FEDERAL LABOR RELATIONS AUTHORITY
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OALJ 14-08

UNITED STATES DEPARTMENT OF STATE PASSPORT SERVICES RESPONDENT AND NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-78, AFL-CIO CHARGING PARTY	Case No. WA-CA-11-0109

Kristine T. Burgos
Jessica S. Bartlett
For the General Counsel

Steven J. Polson
For the Respondent

Robert A. Arnold
For the Charging Party

Before: RICHARD A. PEARSON
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 December 29, 2010, the National Federation of Federal Employees, FD 1, IAMAW, Local 1998, AFL-CIO (the Union or the Charging Party) filed an unfair labor practice charge against the United States Department of State, Passport Services (the Agency or Respondent). After investigating the charge, the Regional Director of the Washington Region of the Authority issued a Complaint and Notice of Hearing on June 30, 2011, alleging that the Agency changed the Standard Operating Procedures (SOP) used by employees to

adjudicate passports and changed the categories of errors for which employees are held accountable, without giving the Union notice or the opportunity to bargain. The Respondent filed its Answer to the Complaint on July 25, 2011, admitting that it refused to bargain with the Union over these matters, but denying that it was required to do so.

A hearing was held in this matter on September 8, 2011, in Washington, D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to 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. GC Ex. 1b, 1c. Passport Services is the division of the State Department's Bureau of Consular Affairs that is responsible for processing, or "adjudicating," applications for U.S. passports. The job of adjudicating passport applications is primarily assigned to Passport Specialists, who work at the Respondent's 28 passport agencies around the country, and who are represented for collective bargaining by the Union, which is a labor organization within the meaning of section 7103(a)(4) of the Statute. *Id.* The Respondent and the Union are parties to a nationwide collective bargaining agreement (CBA), the most recent of which went into effect in July of 2009. Tr. 185; Resp. Ex. 2.

In determining whether an applicant is legally entitled to a passport, a Passport Specialist must decide whether the applicant is a United States citizen and whether the applicant has properly established his identity, based on the information in the application and in the supporting documents provided by the applicant. Tr. 16, 141. Other factors may also make an applicant ineligible for a passport, but citizenship and identity are the primary criteria. Tr. 141.

The Respondent has always had guidelines and procedures for adjudicating passport applications, but in 2008 and 2009 the Respondent undertook a comprehensive overhaul of those rules. Tr. 147-48. Up until that time, adjudication procedures were compiled in a section of the Foreign Affairs Manual called "the Green Instructions," but these had become out-of-date by 2008, and many passport offices had developed their own local procedures. Tr. 86-88, 147-48, 166-67. Although plans to update the Green Instructions had been discussed for many years, the process was jump-started by two independent, but roughly simultaneous, outside reports – one from the State Department's Inspector General and another from the Government Accountability Office – which found that the Respondent's adjudicators were not effectively identifying fraudulent applications. Both reports recommended, among other things, that the Respondent standardize its adjudication procedures nationwide. Tr. 17-18, 146-48.

In performing their jobs, Passport Specialists are subjected to both quantitative and qualitative standards; in other words, they are rated on how many passports they adjudicate and how many mistakes they make. Tr.16, 145-47, 168-70. According to Robert Arnold, President of the Union, the Agency has historically focused more of its attention on the speed of the process, because of the public demand to obtain passports quickly, while the Union has contended that the emphasis on speed has come at the expense of quality. Tr. 17. The Agency also recognizes that speedy processing is unacceptable if it is replete with errors. Tr. 168-69. Consequently, the Agency has established performance standards requiring that Passport Specialists adjudicate, on average, a certain number of passports per hour, and setting limits on the percentage of errors made, varying with the type of error and the grade of the employee. Tr. 16-17, 33-34, 139-40, 144-45, 151, 168-70; Jt. Ex. 1 at 2, Jt. Ex. 3. Failure to meet the acceptable standard for either production or errors will affect an employee's performance appraisal and can result in disciplinary action. Tr. 47-49, 144-46.

In response to the IG and GAO "sting" reports, and the negative publicity generated by them, the Respondent created an Adjudication Requirements and Standards Working Group to develop a uniform set of rules. Tr. 18, 146; Jt. Ex. 1 at 1. While the new standards were being developed, the Respondent suspended its production standards for 2009. A "time and motion study" was also performed, in order to "take a . . . scientific look at how long it takes to adjudicate passport applications and how many it's reasonable to expect someone to do." Tr. 151; *see also* Tr. 146, 199-200. After the time and motion study was completed, and new, comprehensive adjudication procedures had been formulated, the production standard for employees working at their desks (i.e., working on applications that were mailed in) was reduced from 24 per hour to 16 per hour, effective in March 2010. Tr.16-17, 21, 33-34, 145-56, 151, 159.[1]

On July 24, 2009, Florence Fultz, the Respondent's Managing Director for Passport Issuance, sent a memorandum to all employees, explaining the first product of the working group's deliberations: a detailed analysis of the types of errors that can be made in the adjudication process, with different maximum permissible error rates for each type of error. Jt. Ex. 3; Tr. 139-40. As noted in the memo's introduction, four classes of errors were identified: 1) significant knowledge errors; 2) major notational and procedural errors; (3) minor notational errors; and 4) data errors. Jt. Ex. 3 at 1. Significant knowledge errors (SKEs) are those which would cause a passport to be issued (or not issued) in error: i.e., a mistake that allows a passport to be issued to someone not entitled to one, or to reject a

[1] When Passport Specialists work at the "public counter," where they take applications in person, the standard is five per hour. Tr. 33-34. The record is unclear whether the time and motion study modified this standard. According to Mr. Arnold, 1½ hours of an employee's work day is considered to be "non-productive time," when the numerical quota does not apply; this includes time for breaks and for activities other than adjudicating applications. Tr. 17. Although Article 18, Section 3d of the CBA (Agency Ex. 2) refers to 60 minutes of non-productive time, that provision is consistent with Arnold's testimony, as Arnold included breaks in the total non-productive time. Consequently, a Passport Specialist working at his desk on an eight-hour work day, with 6½ hours of productive time, is required to adjudicate one application every 3 ¾ minutes, and 104 applications per work day, as averaged over a year. Tr. 16-17.

passport to someone who is eligible. Tr. 55, 140-41; Jt. Ex. 3 at 1. Because they are considered fundamental to the employee's knowledge of his job, there is no acceptable number of SKEs that an employee can make. Tr. 54, 170-71. But for each of the other classes of errors, the July 2009 memo specified a maximum error rate, with GS-9 and -11 employees held to a stricter standard than GS-5 and -7 employees.[2] Jt. Ex. 3 at 3, 5, 6. In October of 2009, the Agency introduced a standardized audit program, requiring weekly audits of a certain number of approved applications of each Passport Specialist, more frequent audits of employees who exceed the maximum error rates, and the use of performance improvement plans for employees who continue to make too many errors. *See* Agency Ex. 1 at 1. In January of 2010, the Agency increased the maximum error rates, based at least in part on objections from the Union, and a month later it modified some aspects of the audit program. Jt. Ex. 1 at 2; Agency Ex. 1; Tr. 77.

The second major innovation of the Adjudication Requirements and Standards Working Group was communicated to employees on January 13, 2010, when the Agency published Standard Operating Procedures for adjudicating the various types of passport applications. Jt. Ex. 1. One section of the SOP focused on applications presented at a passport agency's public counter (Tab 1); another focused on desk adjudication of the basic DS-11 application (Tab 2); a third addressed desk adjudication of the DS-82 renewal application (Tab 3); and additional attachments specified standard notation procedures for a variety of applications. *See also* Tr. 182. The SOP represented, among other things, the Agency's intent to create a uniform, nationwide set of rules and procedures for adjudicating passports – "to make sure everybody did things the same way." Tr. 147-48, 173. It identified specific items that adjudicators should look for in the documents provided by applicants, such as whether the information on the documents match the information in the application. Jt. Ex. 1, Tab 1 at 5, Tab 2 at 3. It also listed a number of "fraud indicators," which require the adjudicator to look more closely to determine whether a passport can be issued. Jt. Ex. 1, Tab 1 at 3-4, Tab 2 at 3-4. When the adjudicator's inspection leads him to suspect fraud, he is required to remove the application, complete a fraud indicator checklist, and send the application to the Agency's FPM (Fraud Prevention Manager) office. Jt. Ex. 1, Tab 1 at 3, 5 (item 6), Tab 2 at 2 (items 2, 3), 5 (item 8). Additionally, the SOP required adjudicators to notate the applications in a uniform manner. *See, e.g.*, Jt. Ex. 1, Tab 1 at 5 (items 2-5, 8), Tab 2 at 4-5 (items 7, 9, 12). The cover memo advised the Union of its right to negotiate on the SOP and the Agency's intent to implement the procedures on February 15, 2010. Jt. Ex. 1 at 1, 2; *see also* Tr. 21. The Union did not request negotiations, and the SOP was implemented as scheduled. Tr. 181.

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[2] Prior to 2009, the Agency made distinctions between different types of errors, but in the July 2009 memo the Agency intended "to sort of kind of formalize the classification[.]" Tr. 168. Ms. Fultz explained that the working group sought, though Joint Exhibit 3, "to lay as much out as possible the stuff that was really important and significant, and then the things that were important but weren't necessarily indicative of a passport being issued in error." *Id.* Previously, SKEs were treated as "substantive" errors and represented deficiencies in an employee's knowledge of the job, whereas "procedural" errors were evaluated as part of an employee's production. Tr. 168-70, 173-74.

On July 27, 2010, the Agency implemented a revised version (labeled "Version 2.0") of the SOP. Jt. Ex. 2; Tr. 149. It was organized in the same manner as the January SOP, with Tabs 1 and 2 devoted to the procedures for adjudicating applications at the public counter and at the employees' desks, respectively. (Text that was changed from the January 2010 SOP is shown in bold type on Joint Exhibit 2.) In the Fraud Awareness sections of Tabs 1 and 2, several procedural requirements were added to supplement existing procedures regarding birth certificates, "breeder documents," suspect geographic dispersion, and out-of-state primary IDs.[3] Jt. Ex. 2, Tab 1 at 4-5, Tab 2 at 1-4. In each of these cases, Passport Specialists are required either to refer the application to FPM or to take specific additional actions when specified criteria are met. The new SOP also added procedures to be followed in reviewing an applicant's Social Security information, which is compared to information in the Social Security Administration database, and which can sometimes constitute a basis for suspecting fraud. Tr. 72-73; Jt. Ex. 2, Tab 2 at 6-7. The new SOP requires employees in all adjudications to visually compare the applicant's biographical information to the information in the SSA database. Jt. Ex. 2, Tab 2 at 7. In the "Electronic Adjudication" section of the SOP, an additional procedure was added in reviewing Social Security information: in certain situations, adjudicators are required to verify the information through a different database called MS Access SSN and then to either notate the application accordingly or check the information through still another database (CLEAR). Jt. Ex. 2, Tab 2 at 17; Tr. 111-12.

Unlike the January 13, 2010, memo, the Agency did not provide the Union with advance notice of the July 27, 2010, SOP or an opportunity to negotiate. Tr. 61. On August 12, 2010, the Union protested the Agency's failure to provide notice; it also requested negotiations and proposed that Passport Specialists be given an additional fifteen minutes of non-productive time per day to account for the additional duties. GC Ex. 6. The Agency did not respond to the Union's August 12 email, nor did it engage in any negotiations concerning the revised SOP. Tr. 62, 190-91.

On October 22, 2010, the Assistant Director of the Colorado Passport Agency sent an email to his staff, advising them of "new guidance" from "the highest levels of Passport Services" regarding the notation of recently-issued ID cards. GC Ex. 5 at 1. The special scrutiny to be given to recent IDs had been explained in the "breeder document scenario" of the July 2010 SOP (Jt. Ex. 2, Tab 1 at 4 and Tab 2 at 3), but the passport agencies in some states (such as Colorado) had not explicitly notated the issue dates of local driver's licenses, because the licenses themselves indicate the issue dates. GC Ex. 5 at 1. Nonetheless, as part of the Agency's effort to institute uniform procedures nationwide, the national office of the Agency notified Colorado managers that adjudicators in Colorado must explicitly notate the issue dates of driver's licenses used as identification for the passport, and that the failure to

[3] The requirement of a second ID when an applicant presents an out-of-state primary identification was such a dramatic change that it was highlighted in the cover memo sent by Agency management to employees in the field, notifying them of the revised SOP. Jt. Ex. 2 at 1-2.

do so would be considered a Significant Knowledge Error. GC Ex. 5 at 2. Recognizing that "this is such a change from our past practice," and in order to give employees "sufficient time . . . to get use [sic] to this procedure before counting it as an SKE[,]" the Colorado Assistant Director advised employees that they would have a 30-day grace period before implementation. GC Ex. 5 at 1.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel alleges that the July 27, 2010 revisions to the SOP, along with the October 22, 2010 clarification on notating recently-issued IDs, changed the conditions of employment for Passport Specialists and had more than a *de minimis* effect on their working conditions. Therefore, it argues that the Agency had an obligation to negotiate with the Union over the impact and implementation of the changes.[4] Accordingly, in the GC's view, the Respondent violated section 7116(a)(1) and (5) of the Statute.

The GC argues that the revised SOP changed conditions of employment by adding several mandatory steps in the adjudication process, eliminating the Passport Specialists' discretion on a wide variety of issues, and adding two new types of significant knowledge errors. For instance, the revised SOP requires employees to remove an application and to refer it to a supervisor or to FPM in two specific situations regarding birth certificates: when the birth certificate indicates simply "Certified Copy" without other governmental identifying information, and when the numbering on the certificate is suspect or inconsistent with information on the application. Jt. Ex. 2, Tab 1 at 4. Under the prior SOP, employees were simply advised to look more closely "and require more checks before issuance" when they encountered an "unfamiliar birth certificate format or possible counterfeit birth record[.]" Jt. Ex. 1, Tab 1 at 3-4; *compare also* Jt. Ex. 2, Tab 2 at 1-2 and Jt. Ex. 1, Tab 2 at 1-2. The new procedure removes any discretion from the Passport Specialist when encountering these fact patterns, but when the employee refers an application to his supervisor or to FPM, he must still adjudicate all aspects of the full application, then explain why he's suspending the application, and fill out a fraud checklist. Tr. 27-30, 89-91. Similarly, the revised SOP clarified the "breeder document scenario" to require employees to suspend adjudication and refer an application to FPM when the relevant documents were issued within a four-month period. Jt. Ex. 2, Tab 1 at 4, Tab 2 at 3; Tr. 28-30. Other new procedures include the requirement to visually check all applicants' Social Security information and to use the MS Access SSN database to verify anomalies in the SSN data (Jt. Ex. 2, Tab 2 at 7); the

[4] The GC does not argue that the Agency was required to negotiate over the actual changes to the SOP. In its opening argument, the GC stated, "Neither the Charging Party or the General Counsel is disputing the Agency's right to update the standard operating procedures. We're only asking that Your Honor enforce the Union's statutory right to bargain the impact and implementation of these updates." Tr. 11.

requirement of a second ID when an applicant's primary ID is from another state (Jt. Ex. 2, Tab 1 at 5); and added emphasis on examining reasons for geographic differences between an applicant's address(es), ID cards, and the place of application (Jt. Ex. 2, Tab 2 at 3-4). According to the General Counsel's witnesses, these new procedures increase the time needed to adjudicate applications by 15 to 30 minutes per day. Tr. 29-30, 46, 97-98, 113-14, 119, 132.

In arguing that the effects of the revised SOP were more than *de minimis*, the General Counsel asserts not only that the workload for Passport Specialists was increased, but also that it subjected the employees to greater jeopardy of performance-based disciplinary action in a broader range of situations. Since Passport Specialists are rated on the number of applications they adjudicate as well as on the accuracy (lack of errors) of adjudication, the GC asserts that the new procedures were likely to cause employees both to make more errors and to adjudicate applications more slowly. This jeopardy was further heightened in October of 2010, when the Agency advised employees that their failure to annotate recently-issued IDs would be considered a significant knowledge error. GC Ex. 5. The GC asserts that this was a separate, additional change in working conditions. GC Ex. 1(b), ¶ 14.[5]

The General Counsel cites a number of decisions as supporting its contention that the revised SOP was the sort of change that required impact and implementation bargaining. For instance, in *SSA, Malden Dist. Office*, 54 FLRA 531 (1998), the Authority held that the reassignment of duties from one group of employees to another was greater than *de minimis*, because the employees had to spend an average of ten minutes on one to two new cases per day on duties they had never performed before. A similar rationale was used to find a change in duties greater than *de minimis* in *Dep't of Labor, OSHA*, 24 FLRA 743 (1986). And in *General Serv. Admin., Region 9, S.F., Cal.*, 52 FLRA 1107, 1111 (1997), the GC claims that the Authority found a duty to bargain occurs when an agency expands the range of issues that can subject employees to discipline. The GC cites testimony from witnesses that the new procedures have added to their work day, caused them to work through breaks and lunch and made them fearful of disciplinary action, while the Union cites the revised SOP as causing more employees to be disciplined for excessive adjudication errors and for failing to meet the production standard. Tr. 46-47, 91-94.

The General Counsel further rejects the Respondent's assertion that the "covered by" doctrine is applicable to the facts of this case. While the Respondent asserts that Article 18, Section 3(d) of the CBA (specifically, the provision that "Passport Specialists shall have a minimum of 60 minutes of the day counted as non-productive time when assigned to desk

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[5] The GC is not clear as to when it believes this second unilateral change occurred. Thus, the Complaint alleges that the Agency increased the penalties for annotation mistakes in November 2010. GC Ex. 1(b), ¶ 14. The GC's post-hearing brief repeats this allegation at page 2, but later in the brief, the GC says it occurred on October 22, 2010. GC's Brief at 10, 13. And in its opening statement at the hearing, Counsel for the GC said that the unlawful changes occurred from July through December 2010. Tr. 10. The only documentary evidence of this change is GC Ex. 5, which contains two emails, both dated October 22, 2010. I will interpret the Complaint, in accord with the evidence, as alleging that the Agency unlawfully increased the penalty for certain annotation errors on October 22, 2010.

adjudication.") precludes bargaining over the Union's proposal to add fifteen minutes of non-productive time per day, the GC insists that by setting the amount of non-productive time at "a minimum of 60 minutes," the CBA permits the possibility of negotiating higher amounts.

To remedy the Respondent's unfair labor practice, the GC seeks a prospective order directing the Respondent to bargain over the impact and implementation of the unilateral changes in adjudication procedures. It further requests that the Respondent post and electronically disseminate a nationwide notice to employees regarding its unfair labor practice.

Respondent

The Respondent denies that it had any obligation to bargain over the impact or implementation of the revised SOP. It argues that the revised SOP did not change conditions of employment, that it had a *de minimis* impact on working conditions, that the SOP was a permissible exercise of management's statutory right to determine the methods and means of performing work, and that the Union's single bargaining proposal was covered by the CBA.

In asserting that the revised SOP did not change conditions of employment for Passport Specialists, the Agency says that both the January and the July 2010 SOPs simply incorporated into one document legal and procedural requirements that had long existed. Tr. 148-50, 154-58, 173. Most, if not all, of the rules listed in the two SOPs existed prior to 2009, but the January and July 2010 SOPs were drafted to point the adjudicators' attention to specific problem areas that they needed to look at more carefully, because these had been found to be common sources of fraud. Tr. 156-57, 158. For instance, Joint Exhibit 2, Tab 1 at page 4, requires adjudicators to remove applications that have specific problems with the birth certificate. Ms. Fultz testified that Passport Specialists have always been required to look closely at the birth certificates furnished by applicants; the revised SOP simply identified specific problems with birth certificates and incorporated the longstanding rule into written form. Tr. 155-56. She explained: "So, whereas they would always be expected to evaluate the genuineness of a document, this is giving them more details to look for, to help them identify something that might not be a genuine document." Tr. 157. Similarly, the Agency has always recognized that "breeder documents" constitute a frequent source of passport fraud, and it has trained Passport Specialists to recognize documents issued within a short time of each other as an indicator of possible fraud that must be examined more closely. *Id.* Although the revised SOP added a new, specific requirement to forward applications to FPM that were filed within four months of the issuance of an applicant's driver's license, ID card, or birth certificate (Jt. Ex. 2, Tab 1 at 4), adjudicators have always been trained to look more carefully at such applications. Tr. 68-69, 158. The Agency also asserts that the new language in the July 2010 SOP regarding "suspect geographic dispersion" simply provides more detail concerning this type of situation, without actually changing the procedures for adjudicators, and that the new MS Access SSN database simplifies the process of checking the accuracy of Social Security information, rather than making it more time consuming. Finally, the Agency asserts that the Colorado Assistant Director's memo of October 22, 2010, regarding recently issued IDs was factually erroneous and was rescinded.

For many of the same reasons, the Agency argues that even if the revised SOP changed conditions of employment, that change had no appreciable effect on the working conditions of Passport Specialists. The new provisions of the SOP merely facilitated the adjudication process or made the rules more distinct. The Respondent cites *Assoc. of Admin. Law Judges v. FLRA*, 397 F.3d 957, 959 (D.C. Cir. 2005), in support of its contention that notice and bargaining are not required over trivial matters. Similarly, the revised SOP did not change the definition of a significant knowledge error. Both before and after 2010, an SKE is identified by whether it causes a passport to be issued in error. A Passport Specialist must have a sound understanding of the adjudication process and must demonstrate good judgment in applying the rules to specific applications.

Finally, the Respondent argues that it was not required to give advance notice to, or bargain with, the Union over the revised SOP because Article 18 of the CBA expressly covers the Union's proposal to add fifteen minutes per day to a Passport Specialist's non-productive time. Section 3(b)(iv) of Article 18 specifies in detail how a Passport Specialist's numerical performance standards are calculated, and Steve Rojas testified for the Respondent that section 3(d) of Article 18 limits Passport Specialists to 60 minutes a day of non-productive time, unless there are special factors present for an employee (such as when an employee is not adjudicating passports or is engaged in an unusual amount of administrative work during a day). Tr. 185-88. The Respondent argues that the time and motion study, which set the production standard, took into account all steps involved in adjudicating the many types of passport applications. Accordingly, the CBA fixed the amount of non-productive time at 60 minutes a day, and the Agency was not required to bargain again to modify the standard or to increase non-productive time above 60 minutes a day.

Accordingly, the Respondent urges that the Complaint be dismissed.

Analysis

The Respondent Changed Conditions of Employment

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 is likely to have more than a *de minimis* effect on conditions of employment. *U.S. Dep't of the Air Force, AFMC, Space & Missile Systems Ctr. Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*). Where, as here, an agency exercises a reserved management right and the substance of the decision is not itself negotiable, the agency nonetheless has an obligation to bargain over the procedures to be used in implementing the decision and over appropriate arrangements for employees adversely affected by the decision.[6] *Fed. Bureau of Prisons, FCI, Bastrop, Tex.*, 55 FLRA 848, 852 (1999); *HHS, SSA*,

[6] Although the Respondent offers a number of reasons for its refusal to notify and bargain with the Union, at times it seems to claim that because the revised SOP was an exercise of its statutory right to determine the methods and means of performing work, it had no obligation whatever to notify the Union or bargain. *See* Resp. Brief at 2, 12. The case law is clear, however, that while an agency is not required to bargain over the substance of such changes, it is required to bargain over the impact and

24 FLRA 403, 407-08 (1986) (*SSA*). In determining whether the impact of a change is more than *de minimis*, the Authority looks to the nature and extent of either the effects, or the reasonably foreseeable effects, of the change on bargaining unit employees' conditions of employment, at the time of the change. *Kirtland AFB*, 64 FLRA at 173.

Determining whether an agency's action changed conditions of employment requires an inquiry into the facts and circumstances of the agency's conduct and the employees' conditions of employment. *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995). In this case, the Respondent implemented a series of changes to its rules and procedures for adjudicating passport applications. Adjudicating these applications is what Passport Specialists do every day, for nearly their entire work day. The SOPs are the "rules of the road," so to speak, for these employees, who are "on the road" nearly all the time. These rules and procedures govern every aspect of the work the Passports Specialists do, and the July 2010 changes to those rules and procedures covered many of the steps in the adjudication process, including the types and numbers of identification documents they are required to obtain, what information on the documents must be inspected, when adjudicators can approve an application on their own and when they must refer it to FPM, what databases must be used to verify information, and what notations must be made on the application by the adjudicator.

It is clear that the Agency indeed changed the Passport Specialists' conditions of employment when it implemented the revised SOP. As applied by the Authority, the term "conditions of employment" in section 7103(a)(14) of the Statute means an issue that pertains to bargaining unit employees and has a direct connection to employees' work situation or employment relationship. *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 237 (1986). In *U.S. Dep't of the Air Force, Griffiss AFB, Rome, N.Y.*, 37 FLRA 570 (1990), the Authority found that a change in policy relating to discipline for off-duty misconduct was sufficiently connected to the work relationship to qualify as a condition of employment. In our case, violations of the SOP are considered errors, and every employee's error rate is audited, measured and incorporated into their performance appraisals. Violations of these rules, both "major" and "minor," can result in performance-based discipline to employees, and will affect employees' performance appraisals and promotion opportunities; thus the connection here is much stronger, and more direct, than in *Griffiss*. Even more pertinent to our case is *U.S. Dep't of Justice, U.S. INS, El Paso Dist. Office*, 34 FLRA 1035 (1990) (*INS El Paso*), where the Authority held that several changes in employee work rules constituted changes in conditions of employment. As the ALJ noted, the rules could affect the number of cases an employee handles and could subject employees to discipline, among other factors. *Id.* at 1072-73.

The Respondent argues, nonetheless, that the rules established in the revised SOP simply "clarified" longstanding principles for adjudicating applications, that there was nothing "new" about them. Respondent is certainly correct that the basic legal standards for passport eligibility were not changed by the SOP. An applicant must establish his identity

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footnote 6 continue:
implementation of the changes. The General Counsel and the Union are not seeking bargaining over the substance of the SOP; thus the Respondent's argument misses the point.

and his eligibility for a passport (primarily by proving citizenship), and Passport Specialists must determine whether each applicant has satisfied these conditions; neither the January nor the July SOP altered this basic underlying responsibility of adjudicators. Moreover, Passport Specialists have always been required to inspect each application (and its supporting documents) for indicia of fraud, and most of the common fraud indicators have been well-known for many years. But this argument glosses over the fact that the July 2010 SOP imposed specific requirements on adjudicators that did not previously exist, and eliminated adjudicators' discretion on certain matters. The new SOP requires that adjudicators at the public counter obtain a second form of ID from applicants who use an out-of-state ID, and it gives a detailed explanation of how the employees should carry out this requirement, including copying certain documents but not others. Jt. Ex. 2 at 1-2 and Tab 1 at 5. Mr. Conway's memo to employees, explaining the rule, states: "Taking a few extra moments to document more ID . . . will improve the integrity of the application process." Jt. Ex. 2 at 2. He understood that the rule was new, and the Agency can hardly argue otherwise now. To give just one other example, the "breeder document scenario" spelled out in the revised SOP goes beyond simply "clarifying" the longstanding recognition that multiple documents obtained within a short period of time are an indicator of fraud that must be examined closely. Where the January SOP stated that "newly issued" IDs and supporting documents "may . . . require more checks before issuance [ ]" (Jt. Ex. 1, Tab 1 at 3), both Tabs 1 and 2 of the July SOP eliminate any room for discretion on the adjudicator's part by requiring the employee to forward applications to FPM "when the document/applicant sequence has occurred within four months[.]" Jt. Ex. 2, Tab 1 at 4, Tab 2 at 3. The adjudicator's discretion is similarly eliminated in other portions of the revised SOP, where applications must be referred to FPM.[7] *See, e.g.*, Jt. Ex. 2, Tab 1 at 4, Tab 2 at 1-2, 10. Thus, the procedures applicable to nearly all the work performed by Passport Specialists – whether they were adjudicating applications at the public counter or at their desks – were indeed changed in July 2010.

I do not agree with the General Counsel, however, that the policy announced in the October 22, 2010, emails to the Colorado office (GC Ex. 5) represented an additional change in the adjudication procedure or in the definition of an SKE. In the two emails sent that day, the Colorado office first obtained clarification from Agency headquarters as to how to annotate recently issued IDs, and the Assistant Director then explained headquarters' guidance to his employees. Tr. 58. But it is clear from the emails that this rule was "new" only for the offices in Colorado and a few other states that show the original issuance date on the ID. GC Ex. 5 at 1. Although adjudicators in those states had not previously been required to make specific notations concerning the issuance date on the passport applications, headquarters was simply emphasizing to those offices that the annotation rules set forth in the

[7] To describe the new rules as simply "clarifications" of some longstanding principles is thus a serious distortion. The new rules require employees to take different actions than they would have under the old rules. The disciplinary consequences of an error in one of these areas are significant. If a Passport Specialist were to follow the procedure in the original SOP and simply inspect an application more fully before approving it (rather than referring it to FPM, as now required), this would likely be considered an SKE.

January and July SOPs were meant to be uniform nationwide. *Id.* at 1, 2. With regard to recently issued IDs, the Colorado employees were simply being required in October to adopt the "change" in procedure that had been implemented everywhere else in July.

While GC Exhibit 5 does not represent a change in conditions of employment distinguishable from the changes implemented by the July 2010 SOP, the October 22 emails do illustrate the potential impact of a single procedural rule on employees. Both Mr. Daniels and Mr. Chojnacki emphasized that a failure to properly annotate an application with a recently issued ID would be considered an SKE. *Id.* at 1, 2. It is not clear from the record whether this was an expansion of the definition of an SKE (as the GC argues), but the emails show clearly that a violation of some of the SOPs will be counted as an SKE, the most serious type of error a Passport Specialist can make, and that such mistakes can adversely affect an employee's performance appraisal and promotion opportunities, or result in disciplinary action.

The Changes Were More Than *de Minimis*

While it is clear to me that the July 2010 SOP changed conditions of employment, there is more room for debate as to whether the impact of the change was more than *de minimis*. The difficulty of this question stems from the difficulty in quantifying the impact of the new rules. Nonetheless, a full consideration of the impact of the revised SOP demonstrates to me that the changes were significant enough to warrant advance notice to, and negotiations with, the Union concerning procedures for implementing the SOP and appropriate arrangements for employees adversely affected by them. *See SSA*, 24 FLRA at 407-08.

As already noted, the *de minimis* doctrine examines the "nature and extent" of the effects of a change. *Kirtland AFB*, 64 FLRA at 173. Thus, the analysis incorporates both a qualitative and quantitative evaluation of those changes. It is much easier in this case to identify the changes in the SOP than to quantify them, although the witnesses spent a good deal of time trying to do the latter. Mr. Arnold and Melissa Toby both testified that the new procedures require employees to work about 30 minutes more per day to adjudicate the same number of applications, while Josue Trinidad Perez testified that the procedures take him between 15 to 30 minutes more per day. Tr. 46, 132, 98. Ms. Fultz, on the other hand, testified that the revised SOP didn't add any more time to the process of adjudicating an application. Tr. 162. She explained that about 95 percent of all applications are fairly routine, in that they don't have any fraud indicators and they have all the required documentation. Tr. 148. The time and motion study performed by the Agency in 2009 was used to adjust the production standards when the January 2010 SOP was implemented, but Ms. Fultz indicated that the revised SOP of July 2010 did not require a new time and motion study or an adjustment to the production or error rate standards. Tr. 146, 150.

While neither the testimony of Ms. Fultz nor the employees was especially precise in characterizing the time needed to comply with the revised SOP, I find that the estimates of the employees were supported with more specifics, and I give them more weight in assessing the extent of the effects of the SOP on Passport Specialists. First of all, as Passport Specialists themselves, they have more direct experience in complying with the adjudication procedures, both new and old. I recognize, as Ms. Fultz indicated, that to some degree the removal of discretion from the hands of adjudicators, particularly in assessing the various indicators of fraud, may actually simplify the process for employees, as they can automatically suspend those applications which meet the criteria outlined in the new SOP. But even in cases where the application is suspended and referred to the FPM, the adjudicator must still scrutinize the entire application and supporting documents, make all appropriate notations, and identify all potential areas for review. As a result, the removal of certain areas of discretion does not actually speed up the process, while filling out the fraud checklist adds time to the adjudicator's task. Tr. 30, 89-91. Moreover, while the common indicators of fraud may only occur in a small proportion of the applications (Tr. 31, 148), adjudicators must still be cognizant of the new rules and procedures even in what appear to be routine applications, because they must be looking for the appropriate criteria and making the appropriate notations on all applications. Tr. 31. Finally, the Respondent failed to rebut either the testimony that the Union was receiving more complaints from employees about the difficulty of meeting the new standards and handling more disciplinary actions related to the production and error standards (Tr. 47, 91-93, 99), or Trinidad's testimony that he sometimes has to work through his breaks and bring manuals home to keep up with the standards. Tr. 97-98. These are circumstantial, but significant, indications that the new SOP is affecting employees' work hours and their ability to meet the demands of the job.

The employees' testimony that it now takes them longer to adjudicate the required number of applications than before July 2010 is corroborated by the specific examples of changes in the SOP that I outlined at pages 4-5 and 6, *supra*. These include the mandatory fraud referrals for certain birth certificates, breeder documents, and suspect geographic dispersion, the second required ID for out-of-state primary IDs, the additional and more explicit procedures for verifying Social Security information (including the new use of the MS Access SSN database), and the more detailed notation requirements. All of these requirements changed the normal routine and criteria that employees use to adjudicate applications, and in their own way, each slow down the work process for Passport Specialists. While it is impossible to quantify (without a new time and motion study) how much time it now takes to adjudicate an application, I find the employees' testimony persuasive that the new SOP requires them to spend more time, on average, on applications. While Ms. Fultz may be correct that the employees will adjust to the new rules and that they will ultimately perform their work in essentially the same time as before, it is clear that was not true in the first year after implementation, and it is also clear to me that this was a foreseeable result of making so many changes in the rules for adjudicating passport applications. Mr. Conway certainly foresaw that it would take "a few extra moments" for employees working at the public counter to obtain a second ID from applicants using an out-of-state primary ID – he said as much in his cover memo to the July 2010 SOP (cosigned by

Ms. Fultz). Jt. Ex. 2 at 2. And that is for just one of the many changes implemented at that time. Mr. Daniels, the Colorado Assistant Director, foresaw the need for an adjustment period in transitioning to the new notation requirement on recently issued IDs, as he unilaterally offered the Colorado employees "a 30 day grace period before implementation of the SKE error policy [ ]" in his email of October 22, 2010. GC Ex. 5 at 1. Mr. Daniels essentially offered the sort of implementation procedure and appropriate arrangement that is precisely what the Union is supposed to have an opportunity to negotiate in such situations.

A proper evaluation of the foreseeable effects of the new SOP must also account for the interplay between the competing demands of speed and accuracy that the Agency makes on its Passport Specialists. Not only are they required to adjudicate, on average, over a year's time, one application every 3.75 minutes, but they must do so with a minimum of errors. Every possible type of error an employee can make has already been classified by the Agency, and GS-9 and -11 employees can make errors in no more than two to four percent of their cases, depending on the type of error. Jt. Ex. 1 at 2. The new adjudication rules implemented in the July 2010 SOP required employees to re-think all of their work habits and practices for a large number of the applications that they handled every day, and that re-thinking is necessarily going to make employees work a bit more carefully, and slowly, than before. Indeed, working more carefully was precisely what the Agency intended with both the January and July SOPs: the "sting" operations had identified the fact that improper applications were being approved, and the Agency recognized that it needed both to standardize its procedures and to make adjudicators more careful in inspecting all of the information in applications and supporting documents. To the extent that employees work more slowly, they run the risk of violating the production standard; to the extent that they work more quickly, they run the risk of exceeding the acceptable error rates. This dual pressure on employees cannot be adequately quantified, but it is a significant factor that must be considered in determining whether the revised SOP had more than a *de minimis* impact on working conditions. The Authority considers a change in the matters for which employees are subject to discipline to be greater than *de minimis*. *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875, 882 (1990); *INS El Paso*, 34 FLRA at 1044-45. It also considers a change that is likely to affect employees' performance appraisals to be greater than *de minimis*. *U.S. EEOC*, 40 FLRA 1147, 1155 (1991). The revised SOP did change rules that are likely to affect Passport Specialists' appraisals and subject them to discipline.

Finally, I note two other relevant factors that have traditionally been considered in making a *de minimis* determination. *See SSA*, 24 FLRA at 407. The revised SOP affects all Passport Specialists nationwide, and it is permanent (or at least as permanent as a government procedure can be). The Authority has held that changes affecting even a single employee can be greater than *de minimis*, but changes affecting large numbers of employees are more likely to meet the standard, and the same can safely be said about permanent changes. *See id.* at 408. Moreover, the new adjudication rules are applicable to the entire body of work that Passport Specialists do, and thus the impact of those rules is pervasive. Accordingly, I conclude that the July 2010 revision of the SOP had a greater than *de minimis* impact on the conditions of employment for Passport Specialists.

The Union's Bargaining Proposal Was Not Covered By the CBA

The Respondent issued the revised SOP in a memo sent to employees on July 27, 2010. Jt. Ex. 2. On August 12, 2010, Union President Arnold sent an email to Agency officials, requesting bargaining over the changes made in the SOP, and specifically proposing "an additional 15 minutes non-productive time per Passport Specialist per day to account for the additional duties." GC Ex. 6. Arnold testified that the Agency did not notify him of the SOP revisions in advance, but when he received the July 27 memo, he requested to bargain. Tr. 61-62. The Agency never responded to the Union's demand, however. Tr. 62. The Respondent has not offered any evidence to rebut these facts – indeed, the testimony of the Respondent's Labor Relations Specialist, Steve Rojas, essentially admits them. Tr. 190-91.

The Respondent contends, however, that it was not required to bargain over the revised SOP, because the Union submitted only one bargaining proposal, and it was covered by Article 18 of the parties' collective bargaining agreement. Resp. Ex. 2; see also Tr. 190-92. Citing section 3(d) of Article 18, Mr. Rojas testified that "Passport Specialists shall have a minimum of 60 minutes of the day counted as non-productive time when assigned to desk adjudication[,]" and that they can qualify for more non-productive time when they handle complex cases and have other extenuating circumstances. Tr. 186-88, 191-92. According to Mr. Rojas, Article 18 stipulates that "the standards were fair and reasonable, and that within that, the specialists have this 60 minutes of time during the day where all these extraneous activities will fit in. Part of what was contained in the SOPs were a lot of these extraneous activities that were not captured on paper and we were putting them on paper." Tr. 191-92. On further questioning, he specified that "to the extent that Mr. Arnold was requesting additional non-productive time, that non-productive time for the duties that were included in the SOPs was already factored into the 60 minutes that's in the contract." Tr. 192. Thus, applying the legal standard outlined in *U.S. Dep't of HHS, SSA, Baltimore, Md.*, 47 FLRA 1004 (1993), Respondent submits that the plain language and the intent of Article 18 take into account all of the tasks necessary to perform passport adjudication and limit Passport Specialists to 60 minutes a day of non-productive time, plus breaks.

It should first be noted that the Respondent's covered-by defense does not address either the Agency's failure to provide advance notice of the revised SOP to the Union or its failure to respond to the Union's August 12 bargaining request. Both notice to the Union and bargaining should take place before a change goes into effect. *U.S. Dep't of Justice, INS*, 55 FLRA 892, 902-03 (1999); *Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9, 11 (1981). If the Agency believed that the Union's bargaining proposal was covered by the CBA, it should at least have advised the Union in writing of this. The combined failure to provide advance notice and to respond to the Union's bargaining request demonstrate a cavalier neglect of the Union that is not commensurate with a good faith bargaining relationship.

With respect to the covered-by defense, the Respondent has quoted selectively from Article 18 of the CBA. A proper reading of the article shows that it does not preclude the Union's August 12 bargaining proposal. The following additional provisions of Article 18 must also be taken into account:

3. FAIR AND REASONABLE STANDRARDS

b. Passport Application Adjudication Numerical Performance Standards:

i. The Employer agrees that adequate time must be provided to bargaining unit employees when adjudicating passports, to include diligent scrutiny of fraud indicators. The Employer agrees to continue to monitor, evaluate and where appropriate, implement changes to the technology and methods of adjudicating passports to enhance both the quality and quantity of passport adjudication. The Employer agrees to monitor, evaluate, and where appropriate, adjust numerical passport adjudication standards.

. . . .

iii. Management recognizes that additional steps and procedures added to desk adjudication or counter adjudication may require additional time.

Even the Agency's reading of section 3(d) of Article 18 misses the basic point of the provision: that Passport Specialists shall have "a **minimum** of 60 minutes of the day counted as non-productive time . . . ." (emphasis added). I asked Mr. Rojas about this key point, but his answer was unpersuasive. After I noted that the provision specifies a "minimum of 60 minutes," I asked him, "So then how would that language prohibit his request of additional time?" Tr. 193. Mr. Rojas responded, "Because the duties that were contained in the SOPs were already factored into this minimum 60 minutes of the day." *Id.* He noted that the 2009 time and motion study of the Passport Specialist position "looked at everything that a passport specialist does throughout the day . . . ." *Id.* But Mr. Rojas also noted that the CBA went into effect in July 2009. Tr. 185. The first SOP was implemented in January 2010, and the revised SOP in July 2010. Thus, the CBA could not have possibly have "factored in" the duties encompassed in the SOPs. More importantly, however, the CBA did provide explicitly for the possibility that "additional steps and procedures added to desk adjudication or counter adjudication may require additional time." CBA, Article 18, Section 3(b)(iii). That is precisely what the Union was seeking in its bargaining proposal. Therefore, not only is the Respondent wrong in asserting that the CBA **precludes** the Union's proposal, but the CBA explicitly **permits** such a proposal.

In summary, the July 2010 revisions to the SOP changed conditions of employment, and the impact of those changes were more than *de minimis*. The Respondent was required to notify the Union prior to implementing those revisions, but failed to do so. The Respondent was further required to respond to the Union's request to bargain, but again failed to do so. The Union's bargaining proposal was not covered by the CBA, and therefore the Respondent was required to engage in negotiations over the impact and implementation of the SOP. In all these respects, the Respondent violated section 7116(a)(1) and (5) of the Statute.

Remedy

In order to remedy the Agency's unfair labor practice, the General Counsel does not seek a return to the status quo ante or the rescission of the revised SOP. Instead, it asks that the Respondent be ordered to bargain prospectively over the impact and implementation of the July 2010 SOP, in addition to the traditional cease and desist order and posting of a notice to employees (both electronically and on bulletin boards). The Respondent did not address a remedy, other than to seek dismissal of the Complaint. Based on the facts of this case, it is clear that the Respondent must be ordered to bargain with the Union concerning the impact and implementation of the July 2010 SOP, and that the Respondent must notify its employees that it will not implement changes in conditions of employment without providing advance notice to, and negotiating with, the Union. In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted both on bulletin boards and electronically, I will incorporate this in the Order. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

Accordingly, I recommend that the Authority adopt the following remedial Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the United Broadcasting Board of Governors, shall:

1. Cease and desist from:

(a) Changing the conditions of employment of bargaining unit employees without providing the National Federation of Federal Employees, FD 1, IAMAW, Local 1998, AFL-CIO (the Union) with adequate notice and an opportunity to bargain to the extent required by the Statute.

(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 actions in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the Union concerning the impact and implementation of the changes implemented on July 27, 2010, to the Standard Operating Procedures for the adjudication of passport applications.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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 Managing Director of Passport Issuance, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued Washington, D.C., June 13, 2014

RICHARD A. PEARSON
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 United States Department of State, Passport Services, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the conditions of employment of bargaining unit employees without providing the National Federation of Federal Employees, FD 1, IAMAW, Local 1998, AFL-CIO (the Union) with adequate notice and an opportunity to bargain 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 their rights assured by the Statute.

WE WILL, upon request, bargain with the Union concerning the impact and implementation of changes implemented on July 27, 2010, to the Standard Operating Procedures for the adjudication of passport applications.

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature) (Managing Director)

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 any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW, 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.