United States of America
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C. 20424

OALJ 25-7

U.S. DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
NASHVILLE REGIONAL OFFICE
NASHVILLE, TENNESSEE
Respondent

And

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 2470, AFL-CIO
Charging Party

CH-CA-23-0050

Daniel A. Kornberg
For the General Counsel

Derrick W. Grace
For the Respondent

David Tidwell
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION

I. Statement of the Case

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

On November 2, 2022, the American Federation of Government Employees, Local 2470, AFL-CIO (the Union), filed ULP charge CH-CA-23-0050 against the U.S. Department of Veterans Affairs, Veterans Benefits Administration, Nashville Regional Office, Nashville, Tennessee (the Agency or Respondent). GC Ex. 1(a)-1(b). After investigating the charges, the Regional Director of the Chicago Region issued a Complaint and Notice of Hearing (Complaint) on July 18, 2023, on behalf of the Acting General Counsel (GC). GC Ex. 1(b). The Complaint alleged that the Agency violated § 7116(a)(1) and (5) of the Statute by reassigning employees without providing the Union with notice and an opportunity to negotiate over the procedures management would observe in implementing the change and appropriate arrangements for employees adversely affected by the change. *See id.* ¶¶ 6-12. On August 9, 2023, the Respondent filed the Respondent's Answer to Complaint and Notice of Hearing, in which the Respondent denied violating the Statute.

A hearing was held on this matter on November 12, 2024, via the Microsoft Teams video platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered. Based on the entire record, including my observations of the witnesses and their demeanor, the undersigned makes the following findings of fact, conclusions of law, and recommendations.

II. Findings of Fact

The Agency operates a call center in Nashville, Tennessee. Tr. 215-16. The vast majority of the 400 or so bargaining unit employees at the call center work on the "general line" (also referred to as the "general queue"). Tr. 24, 215-16. These employees – Legal Administrative Specialists (also referred to as Contact Representatives, or agents) – answer calls from veterans, dependents of veterans, and others who want information about benefits administered by the Veterans Administration (VA). Tr. 51, 151, 216.

In September 2019, the Agency created a new phone line called VA Solid Start, or the VASS line. Tr. 46-47, 217-18. Like the general line, the VASS line is staffed by Legal Administrative Specialists. Tr. 218. But instead of receiving calls, agents on the VASS line reach out to veterans, calling them within a year of their discharge to tell them about VA benefits. The goal of this outreach is to reduce the risk of suicide among veterans. Tr. 216-17. The VASS line is staffed by around 15 to 20 employees. Tr. 24, 187, 217.

In 2022, the Agency saw an increase in the number of service members being discharged, which meant more work for the VASS line to accomplish. Tr. 219. John McDonald, the manager of the Agency's call center, responded to this challenge by directing VASS line agents to increase their output. Tr. 215, 219. About two months later, McDonald determined that four VASS line agents – Calvin Robinson, Angela Bell, Kimberly March, and Chaundra Briggs, all GS-9 bargaining-unit employees whose performance had been rated Fully Successful to Outstanding – should be moved to the general line, where all four had previously worked, because they had the lowest output among VASS line agents. (Briggs had early concerns about returning to the general line and chose to take a different job at the Agency before the move could be effectuated; the other three moved back to the general line as planned; the new vacancies on the VASS line were filled with four other employees, including at least two who were reassigned from the general line.) Tr. 24, 33, 55-56, 78,

88, 145-46, 150, 179, 183, 220, 228-29, 245-46. The reassignments did not change any employee's work location, as agents on the VASS line and general line work from home. *See* Tr. 78, 144, 190, 223.

On October 13, 2022, McDonald emailed David Tidwell, the Union's president, to memorialize their discussion earlier that day. In the email, McDonald stated that the employees being reassigned from the VASS line to the general line had been given 30 days' notice about the reassignment. *See* Resp. Ex. G; Tr. 19.

(At the hearing, Tidwell testified that there wasn't an initial notice to the Union prior to the time that employees came to the Union with their concerns. Tr. 25. Asked about McDonald's October 13, 2022, email, Tidwell stated that McDonald did not provide the Union an opportunity to bargain or describe specifically how the change would impact employees. As to whether the email gave the Union adequate notice, however, Tidwell answered "possibly.") Tr. 58.

Meanwhile, the Union was hearing concerns from employees affected by the move. The employees wanted to know how much training they'd receive and how much time they'd have to adjust to working on the general line. Tr. 24-25.

On October 17, 2022, Tidwell sent McDonald an email stating that the Union demanded to bargain over the impact and implementation of the Agency's decision to reassign those employees to the general line. GC Ex. 21 at 2. The Union felt the change would negatively affect the reassigned employees and had greater than de minimis effects on conditions of employment. Tr. 26, 31. (The Union did not seek to bargain over performance standards, which are negotiated at the national level.) Tr. 32, 50-51.

Later that day, McDonald replied to Tidwell by email, writing that "[i]ntra-division moves are not . . . a 'major change to working conditions.' As such, I do not intend to delay assignment of work from the VASS [line] to the general [line]." GC Ex. 21 at 1. McDonald indicated as well that the Agency had implemented new performance standards for the general line, and that the reassigned employees would be adjusting to the new standards along with all other general line agents. *See id.*; *see also* Tr. 223.

At a meeting on October 20, 2022, McDonald told Tidwell that any bargaining would be "post-implementation," in the sense that the VASS line "has been around since 2019. Employees have been assigned to this line, they've been removed from the line several times before these four individuals, so in my mind, we've already implemented." Tr. 224. Additionally, McDonald asserted that there would be no change in working conditions, as the agents would continue to use the same computer systems, continue to work from home, and continue to follow the same policies and reference manuals. Tr. 225. Tidwell replied that the Union wanted to bargain over training the reassigned employees would receive before the move. McDonald said the Agency was already going to provide training. Tr. 225. Tidwell then asked about a grace period for performance, and McDonald replied that the Agency was prohibited under the Master Agreement from taking any adverse action during the first 90 days of a new performance standard, and that the matters the Union wanted to bargain over were therefore moot. Tr. 225-26.

No bargaining took place, and in November 2022 the Agency began to implement the reassignments as planned. Tr. 96; GC Ex. 1(c); *see also* Tr. 30, 32. The Agency did not issue any SF-50s in connection with the reassignments. *See* Tr. 126-27. The move from the VASS line to the general line did not change the title or position description of the reassigned employees. Rather, those employees continued to work as Legal Administrative Specialists. Tr. 218.

There are a number of differences between working on the VASS line and working on the general line. The work on each line is different, and the work is evaluated under different standards. These differences, which apply to the affected employees in this case, are as follows. First, agents on the VASS line make outbound calls to veterans. When a VASS line agent reaches a veteran, the agent reads from a script covering topics like life insurance, home loans mental health resources, and education benefits. After finishing the script, the agent gives the veteran the chance to ask questions before ending the call. *See* Tr. 84-85, 146, 148, 185, 194.

With respect to performance evaluations, employees on the VASS line are in large part rated based on output, a critical element that is unique to VASS line agents. (The element is considered critical because an employee needs to get a Fully Successful rating in that element in order to get a Fully Successful rating overall.) Tr. 34, 74; GC Ex. 2 at 1-2. Output is measured in points. Tr. 80. Each agent receives a certain number of points for an attempted call, i.e., a call that goes straight to voicemail, and additional points for a successful call where the veteran picks up and talks with the agent. *See* Tr. 80, 201, 246-247; GC Ex. 3 at 13.

To be rated Fully Successful in output, a VASS line agent must average 84 points per day in a month. *See* Tr. 80, 88, 94; GC Ex. 2 at 1-2. Because VASS line agents spend much of their day making calls that are not answered, VASS line agents' calls are not timed, and the Agency does not directly evaluate VASS line agents on the length of their calls. Tr. 75, 140, 148, 175.

Asked to explain why the Agency does not evaluate VASS line agents based on their call times, McDonald explained

> On the [VASS] line, because they're making attempts and sometimes – you know, a person needs to answer their phone, right? It's – I hate to say this, but for lack of a better term, it's telemarketing. So we're calling, okay, and a person may not answer the phone. I can't manage you by saying, hey, you have to have a particular talk time because most of your work is really making these attempts. So we couldn't measure the time that you're talking to an individual because a lot of the work is making these attempts, getting a person on the phone.

Tr. 246-47.

VASS line agents are also rated on three other critical elements, specifically quality, availability rate, organizational support/customer service, as well as training, which is a non-critical element.

By contrast, on the general line, agents answer inbound calls and have to answer questions that are generally more varied and complex than the ones asked of agents working on the VASS line. Tr. 75, 194. These differences were elaborated on at the hearing. Bell testified that

> [o]n [the] general line, we have to send up . . . more service requests. We have to do dependency verifications. We have to actually add dependents over the phone. . . . [W]e have to do the first notice of death . . . . We have to do tracers for those who have payment issues or have not received their pay. And we have to research why they didn't receive the payments. We have to do . . . intent to file a claim. So these are things that we have to actually – these are forms within the applications that we utilize that we have to complete and submit to the Veterans regional office so that they can process those things.

Tr. 160.

Similarly, March testified that on the general line there were "a lot of questions that . . . you would have to kind of do a lot of research on . . . kind of like on the fly. Basically, you never know what questions are going to be asked, so you had to use your research sources, so that would take up time on the call[.]" Tr. 185. On balance, March testified, work on the VASS line was "pretty much straightforward," while work on the general line was "intense" and "a little more stressful." Tr. 185, 199.

Unlike VASS line agents, general line agents are rated on timeliness, or "talk time." Tr. 23, 34, 75, 107, 157. (The full name of the element is Timeliness of Client Contact Management.) GC Ex. 9 at 2. In order for an agent at the GS-9 full performance level (Tr. 56) to be rated Fully Successful on talk time, the agent needs to resolve each caller's question in 8 minutes and 30 seconds or less, on average. Tr. 68-69; GC Ex. 9 at 2.

The talk time requirement can be challenging. Some calls can be resolved quickly, like calls inquiring as to the date a veteran will receive a payment. Other calls, like those reporting the death of a veteran, can be complex and highly emotional. Such calls can take agents 15 minutes or longer to resolve. Tr. 107, 153.

There are other differences as well. General line agents are also rated on four other critical elements – quality, release time, collaboration & customer service – and the noncritical element of training. The description of the "quality" element for VASS line agents and general line agents is identical, but the metrics used to determine one's rating on that element are slightly different. The VASS line element of "organizational support/customer service" is similar to the general line element of "collaboration & customer service," as they both pertain to customer service, but the two elements are described differently. Likewise, the VASS line element of "availability rate" is similar to the general line element of "release time," as both pertain to working in a timely manner, but the two elements are described differently. "Training," on the other hand, is nearly identical for both lines. GC Exs. 2, 9.

At the hearing, McDonald acknowledged there were differences between working on the VASS line and the general line, but he also sought to highlight commonalities. He testified that employees on both lines use the "same documents, . . . the same computer system, staying in the same place, using the same phone system," and employees on both lines discuss the same benefits. Tr. 221. McDonald also stated that the reassignments would have no effect on career progression, as most of the Agency's promotions are off of the general line. Tr. 222.

Reassigned employees testified in significant part about the difficulties they encountered after being reassigned from the VASS line to the general line.

We begin with Robinson, who has worked as a Legal Administrative Specialist at the Agency since 2011. Tr. 122. He worked on the general line before moving to the VASS line in 2021, where he worked for one fiscal year. Tr. 80, 105. Robinson has regularly received within-grade increases. Tr. 123.

Robinson was reassigned from the VASS line to the general line in November 2022. Tr. 96, 122. Robinson stated that the Respondent provided him with "boot camp" training for his return to the general line, and that his training also involved shadowing other general line agents. He asked for additional training but was denied because he was an experienced representative. Tr. 109. Robinson requested the training because he had been on the VASS line for a year and transitioning back to the general line was an adjustment for him, even with all of his experience. Tr. 110.

Robinson found it difficult to return to work on the general line because he had "gotten used to talking and talking about myself and giving veterans information" on the VASS line, and because he was taking longer on difficult or "special care" calls (calls involving a veteran's passing, for example). Robinson explained that the Agency had allowed general line agents to take additional time on such calls prior to 2019 by "mitigating" or "deducting" the time of those calls when calculating his call time stats, and he didn't realize that the Agency was no longer providing such a deduction. On March 9, 2023, Robinson received a written counseling memo for unacceptable performance because he was not meeting his talk time standards. *See* Tr. 66, 105, 110-12, 191; GC Ex. 11.

Robinson continued to struggle with his talk time, and as a result the Agency placed him on a Performance Improvement Plan (PIP) in July 2023. Tr. 34, 115-17. A PIP means that an employee has an initial 90-day period to improve his or her performance (though that period can be extended), followed by a probationary-like year in which the employee may be terminated if he or she does not perform successfully. *See* Tr. 33, 114, 117-18.

Robinson had never been placed on a PIP, and he found the process to be very stressful. Tr. 34, 110-11, 113-14. Robinson continued to struggle with talk time and failed to successfully complete his PIP in March 2024, but he was allowed further time to improve and successfully completed his PIP in July 2024. His work will be monitored until July 2025. Tr. 118-21, 137-38; GC Ex. 14. Robinson has not received a proposed removal. Tr. 138-39.

Bell has worked as a Legal Administrative Specialist at the Agency for seven years. Bell worked on the general line for two and a half to three years, then worked on the VASS line for more than one year. She received a within-grade increase in June 2023. Tr. 169, 172.

Bell was reassigned from the VASS line to the general line, where she currently works, in December 2022. Tr. 145-47, 150-51, 159. Bell did not receive initial training, but she contacted her union representative and asked for training since it had been a long time since she had worked on the general line, and through her union representative she was able to receive training. Tr. 159.

It was difficult for Bell to transition from the VASS line to the general line, because she had to adjust to working under the talk time standard. On the VASS line she had been trained "to be extremely detailed with the information," but on the general line she had to "cut that into . . . little bitty pieces and only provide minimum information to get out of that call to be able to take more calls." Tr. 156. On March 21, 2024, and on June 21, 2024, management met with Bell to inform her that her performance on the talk time element was unacceptable. GC Ex. 19. Bell's talk time did not improve, and on July 8, 2024, Bell was placed on a PIP for failing to get a Fully Successful rating on talk time. Tr. 156, 164-65. Bell had never been placed on a PIP, and she found the experience to be stressful. Tr. 165, 167. Bell successfully completed her PIP in November 2024. Tr. 165, 177.

Finally, March has worked at the VA for almost 29 years, and she began her work on the general line in 2007 or 2008 as a Legal Administrative Specialist. March moved from the general line to another line, the Veterans Service Officers line, around 2010. March moved to the VASS line in 2020 or 2021, and worked there for one or two years. In November 2022, March was reassigned to the general line. Tr. 180, 184-85, 194-96, 203-04. March was concerned about being able to meet the general line's talk time standards. Tr. 191. March received training for working on the general line, which she described as "hit and miss," and she believes there was a lot of training she missed over the years when she was not on the general line. Bell indicated that she was able to do training for a few hours, but when she asked for additional training she was told that she would not receive more because she had worked on the general line previously. Tr. 190.

March worked on the general line until May 2023, when she became a Field Examiner. Tr. 192. March applied to be a Field Examiner because she felt she was being set up to fail on the general line. She felt that the general-line training was inadequate, and that the performance goals were unrealistic. Tr. 192. Talk time requirements on the general line were stricter than they had been prior to 2019, and, she testified, "that alone was enough to add pressure to where . . . you were stressed and you felt like you couldn't really do your job properly without rushing." Tr. 191, 193. March believed that she would have been put on a PIP if she had stayed on the general line. Tr. 193.

Another topic addressed at the hearing was whether there were past attempts at bargaining similar types of reassignments. Tidwell acknowledged that the Union had not previously demanded to bargain when in the past the Agency reassigned employees from the general line to the VASS line. Tr. 49-50. Tidwell stated that the Union would not bargain over a change where there was no adverse impact, as there would be nothing about which to bargain. Tr. 32-33. Relatedly, Robinson, Bell, and March testified that they had no problem being reassigned to the VASS line, as they viewed the move as an opportunity to educate veterans, to be part of a special team, and to do something new. Tr. 108-09, 159, 186.

Tidwell also stated, in response to being asked whether he had represented unit employees regarding talk time prior to 2019, that he was certain there had been PIPs before 2019, but that he was unable to cite any specific examples. Tr. 67.

As for the impact of receiving a PIP, Tidwell stated that a PIP "really amounts to a way to start the employee on their way out the door, because if they're not successful on the [PIP], that's certainly what will happen is that they're going to ultimately be fired." Tr. 33.

III. Positions of the Parties

General Counsel

The GC asserts that the Agency changed employees' conditions of employment when it reassigned the four employees from the VASS line to the general line, and that that change had greater than de minimis effects. GC Br. at 9. The GC argues that agency-initiated changes to employees' duties constitute changes to conditions of employment, and that applies even where the change involves redistributing work assignments among employees who share the same position. *Id.* at 10 (citing *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 10 (2021) (*El Paso III*); *U.S. Dep't of HHS, SSA, Balt., Md.*, 41 FLRA 1309, 1318 (1991) (*SSA Baltimore*)). The GC notes that the number of employees is not dispositive. *Id.* at 10 (citing *U.S. Dep't of HHS, SSA, Balt., Md.*, 37 FLRA 278, 285 (1990) (*HHS-SSA*); *U.S. INS, U.S. Border Patrol, Del Rio, Tex.*, 47 FLRA 225, 231 (1993) (*INS Del Rio*)). Also, the GC asserts that changing employees' performance standards constitutes a change in employees' conditions of employment. *Id.* (citing *Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 21 FLRA 609, 609 (1986) (*Wright-Patterson AFB*); *56th Combat Support Grp. (TAC) MacDill AFB, Fla.*, 43 FLRA 434, 447-48 (1991) (*MacDill AFB*); *U.S. Dep't of HUD*, 56 FLRA 592, 592 (2000) (*HUD*)).

Whether the changes were greater than de minimis, the GC argues the move to the general line resulted in employees performing different duties under different performance standards. *Id.* at 10. The GC submits that the training provided to the reassigned employees indicates a greater than de minimis effect as well. *Id.* at 10-11 (citing *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 90 (2009)). The GC adds that work on the general line was more stressful. *See id.* at 11 (citing *U.S. DHS, U.S. CBP*, 74 FLRA 6, 10 (2024); *AFGE, Local 1164*, 65 FLRA 836, 839 (2011); *SSA Baltimore*, 41 FLRA at 1318). Additionally, the move was more than merely de minimis because it was seemingly permanent. *Id.* (citing *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Rsrv. Station, Willow Grove, Pa.*, 57 FLRA 852, 875 (2002)). The GC further submits that the Authority has held that new performance standards constitute a greater than de minimis change. *Id.* at 11-12 (citing *MacDill AFB*, 43 FLRA at 447-48; *Wright-Patterson AFB*, 21 FLRA at 609; *HUD*, 56 FLRA at 592).

The GC acknowledges that in some instances, the Authority has found the reassignment of employees to involve changes that were merely de minimis. The GC argues, however, that those cases are distinguishable. *Id.* at 13 (citing *U.S. DOL, Wash., D.C.*, 30 FLRA 572, 579-80 (1987) (*DOL*); *Dep't of HHS, SSA*, 24 FLRA 403, 408 (1986)).

The GC submits that the Union's failure to bargain over the Agency's decision starting in 2019 to reassign employees to the VASS line does not constitute a waiver of the Union's right to bargain over the reassignments at issue here, because there is "no evidence in the record about the length of any prior reassignments, the number of employees involved, or whether the Union was even aware of them." *Id.* at 13-14 (citing *IRS, Wash., D.C.*, 27 FLRA 664, 666 (1987); *INS Del Rio*, 47 FLRA 225, 231 n.2 (1993)).

Finally, the GC requests a status quo ante remedy. *Id.* at 14 (citing *U.S. Dep't of Energy, W. Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000) (*WPA*); *U.S. DOD, Def. Commissary Agency, Peterson AFB, Colo. Springs, Colo.*, 61 FLRA 688, 695 (2006)). If a status quo ante remedy is deemed inappropriate, the GC requests a retroactive bargaining order. *Id.* at 15 (citing *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004) (*Letterkenny*)).

Respondent

The Respondent suggests that its decision to reassign the affected employees did not implicate their conditions of employment. Resp. Br. at 11. Relatedly, the Respondent argues that it had no duty to bargain because the Agency did not change a policy, practice, or procedure affecting employees' conditions of employment. *See id.*; *see also id.* at 9 & n.37-38. (citing *NLRB*, 72 FLRA 226, 227-28 (2021)). The Respondent submits that the change must affect working conditions, *id.* at 9 n.38 (citing *NLRB*, 72 FLRA at 228), and that working conditions are the circumstances or state of affairs attendant to one's performance of a job, *id.* at 9 n.39 (citing *El Paso III*, 72 FLRA at 11).

The Respondent argues that there was no change in working conditions because affected employees continued to work from home, continued to talk to veterans about benefits, and continued to hold the same title and work under the same position description. *Id.* at 12. The Respondent adds that there was no administrative action taken to reassign the employees, and that the Agency had previously reassigned employees from the general line to the VASS line. *See id.* The Respondent also contends that the reassigned employees had previously worked on the general line, and worked there longer than they had worked on the VASS line. (The Respondent acknowledges that the reassigned employees had to adjust to new performance standards, but argues that such was the case for all agents working on the general line.) *Id.* at 11. The Respondent adds that the reassigned employees continued to work as GS-9 employees.

In addition, the Respondent asserts that an agency must bargain over matters that significantly impact an employee's conditions of employment, and it is suggested that the reassignments had no significant impact. *Id.* at 9 & n.37 (citing *NLRB*, 72 FLRA at 227-28). Alternatively, the Respondent asserts that the obligation to bargain is triggered only where the is a greater than de minimis change in conditions of employment, *id.* at 9 n.40 (citing *U.S. Dep't of the Air Force, 325th Mission Support Grp. Squadron, Tyndall AFB*, 65 FLRA 877, 880 (2011) (*Tyndall AFB*)). And the Respondent argues that if there was a change its effects resulted in merely de minimis effects. *Id.*. at 12 & n.48 (citing *Bureau of Field Operations, SSA, S.F., Cal.*, 20 FLRA 80, 81 (1985) (*Field Operations*); *Dep't of HHS, SSA, Region V, Chi., Ill.*, 19 FLRA 827 (1985) (*Region V*)); *see also id.* at 14-15 (citing *El Paso III.* 72 FLRA at 10-11). The Respondent reiterates that there was no change to duty location, office space, office equipment, work hours, salary, title, position description, or promotion potential. *Id.* at 13 (citing *NFFE, IAMAW, Fed. Dist. 1, Fed. Local 1998*, 69 FLRA 586, 589-90 (2016) (*NFFE*)). The Respondent further contends that the performance standards for VASS line agents are not notably different from the performance standards for general line agents. *Id.* at 14. And while VASS line agents' calls aren't timed like general line agents' calls are measured, the Respondent argues, VASS line agents nevertheless need to limit the length of their conversations with veterans in order to meet their output requirements. *Id.*

Additionally, the Respondent argues that it did not actually refuse to bargain over the reassignments. The Respondent claims that while McDonald told Tidwell that the reassignments were not a major change in working conditions and that he did not intend to delay his plan to reassign the four employees from the VASS line to the general line, McDonald "did not indicate that he would not bargain over the impact and implementation." *Id.* at 17-18.

The Respondent also contends that the Union waived any right to bargain over the reassignments, as the Union had a 3-year past practice of not demanding to bargain over the Agency's assignment of employees from the general line to the VASS line. Resp. Br. at 16-17 (citing *BEP, Wash., D.C.*, 44 FLRA 575, 582 (1992) (*BEP*).

Finally, if a violation is found, the Respondent maintains that a status quo ante remedy "makes no legal or factual sense, especially two years after the fact." Resp. Br. at 18.

We begin by assessing whether the Respondent's decision to reassign the affected employees from the VASS line to the general line implicated employees' conditions of employment. 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 HHS, SSA, Balt., Md.*, 36 FLRA 655, 668 (1990) (citing *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 236-37 (1986) (*Antilles*)).

IV. Analysis and Conclusions

Here, the affected employees are bargaining-unit employees, and there is a direct connection between the Respondent's decision to reassign them and the employees' work situation, as the reassignments are connected to the tasks the employees performed, the phone line on which they worked, and the performance standards by which they were evaluated. Accordingly, the reassignments implicated employees' conditions of employment.

The cases relied on by the Respondent, *NLRB*, 72 FLRA 226, and *El Paso III*, 72 FLRA 7, do not support a contrary conclusion. In *AFGE, Local 0906*, 74 FLRA 146, 151 (2024), the Authority reaffirmed the test set forth in *Antilles* and the principle that there is no substantive difference between "conditions of employment" and "working conditions" as those terms are practically applied. With these rulings, the Authority reversed *El Paso III* and its progeny, including *NLRB*. Accordingly, the Respondent's reliance on those cases is misplaced.

Next, we consider whether the Respondent changed employees' conditions of employment by reassigning them from the VASS line to the general line. The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment. *Tyndall AFB*, 65 FLRA 877, 880 (2011).

The undersigned has no doubt that the Respondent changed employees' conditions of employment. When the employees worked on the VASS line, they made outbound calls, read from a script, answered relatively few questions, and were rated based on their call output rather than their

talk time. The Respondent changed this when it reassigned employees to the general line. There, the affected employees did not place calls but instead answered calls. They took questions and researched the answers instead of reading off a script. And they were rated on their talk time rather than on their call output. Accordingly, the undersigned finds that the Respondent's decision to reassign these employees changed their conditions of employment. *See HUD*, 56 FLRA at 592; *HHS-SSA*, 37 FLRA at 285.

Turning to the impact of the change, the Respondent argues that it was not obligated to bargain because the change did not "significantly impact" employees' conditions of employment . Resp. Br. at 9 & n.37 (citing *NLRB*, 72 FLRA at 227). The Respondent's argument is based on *U.S. Dep't of Educ.*, 71 FLRA 968, 971 (2020) (*DOE*), in which the Authority abandoned the de minimis standard in favor of the substantial-impact test. However, *DOE* has been vacated by the United States Court of Appeals for the District of Columbia Circuit. *AFGE, AFL-CIO v. FLRA*, 25 F.4th 1, 2-3 (D.C. Cir. 2022). As such, and as the Authority has not signaled a different standard it will follow, it is appropriate in the absence of definitive guidance from the Authority to apply the de minimis standard.

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 AFB*). 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. *Id.*

In assessing whether the effect of a change is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining-unit employees' conditions of employment. *AFGE, Nat'l Council 118*, 69 FLRA 183, 187-88 (2016) An analysis of whether a change is de minimis does not focus primarily on the actual effects of the change, but on reasonably foreseeable effects. *Id.* at 187. Also, the number of employees affected by a change in conditions is not determinative as to whether it is de minimis. *See, e.g., INS Del Rio*, 47 FLRA at 231.

The Authority has found changes to have only a de minimis effect where they have little significance and impact, such as the reassignment of an employee from one position back to the employee's previous, substantially similar, position, or the discontinuation of an assignment involving only a small amount of work. *NFFE*, 69 FLRA at 589-90 & n.51 (citing *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574, 577-78 (1992) (slight reduction in hours of one type of training employees conducted merely de minimis)); *see also Kirtland AFB*, 64 FLRA at 176 (citing *DOL*, 30 FLRA at 579-80 (reassigning mail clerk to a similar clerk position that contained an additional critical element that required her to type correspondence was de minimis, where employee already knew how to type and needed little training)); *but see HHS-SSA*, 37 FLRA at 285, 299-300 (reassigning field representative back to claims representative greater than de minimis where change entailed a loss of overtime and travel reimbursements).

By contrast, the Authority has found a change to have a greater than de minimis effect when it involves a change in conditions of employment that is more significant, such as where: employees are assigned additional tasks which they did not perform before, employees' workloads are increased significantly, or employees' regular schedules or work hours are altered. *NFFE*, 69 FLRA at 590.

With all that said, whether a change is de minimis is ultimately based on a consideration of "the pertinent facts and circumstances presented in each case." *Dep't of HHS, SSA*, 24 FLRA at 407; *see also Tyndall AFB*, 65 FLRA at 881 (remanding case to judge to make further factual findings as to whether reassignments constituted greater than de minimis changes).

The undersigned is persuaded that the Respondent's decision to reassign the employees from the VASS line to the general line had greater than de minimis effects on the employees' conditions of employment.

The record makes clear that working on the general line was significantly different, and significantly more difficult, than working on the VASS line. On the VASS line, the employees were able to read off of a script, a relatively straightforward task, but on the general line, employees had no script, took a wider variety of calls, and had to do research during the call. The affected employees all indicated that the work was significantly harder and more involved. *See* Tr. 110, 160, 199.

It is also clear that the affected employees were subject to new performance standards as a result of the change. Most notably, they went from being rated on the VASS line on a points-based system, where they could earn credit simply for placing calls, to being rated on the general line, where their talks with veterans were timed and could not average longer than 8 minutes and 30 seconds a call. This was an adjustment not only from working on the VASS line, but also from the affected employees' previous work on the general line, where some of the longer, more difficult calls were "mitigated" and not counted against the agent. Whether compared to their work on the VASS line or to their earlier work on the general line, the affected employees were subject to new performance standards, another significant factor that the change was greater than de minimis. *See, e.g.*, *MacDill AFB*, 43 FLRA at 447-48 (new performance standards, which increased the chances employees would fail to meet given standards, a greater than de minimis change).

Further, given that employees' calls were not timed on the VASS line, and that there was previously mitigation of calls on the general line, it was entirely foreseeable that the affected employees might struggle to meet this new performance standard. And in fact, they did struggle. Two of the three reassigned employees received PIPs and faced termination for not being able to meet their talk time requirements, and the other reassigned employee moved to take a different job within the Agency because she credibly feared she would be unable to meet the talk time requirement. All of this further drives the conclusion that the reassignments had significant effects.

Additional factors include and reveal – the employees had not worked on the general line for at least one year; their reassignment to the general line was not temporary; the employees asked for and received training to adjust to working on the general line –that the significance of the change as well. Clearly, the reassignments were more than de minimis.

The cases relied on by the Respondent do not compel a contrary conclusion. In this regard, the changes at issue in this case are far more significant those upon which the Authority suggest were de minimis in *El Paso III*, 72 FLRA at 7, 10-11 (agency changed the standard for referring vehicles to a secondary border inspection area, altering the duties of some border patrol agents with respect to those referrals, and altering the balance of work between the primary and secondary inspection areas). Also, unlike in *Field Operations*, 20 FLRA at 81, and *Region V*, 19 FLRA at 829, the reassignments in the case at bar were not temporary or short-lived. Rather, they were understood as a permanent move off the VASS line and onto the general line.

For all of these reasons, it is concluded that the Respondent's decision to reassign the employees was greater than de minimis.

The Respondent's remaining arguments are also unavailing. First, the Respondent claims that it did not actually refuse to bargain with the Union. The record reveals otherwise. Tidwell sent McDonald an email demanding to bargain, and McDonald replied that the reassignments were not bargainable and would be carried out as planned. *See* GC Ex. 21; Tr. 223. The only fair reading of this exchange is that Tidwell asked McDonald to bargain, and McDonald replied "no." And while McDonald indicated he was open to "post-implementation" bargaining, that does not satisfy the Respondent's obligation to bargain *prior* to implementing a change in conditions of employment. *See U.S. INS, Wash., D.C.*, 55 FLRA 69, 73 n.8 (1999) (noting exception, not applicable here, that an agency implementing a change in order to correct an unlawful practice is only obligated to engage in post-implementation bargaining). For these reasons, the Respondent's argument is unfounded.

Finally, the Respondent contends that the Union waived any right to bargain over the reassignments because the Union had not asked to bargain in the past when the Respondent reassigned employees between lines in the past. The Authority has recognized that a union may waive its right to bargain over a proposed change through agreement or inaction. *U.S. DHS, U.S. CBP*, 62 FLRA 263, 265 (2007). But such waiver must be clear and unmistakable, and the Respondent bears the burden of proving the waiver. *See U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 527 (2009); *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 82-83 & n.2 (1997). Moreover, it is well established that a right to bargain need not be exercised at every opportunity: it exists unless waived by the parties. *Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9, 22 (1981).

There was no waiver here. The only specific reassignments the Union was aware of were those in which the Agency reassigned employees from the general line to the VASS line, and the Union did not ask to bargain with respect to those reassignments because there were no adverse impacts that would have warranted it. Those circumstances are entirely different from our case, where it is claimed that the Respondent-initiated change *did* adversely impact the reassigned employees. And even if the Union had also declined to bargain over an agency decision to reassign employees from the VASS line to the general line in the past, that alone does not constitute a waiver. *See id.* at 22-23; *see also Dep't of the Air Force, Nellis AFB*, 41 FLRA 1011, 1016 (1991) ("We find that the mere failure of the [u]nion to request bargaining with regard to specific changes in past shift assignments did not extinguish the [u]nion's right to request bargaining over the changes in shift assignments in this case."). For these reasons, the Union's decision not to demand bargaining in the past is not a clear and unmistakable waiver of its right to bargain over the reassignments at issue here.

Furthermore, the case relied on by the Respondent, *BEP*, 44 FLRA 575, is clearly distinguishable. In that case, the Authority found the union waived its right to bargain over the substance of a change pertaining to employee parking because that change was made pursuant to a previously promulgated parking regulation, and the union did not demand to bargain over that regulation when it was promulgated. At the same time, the Authority found the union had *not* waived its right to bargain over the impact and implementation of that change because the parking regulation did not address the full range of impact and implementation issues stemming from agency's actions. *Id.* at 582-84. Unlike in *BEP*, the Agency's decision to reassign employees here was not made pursuant to a specific regulation, or anything of the kind, such as a written policy, that could be the basis of a clear and unmistakable waiver. Moreover, *BEP* does nothing to contradict the cases cited above indicating that the Union's decision not to demand bargaining over reassignments in the past does not, by itself, constitute a waiver. To the contrary, *BEP* stands for the notion that a union can still bargain over the impact and implementation of a change, even when the change is made pursuant to a specific regulation.

To summarize, the Respondent changed unit employees' conditions of employment by reassigning them from the VASS line to the general line, and the change had greater than de minimis effects. By refusing to bargain over the impact and implementation of the change prior to its implementation, the Respondent violated § 7116(a)(1) and (5) of the Statute.

Turning to the remedy, the GC asks for a status quo ante remedy or, in the alternative, a retroactive bargaining order. The Respondent argues that a status quo ante remedy would be impractical.

Where an agency has failed to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of a status quo ante remedy using the factors set forth in *Fed. Corr. Inst.*, 8 FLRA 604 (1982) (*FCI*). The Authority considers: (1) whether, and when, an agency notified the union concerning the change; (2) whether, and when, the union requested bargaining over procedures for implementing the change and/or appropriate arrangements for employees adversely affected by the change; (3) the willfulness of the respondent's conduct in failing to bargain; (4) the nature and extent of the impact upon adversely affected employees; and (5) whether, and to what extent, a status quo ante remedy would disrupt the respondent's operations. *WPA*, 56 FLRA at 13. The appropriateness of a status quo ante remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that such a remedy would cause. *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 70 FLRA 119, 124 (2016). When an agency argues that a status quo ante remedy would disrupt the efficiency and effectiveness of the agency's operations, the Authority requires that the agency's argument be based on record evidence. *Id.* at 124-25.

While a close question, the undersigned does not find a status quo ante remedy to be warranted.

With respect to the first factor, McDonald's October 13, 2022, email to Tidwell, which reiterated a conversation the two had earlier that day. Although the email could have been more detailed, and should have offered the Union a chance to bargain, it was provided approximately one month before the planned change, and provided the Union enough information to demand bargaining. Thus, this factor does not support a status quo ante remedy.

With respect to the second factor, the Union quickly demanded to bargain four days after receiving Tidwell's email. This supports the GC's requested remedy.

On the third factor, the Respondent based its refusal in part on its belief that there was no significant change in working conditions, implying that it did not require bargaining under *DOE*, 71 FLRA at 971, or *El Paso III*, 72 FLRA at 10. While *DOE* was vacated by the D.C. Circuit on February 1, 2022, it is unclear whether McDonald was aware of that. And even if he was, the Authority had not issued any decision clearly indicating that it would return to applying the de minimis test in October 2022. *See* GC Ex. 21 at 1. Likewise, *El Paso III* was still good law at that time. As such, and as there are Authority cases in which reassignments were found to have only de minimis effects on conditions of employment, there is sufficient support for the conclusion that McDonald's position was made in good faith and had an actual basis in law. Accordingly, this factor does not support a status quo ante remedy.

Turning to the fourth factor, the Respondent's actions had a somewhat significant effect on the affected employees. While the Union could not prevent the Respondent from reassigning the employees or bargain over the performance standards, the Union could have negotiated other appropriate arrangements, such as a commitment to additional training, and that in turn might have enabled the employees to perform more confidently and, in the case of Robinson and Bell, avoid being put on a PIP. As such, this factor supports a status quo ante remedy.

As for the fifth factor, the record evidence supports the Respondent's claim that a status quo ante remedy would be disruptive. As an initial matter, the Respondent reassigned the employees from the VASS line because they were the least productive agents on that line, and it is reasonable to conclude that returning lower-producing agents to the VASS line would negatively impact the Respondent's operations. Moreover, such a return would likely require the Respondent to remove others from the VASS line or to increase the size of the VASS line. The remedy could have additional disruptive effects in that it could result in March and Briggs leaving their current posts elsewhere in the Agency to return to the VASS line. That the remedy would be implemented more than two years after the reassignments were implemented further suggests the remedy would be disruptive. Accordingly, the fifth factor does not support a status quo ante remedy.

Balancing all of these factors, the undersigned concludes that a status quo ante remedy is not warranted in this case.

The undersigned does however find a retroactive bargaining order to be appropriate. It is well established that the Authority has broad discretion to fashion appropriate remedies for unfair labor practices. *Letterkenny*, 60 FLRA at 457. A retroactive bargaining order is appropriate where a respondent's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees. In particular, a retroactive bargaining order affords the parties the ability to negotiate and implement the results of their agreement retroactively, thereby approximating the situation that would have existed had the respondent fulfilled its statutory obligations. *Id.*

Here, there is no question that the Respondent's conduct deprived the Union of an opportunity to bargain before employees were affected, and at a time when negotiations would have been meaningful. A bargaining order that gives retroactive effect to any agreement reached by the parties at this time is appropriate because it permits the parties to determine – through negotiations – the best way to provide relief for employees who were adversely affected by the Respondent's unlawful refusal to bargain. Accordingly, a retroactive bargaining order is appropriate.

Accordingly, the undersigned recommends 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 (the Statute), the U.S. Department of Veterans Affairs, Veterans Benefits Administration, Nashville Regional Office, Nashville, Tennessee (the Agency), shall:

1. Cease and desist from:

   (a) Changing employees' conditions of employment without first providing the American Federation of Government Employees, Local 2470, AFL-CIO (the Union) with notice and an opportunity to bargain to the extent required by law.

   (b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

   (a) Bargain on request with the Union concerning the reassignment of employees from the VASS line to the general line and apply any agreement which is reached retroactively to the date the reassignments were first implemented, unless an earlier date is agreed to by the parties.

   (b) Post copies of the attached Notice at the Agency. The Notices will be displayed on forms to be furnished by the Federal Labor Relations Authority, Chicago Regional Office. Upon receipt of such forms, they shall be signed by the Agency's Executive Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous 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) Email copies of the attached Notice to all bargaining unit employees represented by the Union. The message of the email transmitted with the Notice will state in its entirety: "The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Veterans Benefits Administration, Nashville Regional Office, Nashville, Tennessee, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by the attached Notice."

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority in writing, within 30 days from the date this Order becomes final if no exceptions are filed, as to what steps have been taken to comply.

Issued, February 13, 2025, Washington, D.C.

David L. Welch

Digitally signed by David L. Welch
Date: 2025.02.13 10:04:48 -05'00'

DAVID L. WELCH
Chief 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 Department of Veterans Affairs, Veterans Benefits Administration, Nashville Regional Office, Nashville, Tennessee, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this notice:

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT change employees' conditions of employment without first providing the American Federation of Government Employees, Local 2470, AFL-CIO (the Union) with notice and an opportunity to bargain to the extent required by law.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL bargain on request with the Union concerning the reassignment of employees from the VASS line to the general line and apply any agreement which is reached retroactively to the date the reassignments were first implemented, unless an earlier date is agreed to by the parties.

_____

(Agency)

Date:_____ 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, Federal Labor Relations Authority, Chicago Regional Office, whose address is: 224 S. Michigan Ave., Suite 445, Chicago, IL 60604, and whose telephone number is: (872) 627-0020.