides that nothing therein is to affect the authority of any management official of an agency to exercise certain management rights. Such rights include the right to assign work. The right to assign work, as set forth in §7106(a)(2)(B) of the Statute, includes the right to determine when work assignments will occur and to whom the duties will be assigned, *National Treasury Employees Union and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 539, 567 (1997). Therefore, the scheduling of overtime is a management right.

In *U.S. Department of the Air Force, 832nd Combat Support Group, Luke Air Force Base, Arizona*, 36 FLRA 289, 300 (1990) the Authority held that an agency is not entitled to exercise even a management right without notice and bargaining in the absence of an overriding exigency. The Respondent has not suggested that such an overriding exigency exists and the evidence does not support the proposition. However, in the case of a management right an agency is only required to bargain with regard to the impact and implementation of the change in conditions of employment, see §7106(b)(2) and (3).

The Remedy

In urging the adoption of a *status quo ante* remedy, the General Counsel has correctly cited *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) as setting forth the criteria for determining whether such a remedy is appropriate in a case involving the exercise of a management right. Each of those criteria will be applied to the circumstances of this case.

Whether, and when, notice was given to the Union by the agency concerning the action or change. It is undisputed that the change in overtime procedures went into effect immediately after Lamourt's memorandum of January 30 and that the Union was not an addressee. Thus, the Union was afforded no advance notice of the change.

Whether, and when, the Union requested bargaining. It is similarly undisputed that the Union, through Denman, requested bargaining almost immediately after learning of the change.

The willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute. The Respondent acknowledges that it provided no advance notice [16] to the Union and refused the Union's request to bargain. The Respondent's belief that it was under no legal obligation to bargain does not detract from the willful nature of the refusal, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000).

The nature and extent of the impact experienced by adversely affected employees. Witnesses for the General Counsel acknowledged that the change at issue did not affect either the amount of overtime which was available or the method by which the overtime was made available to employees. Furthermore, there is no evidence that any employee lost overtime because of the change. Therefore, the impact on adversely affected employees was slight.

Whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. The Respondent offered no evidence as to the adverse impact of such a remedy other than the testimony of Stransky to the effect that network access in the office is blocked after 6:00 p.m. and that a change in the access might have security implications (Tr. 129, 130). Stransky did not elaborate on the difficulty of expanding the "window" of network access or the effect of such an expansion on the security of the system.

In its post-hearing brief the Respondent argues that the imposition of a *status quo ante* remedy would impair the ability of the agency to control a "rogue office" which is in violation of the statutory and contractual prohibitions against the allowance of credit hours beyond the flexible band. That argument is inapplicable to the issue of the allowance of overtime work since

15. The Respondent has not alleged that the effect of the change is *de minimis*.

16. Even if I were to accept the Respondent's contention that the notice to employees was attributable to the Union, the alleged notice could hardly be considered sufficient since the change went into effect on the same day.

there are no applicable statutory or contractual prohibitions.

In view of the foregoing, the General Counsel has satisfied four of the five criteria and has thereby justified the imposition of a *status quo ante* remedy.

The General Counsel also seeks a back pay order to employees who can show that they would have worked overtime if the change of January 30 had not been implemented. The obligation of an agency to provide back pay is limited by the provisions of the Back Pay Act, 5 U.S.C. §5596(b), *U.S. Department of Defense, Education Activity, Arlington, Virginia and Federal Education Association* (Babiskin, Arbitrator), 56 FLRA 768, 773 (2000). The Back Pay Act, in 5 U.S.C. §5596(b)(1)(A)(I), provides that an employee who is affected by an unjustified or unwarranted personnel action is entitled to the payment of:

> an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period [when the personnel action was in effect] if the personnel action had not occurred . . . .

The undisputed evidence indicates that overtime was available only on an irregular basis and that employees had sufficient opportunity to work available overtime prior to 5:45 p.m. on weekdays and also on at least some Saturdays. There is no evidence to even suggest that any employee was prevented from working all of the overtime available in spite of the change which the Respondent implemented on January 30. In the absence of any evidence of proximate cause between the change in procedure and a reduction in any employee's overtime earnings, the award of back pay could only be based upon unsupported speculation. I will, therefore, not include an award of back pay.

The General Counsel maintains that the notice should be signed by the Respondent's Area Director for Northern Ohio, while the Respondent contends that any notice should be signed by the manager of the Painesville office. It is true that the unilateral change in conditions of employment affected only employees at the Painesville office and was initiated by Lamourt because of his misinterpretation of the results of the audit of January, 2004. However, the change was perpetuated by Stransky. This suggests that it would be more appropriate for the notice to be signed by the Area Director since it was at that level that the audit was performed. Furthermore, the signature of the Area Director will eliminate any doubt as to the limitations on the authority of the office manager to unilaterally change the past practice regarding overtime work.

In view of the foregoing, I have concluded that the Respondent committed an unfair labor practice in violation of §7106(a)(1) and (5) of the Statute by unilaterally changing the hours during which employees at the Painesville, Ohio office may work overtime without affording the Union advance notice or the opportunity to bargain over the change. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Social Security Administration, shall:

1. Cease and desist from:

(a) Unilaterally changing the ability of bargaining unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays if they so desire without giving prior notice to the American Federation of Government Employees, AFL-CIO (AFGE), either directly or through its agent, AFGE Local 3448, and affording AFGE the opportunity to bargain concerning the proposed change.

(b) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Promptly restoring the practice of allowing bargaining unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays if they so desire and maintaining that practice until AFGE or AFGE Local 3448 have been given notice of a proposed change to the practice and an opportunity to bargain concerning the proposed change.

(b) Post at the Painesville, Ohio District Office, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Area Director for Northern Ohio, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, March 3, 2005

PAUL B. LANG
Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Social Security Administration violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the ability of bargaining unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays if they so desire without giving prior notice to the American Federation of Government Employees, AFL-CIO (AFGE), either directly or through its agent, AFGE Local 3448, and affording AFGE the opportunity to bargain concerning the proposed change.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL promptly restore the practice of allowing bargaining unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays if they so desire and will maintain that practice until AFGE or AFGE Local 3448 have been given notice of a proposed change to the practice and an opportunity to bargain concerning the proposed change.

_____
(Agency)

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

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-886-5977.