64 FLRA No. 24

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
SPACE AND MISSILE SYSTEMS CENTER
DETACHMENT 12
KIRTLAND AIR FORCE BASE, NEW MEXICO
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2263, AFL-CIO
(Charging Party/Union)

SF-CA-04-0502

DECISION AND ORDER

September 30, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) in several respects. These include (1) temporarily relocating one employee (Socha) while her office was being remodeled [2]; (2) relocating a second employee (Helwig) without providing the Union with notice and an opportunity to bargain; [3] and (3) implementing a reorganization, which resulted in the relocation of several employees, without providing the Union with notice and an opportunity to bargain. The complaint also alleges that the Respondent violated § 7116(a)(1) and (8) of the Statute by conducting a formal discussion, within the meaning of § 7114(a)(2)(A) of the Statute, without affording the Union notice and an opportunity to be represented.

For the following reasons, we deny the Respondent's exceptions.

II. Background and Judge's Decision

The facts of this case are fully set forth in the Judge's decision and will only be summarized here.

A. Background

Detachment 12 of the Space and Missile Systems Center (Center) is a sub-division of the Air Force Materiel Command, located at Kirtland Air Force Base, New Mexico. Detachment 12, which "provides space flight and access to space for the research and development community[,]" is located in a series of five conjoined buildings connected by interior walkways, on a geographically segregated part of the Center. Judge's Decision at 3 (citing Tr. at 271). The bargaining unit employees at issue work in the Mission Support Directorate (MSD), a sub-division of Directorate 12, which "provides management support[;] technical services concerning computer networks, facilities, [and] training[;] and serves as a liaison regarding manpower and personnel matters in support of Detachment 12's research and redevelopment test and evaluation mission." *Id.* (citing Tr. at 22).

1. Helwig's Office Relocation

Employee Helwig is the Training Manager. He is responsible for training employees in Detachment 12 and maintaining records ensuring that employees meet all mandatory training requirements. The Director of Vehicle Operations (VO) requested that Helwig provide training to VO employees. *Id.* at 7. His regular office, Room 254, was in Building 413, but to provide training in VO, he was also given the use of Room 132 in Building 412, which was close to the VO area. In Room 132, Helwig had the use of two desks and computer equipment. He also used the room for: (1) storage of videos, files, and training plans used to support the training program; and (2) face-to-face training. In addition, he also used the room to conduct some MSD training. *Id.*

1. Member Beck's separate opinion, concurring in part, is set forth at the end of the decision.

2. The Judge found a violation with respect to this employee and, as the Respondent does not except to this finding, it will not be addressed further.

3. The Judge found a violation with respect to both the Respondent's: (1) relocation of Helwig from one permanent office (254) to another (247); and (2) order that Helwig vacate a temporary office (132). As the Respondent disputes only the latter violation, only the latter is addressed herein.

In February 2004, [4] Helwig was ordered to relocate from Room 254 to Room 247, a smaller office, and to move out of Room 132. As a result, the equipment and materials stored in Room 132 had to be moved to Room 247, as well as the equipment and materials stored in Room 254. Storage space in Room 247 became strained, and some of Helwig's materials and equipment had to be stored in a different office. Helwig was notified of the move on a Thursday and was told to have his belongings in Room 247 by Monday. *Id.* at 6. Because Friday was his regular day off, he had only one workday to complete the move. *Id.* He was given no assistance with the move. *Id.*

Helwig's computer, telephone, and fax at his new office in Room 247 were not functional for two weeks. *Id.* at 10. Further, Helwig was forced to use the telephone and e-mail to communicate training information to employees in VO. This was far less effective than face-to-face communication. *Id.* at 7. In September, Helwig was ordered to cease his training activities in VO. *Id.* at 8.

2. April Meeting

The head of Directorate 12 (Commander) notified all MSD employees of a meeting scheduled for April 16. All MSD employees were required to attend and several employees were required to cancel their regular day off in order to attend the meeting. *Id.* The Union was not notified of the meeting.

The meeting was held in the Commander's conference room, which is outside the MSD work area. The highest-ranking officials of the sub-divisions of MSD were also in attendance. The Commander announced that there would be a reorganization and realignment of MSD that would take effect on April 19. He informed employees that: (1) MSD would expand from two divisions to four; (2) each division would have new leadership; (3) similar functions would be co-located in the same division; and (4) employees would have to be moved to centralize them with their new divisions. *Id.* at 8-9.

The Commander asked for questions and when there were none, he turned the meeting over to another management official. At this point, various management officials discussed the reorganization. The meeting lasted about an hour, with the Commander's announcement and comments taking about 15 to 20 minutes.

3. Implementation of Reorganization and Realignment

Implementation of the reorganization and realignment began on April 19. The four new divisions were: (1) Information and Technology; (2) Personnel and Training; (3) Facilities; and (4) Program Security. All bargaining unit employees remained in MSD, but their lines of supervision were generally changed. Several bargaining unit employees were affected by the change. *Id.* at 10, 13-16. Their circumstances, as found by the Judge, are discussed below.

As a result of the reorganization, Helwig's office was again relocated – this time from Room 247 to Room 216 in order to consolidate the remaining training personnel. In addition, as a part of the reorganization, employee J. Myers was reassigned, leaving Helwig and one other person to handle all training duties. Helwig also was directed to terminate his training work with VO employees, and focus on tracking and coordinating the Directorate's mandatory training. *Id.* at 10. In June, Helwig became the sole person responsible for training activities designed for military personnel, civilian employees, and contractors, which added approximately 289 individuals and 3400 training events to his workload. *Id.* at 11.

Employee Smith is an Information Technology Specialist, primarily responsible for, among other things, computer security, communication security, mission security, and program protection planning. *Id.* The reorganization resulted in Smith's assignment to a different division and a new supervisor. Although the reorganization did not result in any changes to her "core document," Smith identified differences in her responsibilities. [5] Smith testified to the various tasks for which she was no longer responsible (or no longer the primary person responsible) and new tasks that she had been assigned. *Id.* at 12-13.

Employee Frost is a Management Analyst who is responsible for "military and civilian manpower, civilian personnel and some aspects of military personnel." *Id.* at 14. Prior to April 2, she devoted all of her time to "manpower duties." *Id.* After April 2, Frost assumed personnel duties, handling disciplinary actions and performance appraisals after another employee left the Respondent's employment. *Id.* Frost worked in Room 216 of Building 413, but she voluntarily moved to Room 247 so that Helwig could move to Room 216 and consolidate training functions. Room 247 is smaller

4. Unless otherwise specified, all dates referenced herein occurred in 2004.

5. The term "core document" is not defined in the record. It appears to be the equivalent of a position description.

than Room 216 and has less storage space. Moreover, Frost shares the office with an employee who does not do personnel work. Consequently, she is unable to conduct private conversations with respect to personnel matters. In addition, the location of her desk in the office is such that the screen of her computer is visible from the hallway and drafts of personnel documents, including disciplinary matters, could be read by anyone passing by. *Id.* at 14-15.

Employee J. Myers changed divisions and was assigned to a new supervisor as a result of the reorganization. *Id.* at 15. As noted above, she was removed from training duties and assigned new responsibilities with respect to information management.

Finally, Employee Ja. Myers is a computer clerk in the Contracting Division, but she is not part of MSD. Prior to the reorganization, she was located with the Contracting Division. After the reorganization, she was moved away from the divisional work area. As a result, she has experienced a decline in work assignments, lost storage space, is subject to increased office traffic, and is separated from the divisional records for which she serves as custodian. Moreover, the location of her computer in her new office is such that it could potentially expose "privacy information" to visitors to the office. *Id.*

B. Judge's Decision

1. Helwig's Office Relocation

The Judge found that Helwig's first office relocation (from 254 to 247) as well as the order that Helwig vacate office 132 violated the Statute. In so concluding, the Judge found that it was undisputed that, in February, Helwig was ordered by the Respondent to relocate from Room 254 to Room 247 and to vacate Room 132. She also found that it was undisputed that Helwig: (1) had only one day to relocate; (2) was given no assistance in the move; and (3) for almost two weeks, was without the use of a computer, telephone, and fax machine. *Id.* at 29. The Judge further concluded that Room 247 had less storage space than Room 254, and the loss of the use of Room 132 further reduced the amount of space available for storage of training materials.

The Judge found that the foregoing changes "had an adverse impact on [Helwig's] ability to perform his various training duties." *Id.* The Judge also found that the effects of these changes were more than *de minimis*. Consequently, the Judge concluded that the Respondent violated § 7116(a)(1) and (5) of the Statute when it failed to give the Union notice and an opportunity to bargain over the initial changes in Helwig's offices.

2. April Meeting

Applying the requirements set forth in § 7114(a)(2)(A) of the Statute, the Judge found that the April meeting constituted a formal discussion. In this regard, the Judge concluded that, by conducting that meeting without notice to the Union and an opportunity to be present, the Respondent violated § 7116(a)(1) and (8) of the Statute.

Specifically, the Judge found that: (1) the meeting was called to announce the reorganization and realignment of personnel; (2) the Commander and subordinate management officials were present, as well as most bargaining unit employees; (3) the Commander explained that the reorganization would involve a shift from two divisions to four and result in new lines of supervision; (4) employees were told that they would be co-located within their divisions; and (5) employees were informed that there would be moves in the future as a result of the reorganization. Based on these findings, the Judge found that the meeting was "a discussion between representatives of the agency and unit employees." *Id.* at 30. The Judge also found that the facts contained sufficient indicators of formality and concluded that the meeting constituted a formal discussion.

Finally, the Judge found that the meeting concerned the conditions of employment of unit employees. In this regard, the Judge noted that the meeting concerned changes in the number of organizational divisions, with concomitant changes in supervision, and moves of unit employees to co-locate them with the personnel of their divisions. The Judge rejected as "overly narrow" the Respondent's claim that the meeting merely involved an announcement of a change in management structure. *Id*. at 31.

3. Implementation of Reorganization and Realignment

As discussed below, the Judge found that certain office moves were a result of the reorganization. The Judge rejected the Respondent's claim that the moves were not related to the reorganization, finding that "the timing and outcome of the office moves belies this defense and supports the unit employees' understanding that the moves were related in some way to the reorganization." *Id*. at 33. In so concluding, she found the office moves were necessary to consolidate employees in their respective divisions.

The Judge also rejected the Respondent's claim that the reorganization was merely a change in management structure and that any impact on unit employees was *de minimis*. The Judge noted, in this regard, that

more than half of unit employees were reassigned to the new divisions and to new supervisors. The Judge found that two employees, Helwig and Frost, were moved without notice (a second move in offices for Helwig), resulting in the disruption of telephone and computer service and changes in the adequacy of available space. The Judge noted that "there are serious limitations to the actual work space occupied" by employees in Detachment 12. Judge's Decision at 33. Specifically, the Judge found that Frost "has legitimate concerns regarding her loss of privacy" in Room 247 because she shares that office with an employee who does not, like her, perform confidential personnel work. *Id.* Citing Authority precedent, she concluded that the office moves were sufficient to find that "the change in conditions of employment was more than *de minimis*." *Id*. at 32 (citing *United States Dep't of the Treasury, IRS*, 56 FLRA 906, 906 (2000) (*IRS*)).

The Judge also found that changes in job duties for Helwig and Smith were a result of the reorganization. In particular, she found that both employees were directed to focus on specific aspects of their assigned duties to the exclusion of others. For example, she noted that Helwig had an increased responsibility for tracking and reporting on the individual development plans for civilian, military, and contract personnel. The Judge also found that Smith "had an increase in certain responsibilities and a decrease in other areas." *Id*. at 33. The Judge concluded that the Respondent "knew, or should have known, that these changes in job responsibilities would have an impact on bargaining unit employees that was greater than *de minimis*." *Id*.

The Judge concluded that, as a result of the reorganization of MSD, the bargaining unit employees experienced a change in conditions of employment. The Judge further concluded that the Respondent should have given the Union notice and an opportunity to bargain over the impact and implementation of the changes, which were greater than *de minimis*. By its failure to provide notice and an opportunity to bargain, according to the Judge, the Respondent violated § 7116(a)(1) and (5) of the Statute.

Applying the factors set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*), the Judge determined that a *status quo ante* remedy was warranted. Among other things, the Judge ordered that the Respondent: (1) return Helwig to Room 254 and return to him the use of Room 132; (2) cease and desist from failing to give the Union advance notice of, and an opportunity to be present at, formal discussions with unit employees, including special "All-Hands" meetings; and (3) rescind the reorganization, including returning employees who were moved to different offices back to their former work locations. Judge's Decision at 35-36.

III. Positions of the Parties

A. Respondent's Exceptions

1. Helwig's Office Relocation

The Respondent contends that the Judge erroneously concluded that it violated § 7116(a)(1) and (5) of the Statute by failing to give the Union notice and opportunity to bargain over its order mandating that Helwig vacate Room 132. According to the Respondent, the order that Helwig vacate Room 132 merely constituted a reassignment of duties. Respondent's Exceptions at 6-7. In this regard, the Respondent contends that it had the right to order such a reassignment under its right to assign work pursuant to § 7106(a)(2)(B) of the Statute. The Respondent contends that the Judge's decision amounts to requiring management to consult with the Union "before directing [an] employee back to his place of duty." *Id*. at 8. For this reason, according to the Respondent, the Judge's order to restore the use of Room 132 to Helwig is "inconsistent" with the Statute and case law. *Id.*

2. April Meeting

The Respondent also claims that the Judge erroneously concluded that it violated § 7116(a)(1) and (8) of the Statute when it failed to give the Union notice and an opportunity to attend the April 16 meeting. The Respondent contends that the April meeting was not a formal discussion because "the discussion did not concern a grievance, policy or practice or other general condition of employment[.]" *Id*. at 10. The Respondent recognizes that a meeting may constitute a formal discussion if the purpose of the meeting is merely to make an announcement or disseminate information concerning the policies and practices of the Agency or other general conditions of employment. The Respondent asserts, however, that "[t]here was no discussion of the policies, practices, or conditions of employment announced at the meeting." *Id.*

The Respondent further argues that the meeting did not constitute a formal discussion because the realignment of its management functions is an exercise of management's right to determine its organization under § 7116(a)(1). According to the Respondent, although it recognizes its obligation to negotiate over appropriate arrangements for employees adversely affected by the exercise of that right, no MSD employees were adversely affected by the realignment.

The Respondent also argues that the Judge's conclusion that the meeting related to conditions of employment was erroneous. In this regard, the Respondent claims that "[a] change in supervision is not a change in conditions of employment" and that "[a]t most it is a change in working conditions." *Id*. at 11-12 (citing *United States Dep't of Labor, OSHA, Region 1, Boston, Mass.,* 58 FLRA 213 (2002) (*DOL*) (Chairman Cabaniss concurring). In addition, the Respondent argues that mere mention of the fact that there might be future office moves does not change the meeting into a formal discussion. The Respondent reiterates that, at the time of the hearing in this case, only two employees had been moved and the impact of those moves was *de minimis*.

3. Implementation of Reorganization and Realignment

The Respondent contends that the Judge erroneously concluded that it was required to provide the Union with notice and opportunity to bargain over the reorganization. According to the Respondent, it had no duty to bargain since the impact of the reorganization on unit employees was *de minimis*.

The Respondent claims that the Judge erred in concluding that it was required to bargain with the Union over the office moves because the moves constituted an adverse affect resulting from the reorganization. *Id.* at 14. First, the Respondent contends, contrary to Judge's factual findings, that the majority of the office moves did not result from the reorganization. According to the Respondent, four of the six people that the GC claimed had moved offices as a result of the reorganization were actually moved for other reasons. In particular, the Respondent claims that two employees were moved as an accommodation, another was transferred out of MSD and so was not affected by the reorganization, and another was moved to a permanent office after occupying a temporary office for one or two weeks. *Id.*

Second, according to the Respondent, the impact of the two office moves that were related to the reorganization, those of Helwig and Frost, was *de minimis*. *Id.* at 12. The Respondent claims that Helwig's and Frost's moves resulted from Frost's offer to move so that Helwig could be located nearer to those with whom he routinely worked. *Id.* at 15. In this respect, the Respondent claims that there is no evidence that management otherwise would have moved Frost. *Id.* In any event, the Respondent contends that neither Helwig nor Frost were adversely affected by the office moves, and, as such, that the Judge mistakenly determined that the Respondent was required to bargain with the Union over the moves. *Id.*

The Respondent also argues that the Judge erred in finding that the reorganization resulted in a change of duties for Helwig and Smith. In this regard, the Respondent claims that the Judge committed a factual error in concluding that Helwig's and Smith's assigned duties changed as a result of the realignment. *Id.* at 2-3. According to the Respondent, "Smith's duties may have slightly changed but they were still in keeping with her core document." *Id*. at 15. The Respondent asserts that the alleged changes are simply "fluctuations in Ms. Smith's workload." *Id*. at 16. As to Helwig, the Respondent states that there were no changes in his duties; "he was merely asked to perform the duties he was always responsible for." *Id*. In addition, the Respondent claims that reassignment of an employee with minimal change of duties or mere relocation of an employee are *de minimis*, citing Authority precedent in support. *See Gen. Servs., Admin., Region 9, San Francisco, Cal.*, 52 FLRA 1107, 1111 (1997) (*GSA, Region 9*); *United States Dep't of Labor, Wash., D.C. and United States Dep't of Labor, Employment Standards Admin., Chicago, Ill.*, 30 FLRA 572 (1987) (*Employment Standards Admin.*). The Respondent maintains that, balancing the equitable interests involved, this case concerns its need to "fix its organizational problem and operate more efficiently" compared to the temporary inconvenience to Helwig and Frost. *Id.* at 20.

The Respondent asks that the Authority reverse the Judge's decision with respect to "the return of the use of Room 132 to Mr. Helwig, the rescission of the reorganization and realignment of the MSD, and the return to the *status quo ante*[.]" *Id*. at 21 (italics added). The Respondent also asserts that the Authority should modify its order consistent with the Respondent's contentions.

B. GC's Opposition

The GC contends that the Respondent's exceptions constitute an attempt to relitigate its case as presented to the Judge and a challenge to her credibility findings. Opposition at 3. The GC maintains that the Respondent has failed to provide any basis for challenging the Judge's credibility findings.

1. Helwig's Office Relocation

The GC argues that the Judge correctly found that the Respondent's order that Helwig vacate Room 132 resulted in changes that were more than *de minimis*. The GC maintains that the Judge properly cited *Veterans Administration Medical Center, Phoenix, Arizona,* 47 FLRA 419, 424 (1993) (*VA, Phoenix*) and *EPA and EPA, Region II*, 25 FLRA 787, 789-90 (1987) in support of

her finding that the effect on Helwig of being required to surrender the use of Room 132 was more than *de minimis*. Opposition at 6. The GC argues that the Respondent made no attempt to distinguish those cases. Moreover, according to the GC, the record supports the Judge's conclusion that surrender of the use of that office had an adverse affect on Helwig's ability to perform his training duties.

2. April Meeting

The GC argues that the Judge correctly found that the meeting constituted a formal discussion. The GC agrees with the Judge that the Respondent's claim, that the purpose of the meeting was only to announce the reorganization, is an overly narrow interpretation of the meeting. Opposition at 4. The GC contends that the Judge correctly found that the number of organizational divisions, changes in supervision, and possible relocations are matters that directly relate to employees' conditions of employment.

3. Implementation of Reorganization and Realignment

The GC argues that the Judge correctly found that the reorganization and realignment had an adverse impact on unit employees that was more than *de minimis*. According to the GC, the Respondent does not dispute that Helwig and Frost's offices were moved. Moreover, the GC maintains that the record demonstrates that "there were changes in job duties for Helwig and [] Smith that were related to the MSD reorganization." *Id.* at 5. The GC maintains that nothing in the Respondent's exceptions provides a basis for reversing the Judge's finding that the reorganization and realignment had "a significant adverse impact on unit employees that was more than *de minimis*." *Id*.

The GC argues that the Respondent's exceptions do not address the Judge's findings as to the *FCI* factors and thus provide no basis for challenging the Judge's *status quo ante* remedy.

IV. Analysis and Conclusions

A. The Judge did not err in her factual findings.

1. Appropriate Standard

In determining whether an ALJ's factual findings are supported, the Authority looks to the preponderance of the record evidence. *See, e.g., United States Sec. and Exch. Comm.,* 62 FLRA 432, 437 (2008), *enforced sub nom. United States Sec. and Exch. Comm. v. FLRA,* 568 F.3d 990 (D.C. Cir. 2009); *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, Fla.,* 59 FLRA 3, 5 (2003); *Dep't of Transp., Fed. Aviation Admin., Ft. Worth, Tex.*, 57 FLRA 604, 607 (2001). [6]

Our concurring colleague would set aside this well established standard in favor of a substantial evidence standard for reviewing ALJs' factual findings. For the reasons that follow, we find that a preponderance of the evidence standard is the proper standard to employ.

First, application of the preponderance of the evidence standard in reviewing ALJs' factual findings accords with the Authority's responsibility under §§ 7118(a)(7) of the Statute to issue final orders in unfair labor practice cases. *See also Steadman v. Sec. and Exch. Comm.,* 450 U.S. 91, 104 (1981) ("[A]djudicatory proceedings subject to the [Administrative Procedure Act] satisfy that statute where determinations are made according to the preponderance of the evidence."). In this regard, it is well established that an unfair labor practice may be established only on "the preponderance of the evidence." 5 U.S.C. § 7118 (a)(7). It is also well established that only "final order[s] of the Authority" are subject to judicial review. 5 U.S.C. § 7123(a).

That the Authority has not chosen to delegate decisional authority to issue final orders to its ALJs as permitted by § 7105(e)(2) of the Statute highlights the Authority's primary role in this area. [7] This primary role signifies that the Authority's relationship to its ALJs is not that of an appellate tribunal. Rather, as the Authority has specified in its regulations, ALJ decisions are only "recommended" decisions. 5 C.F.R. § 2423.34(a). This holds true even where the parties do not except to an ALJ's recommended decision; in such cases, deeming all objections and exceptions waived, the Authority still acts to adopt the ALJ's findings as the Authority's findings. *See* 5 C.F.R. § 2423.41(a).

Thus, the Authority's normal function requires it to examine the entire record of a proceeding and make *de novo* findings of fact. Finding facts on this basis, with subsequent judicial review applying a substantial evidence standard, is fully compatible with the principle

6. Authority case law includes instances where the Authority has articulated a substantial evidence standard for reviewing ALJ factual findings. *See* cases cited in the concurrence. Although some of these cases appear to have actually employed a preponderance of the evidence standard, in any event, to the extent that these cases indicate that the Authority will review ALJs' factual findings based on a substantial evidence standard, they will not be followed.

7. *Compare* 5 C.F.R. Ch. XIV, App. B, § I.C. (delegating authority to regional directors in representation cases pursuant to § 7105(e)(1) of the Statute).

that "the standard of deference is heightened as the appeal process progresses[.]" *Lion Unif., Inc., Janesville Apparel Div. v. NLRB,* 905 F.2d 120, 124 (6th Cir. 1990) (holding that *de novo* review by the agency of ALJ factual determinations is more appropriate than application of the more deferential substantial evidence standard).

Second, the principle to which we adhere accords with the National Labor Relations Board's (NLRB) longstanding practice in analogous proceedings. The NLRB has determined to review factual findings made by its ALJs in unfair labor practice cases based on the preponderance of the evidence standard. In the NLRB's view, the National Labor Relations Act "commits to the Board itself, not to the Board's [ALJs], the power and responsibility of determining the facts, as revealed by the preponderance of the evidence" *Standard Dry Wall Prod., Inc.,* 91 NLRB 544, 544-45 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951).

NLRB precedent is particularly significant because Congress, when it enacted the Statute and established the Authority, looked to the NLRB as a model. *See, e.g., Turgeon v. FLRA,* 677 F.2d 937, 939-940 (D.C. Cir. 1982). In *Turgeon,* the court observed that "the legislative history of the [Statute] makes clear [that] the structure, role and functions of the Authority . . . were closely patterned after the structure, role and functions of the NLRB . . . under the National Labor Relations Act." *Id.* at 939 (citing the Statute's legislative history). The court also held that "[i]n view of the clearly expressed intent of Congress to pattern the Authority upon the model of the NLRB, it is appropriate . . . to consider precedent developed under the NLRA in interpreting the [Statute]." *Id.* at 939-40. That the Statute and Authority diverge from the NLRA and NLRB law in some instances does not demonstrate that it is appropriate to do so with respect to the NLRB's administrative principle of over 50 years duration that renders only Board decisions final, binding, and enforceable. In contrast, the ALJ's findings of fact and conclusions of law are only recommendations.

Therefore, for the reasons discussed above, we will continue to apply the preponderance of the evidence standard when we review factual findings by the Authority's ALJs.

2. Application of the Standard

The Respondent argues that the Judge erred in concluding that (1) some of the office moves that took place were related to the reorganization and, (2) Helwig's and Smith's assigned duties changed as a result of the reorganization.

The preponderance of the evidence supports the Judge's finding that the disputed office changes were related to the reorganization. *See, e.g.,* Tr. at 78-86; 199; 202. As the Judge found, immediately following the implementation of the reorganization, the office moves occurred in order to consolidate employees within their newly assigned divisions. Tr. at 53-54. In addition, as the Judge concluded, Helwig's move to Room 216 was tied to the reorganization. Tr. at 254. The record makes clear that Helwig's move to Room 216 would not have occurred had the Respondent not required Helwig to relocate from Rooms 254 and 132 to the smaller Room 247. Tr. at 161; 205-06. Room 247 provided inadequate storage space for Helwig's training materials. Tr. at 147-48. As the Judge found, Room 216 offered Helwig more space. Tr. at 181. In addition, the Respondent permitted Helwig and Frost's office swap, which was intended to allow Helwig to be closer to his division and align like offices. Tr. at 82. Moreover, the Respondent concedes that the office swap was a result of the reorganization. Exceptions at 12. As Helwig's and Smith's moves were tied to the reorganization, whether there was a factual error with regard to the other four moves is without consequence; the outcome would remain the same. Consequently, we deny the Respondent's exception in this regard.

The preponderance of the evidence also supports the Judge's finding that Helwig's and Smith's duties changed as a result of the reorganization. *See, e.g.,* Tr. at 60-76; 164-176; 394; 396-99. With respect to Helwig's duties, the record supports the Judge's finding that Helwig was told to stop training VO employees because of another employee's reassignment. *Id.* at 165-66. In addition, as the Judge found, after the reorganization, Helwig was assigned new contractor responsibilities and began devoting nearly all of his time to performing non-critical duties. Tr. at 167-68. As the Judge also found, Helwig's workload greatly increased as a result of the reorganization. Tr. at 169-71; 252-53.

With regard to Smith's duties, the Judge credited Smith's testimony regarding actual changes to her job responsibilities. The Respondent does not challenge this credibility finding. The Judge documented at length Smith's testimony articulating how the reorganization had resulted in a change in the execution of her duties and responsibilities. In this respect, as the Judge found, among other things, as a result of the reorganization, Smith's workload has greatly increased, she no longer holds certain leadership roles, nor does she develop and

execute Detachment 12's budget. Tr. at 60-76; *see also* Judge's Decision at 12-13.

Accordingly, we find that the preponderance of the evidence supports the Judge's findings and we deny the exception.

B. The Judge did not err in finding that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to provide the Union with notice and an opportunity to bargain over the impact and implementation of the Respondent's order requiring Helwig to vacate Room 132. [8]

It is well established that prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a *de minimis* effect on conditions of employment. *See, e.g., United States Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999) (*Leavenworth*).

The Respondent contends that the Judge erroneously concluded that it violated the Statute by failing to give the Union notice and an opportunity to bargain over its order requiring Helwig to vacate Room 132. The Respondent claims that it was exercising its management right to assign work and was not required to bargain over the matter. Specifically, the Respondent argues that the use of Room 132 was provided to Helwig for the purpose of training VO employees, and once the Respondent took away those assigned duties, Helwig had no further use for the room.

The Respondent has not demonstrated that the Judge erred. In this regard, although the Respondent contends that Helwig was "told not to go to the VO section" sometime after he was ordered to vacate Room 132 in February, the Respondent does not dispute the Judge's finding that Helwig was not ordered to stop conducting VO training until September — seven months after he was ordered to vacate Room 132. Exceptions at 8; Judge's Decision at 7-8. Consistent with the Judge's undisputed finding, the Respondent did not exercise its management right to cease assigning Helwig VO training duties until months after he was ordered to vacate Room 132. As such, the record does not support the Respondent's claim that the order to vacate Room 132 resulted from the exercise of its management right to assign work.

Moreover, even assuming that the Respondent's order requiring that Helwig vacate Room 132 was a result of its exercise of management rights, the Respondent was required to bargain with the Union over the impact and implementation of Helwig's move. An agency has an obligation to bargain over appropriate arrangements for unit employees adversely affected by a decision to exercise management rights, if the resulting changes have more than a *de minimis* effect on conditions of employment. *See Soc. Sec. Admin., Office of Hearings and Appeals, Region II, N.Y., N.Y.,* 19 FLRA 328 (1985) (agency violated duty to bargain when exercising management right to relocate offices without negotiating over impact and implementation and the relocation caused changes in conditions of employment of unit employees that were more than *de minimis*.*); United States Dep't of Health and Human Servs., Soc. Sec. Admin., Baltimore, Md.,* 41 FLRA 339, 350 (1991) (relocating offices gives rise to an obligation to bargain impact and implementation).

In applying the *de minimis* doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *See IRS*, 56 FLRA at 913. In determining whether the reasonably foreseeable effects of a change are greater than *de minimis*, the Authority addresses what a respondent knew, or should have known, at the time of the change. *See VA, Phoenix*, 47 FLRA at 423 (citation omitted). Further, the number of employees affected by a change is not dispositive of whether the change is *de minimis*. *See United States Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002) (*Willow Grove*) (citing *VA, Phoenix*, 47 FLRA at 424 (change affecting single employee not *de minimis*)). It is also the case that an analysis of whether a change is *de minimis* does not focus primarily on the actual effects of the change. *See, e.g., Veterans Admin. Med. Ctr., Prescott, Ariz.*, 46 FLRA 471, 475 (1992); *United States Customs Serv. (Wash., D.C.) and United States Customs Serv., Northeast Region (Boston, Mass.)*, 29 FLRA 891 (1987).

Applying the foregoing here, the Judge found that the Respondent's order that Helwig vacate Room 132 had an adverse effect on Helwig's ability to perform his training duties. Judge's Decision at 29. The Judge also concluded that the changes in Helwig's conditions of employment resulting from Respondent's order requiring Helwig to vacate Room 132 were more than *de minimis. Id.* Specifically, the Judge found that, when Helwig was given Room 132 to use as a second office, he was able to conduct face-to-face training, in addition

8. The Respondent does not dispute that it did not afford the Union notice and an opportunity to bargain.

to using the room's desks, its computer equipment, and storage space. *Id*. at 7. The Judge also found that, after Helwig was ordered to vacate Room 132, the materials that were previously stored there were moved to Room 247, which was already crowded and became more strained for storage space. *Id.* According to the Judge, because Helwig's computer, telephone, and fax machine at his new office were not functional for two weeks following the move, his ability to communicate training information to VO employees was much less effective than the face-to-face communication that he enjoyed when he occupied Room 132.

Given the extent and nature of these changes, we conclude that the Judge properly determined that the Respondent's order that Helwig vacate Room 132 resulted in a change in conditions of employment that was more than *de minimis*. Consequently, we hold that the Respondent had a duty to bargain with the Union over the impact and implementation of Helwig's move from Room 132 and deny the Respondent's exception.

C. The Judge did not err in finding that the April meeting constituted a formal discussion and that, as such, the Respondent violated § 7116(a)(1) and (8) of the Statute by failing provide the Union with notice and an opportunity to attend the meeting.

To find that a union has a right to representation under § 7114(a)(2)(A) of the Statute, it must be shown that the following elements exist: (1) there must be a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *See, e.g., United States Dep't of the Army, New Cumberland Army Depot, New Cumberland, Pa.*, 38 FLRA 671, 676 (1990) (citing *Veterans Admin., Wash., D.C. and VA Med. Ctr., Brockton Div., Brockton, Mass.*, 37 FLRA 747, 753 (1990); *United States Dep't of Justice, Bureau of Prisons, FCI (Ray Brook, N.Y.)*, 29 FLRA 584, 588-89 (1987)).

The Respondent contends that the meeting was not a formal discussion because it did not involve any personnel policy or practice or other general condition of employment. [9] According to the Respondent, the purpose of the meeting was merely to provide information concerning the reorganization and change in lines of supervision.

The Authority has emphasized that the intent behind § 7114(a)(2)(A) is to afford an exclusive representative the opportunity to be present at discussions addressing matters of interest to unit employees in order to take "appropriate action" to safeguard their interests. *See Dep't of Def., Nat'l Guard Bureau, Tex. Adjutant General's Dep't, 149th TAC Fighter Group (ANG) (TAC), Kelly AFB,* 15 FLRA 529, 532 (1984). As such, § 7114(a)(2)(A) was designed to address situations precisely such as this one where there is a high potential for changes to employees' conditions of employment. In this respect, contrary to the Respondent's contentions, reorganizations and changes in lines of supervision may result in changes in the conditions of employment of unit employees. *See United States Dep't of Health and Human Servs., SSA, Baltimore, Md.*, 41 FLRA 1309 (1991) (*SSA, Baltimore*) (reorganizing work of claims representatives). Moreover, such "effects may surface not only through actual past effects but also through likely future effects." *AFGE v. FLRA,* 446 F.3d 162, 165 (D.C. Cir. 2006).

Although the Respondent characterizes the disputed meeting as one meant only to "provide information" about the reorganization, it is clear that reasonably foreseeable effects of a reorganization are reassignments, relocations, and changes in assigned duties. *See, e.g., SSA, Baltimore*, 41 FLRA at 1318; *Dep't of Transp., FAA*, 19 FLRA 472, 476 (1985). Moreover, the Respondent concedes that, at the April meeting, it mentioned the possibility of relocating employees to new offices. Thus, the meeting implicates the Union's rights to safeguard the interests of unit employees.

The Respondent also contends that, at the time of the hearing, only two employees had been relocated. However, in resolving the complaint, the issue is whether the meeting involved a personnel policy or practice or other general condition of employment. In this regard, it was reasonably foreseeable at the April meeting that employees might be relocated. Indeed, the Respondent acknowledged that possibility. Judge's Decision at 25, 31. Similarly, the potential also existed for a change in duties for some employees; indeed, the Judge found that such changes actually occurred as a result of the reorganization. *Id.* at 33. That given duties are within an employee's position description does not prevent the assignment of those duties from constituting a change in conditions of employment, if the employee had not been performing those duties before a change. *See United States Dep't of Justice, INS, United States Border Patrol, San Diego Sector, San Diego, Cal.*, 35 FLRA 1039, 1040 (1990) (*San Diego Sector*); *SSA, Baltimore*, 41 FLRA at 1310-14. *Cf. United States*

9. As a result, we do not address the other requirements applicable to determining whether a formal discussion occurred.

Dep't of Homeland Sec., Border and Transp. Sec. Directorate, United States Customs and Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz., 60 FLRA 169, 175 (2004) (Chairman Cabaniss concurring) (*Tucson Sector*) (distinguishing *San Diego Sector* on the grounds there is no change in duties being performed).

Thus, the subject matter of the April meeting involved personnel policies or practices or other general conditions of employment. *See SSA, Baltimore*, 41 FLRA at 1317 (a matter concerns conditions of employment of unit employees if it pertains to unit employees and is directly connected to the work situation or employment relationship of those employees). Moreover, the Judge found that such changes occurred. Accordingly, we find that the Judge properly found that the meeting constituted a formal discussion and deny the Respondent's exception. [10]

D. The Judge did not err in finding that Respondent violated § 7116(a)(1) and (5) of the Statute by failing to provide the Union with notice and an opportunity to bargain over the impact and implementation of the reorganization and realignment.

As set forth above, it is well established that prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a *de minimis* effect on conditions of employment. *See, e.g., Leavenworth,* 55 FLRA at 715.

As also set forth above, in applying the *de minimis* doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *See IRS*, 56 FLRA at 913. In this regard, the Judge found that the relocation of employees and the change in employees' duties resulting from the reorganization and realignment were more than *de minimis*. The Respondent contends, however, that the actual effects of the reorganization were *de minimis*.

We conclude that, in view of what was disclosed about the reorganization just prior to its implementation, certain relocation effects were reasonably foreseeable. Specifically, because the reorganization involved the splitting of two divisions into four, with new lines of authority, and the associated reassignment of specific functions, it was reasonably foreseeable that employees would need to be relocated along those lines and that there would be some changes in assigned work and workload. Indeed, the Judge found that immediately following the implementation of the reorganization, office moves occurred that consolidated employees within their newly assigned divisions. Judge's Decision at 32.

Thus, it was reasonably foreseeable that (in addition to the office moves of Helwig referenced above) Helwig would be relocated so as to group together the training function. It was also reasonably foreseeable, and the record makes clear, that Helwig's move to Room 216 would not have occurred had the Respondent not required Helwig to relocate from Room 254 to the much smaller Room 247. The Respondent argues that "[t]he end result" of Helwig's final move into Room 216 provided him "with a bigger and nicer office[.]" Exceptions at 15. This argument fails to take into account that this result was due to Frost's offer to give Helwig Room 216, providing him more storage space than Room 247, which was the office to which the Respondent had assigned Helwig. Given the small size of Room 247 as compared to Room 216, it was reasonably foreseeable that Frost would experience cramped circumstances. Moreover, noting that the other occupant of Room 247 did not do personnel work, it could have been anticipated that Frost would experience a significant change in her work environment with respect to the confidentiality of her work as a result of the relocation. Judge's Decision at 33. Moreover, Employee Ja. Myers experienced a similar change in work environment as a result of the reorganization. Judge's Decision at 33.

In addition, given the nature of the reorganization, it was reasonably foreseeable that employees would experience changes in work assignments. This is what happened to Smith, who changed divisions and was assigned to a different supervisor. As a result, she was relieved of some responsibilities, particularly her training duties, and was given new work assignments. *Id.* In addition, Helwig experienced an increase in his workload. *Id.*

Further, Authority precedent holds that employee relocations can have a greater than *de minimis* effect on employees' conditions of employment. For example, in *United States Dep't of Health and Human Servs., SSA, Baltimore, Md. and SSA, Fitchburg Mass. Dist. Office, Fitchburg, Mass.*, 36 FLRA 655, 668-69 (1990), the

10. We reject as a bare assertion the Respondent's argument that a change in supervision is, at most, a change in working conditions and not a change in conditions of employment. We note that the Authority recently found "no substantive difference" between the two. *United States Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.,* 64 FLRA No. 14, slip op. at 9 (September 28, 2009).

Authority found that the effect of a change in seating assignments that left one employee without window access was more than *de minimis*. The Authority noted that "the location in which employees perform their duties, as well as other aspects of employees' office environments, are 'matters at the very heart of the traditional meaning of conditions of employment.'" *Id*. at 668 (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983)). Moreover, in *EPA and EPA, Region II*, the Authority concluded that the effect of an office relocation of several employees was more than *de minimis*, noting that the new offices were smaller, had less storage space, and resulted in cramped working conditions. Further, as mentioned above, in *IRS*, 56 FLRA at 913, the Authority noted that an office move that resulted in inoperable computers and the loss of storage cabinets, which were replaced by inadequate cabinets, involved a change in conditions of employment that were more than *de minimis*. Similarly, Authority precedent holds a change in conditions of employment that results in an increased workload is more than *de minimis*. *See SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358 (1998). Moreover, the assignment of new duties, or the assignment of duties that are a part of the job, but have never been performed, is also a change that is more than *de minimis*. *See Willow Grove*, 57 FLRA at 857; *San Diego Sector*, 35 FLRA at 1040. *Cf. Tucson Sector*, 60 FLRA at 175 (where no affect on duties being performed, change is *de minimis*).

The decisions relied on by the Respondent are distinguishable. In *GSA, Region 9*, 52 FLRA 1107, the office relocation was temporary and was made at the request of the employee being relocated. Here, the office changes were permanent and were necessitated by the reorganization. As to *Employment Standards Admin.*, 30 FLRA 572, the reassignment of the employee in that case was to a position that was essentially the same as her old position. In addition, she already knew how to perform the one task that was added. Moreover, although the new task took some of her time, her other duties were proportionately reduced. In contrast, the reorganization in this case resulted in the loss of some old duties, the assignment of new duties that had not been performed before, and an increased workload.

Accordingly, as the Respondent failed to bargain with the Union over more than *de minimis* changes in conditions of employment that resulted from the reorganization, we find that the Judge properly concluded that the Respondent violated § 7116(a)(1) and (5) of the Statute. Consequently, we deny the Respondent's exception.

V. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, the United States Department of the Air Force, Air Force Materiel Command, Space and Missile Systems Center, Detachment 12, Kirtland Air Force Base, New Mexico, shall:

1 Cease and desist from:

(a) Unilaterally relocating bargaining unit employees and remodeling employee work areas, without first providing advance notification and bargaining with the American Federation of Government Employees, Local 2263, AFL-CIO (Charging Party) to the extent required by the Federal Service Labor-Management Relations Statute (Statute).

(b) Failing to provide the Charging Party advance notification and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or another general conditions of employment, including special All-Hands meetings.

(c) Unilaterally implementing a reorganization of the Mission Support Directorate and realignment of unit employees, without first providing advance notification and bargaining with the Charging party to the extent required by the Statute.

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

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

(a) Upon request of the Charging Party, negotiate over the remodeling of Barbara Socha's work area in Building 410, Room 101, including, but not limited to any floor plan.

(b) Return Larry Helwig to room 254 in Building 413 and return the use of Room 132 in Building 412 to Larry Helwig.

(c) Provide the Charging Party with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees, including special All-Hands meetings.

(d) Rescind the reorganization of the Mission Support Division and realignment, including

returning those employees who were moved to different offices back to their former work locations, and return to the *status quo ante.*

(e) Provide the Charging party with advance notice concerning any intended changes in working conditions, including any intent to implement a reorganization and realignment and, upon request, bargain with the Charging party regarding procedures that management will observe in taking these actions and appropriate arrangements for employees adversely affected by these actions.

(f) Post throughout Detachment 12, where bargaining unit employees are employed, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, and they 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.

(g) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

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

The Federal Labor Relations Authority has found that the United States Department of the Air Force, Air Force Materiel Command, Space and Missile Systems Center, Detachment 12, Kirtland Air Force Base, New Mexico, 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 unilaterally relocate any bargaining unit employee and return that employee to a remodeled work area, without first providing advance notification and bargaining with the American Federation of Government Employees, Local 2263, AFL-CIO (Charging Party) to the extent required by the Federal Service Labor-Management Relations Statute (Statute).

WE WILL NOT unilaterally move a unit employee's office space, without first providing advance notification and bargaining with the Charging Party to the extent required by the Statute.

WE WILL NOT unilaterally order a unit employee to vacate an office space, without first providing advance notification and bargaining with the Charging Party to the extent required by the Statute.

WE WILL NOT fail to provide the Charging Party with advance notification and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including special All-Hands meetings.

WE WILL NOT unilaterally implement a reorganization of the Mission Support Directorate and realignment of unit employees, without first providing advance notification and bargaining with the Charging Party to the extent required by the Statute.

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

WE WILL upon request of the Charging Party, negotiate over the remodeling of Barbara Socha's work area in Building 410, Room 101, including, but not limited to any floor plan.

WE WILL return Larry Helwig to Room 254 in Building 413 and return the use of Room 132 in Building 412 to Larry Helwig.

WE WILL provide the Charging Party with advance notice and the opportunity to be represented at any formal discussion, including special All-Hands meetings.

WE WILL rescind the reorganization and realignment of the Mission Support Division, including returning those employees who were moved to different offices back to their former work locations, and return to the *status quo ante.*

WE WILL provide the Charging Party with advance notice concerning any intended changes in working conditions, including any intent to implement a reorganization and realignment and, upon request, bargain with the Charging Party regarding procedures that management will observe in taking these actions and appropriate arrangements for employees adversely affect by these actions.

_____

Department of the Air Force
Air Force Materiel Command
Space and Missile Systems Center
Detachment 12, Kirtland Air Force Base,
New Mexico

Dated: _____ By: _____
(Signature) (Commanding Officer)

This Notice must remain posted for 60 consecutive days from the date of the 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, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 356-5002.