FEDERAL LABOR RELATIONS AUTHORITY OALJ 12-09
Office of Administrative Law Judges
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION EL PASO, TEXAS RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO CHARGING PARTY	Case No. DA-CA-09-0393

James P. Hughes
For the General Counsel

Judith M. Ubando
Peter P. Arcuri
Mark Hannig
For the Respondent

James A. Stack
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On September 28, 2009, the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (Union/Charging Party) filed an unfair labor practice charge against the United States Department of Homeland Security, United States Customs and Border Protection, El Paso, Texas (Agency/Respondent). After investigating the charge, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing on November 29, 2010, alleging that the Agency denied access to its computer systems to a bargaining unit employee on administrative duty without providing the Union an opportunity to negotiate to the extent required by the Statute, in violation of section 7116(a)(1) and (5) of the Statute. The Respondent filed its Answer to the complaint on December 27, 2010, admitting most of the factual allegations of the complaint, but denying that it committed an unfair labor practice.

A hearing was held in this matter on January 25, 2011 in El Paso, Texas. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel (GC) and the Respondent filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(d), 1(f)). Victor Manjarrez occupied the position of Chief Patrol Agent for the El Paso Sector from approximately 2008 through 2010; he has since transferred to the Tucson Sector of U.S. Customs and Border Protection. Chris Clem has held the position of Patrol Agent in Charge at the Ysleta, New Mexico Station from December 2008 through May 2010 (Tr. 211; G.C. Ex. 1(d), 1(f)). At all times material to this matter, Manjarrez and Clem have been supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(d), 1(f)).

The American Federation of Government Employees (AFGE) represents a bargaining unit of all nonprofessional employees of the U.S. Customs and Border Protection. AFGE is a labor organization within the meaning of section 7103(a)(4) of the Statute. (G.C. Exs. 1(d) & 1(e)). The Union is an agent of AFGE for the purpose of representing bargaining unit employees within the El Paso Sector. The El Paso Sector includes Border Patrol Stations in West Texas and New Mexico. (Tr. 25). James Stack is a border patrol agent within the El Paso Sector and has served as President of AFGE, Local 1929 since January 1999. (Tr. 23).

Border Patrol agents generally work in the field, but when they come under investigation, they are often taken out of the field, relieved of their law enforcement duties and placed on administrative duties and assigned duties within their station. They are unable to carry a weapon and thus, unable to perform their law enforcement duties. Juan Rebollo, a

Border Patrol agent, was first placed on administrative duties in April 2008 and continued to maintain his regular access to the agency computers at that time. (Tr. 100-01). In April 2009, Rebollo heard from other employees that his access was going to be removed. When he attempted to log on to the computer, he was told that he was not authorized to use the system. (Tr. 101, 128). Rebollo remained without access to the Agency's computer systems from April 2009 through September 7, 2010, when he was returned to his regular law enforcement duties. (Tr. 102). His computer access was restored around September 9 or 10, 2010. Once his access was restored, he was able to read emails from that date forward, but all past emails were lost. (Tr. 103).

During that time period -- April 2009 through early September 2010 -- Rebollo was unable to access his government email account and did not receive routine information regarding promotion announcements (Tr. 103), possible details (Tr. 105), mandatory training through the Virtual Training Center (VTC) (Tr. 109), or information about any collateral duties, which were in addition to regular law enforcement duties, such as recruiting, career sustainment and peer support. (Tr. 109-10). He also was unable to access information regarding relocations and/or transfers (Tr. 112) and health care announcements (such as open season) (Tr. 113-14). He was also unable to access the Border Patrol Enforcement Tracking System (BPETS), which is used to request any type of leave and to submit time and attendance information. (Tr. 117). He was required to fill in his time and attendance by hand and submit it to his supervisor, who would input it into the system. (Tr. 117). There is no evidence that Rebollo was not correctly paid during the time he was on administrative duties and unable to access the computer systems. He did not face any disciplinary action for not taking any mandatory training and was excused since he did not have access to the system. (Tr. 123). He was eventually told that he could receive training through the VTC and that a supervisor would log him into the system. (Tr. 116).

Another Border Patrol agent, Samuel Hernandez, was assigned administrative duties in August 2009 and was not denied access to the agency's computer systems at that time. He was eventually denied computer access in about mid-February 2010, although he was never informed about the reasons for this denial. (Tr. 152-53). Since this time, Hernandez has not had access to emails nor received information regarding promotion announcements (Tr. 154); details (Tr. 155); training (Tr. 156); collateral duties (Tr. 157); healthcare (Tr. 158) and/or relocations (Tr. 159). He does not have access to the BPETS and handwrites his time and attendance forms. (Tr. 161). At the time of the hearing, Hernandez was expected to be returning to full law enforcement duties soon. (Tr. 153, 164).

In April 2009, Stack became aware that one of the Border Patrol agents (Rebollo) who was on administrative duties, had his computer access removed by the Respondent. Stack testified that the Union was never given any notice that Rebollo, or any other employee on administrative duties, was going to be denied access to the Agency's computers and its systems. (Tr. 29-31). Rebollo was among the first of such agents whose access had been denied, and since April 2009, employees who are reassigned to administrative duties have

had their computer access denied. (Tr. 33 -34). Stack testified that as a Union representative it is more difficult to represent employees who do not have computer access due to the nature of the work, including geographic diversity and shift work. The Union has used access to the computer and email to assist employees in drafting memos, etc., and also to conduct surveys and polls of employees. (Tr. 35-36).

On April 15, 2009, Stack submitted a demand to bargain on this issue to Chief Manjarrez, noting, in part:

> On Thursday, April 9, 2009, the Local Union became aware of a unilateral change(s) to the bargaining unit employees' conditions of employment. According to Assistant Patrol Agent in Charge of the Ysleta, Texas Border Patrol Station, Elizabeth Rosales, there was a new, Sector-wide policy which revoked/suspended some employees' access to and use of the agency's computers, and associated systems, whenever a proposal of adverse action has been issued against an employee. . . .
>
> Prior to this change, the Union has not received any notice from the agency detailing any proposed change(s) pertaining to employee access and use of the agency's computers, or associated systems, nor had the Union been afforded with any opportunity to bargain over any changes(s) to the policies and practices related thereto.

(G.C. Ex. 4).

Stack also requested that the policy be rescinded and that any further implementation be held in abeyance pending the completion of all phases of bargaining. (G.C. Ex. 4; Tr. 37-38). The Union made a data request (which is not an issue in this case) and indicated that it would submit proposals. (G.C. Ex. 4; Tr. 39).

The Agency did not respond to the Union's April 9 letter and the parties have not bargained over this matter. According to Stack, the Union was never given the opportunity to submit proposals in this matter. (Tr. 39).

According to the Respondent, it has had the practice of placing restrictions on computer and systems access for employees assigned to administrative duties on a number of occasions prior to the April 2009 and February 2010 restrictions. (Tr. 200, 340). John L. Hackworth, Special Operations Supervisor in Lordsburg, New Mexico, testified that he was aware that the Respondent had restricted computer access to agents in administrative duty status since at least 2006. (Tr. 199). He had been directed to remove the computer access to an agent on administrative duties three years ago (2008). (Tr. 199-200). The supervisors would then keep the employee apprised of information and they would be allowed to fill out time and attendance and any other requested action by hand. (Tr. 202).

Employees on administrative duty have been assigned duties or have responsibilities which do not involve accessing government property. This work includes working in the fleet office/garage (Tr. 172, 341), answering the phones and radio (Tr. 202), transporting vehicles to vendors (Tr. 202) and other miscellaneous administrative responsibilities. (Tr. 340-41). The Respondent has determined that these assigned duties would be performed without the use of the Agency's computer and systems. (Tr. 201, 340-41, 377).

Even when access is restricted, the Respondent provides alternative means for these employees to obtain and submit information and makes accommodations. Such employees are able to receive current and reliable work-related information through their assigned supervisors, musters and bulletin boards. (Tr. 91, 92, 104, 203, 378, 345-46). Employees submit time and attendance by manually filling out blank forms. (Tr. 118, 217-18). They submit requests for leave in the same manner. (Tr. 185, 203). Any required memorandum can be submitted in a handwritten form. (Tr. 239, 280, 281). Other information is accessible online through non-agency computers. (Tr. 240).

DISCUSSION AND ANALYSIS

General Counsel

Counsel for the General Counsel (GC) acknowledges that the Respondent has determined that it is appropriate and necessary to restrict access to its computer systems for employees assigned to administrative duties pending the outcome of an investigation or the resolution of a proposed adverse action. There is no dispute that the Respondent has the right to assign employees to administrative duties and the corresponding right to remove access to its computer systems from employees who have been assigned to administrative duties. The GC, however, asserts that the Respondent violated section 7116(a)(1) and (5) by failing to notify the Union of its decision regarding computer access, and to bargain over the appropriate arrangements and procedures of that decision.

In support of its position, the GC first asserts that it is undisputed that the Respondent did not provide the Union with any notice prior to implementing the April 2009 change when it began to deny computer access to employees assigned to administrative duties.

The GC further argues that Respondent's denial of such access constituted a change in the employees' conditions of employment over which the Respondent had a duty to bargain. The GC notes that the Authority has held that even where a change involves an agency's internal security, that agency is still obligated under sections 7106(b)(2) and (3) of the Statute to bargain over appropriate arrangements and procedures for the change. *Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 56 FLRA 398 (2000); *Dep't of Veterans Affairs, VAMC, Tenn.*, 50 FLRA 220 (1995). And the Authority has held that bargaining unit employees' access to an agency's computers is a negotiable matter. *Nat'l Treasury Employees Union*, 38 FLRA 615 (1990)(*NTEU & Dep't of Treasury)*; *Nat'l Treasury Employees Union*, 24 FLRA 249 (1986)(*NTEU& IRS*).

The GC finally argues that the Respondent's denial of access to its computers to bargaining unit employees assigned to administrative duties had more than a *de minimis* impact on the employees' working conditions. The Authority has held that changes to the lines of communication between employees constitutes more than a *de minimis* change in conditions of employment. *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 39 FLRA 999, 1010-11 (1991). *See also Air Force Logistics Command, WRALC, Robins AFB, Ga.*, 53 FLRA 1664 (1998)(change to access to telephones); *U.S. Dep't of the Treasury, IRS*, ALJDR No. 137, Case No. CH-CA-70509 (Oct. 16, 1998)(new policy regarding email).

Taking all of this into consideration, the GC argues that the Respondent violated the Statute by failing to give the Union appropriate notice of the change in computer access to employees assigned to administrative duties and by failing to bargain over the impact and implementation of that decision.

Respondent

The Respondent asserts that it has not violated the Statute as alleged and that its restriction of computer and systems access to employees assigned to administrative duty status was a proper exercise of its protected management rights to determine its internal security practices and to assign employees and the means and methods of work. The Respondent denies that its conduct resulted in any changes to these employees' conditions of employment. Even if there was some change, the Respondent asserts that such change was *de minimis* in nature and there was, therefore, no obligation to bargain.

In order to ensure the security of its operations and property, which includes computers and computer systems, various policies have been issued by the Department of Homeland Security (DHS), Customs and Border Protection and the U.S. Border Patrol. (Resp. Exs. 1 & 3-7). These policies were in effect prior to the April 2009 restrictions and remain the operative policies governing the Respondent's conduct in restricting computer and systems access to employees assigned to administrative duty status facing adverse action. The above policies provided the El Paso Sector Management the authority and guidance to restrict computer and systems access for employees assigned to administrative duty status where and when deemed appropriate or necessary. The agency has been restricting computers and systems in accordance with its established policies for some time, even prior to April 2009. (Tr. 200-01, 340-41).

The Respondent argues that its conduct did not change a condition of employment for those bargaining unit employees placed on administrative duty status. An employee's access and use of the Respondent's computers and systems has remained the same prior to April 2009 and thereafter. As far back as 2001, an employee's limited personal use of the Respondent's property remains subject to revocation or restriction upon the Respondent's determination that revocation or restriction is necessary and/or appropriate.

Further, employees on administrative duty status are able to receive current and reliable work-related information through their supervisors and musters, or shift meetings. They were also to submit information through alternative means, including filling out blank forms for time and attendance and leave requests. Employees could submit requests for compassionate transfer with either handwritten forms or having someone else prepare the memorandum. (Tr. 193, 187). For other requests and memoranda, the Respondent would accept handwritten documents. (Tr. 239, 280-81).

Even if there was a change in a condition of employment, there was no duty to provide notice and to bargain the matter with the Union because the Respondent's conduct only had a *de minimis* effect on bargaining unit employees. *Nat'l Treasury Employees Union*, 64 FLRA 462, 464 (2010)(citing *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000)(*Treasury, IRS*). Other than perceived inconvenience to the employees, the Respondent argues that the GC has presented no evidence that any bargaining unit employee was adversely affected as a result of not having access to the Respondent's computer and systems for either government use or limited personal use.

DISCUSSION

Section 7106(a)(1) of the Statute states that: "[s]ubject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency -- (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and (2) in accordance with applicable laws -- (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]" In this matter, the General Counsel acknowledges the right of the Respondent, under section 7106(a) to restrict computer and systems access to bargaining unit employees who have been assigned administrative duties. *See Am. Fed. of Gov't Employees, Local 1712*, 62 FLRA 15, 17 (2007); *Nat'l Treasury Employees Union*, 53 FLRA 539, 581 (1997). The General Counsel does assert, however, that the Respondent violated the Statute by failing to give the Union notice and the opportunity to bargain the procedures and appropriate arrangements of this matter pursuant to section 7106(b) of the Statute. Section 7106(b) states that: "[n]othing in this section shall preclude any agency and any labor organization from negotiating . . . (2) procedures which management officials of the agency will observe in exercising any authority under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

The Respondent first argues that there has been no change and that it has previously removed computer and systems access from employees placed on administrative duties since at least 2001. In that regard, the removal of access from Rebollo in April 2009 and Hernandez in February 2010 was consistent with the Respondent's practice and therefore it was not obligated to bargain with the Union. The GC denies that there was any such past practice.

In support of its argument, the Respondent's witnesses testified regarding at least two incidents -- in 2001 and in 2007 -- in which employees assigned to administrative duties while investigations were pending, had their computer and systems access removed. The Union asserts that it had no knowledge of these events and its first awareness of such a policy was in April 2009.

The evidence reflects that employees placed on administrative duty pending the outcome of the investigation are assigned duties outside the normal Border Patrol agent duties. These employees have, however, continued to have access to the Respondent's computers and computer systems, up until the Respondent makes the determination to have this access removed. Apparently, this determination was triggered when the employee was given a notice of proposed termination. For instance, Rebollo was first placed on administrative duties in January 2008 and his access to the agency computers and systems remained intact until April 2009. Apparently, at some point in the investigation of his conduct, it was determined that he would be given a proposal to terminate his employment, which may have happened in early 2009. After the actual proposal was issued, the Respondent determined that computer and systems access would be denied. It is not clear how long the period of time was between the actual proposal to terminate and the denial of access. The same process seems to be in effect for Hernandez whose access was denied in February 2010.

The standard for determining the existence of a past practice is whether a practice was consistently exercised for an extended period of time with the other party's knowledge and express or implied consent. *U.S. Dep't of the Treasury, IRS, Louisville Dist., Louisville, Ky.*, 42 FLRA 137, 1142 (1991); *United States Dep't of Labor, OASAM, Dallas, Tex.*, 65 FLRA 677 (2011)(*DOL Dallas)*. The practice must be "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *Soc. Sec. Admin., OHA, Montgomery, Ala.*, 60 FLRA 549, 554 (2005).

In this instance, it does not appear that the Union had any knowledge from the Respondent regarding this policy and did not learn of the policy until contacted directly by affected bargaining unit employees. The Respondent does not assert that it ever informed the Union of any such policy or offered it the opportunity to bargain regarding the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision. There is no evidence that the Union was aware of any such policy prior to April 2009. *DOL Dallas*, 65 FLRA at 677. Considering the record as a whole, I find that the Respondent implemented a change in April 2009 when it determined that employees on administrative duty would no longer have access to its computers and computer systems.

The Respondent next argues that the removal of access to its computers and computer systems did not involve a change in bargaining unit conditions of employment. The Respondent asserts that these employees at issue were assigned administrative duties and responsibilities for which they did not have an operational need to access the Respondent's

systems, databases and information. Further, employees do not have a right to use the Respondent's equipment for non-governmental purposes and have only a right to limited personal use. The GC argues that bargaining unit employees' access to an agency's computers is a negotiable matter and thus a condition of employment.

In order to determine whether the Respondent's action violated the Statute, there must first be a finding that the Respondent changed unit employees' conditions of employment. *See, e.g., United States Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customs & Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169 (2004); *Dep't of Labor, OSHA, Region 1, Boston, Mass.*, 58 FLRA 213, 215 (2002); *United States Immigration & Naturalization Serv., New York, N.Y.*, 52 FLRA 582, 585 (1996); *U.S. Immigration & Naturalization Serv., Houston Dist., Houston, Tex.*, 50 FLRA 140, 143 (1995)(*INS Houston*). 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 Respondent's conduct and employees' conditions of employment. *See*
92 Bomb Wing, Fairchild AFB, Spokane, Wash., 50 FLRA 701, 704 (1995); *INS Houston*, 50 FLRA at 144.

In this matter, the GC asserts that the Authority has held that bargaining unit employees' access to an agency's computers is a negotiable matter, citing *NTEU & Dep't of Treasury and NTEU & IRS.* Both of these cases specifically relate to proposals that the agency provide the Union with office space and access to government computers, for the primary use for labor-management relations. In both cases, the Authority found the specific proposals negotiable. Neither case involves the use of government equipment, i.e. computers, by individual employees. However, it appears that at least one of these employees was being represented by the Union while on administrative duties due to an investigation. Under these circumstances, I find that the denial of access to the computers and computer systems involved bargaining unit employees' conditions of employment.

The question then becomes whether the change had more than a *de minimis* impact on bargaining unit employees and thus required an obligation to bargain over the matter. *See HHS, SSA*, 24 FLRA 407-08 (1986)*; Pension Benefit Guaranty Corp.*, 59 FLRA 48, 50 (2003)(*PBGC*); *Fairchild AFB*, 50 FLRA at 704. 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. *Treasury, IRS*, 56 FLRA at 913; *PBGC*, 59 FLRA at 51.

As a result of the denial of access to its computers and computer systems, the affected bargaining unit employees no longer have access to their government email. There is no evidence that the work they were assigned to while on administrative duties was in any way affected by the denial of the access to the computers and the computer systems. The question then becomes whether denial of access to government email, under these specific set of circumstances, is more than *de minimis* in nature. If such denial is *de minimis*, the Respondent would owe no duty to bargain on the impact and implementation of this policy.

As stated above, the GC argues that denial of government email essentially isolates the bargaining unit employee from accessing various types of information that are primarily distributed by email -- information regarding vacancies, training, health benefits, etc. The Respondent argues that this information was made available through its supervisors and through musters, while the GC and the Union assert that these sources were inadequate. The primary testimony in this area concerned Rebello's access to information regarding health benefits and open season, and, although he almost missed a deadline, the record shows that he was, in fact, able to participate as needed. The Respondent noted that there were other methods of communication available to the employees, such as personal email from non-government computers, websites, and telephone communications.

With regard to communications with the Union, the Union representative testified that it was more difficult to represent employees without access to the email system due to geographical diversity, shift work, etc., but that there were other means of communication than with the government email. (Tr. 35, 89). There was no specific evidence that the lack of access had any impact on the representation of any employee on administrative duties.

There was considerable testimony that the employees were no longer able to fill out their time and attendance on the computer and were forced to rely on handwritten submissions to their supervisors. There is no evidence, however, that the handwritten time and attendance information was not utilized or that the employees did not correctly receive their pay during this time period. There is no evidence that they were denied the opportunity to submit requests for leave in a written form or that such written form, over a computer-generated request, was not considered and granted.

With regard to training, since the employees were not able to access the training system, they were excused from any mandatory training. Upon returning to work as a border patrol agent, there is no evidence that they were not granted the opportunity to complete any required training or that it was held against them in any way.

Although it seems reasonable to assume that the denial of access to an agency's computers and computer systems should have an impact on bargaining unit employees, I find that the General Counsel has failed to demonstrate that the impact on the bargaining unit employees was more than *de minimis* in nature. Their administrative duty work was not affected in any way by the lack of access to the computers. Their ability to receive certain information may have been curtailed, but there was no evidence that the employees were actually affected in any way by this.

Under these circumstances, I find that the General Counsel failed to establish that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged. Accordingly, I recommend that the Authority issue the following Order:

ORDER

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

Issued, Washington, D.C., February 21, 2012.

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SUSAN E. JELEN
Administrative Law Judge

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