68 FLRA No. 110

SOCIAL SECURITY ADMINISTRATION
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1395, AFL-CIO
(Charging Party)

CH-CA-10-0370

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DECISION AND ORDER

June 15, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (the Judge) found that the Respondent did not change conditions of employment of employees whom the Charging Party (Union) represents – and, thus, the Respondent did not unilaterally change such conditions. Accordingly, the Judge concluded that the Respondent did not violate § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).

The question before us is whether the Judge erred in her findings of fact or conclusions of law when she found that the Respondent did not change employees' conditions of employment. Because a preponderance of the record evidence supports the Judge's factual findings, and her legal analysis accords with Authority precedent, the answer is no.

II. Background and Judge's Decision

The Respondent's Indianapolis hearing office (the office) allows employees to schedule regular work hours until 6:00 p.m. The total amount of overtime that is available for employees to work fluctuates from year to year. Every year, one of the Respondent's regional offices allots a set number of overtime hours that the office may assign. After receiving its allotment of overtime, the office's director (the director) determines how many overtime hours are available, and when employees may work those hours, during a given week.

On April 30, 2010 (April 30) and May 5, 2010 (May 5), the Respondent emailed certain employees and stated that they could work overtime until 6:00 p.m. during the workweeks immediately following those dates. The office did not notify the Union before sending these emails.

The Union filed an unfair-labor-practice charge, and the FLRA's General Counsel (GC) issued a complaint, alleging that the office unilaterally changed the time frame during which employees could work overtime. The case went to a hearing before the Judge.

Before the Judge, the GC argued that there was a past practice of allowing the employees to work overtime between 6:00 p.m. and 8:30 p.m., and that this past practice established a condition of employment for employees. The GC also argued that the Respondent unilaterally changed this condition of employment by notifying employees that they could work overtime only until 6:00 p.m. during the workweeks immediately following April 30 and May 5.

But the Judge found that the Respondent "did not deviate from its established overtime procedures when" assigning overtime hours in the April 30 and May 5 emails.[1] In this regard, she relied on witness testimony to find that there are established factors that the director has "traditionally" used to determine how many overtime hours employees could work, and when they could work those hours, during a particular workweek.[2] According to the Judge, these factors include: (1) the office's allotment of available overtime; (2) employees' workloads; and (3) the availability of either a management official or an officer in charge. Regarding factor (3), the Judge determined that a management official is always present in the office until 6:00 p.m., but that after 6:00 p.m., the director must ensure that a management official or an officer in charge can stay in the office while employees work overtime.

The Judge found that the director considered these factors during the weeks in question. The Judge further found that the office sometimes closed at 6:00 p.m. because it received a smaller allotment of available overtime hours in 2010 than it had received in 2009, and because sometimes, neither a management official nor an officer in charge was available to work after 6:00 p.m. In this regard, the Judge noted that the director testified that: (1) he had difficulty finding an officer in charge who was available until 8:30 p.m.; and (2) supervisors were not available on certain days past 6:00 p.m., although they never stated that they were unavailable past 6:00 p.m. generally. Moreover, the

[1] Judge's Decision at 7.
[2] *Id.*

Judge found that, although the Respondent decided to close the office at 6:00 p.m., it could continue to assign overtime after 6:00 p.m. if the established factors warrant it. The Judge noted, in this connection, that after the weeks at issue here, the Respondent permitted employees to work overtime until 8:30 p.m. on several occasions.

In addition, the Judge rejected the GC's reliance on the Authority's decision in *SSA*.[3] According to the Judge, in *SSA*, an FLRA administrative law judge found that an agency permitted employees to work overtime between 5:45 p.m. and 7:00 p.m. "at their own volition," but then improperly changed conditions of employment by permitting overtime only until 5:45 p.m. unless specifically authorized by the office manager to work later.[4] The Judge determined that, unlike the respondent in *SSA*, the Respondent in this case "did not deviate from its established overtime procedures."[5]

Therefore, the Judge concluded that the GC had not established that the Respondent changed employees' conditions of employment. Accordingly, she concluded that the Respondent did not violate § 7116(a)(1) and (5) of the Statute as alleged, and she recommended that the Authority dismiss the complaint.

The GC filed exceptions to the Judge's decision, and the Respondent filed an opposition to the GC's exceptions.

III. Analysis and Conclusions

The GC argues that the Judge made both factual and legal errors in concluding that the Respondent did not change employees' conditions of employment.[6] We discuss the GC's factual and legal challenges separately below.

A. The GC has not demonstrated that the Judge erred in her factual findings.

The GC contends that the Judge erred in finding that the director relied on "established overtime procedures" when she decided to restrict overtime during the weeks in question.[7] Specifically, the GC argues that the Judge erred by finding that: (1) the director's undisputed testimony demonstrates that she considered the factors that management traditionally considered when setting overtime hours in restricting overtime work until 6:00 p.m.; and (2) the 6:00 p.m. closing was due to a smaller allotment of overtime hours and the absence of a management official or an officer in charge who was available to work after 6:00 p.m.[8]

In assessing challenges to a judge's factual findings, the Authority determines whether the preponderance of the record evidence supports those findings.[9] Here, the Judge found that, although the Respondent decided to close the office at 6:00 p.m. during the two workweeks at issue, the office could continue to assign overtime after 6:00 p.m. if it met the office's established factors for determining the availability of overtime. A preponderance of the record evidence,[10] including the testimony of the GC's own witness,[11] supports the Judge's findings that, in determining overtime assignments, the director considered established overtime factors by assessing: the amount of overtime available, employees' workloads, and the availability of a management official or an officer in charge. As a preponderance of the record evidence supports the Judge's factual findings, the GC does not demonstrate that the Judge erred in this regard.[12]

B. The GC has not demonstrated that the Judge erred in her conclusions of law.

Before implementing a change in conditions of employment, the Statute requires an agency to provide an 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 bargaining-unit employees' conditions of employment.[13] The determination of whether a change in conditions of employment has occurred involves an inquiry into the facts and circumstances regarding the agency's conduct and the employees' conditions of employment.[14] As relevant here, bargaining-unit employees' conditions of employment may be established by past practice.[15] To establish a condition of employment through a past practice, that 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.[16] The parameters of, or limitations on, the

[3] 64 FLRA 199 (2009).
[4] Judge's Decision at 8 (quoting *SSA*, 64 FLRA at 213).
[5] *Id.*
[6] GC's Exceptions at 3-13.
[7] *Id.* at 4, 9.
[8] *Id.* at 9.
[9] *See, e.g., U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009) (*FAA*) (Member Beck concurring).
[10] *E.g.*, Tr. at 45-80.
[11] *E.g., id.* at 28, 38.
[12] *See FAA*, 64 FLRA at 368.
[13] *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009).
[14] *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704 (1995).
[15] *U.S. DOL, Wash., D.C.*, 38 FLRA 899, 908 (1990) (citation omitted).
[16] *Id.*

condition of employment must be understood by both parties.[17]

According to the GC, the Judge erred as a matter of law when she failed to address whether there was a past practice that allowed employees to work overtime past 6:00 p.m. on weekdays.[18] But the Judge *did* address whether such a past practice existed. Specifically, she found that the office had "established overtime procedures" for determining the total number of hours and time frames that employees could work overtime during a particular workweek.[19] According to the Judge, these established overtime procedures required the director to consider several factors that the office "traditionally" takes into account when assigning overtime, including: (1) the allotment of overtime; (2) employees' workloads; and (3) the availability of either a management official or an officer in charge.[20] Therefore, the Judge found that the office may allow employees to work overtime past 6:00 p.m. *if the established overtime factors are met*. As discussed in Section III.A. above, the GC has not shown that the Judge committed factual errors in this regard. Accordingly, the GC's argument does not demonstrate that the Judge committed a legal error.

Additionally, the GC contends that the Judge erred when she distinguished *SSA* from the present case.[21] In *SSA*, the Authority denied exceptions to an administrative law judge's finding that a respondent violated the Statute by changing the hours during which certain employees could work overtime.[22] Before the change, the respondent in *SSA* allowed employees to work overtime until 7:00 p.m. "at their own volition,"[23] while after the change, employees could work only until 5:45 p.m., unless specifically authorized by the office manager.[24] Here, unlike in *SSA*, the Judge found that – both before and at the time of the April 30 and May 5 emails – the director determined, based on the same factors, when employees could work overtime. Moreover, the Judge also found that the director could continue to assign overtime after 6:00 p.m. if the established overtime factors supported it. Given these findings, the Judge properly found that *SSA* is distinguishable from this case.

The GC argues further that the Judge failed to correctly apply Authority precedent because, in finding no statutory violation, she improperly relied on conduct that occurred after the Union filed its charge.[25] Although the Judge acknowledged the office's post-charge conduct, she did not focus on it. Rather, she listed it as only one of several independent bases – including the director's reliance on established factors for when overtime was appropriate – that supported a finding of no change. Thus, even if the Judge erred in acknowledging post-charge conduct, that alleged error does not demonstrate that she erred in her conclusion that there was no change in conditions of employment.

Finally, the GC asserts that the alleged change in conditions of employment was more than de minimis.[26] Because we uphold the Judge's finding that there was no change, it is unnecessary to resolve the GC's de minimis argument. The GC also makes several arguments regarding remedies.[27] Because we uphold the Judge's finding that there was no violation, it is also unnecessary to resolve those arguments.

For the reasons discussed, we find the GC has failed to demonstrate that the Judge erred in finding that there was no change in conditions of employment.

IV. Order

We dismiss the complaint.

[17] *Id.* at 909.
[18] GC's Exceptions at 7-9.
[19] Judge's Decision at 7.
[20] *Id.*
[21] *Id.* at 8; GC's Exceptions at 12-13.
[22] *SSA*, 64 FLRA at 213.
[23] *Id.*
[24] *Id.*
[25] GC's Exceptions at 12 (citing *U.S. DOJ, Exec. Office for Immigration Review, N.Y.C., N.Y.*, 61 FLRA 460, 467 (2006); *U.S. Dep't of Transp. & FAA*, 40 FLRA 690, 705 (1991)).
[26] *Id.* at 13.
[27] *Id.* at 14-15.

Office of Administrative Law Judges

SOCIAL SECURITY ADMINISTRATION
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1395, AFL-CIO
Charging Party

Case No. CH-CA-10-0370

Ayo Glanton
For the General Counsel

Eric Garcia
For the Respondent

Susan L. French
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et. seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On May 17, 2010, the American Federation of Government Employees, Local 1395, AFL-CIO (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Social Security Administration (Respondent/Agency) with the Chicago Regional Office of the FLRA. The Regional Director of the Chicago Region issued a Complaint and Notice of Hearing on December 27, 2010, claiming that the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing a change to bargaining unit employees' conditions of employment without first notifying the Union and providing it an opportunity to bargain over the impact and implementation of the change.

The Respondent filed its Answer to the complaint on January 24, 2011, in which it admitted certain facts, but denied the substantive allegations of the complaint.

On February 16, 2011, the General Counsel filed a Motion in Limine in which it stated that the Respondent was collaterally estopped from raising a "covered-by" defense because the Authority, in *Social Security Administration*, 64 FLRA 199, 203 (2009) (*SSA*), had rejected the respondent's contention that Article 10 of the parties' agreement dated April 6, 2000 (2000 agreement) covered the issue of when overtime could be worked. On February 17, 2011, the Respondent filed its response to the motion, claiming that it was not collaterally estopped from raising a "covered-by" defense because, among other things, the parties' agreement dated August 15, 2005 (2005 agreement) was at issue in this case and differed greatly from the 2000 agreement. By order dated February 18, 2011, the General Counsel's motion was denied.

A hearing in this matter was held on February 23, 2011, in Indianapolis, Indiana. All parties were represented and afforded a full opportunity to be heard, to produce relevant evidence, and to examine and cross-examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs that have been duly considered.

Based upon 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 as defined by 5 U.S.C. § 7103(a)(3). The Respondent administers the United States' social insurance programs, namely retirement, survivors, and disability benefits. The Respondent provides its services through of a network of offices nationwide, including the Disability Adjudication and Review Hearing Office in Indianapolis, Indiana (Indianapolis Hearing Office). During all times material to this matter, Donna S. Charles was the Director of the Indianapolis Hearing Office. (G.C. Ex. 1(b), 1(d)).

The American Federation of Government Employees, Local 1395, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Agency. The Union is an agent of AFGE for the purpose of representing bargaining unit employees at the Indianapolis Hearing Office. At all times material to this matter, Susan L. French served as the Alternate Steward of the Union. (Tr. 14; G.C. Ex. 1(b), 1(d)).

The Indianapolis Hearing Office allows bargaining unit employees to work two types of flexible schedules. The first shift has: (1) a core time of

9:30 a.m. to 3:00 p.m. and (2) "flexible bands . . . from 6:30 a.m. to 9:30 a.m. and from 3[:00] p.m. until 6:00 p.m." (Resp. Ex. 19 at 75). The second shift has: (1) a core time of 9:30 a.m. to 4:30 p.m. and (2) "flexible bands . . . from 8:00 a.m. to 9:30 a.m. and from 4:30 p.m. to 6:00 p.m." (*Id.*)

The amount of overtime hours worked by bargaining unit employees at the Indianapolis Hearing Office fluctuates from year-to-year. The Indianapolis Hearing Office receives an allotment of overtime from the Agency's Regional Office in Chicago.[1] After the Indianapolis Hearing Office receives its allotment, the Director is responsible for determining the total number of hours and time frames that employees can work overtime during a given week. The Director makes his/her determination based on: (1) the allotment of overtime; (2) employees' workload; and (3) the availability of either a management official or an officer-in-charge (OIC), an employee who serves the role of a management official in his/her absence. Until 6:00 p.m., at least one management official is always working in the office. However, after 6:00 p.m., the Director must ensure that either a management official or an OIC can stay in the office while employees work overtime. A management official or OIC who works past 6:00 p.m. is responsible for "ensuring the safety and security of the employees in the office and . . . closing the office," making sure all employees have left the office, locking the door, and setting the alarm. (Tr. 49). Additionally, the Director is responsible for soliciting volunteers to work overtime. As Director, Charles delegated the duty of notifying employees about available overtime to a group supervisor. (Tr. 38-39, 45-46, 48-51, 62).

French testified that prior to April 30, 2010, the Indianapolis Hearing Office remained open as late as 8:30 p.m. during the workweek to allow bargaining unit employees to work overtime. According to French, employees who worked overtime on weekdays were required to sign out on an overtime roster by 8:30 p.m. before the security alarm was set at 8:45 p.m. French also testified that she normally worked overtime from 6:00 p.m. to 8:30 p.m. per weekday, and that she had served as an OIC in the past. French claimed that approximately ten to fifteen other employees worked overtime after 6:00 p.m. However, French admitted on cross-examination, that the Agency did not allow employees to work overtime until 8:30 p.m. on various occasions prior to April 30, 2010. (Tr. 15-18, 22, 29-38, 40).

Also, French testified that during a meeting in either January 2010 or February 2010, Charles announced that in the future, the office would close at 6:00 p.m. However, French admitted that when she asked Charles whether employees would be able to work overtime past 6:00 p.m., Charles stated that employees could still work overtime after that time. (Tr. 23-24).

On April 30, 2010, the Agency notified bargaining unit employees via email of available overtime during the following workweek. As relevant here, the Agency notified tech-support employees that during the upcoming workweek, they could work up to three hours of overtime per day until 6:00 p.m. and that a management official or an OIC would be available. The Agency sent an identical notification to such employees on May 5, 2010. The Agency did not give notice to the Union prior to sending these emails. (Tr. 25-26, 46-48, 51-52; G.C. Ex. 3).

French testified that these emails "immediately change[d] and limit[ed] the times" that bargaining unit employees could work available overtime. (Tr. 25). She asserted that because her shift was from 9:30 a.m. to 6:00 p.m., she was unable to work overtime during the workweek and could only work overtime on Saturday. According to French, she preferred not to work overtime on Saturday, in part, because she had family who lived out-of-state. French also claimed that, if the office had not closed at 6:00 p.m., she would have worked more overtime. French asserted that Charles did not give a reason for her decision to close the office at 6:00 p.m. besides stating that she believed employees were too tired to work past 6:00 p.m., that supervisors were unwilling to work after that time, and that she chose not to utilize OICs. (Tr. 25-28).

While Charles stated that after April 30, 2010, the Agency's normal practice was to close the office at 6:00 p.m., she testified that tech-support employees were notified via email on June 17, 2010, that they were allowed to work overtime until 8:30 p.m. during the upcoming workweek and that they received a similar notice on July 8, 2010. Charles also claimed that she was not opposed to utilizing an OIC but, rather, had difficulty finding a volunteer who would agree to comply with the Agency's policy requiring an OIC, for security reasons, to leave before 8:30 p.m. if all other employees had left the office. Also, Charles asserted that although supervisors told her that they could not work past 6:00 p.m. on certain days, they never stated that they were unwilling to work overtime after that time as a general matter. Charles testified that she did not believe that the Agency was required to notify the Union before sending the emails dated April 29, 2010 and May 5, 2010 because management had the right to assign overtime. (Tr. 49, 52-63; Resp. Exs. 4, 5).

[1] The Indianapolis Hearing Office's allotment of overtime hours decreased from 5,400-5,800 hours during fiscal year 2009 to 4,400 hours during fiscal year 2010, and finally to 1,000 hours during fiscal year 2011.

POSITIONS OF THE PARTIES

General Counsel

Citing *SSA*, the General Counsel asserts that the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing a change in bargaining unit employees' conditions of employment that were established by a past practice without first providing the Union with notice and an opportunity to bargain over the impact and implementation of the change. In support of its assertion, the General Counsel contends that, at the Indianapolis Hearing Office, a past practice existed, allowing bargaining unit employees to work overtime after 6:00 p.m. Specifically, the General Counsel asserts that based on French's testimony and evidence presented at the hearing, management allowed employees to work available overtime "as late as 8:30 p.m. on weekdays" for several years. (G.C. Br. at 7). The General Counsel claims that evidence demonstrates the Agency was aware of this practice because, among other things, management notified employees of available overtime and approved employees' requests to remain in the office to work overtime after 6:00 p.m. Also, the General Counsel maintains that management changed this past practice via email on April 30, 2010 and May 5, 2010, by notifying employees that they were only allowed to work overtime until 6:00 p.m. during the following workweek. According to the General Counsel, this change was more than de minimis because, as a result of the change, employees whose shift ended at 6:00 p.m. were unable to earn overtime during the workweek, and employees whose shift ended before 6:00 p.m. could only work limited overtime hours during the workweek. The General Counsel argues that the Respondent conceded it did not provide the Union with notice or an opportunity to bargain before sending these emails.

In addition, the General Counsel claims that the Respondent has failed to establish its "covered-by" defense. In this regard, the General Counsel contends that, because Article 10, Section 3 of the 2005 agreement does not address the hours that employees can work overtime, the substance of the change is not expressly contained in the parties' agreement. The General Counsel also asserts that the substance of the change is not "inseparably bound up with, and thus[,] plainly an aspect of," the subject "covered by" Article 10, Section 3. (G.C. Br. at 10). That section merely provides that management may expect an employee who volunteers to work overtime to do so and may, absent good cause, move an employee's name to the bottom of the overtime roster if the employee does not work overtime. Moreover, the General Counsel notes that the Respondent argues, in support of its "covered-by" defense, that it terminated an MOU signed by the parties in 1996 (1996 MOU) that concerned overtime procedures for bargaining unit employees in hearing offices nationwide and enabled such employees to work overtime, if offered, between 3:00 p.m. and 8:30 p.m. However, the General Counsel argues that because it has not alleged that the Respondent unlawfully repudiated or modified the 1996 MOU, the status of that MOU is immaterial.

As remedy, the General Counsel requests that the Agency be ordered to pay backpay plus interest to employees who were affected adversely by the change at issue. The General Counsel also seeks a status quo ante remedy. According to the General Counsel, that remedy is warranted because: (1) the Respondent does not contest that it failed to give notice to the Union before implementing the change at issue; (2) the Union promptly requested to bargain over the change; (3) the Respondent's actions were willful; (4) the impact of the change on bargaining unit employees was substantial, and (5) the Respondent offered no evidence demonstrating that such a remedy would disrupt its operations. *See, e.g.*, *SSA*, 64 FLRA at 205. Finally, the General Counsel requests that the Respondent be ordered to post a notice in conspicuous places, including all bulletin boards and other locations where notices to employees are customarily posted. The General Counsel asks that such notice be signed by Michal J. Astrue, Commissioner, because the Respondent's "refusal to bargain stems from [its] national labor relations office's faulty interpretation and application of the parties'" 2005 agreement. (G.C. Br. at 14).

Respondent

The Respondent contends that the General Counsel has failed, by a preponderance of the evidence, to establish that the Respondent committed a ULP in violation of § 7116(a)(1) and (5) of the Statute. In support of its contention, the Respondent claims that management at the Indianapolis Hearing Office did not change bargaining unit employees' conditions of employment. The Agency maintains that, while French testified that the emails sent to employees on April 30, 2010 and May 5, 2010, immediately altered and limited the hours that employees could work overtime, employees were authorized to work overtime until 8:30 p.m. after May 5, 2010, because either a management official or an OIC was available. The Respondent asserts that testimony and evidence presented at the hearing demonstrate that management has always controlled not only the total number of hours but also the specific hours that employees could work overtime during the workweek. Moreover, according to the Agency, on various occasions prior to April 30, 2010, management did not allow employees to work overtime until 8:30 p.m.

Also, the Respondent argues that even if the two emails at issue changed employees' conditions of employment, the change was de minimis. Among other things, the Agency contends that the emails did not effect a permanent change because employees could still work overtime until 8:30 p.m. during the workweek. The Respondent claims that at most, the emails affected two "weeks of available overtime for a limited amount of employees in an office where management sometimes offer[ed] overtime 52 weeks a year." (Resp. Br. at 16).

The Respondent maintains that even if the alleged change was not de minimis, the substance of the change was "covered by" the 2005 agreement. Among other things, the Respondent contends that based on bargaining history, the substance of the alleged change is inseparably bound up with and thus, clearly an aspect of the subject "covered by" Article 10 of the 2005 agreement. In this regard, the Respondent claims that during negotiations, AFGE submitted proposals in which it attempted to preserve the right to bargain overtime procedures at each hearing office, but the Agency did not agree to those proposals because it wanted to retain management's right to assign overtime. Similarly, the Respondent argues that it rejected an AFGE proposal that would have required the Agency in scheduling overtime, to maintain current practices and MOUs to preserve the 1996 MOU. The Respondent asserts that while AFGE proposed language for Article 49 that would have forced the Agency to waive prong two of the "covered-by" defense, the Agency did not agree to such language because it intended to restore its "covered-by" defense. Moreover, the Agency indicates that the agreed-upon language of Article 10, Section 3 included general overtime provisions that allowed bargaining unit employees to "work overtime hours within certain parameters." (Resp. Br. at 12).

In relying on some of the contentions it made in support of the "covered-by" defense, the Respondent argues that AFGE waived its right to bargain over the substance of the alleged change. According to the Respondent, because the Agency's representatives negotiated in good faith with AFGE while bargaining over the 2005 agreement and agreed to modify the language of Article 10, Section 3 to accommodate both the Agency's and AFGE's needs regarding overtime, AFGE waived its right to bargain overtime hours at the local level.

The Respondent contends that French's testimony is not credible. In support of its contention, the Respondent claims that while French testified that she usually worked twelve-and-one-half hours of overtime per workweek, evidence presented by the General Counsel demonstrates that French was only able to work that much overtime during two weeks. Additionally, the Respondent claims that although French testified that the office was always open until 8:30 p.m., evidence shows that prior to April 30, 2010, bargaining unit employees were only authorized to work overtime until either 6:00 p.m. or 8:00 p.m. during several weeks.

Finally, with respect to the proposed remedy, the Respondent maintains that if it did commit a ULP the appropriate official to sign the notice would be Charles, rather than the Commissioner. According to the Respondent, Charles's undisputed testimony demonstrates that she determined the number of hours that bargaining unit employees could work overtime, that she instructed a group supervisor to send the two emails at issue, and that she did not receive any advice from higher-level management officials. The Respondent also claims that it should not be ordered to pay backpay plus interest because, among other things, Charles testified that the Indianapolis Hearing Office had used its entire allotment of overtime hours by the end of the 2010 fiscal year. Moreover, the Respondent asserts that it should not be required to bargain over employees' overtime hours because the Agency already met its statutory duty to bargain during negotiations over the 2005 agreement.

DISCUSSION AND ANALYSIS

In order to determine whether an agency has violated § 7116(a)(1) and (5) of "the Statute by failing to bargain over a change in conditions of employment, it must be established that the agency made a change in a policy or practice concerning unit employees' conditions of employment." *U.S. Dep't of VAMC, Sheridan, Wyo.*, 59 FLRA 93, 94 (2003) (*VAMC Sheridan*). The determination of whether a change in employees' "conditions of employment has occurred involves a case-by-case analysis, inquiring into the facts and circumstances regarding an agency's conduct and employees' conditions of employment." (*Id.* at 94).

Evidence and testimony presented at the hearing demonstrate that management at the Indianapolis Hearing Office did not deviate from its established overtime procedures when Charles instructed a group supervisor to notify tech-support employees via email on April 30, 2010 and on May 5, 2010, that they could only work overtime until 6:00 p.m. during the following workweek. In this regard, Charles testified and French confirmed, that as the Director, Charles had control over determining the total number of hours and the time frames that employees could work overtime during a particular workweek and soliciting volunteers to work overtime. Charles' undisputed testimony also demonstrates that, in deciding to allow tech-support employees to only work overtime until 6:00 p.m., she considered several factors that management at the Indianapolis Hearing Office traditionally has taken into account when setting overtime

hours: (1) the allotment of overtime it receives from the Agency's Regional Office in Chicago; (2) employees' workload; and (3) the availability of either a management official or an OIC.

Also, testimony and evidence presented at the hearing establish that after receiving these two emails tech-support employees were authorized to work overtime until 8:30 p.m. during the workweek. In this regard, Charles testified and French confirmed, that Charles allowed such employees to work overtime until 8:30 p.m. after April 30, 2010. An email dated June 17, 2010, shows that tech-support employees were notified that they could work overtime until 8:30 p.m. on Tuesday and Wednesday of the following workweek. Additionally, an email dated July 8, 2010, demonstrates that employees were allowed to work overtime until 8:30 p.m. on Thursday during the next workweek.

While French alleged that during a meeting in either January 2010 or February 2010, Charles announced that in the future, the office would close at 6:00 p.m. French admitted that when she asked Charles whether employees would be able to work overtime past 6:00 p.m. Charles stated that employees could still work overtime after that time. Similarly, although Charles asserted that the Agency's normal practice after April 30, 2010, was to close the office at 6:00 p.m., she persuasively testified that this occurred because: (1) the Indianapolis Hearing Office received a smaller allotment of overtime hours; and (2) neither a management official nor an OIC could work after 6:00 p.m. In this regard, Charles' undisputed testimony demonstrates that the Agency's allotment of overtime hours decreased from 5,400-5,800 hours during fiscal year 2009 to 4,400 hours during fiscal year 2010, and finally to 1,000 hours during fiscal year 2011. Charles also testified that she was not opposed to utilizing an OIC, but that she had difficulty finding volunteers who agreed to comply with the Agency's policy requiring an OIC, for security reasons, to leave before 8:30 p.m. if all other employees had left the office. Moreover, Charles claimed that management officials at times, were unable to work past 6:00 p.m., but were never unwilling to work overtime after that time as a general matter. Even though according to French, Charles stated that management officials were opposed to working past 6:00 p.m. and that she did not want to use OICs, Charles' testimony is more credible because she is in the best position to know whether she intended to utilize OICs and whether management officials were always unwilling to work after 6:00 p.m.

While the General Counsel cites to *SSA* in arguing that the Agency improperly changed employees' conditions of employment, *SSA* is distinguishable from this case. In concluding that the agency improperly changed employee's conditions of employment, the judge in *SSA* found that bargaining unit employees could work overtime if available, after 5:45 p.m. and "as late as 7:00 p.m. at their own volition[ ]" for several years. *SSA*, 64 FLRA 208, 213 (2005). The judge determined that after January 30, 2004, employees could not work overtime past 5:45 p.m. "unless specifically authorized by the office manager[ ]" and that such a practice did not exist before that date. (*Id.*). Additionally, the Judge found that, although the respondent claimed that employees were not prohibited from working overtime after 5:45 p.m., no evidence was presented indicating "how often, if ever, employees asked to work overtime beyond 5:45 p.m. or how often such requests were granted." (*id.* n.13). However, as noted above, evidence and testimony show that management here did not deviate from its established overtime procedures at the Indianapolis Hearing Office when it sent the two emails at issue and that after receiving both emails, tech-support employees were allowed to work overtime until 8:30 p.m. during the workweek.

Consequently, I find that the General Counsel has not established that the Respondent through management officials at the Indianapolis Hearing Office changed employees' conditions of employment.[2] *See VAMC Sheridan*, 59 FLRA at 94-95 (determining that while the record showed that more acute patients were admitted to a particular unit, the record did not demonstrate that the agency changed its practice concerning the acuity of patients admitted to that unit); *U.S. Dep't of the Air Force Headquarters, 96th Air Base Wing, Eglin AFB, Fla.*, 58 FLRA 626, 630 (2003) (*INS*) (finding that because the agency had "an established practice of modifying work assignments in response to mission and workload fluctuations," the agency did not change employees' conditions of employment when it made an assignment consistent with that practice); *U.S. Immigration & Naturalization Serv., Hous. Dist., Hous., Tex.*, 50 FLRA 140, 144 (1995) (concluding that because the respondent assigned and reassigned employees to different shifts depending upon anticipated workload requirements, the respondent did not change employees' conditions of employment when it assigned them to a particular shift). Accordingly, I find that the Respondent did not violate § 7116(a)(1) and (5) of the Statute, and I recommend that the Authority issue the following Order:

[2] Based on this conclusion, I find it unnecessary to address the parties' remaining arguments. *See INS*, 50 FLRA at 144 (determining that it was unnecessary to address the respondent's other contentions after concluding that the respondent did not change bargaining unit employees' conditions of employment).

ORDER

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

Issued, Washington, D.C., April 26, 2013

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SUSAN E. JELEN
Administrative Law Judge