69 FLRA No. 27

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL 118
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION
AND CUSTOMS ENFORCEMENT
ENFORCEMENT AND REMOVAL OPERATION
WASHINGTON, D.C.
(Agency)

0-AR-5108

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DECISION

January 29, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting in part)

I. Statement of the Case

Arbitrator Carol Kyler found that the Agency did not violate § 7116(a)(5) of the Federal Service Labor-Management Relations Statute (Statute),[1] or provisions of the parties' collective-bargaining agreement that mirror relevant provisions of the Statute, when the Agency did not notify the Union and provide an opportunity to bargain over the impact and implementation of two separate sets of changes made to an Agency form (detainer form) in 2011 and 2012. Specifically, the Arbitrator found that the changes had only de minimis effects on the conditions of employment of law-enforcement officers (officers) whom the Union represents. There are two substantive questions before us.

The first question is whether the Arbitrator's award is based on a nonfact. Because the Union's nonfact arguments either fail to show that the Arbitrator made a clearly erroneous factual finding, or challenge her weighing of the evidence, the answer is no.

The second question is whether the award is contrary to law. As for the 2011 changes, given the Arbitrator's existing factual findings, we are unable to determine whether the award is contrary to law. Accordingly, we remand the portion of the award concerning the 2011 changes to the parties for resubmission to the Arbitrator, absent settlement, for further findings. As for the 2012 changes, the Union provides no basis for finding that the Arbitrator's legal conclusion is deficient. Therefore, we find that the portion of the award concerning the 2012 changes is not contrary to law.

II. Background and Arbitrator's Award

The detainer form is a form that Immigration and Customs Enforcement (ICE) issues to federal, state, and local law-enforcement agencies to inform those agencies that ICE intends to take custody of individuals who are being detained by those law-enforcement agencies. Officers fill out the detainer form as part of their duties.

As discussed in greater detail below, in 2011, the Agency made one set of changes to the detainer form, and the Union filed a grievance. Then, in 2012, the Agency made a separate set of changes to the detainer form, and the Union filed another grievance. Both grievances went to arbitration and were resolved in a single arbitration proceeding.

At arbitration, the parties were unable to agree upon a statement of the issues, so the Arbitrator framed the issues as:

> 1. Did the Agency violate Article 9.A[.] of the [parties' agreement] and . . . §[]7116(a)(5) of the . . . Statute[] when it unilaterally implemented the [2011] detainer form without providing the Union with prior notice and an opportunity to bargain over the impact and implementation of the changes made to the form? If so, what is the proper remedy?
>
> 2. Did the Agency violate . . . §[]7116(a)(5) of the Statute when it unilaterally implemented the . . . 2012 detainer form . . . without providing the Union an opportunity to bargain over the impact and implementation

[1] 5 U.S.C. § 7116(a)(5).

> of the changes made to the form? If so, what is the proper remedy?[2]

As an initial matter, the Arbitrator found that the relevant provisions of the parties' agreement "essentially parallel[]" the Statute's provisions regarding the duty to bargain.[3] She determined that, as a result,

> the requirement that the Agency notify and provide the Union [with] an opportunity to bargain over the impact and implementation of the changes . . . is contingent upon the Union establishing that the [2011 and 2012] changes . . . not only had an actual, or a reasonably foreseeable, impact on the working conditions of the [employees], but also that the impact was more than [de minimis].[4]

The Arbitrator discussed the 2011 and 2012 changes separately.

A. The 2011 Changes

Before the Arbitrator, the Union contended that the "most significant change" made to the detainer form in 2011 was that a copy of the form was now being provided to individuals whom officers detain (detainees), whereas previously, it was not.[5] The front page of the detainer form contains the number to a duty phone, which is a mobile phone that officers are assigned, on a rotating basis, to take home with them to answer after hours. According to the Union, the 2011 changes now gave detainees, their family members, and their attorneys access to the duty-phone number, which enabled those individuals to contact ICE, even after business hours. And a Union witness testified that she had, in fact, "received reports from [officers] . . . being inundated with calls on the duty phone . . . at all hours of the night from [detainees] and their families."[6] Additionally, the Union argued that the officers "were not just fielding more calls[;] . . . they were fielding different types of calls and working different hours because of it."[7]

But the Arbitrator found that one witness who testified did not have (or request) any evidence of the type of phone calls that officers allegedly were receiving, and that none of the officers "who had, allegedly, reported . . . being inundated with calls on the duty phone . . . at all hours of the night . . . [had been] called to testify" at the arbitration hearing.[8] The Arbitrator stated that "[a] contention without any corroborating evidence remains just that, a contention."[9] So she concluded that "the Union . . . failed to present any record evidence to support a finding that the [officers] tasked with monitoring and answering incoming telephone calls to the duty[-]phone number after business hours experienced a significant, or more than [de minimis], increase in telephone calls as a result of a copy of the . . . 2011 detainer form being provided to the [detainees]."[10] The Arbitrator noted that the Union relied on an Agency standard operating procedure and an Agency email "as support for its contention that the Agency was aware of and even anticipated that the detainees and their families would be calling the duty[-]phone number directly once they had been provided a copy of the detainer form."[11] However, the Arbitrator then stated that, "in view of the Union's failure to establish that there was a more than [de minimis] increase in incoming calls to the duty phone . . . , it [was] not necessary to address this argument any further."[12]

The Union also contended that providing a copy of the detainer form to the detainee gave the detainee access to the issuing officer's full name, which posed a security risk. In this connection, the Arbitrator noted witness testimony that, now that employees' full names were known to detainees, their names "could be read and then searched, which could . . . cause a safety and security risk to those officers in the public."[13] But the Arbitrator also noted witness testimony that officers "perform job duties that are inherently dangerous,"[14] and that, "[b]ecause [they]'re law enforcement . . . [, they] pretty much have a target on [their] backs regardless."[15]

The Arbitrator noted that, in 2013 – nearly two years after the 2011 changes – the Agency issued a directive stating that placing an officer's full name on the detainer form "could potentially lead to an officer[-]safety issue due to the ever[-]increasing ability to discover personal details about an individual such as their home address and the names of family members and friends."[16] The Arbitrator also noted that the directive ordered offices to change the pertinent Agency database's "naming convention" so that it "consist[s] of the officer's full last name, first initial, badge number, and title."[17] In

[2] Award at 4.
[3] *Id.* at 7.
[4] *Id.* at 8.
[5] *Id.* (internal quotation marks omitted).
[6] *Id.* (internal quotation mark omitted).
[7] *Id.* at 9.
[8] *Id.* (internal quotation marks omitted).
[9] *Id.*
[10] *Id.*
[11] *Id.* at 10 n.5 (citation omitted).
[12] *Id.*
[13] *Id.* at 10 (internal quotation marks omitted).
[14] *Id.*
[15] *Id.* (internal quotation marks omitted).
[16] *Id.*
[17] *Id.* at 11.

this regard, the Arbitrator noted witness testimony that "[t]here were concerns raised by officers," and that the Agency issued the 2013 directive to "satisfy [the officers'] concerns about their safety."[18] The Arbitrator then stated that, as a result of this change, "the Union's safety concern[s], on this point, appear to have been resolved."[19] And the Arbitrator concluded that the Union "failed to present any corroborating evidence to substantiate [its] contention that there had been an actual significant, or more than [de minimis], increase in the [officers'] safety or security risk as a result of providing a copy of the detainer form to the detainee[s]."[20]

Finally, the Union contended that, as a result of the 2011 changes, the detainees now have access to the toll-free numbers to the ICE Joint Intake Center and the Law Enforcement Support Center. The Union argued that providing those numbers would lead to detainees using the numbers to file civil-rights or civil-liberties complaints against officers. The Arbitrator noted witness testimony that: any time there is an investigation into a complaint against an officer, the Agency takes away the officer's weapon and credentials and does not allow the officer to work administratively uncontrollable overtime; those investigations can take up to two years; and this may result in officers losing twenty-five percent of their pay during the period of the investigation. But the Arbitrator concluded that, "[b]eyond mere speculation, the Union failed to present any evidence in support of [its] contention that there had been a more than [de minimis] effect on the [officers'] working conditions due to an increase in complaints filed by [detainees] against [officers] as a result of having access to the two toll[-]free telephone numbers."[21]

B. The 2012 Changes

The 2012 changes involved a change in the wording used in the first "check box" of the detainer form.[22] Specifically, while the 2011 form had stated, "*[i]nitiated* an investigation to determine whether [the detainee] is subject to removal from the United States," the 2012 form stated that the Agency has "*[d]etermined* that there is reason to believe the [detainee] is an alien subject to removal from the United States,"[23] followed by wording stating: "The individual (check all that apply):,"[24] and eight "sub-check boxes that correspond to the enforcement priorities set forth by the Agency."[25]

The Union contended that these changes had more than a de minimis effect on officers' conditions of employment because officers were now required to perform duties "beyond . . . simply checking a single check box" to explain why the detainer form was issued.[26] According to the Union, the changes affected "the tasks and procedures the [officers] had to perform in order to issue a detainer."[27]

But the Arbitrator noted witness testimony that the work required was "not a new process."[28] In this regard, the Arbitrator found that, both before and after the 2012 changes, officers "conducted the same comprehensive investigation" to determine whether to issue a detainer form to a detainee.[29] Rather, the Arbitrator found, "[t]he only difference [was that] the [officer was] required to conduct and complete [the] investigation prior to, rather than after, issuing the detainer form."[30]

The Arbitrator also noted witness testimony that "[t]he change . . . is simply the checking of a box."[31] The Arbitrator determined that, "while placing check marks in the applicable check boxes was new" in 2012, "the Union has failed to establish that checking the applicable check box constituted a more than [de minimis] effect upon the working conditions of [unit employees]."[32]

The Union argued that the terms that are connected with the eight new check boxes on the 2012 detainer form are "undefined" and "open to a lot of interpretation," and that, "[a]bsent receiving training on the new form, . . . [officers] are left to interpret the terms on the form with little to no guidance from the Agency."[33] The Union claimed that the Agency counseled and threatened disciplinary action against officers for not properly completing the form. In this connection, the Arbitrator noted witness testimony that: the eighth check box – which states, "other (specify) _____" – was general; some employees would write "illegal alien" and then impose detainers on detainees; and those employees were counseled and told that they would be disciplined if they did it again.[34]

But the Arbitrator found that witness testimony on this issue lacked specificity, that no documentary evidence was submitted, and that none of the allegedly affected officers were called to testify. By contrast, the

[18] *Id.* (internal quotation marks omitted).
[19] *Id.*
[20] *Id.*
[21] *Id.* at 12.
[22] *Id.*
[23] *Id.* (internal quotation marks omitted).
[24] *Id.* (internal quotation mark omitted).
[25] *Id.* at 13.
[26] *Id.* at 12.
[27] *Id.*
[28] *Id.* at 13.
[29] *Id.* at 14.
[30] *Id.* at 15.
[31] *Id.* (internal quotation mark omitted).
[32] *Id.*
[33] *Id.* (internal quotation marks omitted).
[34] *Id.* (internal quotation marks omitted).

Arbitrator noted, two witnesses testified that they were unaware of officers being disciplined for improperly completing the "other" check box.[35] In this regard, the Arbitrator noted that one witness testified that if it was discovered the information provided in the "other" check box did not meet the criteria for issuing a detainer, the Agency would review the detainer and "lift it or not honor it."[36]

The Arbitrator found that, "[a]bsent evidence to the contrary, the Union . . . failed to establish that because of lack of training, [officers] who had, allegedly, improperly completed the 'other' check box, had been counseled and threatened with disciplinary action for their failure to complete the check box correctly."[37] Accordingly, the Arbitrator concluded that the evidence was "insufficient to support a finding that the Agency's failure to provide additional training" in this regard "had a more than . . . [de minimis] effect."[38]

In conclusion, the Arbitrator determined that the Union had failed to establish that either the 2011 or the 2012 changes to the detainer forms had more than de minimis effects on officers' conditions of employment. Thus, she denied the Union's grievances.

The Union filed exceptions to the award. The Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's arguments regarding bypass, but do not bar the Union's arguments regarding reasonably foreseeable effects of the changes.

In its exceptions, the Union argues that the award is contrary to law because: (1) the award "permits the Agency to bypass the Union in violation of" § 7116(a)(1) and (5) of the Statute;[39] and (2) in finding no unlawful failure to bargain, the Arbitrator improperly focused solely on the actual effects of the changes, rather than also considering the reasonably foreseeable effects of the changes.[40] The Agency argues that the Authority should dismiss the bypass argument because the Union did not raise it before the Arbitrator.[41] Similarly, the Agency argues that the Union's post-hearing brief to the Arbitrator used the term "reasonably foreseeable" only three times, and instead focused on the "*actual* impact of the forms."[42]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.[43]

Regarding the bypass argument, there is no evidence that the Union contended, before the Arbitrator, that the Agency separately violated § 7116(a)(1) and (5) of the Statute by bypassing the Union. The Union did state that "[t]he Agency, improperly bypassing" the Union, "made the change to the officers' names due to safety concerns raised by the officers."[44] However, the Union made that argument in the context of explaining why the Agency should have bargained – not as an allegation of a separate bypass violation.[45] If the Union had wanted to make a separate bypass allegation at arbitration, it could have done so. But because it did not clearly do so, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar it from doing so now, and we do not consider the Union's bypass allegation.

Regarding the Agency's claim concerning reasonably foreseeable effects, in its post-hearing brief to the Arbitrator, the Union clearly argued that agencies are required to bargain over reasonably foreseeable effects that are greater than de minimis.[46] Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's arguments regarding reasonably foreseeable adverse effects, and we consider those arguments below.

[35] *Id.* (internal quotation marks omitted).
[36] *Id.* at 16 (internal quotation marks omitted).
[37] *Id.*
[38] *Id.*
[39] Exceptions at 19.
[40] *Id.* at 22.
[41] Opp'n Br. at 11-18.
[42] *Id.* at 22 (emphasis added).
[43] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g.*, *AFGE, Council 215*, 66 FLRA 771, 773 (2012) (declining to consider an argument that the award failed to draw its essence from the parties' agreement because the argument was not made to the arbitrator); *U.S. Dep't of HUD*, 64 FLRA 247, 249 (2009) (refusing to consider documents existing at the time of the arbitration hearing, but not presented to the arbitrator); *AFGE, Council 236*, 63 FLRA 213, 214 (2009) (refusing to consider an unfair-labor-practice claim that could have been, but was not, raised to the arbitrator).
[44] Opp'n, Attach. 3 (Union Post-H'rg Br.) at 44.
[45] *Id.*
[46] *See, e.g.*, *id.* at 35 ("An agency must bargain . . . when the change has an actual or *reasonably foreseeable* impact which is more than [de minimis]." (emphasis added)); *id.* ("In applying the [de minimis] test, the FLRA examines the nature of either the effect, or the *reasonably foreseeable* effect of the change." (emphasis added)); *id.* at 36 ("In determining whether the *reasonably foreseeable* effects of a change are greater than [de minimis], the FLRA considers what the agency knew, or should [have] known, when it made the change." (emphasis added)) .

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the Arbitrator's decision is based on a nonfact.[47] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[48] Disagreement with an arbitrator's evaluation of the evidence, including the determination of the weight to be given to such evidence, provides no basis for finding that an award is based on a nonfact.[49]

First, the Union argues that the Arbitrator erroneously found that the Union did not present evidence from officers in the field whom the 2011 changes affected.[50] According to the Union, it did present a witness who testified based on his personal experience in the field.[51] However, a review of the hearing testimony of that witness – who was both an officer and a Union representative – does not demonstrate that the Arbitrator clearly erred. Specifically, the witness testified about effects that "we" experienced in the field,[52] but did not expressly state that *he* personally experienced those effects – as opposed to having others tell him that *they* were experiencing those effects. Therefore, the cited witness testimony does not demonstrate that the Arbitrator made a clearly erroneous factual finding. Consequently, this Union argument does not provide a basis for finding that the award is based on a nonfact.

Second, the Union argues that "[t]he Arbitrator's decision to disregard [certain Union witness] testimony when the Agency presented *no evidence* to contradict it is erroneous,"[53] and that the Arbitrator erroneously "ignore[d] evidence . . . that the Agency repeatedly acknowledged that providing the duty[-]phone number to detainees would impact [officers]."[54] However, these arguments challenge the Arbitrator's weighing of the evidence, which, as stated above, provides no basis for finding the award based on a nonfact.[55]

For the above reasons, we deny the Union's nonfact exception.

B. We remand the portion of the award concerning the 2011 changes; the award is not contrary to law insofar as it concerns the 2012 changes.

The Union contends that the award is contrary to law because the Arbitrator applied the incorrect standard in determining whether the changes to the detainer form were more than de minimis.[56] Specifically, the Union asserts that the Arbitrator looked at only the *actual* effects, and not the *reasonably foreseeable* effects, of the changes to the detainer form.[57]

In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[58] In applying a de novo standard of review, the Authority assesses whether the Arbitrator's legal conclusions are consistent with the applicable standard of law.[59] Under this standard, the Authority defers to the Arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[60]

Before an agency may change bargaining-unit employees' conditions of employment, the agency must 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 under the Statute.[61] As relevant here, an agency is not required to bargain over the impact and implementation of a change unless the change will have a more than de minimis effect.[62] In assessing whether the effect of a change is more than de minimis, the Authority "looks to the nature and extent of either the effect, *or* the reasonably foreseeable effect, of the change on bargaining[-]unit

[47] Exceptions at 33.
[48] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015) (Member Pizzella dissenting); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014); *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[49] *AFGE, Local 3911, AFL-CIO*, 68 FLRA 564, 568 (2015) (*Local 3911*).
[50] Exceptions at 34.
[51] *Id.*
[52] *E.g.*, Exceptions, Attach. 1 (Tr.) at 160, 200, 201.
[53] Exceptions at 36.
[54] *Id.*
[55] *Local 3911*, 68 FLRA at 568.
[56] Exceptions at 22.
[57] *Id.*
[58] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[59] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[60] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[61] *E.g., U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999) (*Leavenworth*).
[62] *E.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*) (citing *Leavenworth*, 55 FLRA at 715).

employees' conditions of employment."[63] In other words, a change need not have actual effects that are greater than de minimis in order to establish a bargaining obligation; *reasonably foreseeable* effects that are greater than de minimis are sufficient to establish such an obligation.[64] In determining whether the reasonably foreseeable effects of a change are greater than de minimis, the Authority looks to what the party knew, or should have known, at the time of the change.[65] "It is also the case that an analysis of whether a change is de minimis does not focus primarily on the actual effects of the change,"[66] but on reasonably foreseeable effects.

In this case, the Arbitrator stated that the Union was required to establish that the 2011 and 2012 changes "not only had an actual, or a reasonably foreseeable, impact on the working conditions of the [officers], but also that the impact was more than [de minimis]."[67] We discuss the Arbitrator's assessments of the 2011 changes and the 2012 changes separately below.

1. The 2011 Changes

Although the Arbitrator acknowledged the "reasonably foreseeable" portion of the de minimis test, she did not appear to apply it (or apply it properly) in analyzing the 2011 changes. Regarding allegedly increased calls as a result of providing the form (with the duty-phone number) to detainees, the Arbitrator found de minimis effects because the Union failed to provide corroborating evidence that there *actually was* a significant increase in calls after the change.[68] Similarly, regarding detainees now having access to the toll-free numbers to the ICE Joint Intake Center and the Law Enforcement Support Center, the Arbitrator appears to have focused only on the actual effects of the change.[69] And regarding increased risk to officer safety and security that allegedly resulted from providing the officers' full names on the detainer form, the Arbitrator appears to have focused on only the actual effects of the change,[70] as well as on the Agency's later changes to address officers' safety concerns that resulted from the change[71] – which is contrary to the requirement that the Arbitrator consider what the Agency knew, or should have known, *at the time of the change*.[72]

There are certain bases for concluding that the 2011 changes – providing detainees with the detainer form, which includes the duty-phone number, the officers' full names, and the toll-free number to file civil-rights and civil-liberties complaints – would have had reasonably foreseeable effects that were greater than de minimis. Specifically, it would be reasonably foreseeable that: (1) officers who man the duty phone would receive more, and possibly different types of, calls from detainees, their families, or their representatives; (2) officers' safety could be detrimentally affected by detainees learning their full names; and (3) officers could be subjected to more civil-rights and civil-liberties complaints, along with the investigations and attendant financial effects that allegedly can result when such investigations are conducted. We find that these types of effects, especially when taken together, are greater than de minimis.

However, the Agency cites record evidence, not discussed by the Arbitrator, that could support a conclusion that the alleged changes did not give rise to reasonably foreseeable adverse effects that were greater than de minimis. For example, the Agency argues that: detainer forms had been provided to detainees in the past, even if that practice had "never really been enforced";[73] there is a center that takes the calls that come in;[74] officers' names are already provided to detainees, their family members, and other associates when the officers act as witnesses at trial;[75] detainees are entitled to officers' names upon arrest;[76] and a witness testified that the law generally requires officers to identify themselves when they arrest a detainee.[77]

Additionally, before the Arbitrator, the Union relied on an Agency standard operating procedure and an Agency email "as support for its contention that the Agency was aware of and even anticipated that the detainees and their families would be calling the duty[-]phone number directly once they had been provided a copy of the detainer form."[78] The Arbitrator

[63] *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 240 (2011) (emphasis added) (quoting *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000)).
[64] *See, e.g.*, *U.S. DHS, U.S. CBP, El Paso, Tex.*, 67 FLRA 46, 49 (2012) (*CBP El Paso*) (finding administrative law judge erred by "neglect[ing] to consider adequately [a] change's reasonably foreseeable effects"); *U.S. Dep't of the Treasury, IRS*, 66 FLRA 528, 530 (2012) ("Because the [a]rbitrator concluded that the reclassifications had *reasonably foreseeable* effects that were greater than de minimis, . . . the [a]gency's claim [that the union admitted that it had not shown actual adverse effects] provides no basis for finding that the remand award is contrary to law.").
[65] *Kirtland AFB*, 64 FLRA at 173.
[66] *Id.* (citing, inter alia, *Veterans Admin. Med. Ctr., Prescott, Ariz.*, 46 FLRA 471, 475 (1992) (*VAMC Prescott*)).
[67] Award at 8 (citation omitted).
[68] *Id.* at 9.
[69] *Id.* at 12.
[70] *Id.* at 11.
[71] *Id.*
[72] *Kirtland AFB*, 64 FLRA at 173.
[73] Opp'n Br. at 5 (internal quotation marks omitted).
[74] *Id.* at 6.
[75] *Id.*
[76] *Id.* at 6-7.
[77] *Id.* at 7.
[78] Award at 10 n.5.

found it unnecessary to address the Union's contention because the Union "fail[ed] to establish that there was a more than [de minimis] increase in incoming calls to the duty phone."[79]

Both the evidence that the Agency cites and the evidence that the Union cited at arbitration may affect whether, at the time of the 2011 changes, the reasonably foreseeable effects of those changes were greater than de minimis. As the Arbitrator did not make findings regarding this evidence, we find that the most appropriate course of action is to remand this particular issue to the parties for resubmission to the Arbitrator, absent settlement.[80] On remand, the Arbitrator should address this (and any other relevant) evidence and determine whether, *at the time of the 2011 changes*, the *reasonably foreseeable* effects of the changes were greater than de minimis – regardless of whether the Union proved that those reasonably foreseeable effects ended up actually occurring.

The dissent disagrees with our analysis of the 2011 changes, but the dissent's analysis is problematic for several reasons.

First, the dissent mischaracterizes our holding in this case. Specifically, the dissent asserts that we are requiring the Agency to (1) bargain any time a union "conjures up any plausible, potential, or conceivable impact that might just possibly occur, *no matter how unlikely*,"[81] and (2) "assuage [the Union] of each and every nightmarish-like concern it could possibly conjure up in its collective imagination."[82] Not so. We hold only that, absent actual effects that are greater than de minimis, the Agency is still required to bargain if the *reasonably foreseeable* effects of a change are greater than de minimis – not that the Agency is required to bargain over "unlikely" effects[83] or any potential effects that the Union can "conjure up."[84]

Second, the dissent misstates the law. According to the dissent, the majority "[i]gnor[es] the Authority's longstanding precedent" with its decision in this case.[85] The dissent asserts: "[F]or at least twenty-five years,"[86] the Authority's existing "rules" have left "the decision . . . whether to consider actual effects (in those cases where it is obvious whether or not an adverse action has occurred) *or* reasonably foreseeable effects (in those cases where it is not possible or will not be possible to consider actual effects) . . . to the factfinder after considering 'the facts and circumstances' of each case."[87] The dissent also says that "where the factfinder has the luxury of hindsight, the inquiry focuses most *appropriately* on *actual* effects."[88]

The dissent is wrong as a matter of history and as a matter of law. Inventing principles that have no legal foundation, it is the dissent, not the majority, that "[i]gnor[es] the Authority's longstanding precedent"[89] in determining whether an agency was required to bargain with an exclusive representative before changing bargaining-unit employees' conditions of employment. Specifically, none of the decisions that the dissent cites either (1) provides for factfinder discretion to decide whether to focus on actual or reasonably foreseeable effects, or (2) states that a focus on reasonably foreseeable effects is appropriate only when it is not possible to consider actual effects.[90] In fact, the Authority has *flatly held to the contrary*. In *CBP El Paso*,[91] the Authority expressly held that a judge erred

[79] *Id.*
[80] *See, e.g., U.S. Dep't of the Air Force, 325th Mission Support Squadron, Tyndall Air Force Base, Fla.*, 65 FLRA 877, 881 (2011) (where an administrative law judge did not "discuss much of the [relevant] evidence," the Authority was "unable to determine whether the change in . . . conditions of employment, if such change occurred, was more than de minimis," so the Authority remanded the case); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa.*, 58 FLRA 750, 756 (2003) (remanding where arbitrator's award did not contain a determination regarding whether there was a change in conditions of employment and, if so, whether the effect of the change was greater than de minimis, and the arbitrator "did not make findings of fact on either issue – which are both in dispute on review – on which the Authority could base such a determination.").
[81] Dissent at 22 (emphasis added).
[82] *Id.* at 17-18.
[83] *Id.* at 22.
[84] *Id.* at 17.
[85] *Id.* at 21.
[86] *Id.* at 18.
[87] *Id.*
[88] *Id.* at 19.
[89] *Id.* at 21.
[90] *Kirtland AFB*, 64 FLRA at 173-74 (finding violation based on effects of a change, while noting that the standard also includes "reasonably foreseeable" effects); *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704-05 (1995) (finding it unnecessary to address extent of change's impact on employees because change was substantively negotiable, but stating that where an agency is exercising a management right, focus is on extent of actual or reasonably foreseeable impact of change); *VAMC Prescott*, 46 FLRA at 475-76 (finding violation based on reasonably foreseeable effects); *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574, 575 & n.1 (1992) (finding focus was properly on reasonably foreseeable effects because the actual effects were "minimal"); *U.S. Customs Serv. (Wash., D.C.) & U.S. Customs Serv., Ne. Region (Bos., Mass.)*, 29 FLRA 891, 899 (1987) (finding violation based on reasonably foreseeable effects).
[91] 67 FLRA 46.

by focusing primarily on the actual effects of the change, while "neglect[ing] to adequately consider the change's reasonably foreseeable effects"[92] – precisely what we hold regarding the Arbitrator's analysis of the 2011 changes in this case. In reaching its decision in *CBP El Paso*, the Authority relied on the well-established principle, discussed previously, that "an analysis of whether a change is de minimis does not focus primarily on the actual effects of the change, but rather on a change's reasonably foreseeable effects."[93]

This focus on the need to assess reasonably foreseeable effects accords with one of the Statute's fundamental principles: that "[t]he duty to bargain in good faith under the Statute 'requires that a party meet its obligations to negotiate *prior to* making changes in established conditions of employment.'"[94] As the Authority explained, "the obligation to negotiate would be rendered meaningless if a party were able to unilaterally change established conditions of employment . . . *without first* affording the exclusive representative notice of proposed changes and an opportunity to negotiate."[95] For these reasons, there is no basis whatsoever for the dissent's statements that our assessments of the 2011 changes "[i]gnor[e] the Authority's longstanding precedent"[96] or adopt "an entirely new two-pronged framework."[97]

Third, the dissent relies on its own factual findings, rather than those that the Arbitrator made. In this connection, the dissent states, as fact, that "since at least 2009,"[98] the Agency had directed officers to provide a copy of the detainer forms to detainees, and that the 2011 direction to provide a copy of the form was "in compliance with legal requirements that were already in effect."[99] Although the dissent cites hearing testimony to support one of its statements,[100] the Arbitrator – whom the parties chose to be the factfinder in this case – did not make a determination, one way or the other, on this issue. Also in this connection, we note that the Arbitrator made no factual findings that would support the dissent's claims that some officers "in effect, refus[ed]" to give detainees the form before the 2011 changes,[101] or that, in 2011, the Agency merely "clarified" that officers were required to provide the form.[102]

Finally, the dissent creates a misimpression that, when the Agency made the 2011 changes, it limited the scope of those changes. Specifically, immediately after discussing what happened "[i]n December 2011," the dissent states that, "in order to address the concerns that had been voiced by some officers, [the Agency] clarified that . . . officers would only be required to identify their 'full last name, first initial, badge number, and title' on the form."[103] But, as discussed previously, the Agency made this modification in *2013* – nearly two years after the 2011 changes at issue. Thus, the dissent's reference to this modification in the context of what happened in 2011 is misleading.

2. The 2012 Changes

As stated previously, in 2012, the only changes were to the wording used in the first "check box" of the detainer form. Specifically, while the 2011 form had stated, "*[i]nitiated* an investigation to determine whether [the detainee] is subject to removal from the United States," the 2012 form stated that the Agency has "*[d]etermined* that there is reason to believe the [detainee] is an alien subject to removal from the United States,"[104] followed by wording stating: "The individual (check all that apply):,"[105] and eight "sub-check boxes that correspond to the enforcement priorities set forth by the Agency,"[106] including a box that says "other."[107]

The Arbitrator found that, both before and after these changes, officers conducted the same type of investigation to determine whether to issue a detainer form, and that the only difference was that the officers were required to conduct their investigations before, rather than after, filling out the form. The Union has not filed nonfact exceptions to these findings.

The Union argues that it was reasonably foreseeable that employees would be disciplined as a result of the changes to the wording of the check box.[108] According to the Union, before the changes, there were only four options on the form for issuing a detainer, but the only one that was typically used stated "initiated an investigation to determine whether this person is subject

[92] *Id.* at 49.
[93] *Id.* (citations omitted); *accord, e.g.*, *Kirtland AFB*, 64 FLRA at 173 (citing, inter alia, *VAMC Prescott*, 46 FLRA at 475).
[94] *Dep't of HHS, SSA*, 24 FLRA 403, 405 (1986) (emphasis added) (quoting *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9, 9 (1981) (*Scott AFB*)).
[95] *Scott AFB*, 5 FLRA at 10-11 (emphasis added).
[96] Dissent at 21.
[97] *Id.* at 18.
[98] *Id.* at 16.
[99] *Id.* at 17.
[100] *Id.* at 16 n.10.
[101] *Id.* at 16.
[102] *Id.* at 17.
[103] *Id.* (citation omitted).
[104] Award at 12.
[105] *Id.* (internal quotation marks omitted).
[106] *Id.* at 13.
[107] *Id.* at 15 (internal quotation marks omitted).
[108] Exceptions at 33.

to removal."[109] The Union contends that many terms on the new section are "undefined or open to interpretation,"[110] including the "other" box,[111] and that this makes it more likely that employees will be disciplined for failing to properly fill out the form.

But the Arbitrator did not make any factual findings that would support a conclusion that, at the time of the change, it was reasonably foreseeable that employees would be disciplined for failing to properly fill out the detainer form. And the Union does not cite any record evidence, not discussed by the Arbitrator, that would support such a conclusion (or that would require a remand for further findings). Accordingly, we find that the Union has not demonstrated that the Arbitrator erred, as a matter of law, in finding that the Agency did not violate the Statute in connection with the 2012 changes. Consequently, we deny the Union's contrary-to-law exception regarding those changes.[112]

V. Decision

We dismiss the Union's exception alleging a bypass, and deny the nonfact exception and the portion of the contrary-to-law exception concerning the 2012 changes. We remand the portion of the award concerning the 2011 changes to the parties for resubmission to the Arbitrator, absent settlement.

[109] *Id.* at 16 (citation omitted) (internal quotation marks omitted).
[110] *Id.*
[111] *Id.* (internal quotation marks omitted).
[112] Finally, the dissent's opinion that the Agency had no obligation to bargain because it changed only a "working condition," not a "condition of employment," Dissent at 23 – an issue not raised or discussed by the Arbitrator or either party – is inconsistent with Authority and judicial precedent and lacks merit. As the Authority explained in the case the dissent cites, the Authority has concluded that the terms are effectively synonymous, and the U.S. Court of Appeals for the District of Columbia Circuit has found that conclusion reasonable. *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 75-77 (2014) (citing *U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011)).

Member Pizzella, dissenting, in part:

"I know. I'll simply imagine the worst thing you could possibly tell me, and whatever your news is, it will pale in comparison . . . . Okay, . . . what is the worst thing I can imagine?"[1] This query, though spoken fictitiously by Dr. Frasier Crane on the now-iconic television series *Cheers*, sounds a lot like AFGE, National Council 118 (Council 118) in this case.

Council 118 concocted a plan to force the Agency − the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Enforcement and Removal Operation (ICE) − to spend countless hours bargaining about how an immigration officer should perform his or her official duties when ICE directs a federal, state, or local law enforcement agency (LEA) to detain an "alien" (a term used by 8 C.F.R. § 287.7(a), and by Council 118, ICE, and the Arbitrator in this case) "subject to removal from the United States."[2]

A detention order typically is executed when an immigration officer delivers a "detainer form,"[3] to an LEA[4] ordering the LEA to hold the alien until such time as ICE is able to "assume custody, in situations when gaining immediate custody is either impracticable or impossible."[5] Thus, the delivery of the detainer form, which provides all of the legal bases and illegal activities for which an alien may be "remov[ed] from the United States,"[6] is an important legal document which implicates the "civil liberties"[7] and "civil rights" of the detained alien[8] and has little to do with the conditions of employment of immigration officers. Consequently, and as a result of continuing legal challenges to the process,[9] ICE had directed immigration officers, since at least 2009, to provide a copy of the detainer form to the alien at the same time the form was served on the LEA.[10]

Completing and serving the detainer form is part of the immigration officer's official duties. To complete the form, the officer simply checks the boxes which apply – i.e., the legal bases of the continued detention − fills in his or her name, title, and duty telephone number, and serves the form on the LEA and the alien.[11] Nonetheless, some immigration officers, represented by Council 118, objected to giving a copy of the same "detainer form"[12] to the alien; in effect, refusing to do so.

In December 2011, therefore, ICE clarified for all immigration officers that they were required to "provid[e] a copy of the new detainer form to the [detained] alien" at the same time the form was served on the LEA.[13] Sometime later, in order to address the concerns that had been voiced by some officers, ICE clarified that immigration officers would only be required to identify their "full last name, first initial, badge number, and title" on the form.[14]

But Council 118 was not satisfied and complained that ICE should have bargained with it over what it characterizes as "the 'most significant change.'"[15]

Change? What change?

It is astounding that Council 118 would urge that the directions which ICE gave to its immigration officer – whereby it enforced a legal mandate which had been in effect for more than two years and was a duty already being performed by the officers – is a "change" that requires bargaining and the permission of Council 118. And for some unexplained reason, the Majority seems particularly annoyed by, and discounts entirely, the fact that ICE took the steps it did in 2013 to address its officers' concerns[16] (perhaps because it makes it all the more difficult to find a violation of anything).

Arbitrator Carol Kyler quickly determined that ICE had no obligation to provide notice to and bargain with Council 118 before it redirected immigration officers to serve the detainer form to detained aliens. Specifically, she found that ICE directed its immigration officers to serve the detainer form, in compliance with legal requirements that were already in effect[17] and, at the time of the arbitration hearing, ICE had accommodated the concerns raised by individual officers *two years earlier*.[18] Arbitrator Kyler also found that any adverse effects were entirely "speculati[ve]"[19] or never occurred.[20] Accordingly, she concluded that any impact on the conditions of employment of the immigration

[1] *Cheers: Teaching with the Enemy* (NBC television broadcast Nov. 5, 1992).
[2] Award at 12; *see also* Exceptions, Union Ex. 6 at 6.
[3] Award at 8.
[4] *Id.*
[5] Opp'n, Attach. 2 (Agency's Post-Hr'g Br.) at 12 (quoting 8 C.F.R. § 287.7(a)) (internal quotation marks omitted).
[6] Award at 12 (citations omitted) (quoting another source) (internal quotation marks omitted); *see also* Exceptions, Union Ex. 6 at 6.
[7] Award at 11.
[8] *Id.*
[9] Exceptions, Attach. 1 (Tr.) at 333-34.
[10] *Id.* at 303-04; *see also id.* at 329.
[11] Award at 8, 10-11; Exceptions, Union Ex. 6 at 6.
[12] Award at 8.
[13] *Id.* at 10-11 (citing Exceptions, Agency Ex. 4 at 1).
[14] *Id.* at 11 (quoting Exceptions, Agency Ex. 4 at 1).
[15] *Id.* at 8.
[16] *See* Majority at 14.
[17] Award at 16.
[18] *Id.* at 11.
[19] *Id.* at 12.
[20] *Id.* at 11.

officers was no more than de minimis and that ICE therefore had no obligation to bargain with Council 118.[21]

I agree with Arbitrator Kyler. The Majority does not.

Contrary to the Arbitrator's reasoned award, the Majority wants to send this case *back* to the Arbitrator (*four years later*) to reconsider her decision. The Majority urges that ICE just *might have* violated 5 U.S.C. § 7116(a)(5) when it refused to assuage Council 118 of each and every nightmarish-like concern it could possibly conjure up in its collective imagination *despite the reality* that *not one* of those collective concerns ever materialized in any form or fashion.

And there lies the problem. Frankly, this is just the type of situation about which I warned in another case also involving ICE and Council 118.[22] In that case, I cautioned that the union's never-ending demands to bargain interfered with ability of ICE to carry out its mission and protect "the nation's security."[23]

Contrary to established precedent, the Majority establishes an entirely new two-pronged framework to determine whether a purported change has more than a de minimis effect on the conditions of employment of bargaining-unit employees and thus triggers a duty to provide notice and an opportunity to bargain. Rather than leaving the decision – whether to consider actual effects (in those cases where it is obvious whether or not an adverse effect has occurred) ***or*** reasonably foreseeable effects (in those cases where it is not possible or will not be possible to consider actual effects) – to the factfinder after considering "the facts and circumstances" of each case, the Majority changes the rules and now requires a factfinder to examine ***both*** the actual effects ***and*** the reasonably foreseeable effects without any explanation whatsoever for the change in framework.

As discussed below, the Authority has followed a consistent and commonsense approach for at least twenty-five years whenever it has been called upon to determine whether a purported change is more than de minimis.

In *U.S. Customs Service* (*Customs Service*),[24] *Portsmouth Naval Shipyard Portsmouth, New Hampshire* (*Portsmouth Shipyard*),[25] and *Veterans Administration Medical Center, Prescott, Arizona* (*VAMC Prescott*),[26] the Authority explained that when making that determination, it will "examine *the facts and circumstances*, placing principal emphasis on such ***general*** *areas of consideration* as the nature and extent of *the effect* ***or*** *reasonably foreseeable effect* of the change of conditions of employment on bargaining[-]unit employees."[27] Whereas, in some cases, it will be appropriate to consider "the nature and extent of [*actual*] effects" that did or did not occur; in other cases, however, it will be more "appropriate" to consider effects that are "reasonably foreseeable."[28] But the determination as to whether it is more "appropriate" to consider *actual* effects ***or*** *reasonably foreseeable* effects is a determination which must be made by the factfinder (whether an arbitrator or administrative law judge of the Federal Labor Relations Authority) after considering the unique "facts and circumstances" of each case.[29]

In those cases where the factfinder has the luxury of hindsight, the inquiry focuses most *appropriately* on *actual* effects. For example, in *U.S. Department of the Air Force, Air Force Materiel Command, Space & Missile Systems Center, Detachment 12, Kirtland Air Force Base, New Mexico*

[21] *Id*. at 12, 16.

[22] *U.S. DHS ICE*, 67 FLRA 501 (2014) (Member Pizzella dissenting).

[23] *Id.* at 508 (Dissenting Opinion of Member Pizzella) ("[U]nlike my colleagues, I cannot conclude that Congress intended for our Statute to be read so expansively as to impose additional – in this case bargaining – requirements on federal agencies *before* they can act to secure the integrity of their federal [information-technology] systems, the breach of which, could directly impact '[o]ur nation's security and economic prosperity.'" (quoting *Federal Information Security: Current Challenges & Future Policy Considerations: Hearing Before the H. Comm. on Oversight & Govt. Reform Subcomm. on Gov't Mgmt., Org. & Procurement*, 111th Cong. (May 19, 2009) (statement of Vivek Kundra, Federal Chief Info. Officer, Adm'r for Elec. Gov't & Info. Tech., Office of Mgmt. & Budget, Exec. Office of the President) (second alteration in original)).

[24] 29 FLRA 891, 898 (1987).

[25] 45 FLRA 574, 575 (1992).

[26] 46 FLRA 471, 475 (1992).

[27] *Customs Serv.*, 29 FLRA at 898 (emphasis added) (citing *Dep't of HHS, SSA*, 24 FLRA 403, 407-08 (1986) (*HHS*); *see also Portsmouth Shipyard*, 45 FLRA at 575; *VAMC Prescott*, 46 FLRA at 475.

[28] *Customs Serv.*, 29 FLRA at 898; *VAMC Prescott*, 46 FLRA at 475; *Portsmouth Shipyard*, 45 FLRA at 575 ("balancing the various interest involved").

[29] *92 Bomb Wing Fairchild Air Force Base Spokane, Wash.*, 50 F.L.R.A. 701, 704 (1995) (*Fairchild AFB*) (a statutory obligation to bargain concerning the impact of such change exists only if the change ***either*** results in more than a de minimis impact on unit employees ***or*** such impact is reasonably foreseeable); *see also Customs Serv.*, 29 FLRA at 898; *VAMC Prescott*, 46 FLRA at 475; *Portsmouth Shipyard*, 45 FLRA at 575 ("balancing the various interest involved") (emphasis added).

(*Kirtland AFB*),[30] the agency moved a bargaining-unit employee, whose training duties required a substantial amount of "equipment and materials" and the use of two offices, to a single, smaller office in a different building without providing notice to and bargaining with the union.[31] Under those circumstances, the Authority affirmed the judge's consideration of the *actual* "adverse effect on [the employee's] ability to perform his training duties" – e.g., that he "was [un]able to conduct face-to-face training"; his office "which was already crowded . . . became more strained for storage space"; and the "computer, telephone, and fax machine at his new office *were not functional* for two weeks *following the move*," and "his ability to communicate training information . . . *was* much less effective."[32]

On the other hand, when it is not possible to consider *actual* effects – e.g., an agency decision concerning a "planned renovation" which *has not yet occurred*;[33] or "chang[ing] the days on which an employee [*will be*] required to report to work;"[34] – the Authority has affirmed the factfinder's consideration of "*reasonably foreseeable*"[35] effects. In similar fashion, the Authority has affirmed factfinders who determine that a purported concern is not "reasonably foreseeable," which typically occurs when the likelihood of the concern materializing is "speculative."[36]

As these cases demonstrate, it is not particularly difficult to determine whether it is more appropriate to consider actual ***or*** reasonably foreseeable effects. It depends entirely on a reasonable assessment of the unique "facts and circumstances" of each case by the factfinder.[37] In each of the cases, the factfinder's determination on this important question was reviewed by the Authority, and the Authority either agreed with the factfinders choice of *actual* ***or*** *reasonably foreseeable* or not. When the Authority disagrees with the effect used by a factfinder to determine whether a change is more than de minimis, it substitutes its own judgment and explains why the other impact is more "appropriate."[38] But, always the determination is based on the circumstances *in each case* – e.g., "We do not rely, as did the [j]udge, on the actual effects . . . [r]ather, the *appropriate inquiry* in this case must involve an analysis of the reasonably foreseeable effect."[39]

I will concede that my colleagues in the Majority are determined – quite determined in fact – to recut the fabric of the Authority's longstanding and commonsense approach in order to tailor an entirely new framework that is more to their liking. But there lies the second problem − ***not one*** of the cases cited by the Majority, or in any of those discussed above, has the Authority ever required a factfinder to apply ***both*** *actual* ***and*** *reasonably foreseeable effects*.

It is interesting, therefore, that the Majority accuses this Dissent (in artful alliteration no less) of "*mischaracteriz[ing,] . . . misstat[ing,] . . .* [and of being] wrong as a *matter* of history[,] and as a *matter* of law"[40] (missing a running of the poetic tables by leaving out "misrepresenting" and "misleading"). Wow! And all along I thought that I was simply inviting my colleagues to reread our longstanding precedent.

In *Kirtland AFB*,[41] the Authority "conclude[d] that the [j]udge *properly determined*"[42] that a change had "an [actual] *adverse effect*" and was more than de minimis;[43] but, in that case, the judge *did not consider* any *reasonably foreseeable* effects, and the Authority did not conclude that the judge erred by failing to do so. *Strike one*. Similarly, in *Portsmouth Shipyard* (also cited by the Majority), the Authority agreed with the judge that under the circumstances of that case "at the time the decision was made, the *reasonably foreseeable* effect" of the decision was "the *appropriate inquiry*;"[44] again the judge *did not consider actual* effects, and the Authority did not conclude that the judge erred by failing to do so. *Strike two*. Again, in *Customs Service* (also relied upon by the Majority), the judge found that a change was not more than de minimis because the union did not demonstrate "*actual effects*" would occur as a result of a planned renovation.[45] The Authority may have disagreed with the judge's *consideration of actual* effects but did so because, in their view, "the *appropriate* inquiry in *th*[*at*] case" was "the *reasonably foreseeable* effect of the change";[46] in other words, the Authority determined that the judge used the wrong inquiry, not that the judge erred

[30] 64 FLRA 166 (2009).
[31] *Id.* at 166-67.
[32] *Id.* at 173-74 (emphasis added) (citation omitted).
[33] *Customs Serv.*, 29 FLRA at 899.
[34] *VAMC Prescott*, 46 FLRA at 475.
[35] *See VAMC Prescott*, 46 FLRA at 475 (emphasis added); *accord Customs Serv.*, 29 FLRA at 899.
[36] *Portsmouth Shipyard*, 45 FLRA at 576.
[37] *Customs Serv.*, 29 FLRA at 898; *see also VAMC Prescott*, 46 FLRA at 475; *Portsmouth Shipyard*, 45 FLRA at 575.
[38] *Customs Serv.*, 29 FLRA at 899.
[39] *Id.* (emphasis added) (citing *Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 25 FLRA 541 (1987)).
[40] Majority at 11 (emphasis added).
[41] *See* Majority note 87.
[42] 64 FLRA at 174 (emphasis added).
[43] *Id.* at 173 (emphasis added).
[44] *Portsmouth Shipyard*, 45 FLRA at 575 (emphasis added).
[45] 29 FLRA at 899.
[46] *Id.*

by not applying ***both*** *actual* ***and*** *reasonably foreseeable* effects. *Strike three*.

Even more problematic for the Majority is *VAMC Prescott* – the only case in which the Authority itself had the opportunity to determine whether to apply ***either*** *reasonably foreseeable* ***or*** *actual effects*. *VAMC Prescott* came directly to the Authority without any fact-finding determination because the parties had "stipulated" to the relevant facts in order to avoid a hearing before, and decision by, an administrative law judge of the Authority. However, in a unanimous decision, the Authority *itself* considered and applied ***only*** "*reasonably foreseeable*" effects (without so much as a passing mention of *actual effects*) and determined that a change in employees' tours of duty had more than a de minimis effect on those employees' conditions of employment.[47] In other words, when the Authority itself had the *chance to consider* ***both*** *effects, it* ***applied only one***!!

To support its bold abandonment of the Authority's longstanding precedent, the Majority relies upon a little-noted, and otherwise unremarkable, two-member decision (issued just days before the Authority lost its two-member quorum in December 2012) − *U.S. DHS, U.S. CBP, El Paso, Texas* (*CBP El Paso*).[48] In that case, the union complained when the agency tried to deny computer access to employees who were "under investigation" for misconduct.[49] The administrative law judge saw right through the union's ruse and correctly applied the long-established and consistently followed *actual-**or**-reasonably-foreseeable* framework. The judge determined that there was "*no evidence* that the employees *were actually affected* in any way."[50]

In that two-member decision, which prevented the agency from denying computer access to employees being investigated for serious misconduct, the Majority *did not disagree* with the judge's determination that there was no evidence that the employees "were *actually* affected in any way,"[51] but the Majority ever so quietly reversed the judge because he "neglected" to consider effects that may have been "reasonably foreseeable."[52] My colleagues, however, forgot to address one very discrete point in an apparent rush for the door. They failed to explain whether they disagreed with the judge because he ***only*** considered the *actual* effects of the purported change, which never materialized, or because he did not ***also*** consider effects that may have been *reasonably foreseeable.* Presumably, the Majority did not explain this because they had no precedent to support the notion that the judge was required to consider ***both***.

Ignoring the Authority's longstanding precedent, the Majority, in this case, requires a factfinder to examine both the *actual* ***and*** *reasonably foreseeable effects* of a purported change even when the circumstances clearly establish that *no adverse* effects actually occurred. In other words, in order to determine whether a change in conditions of employment is more than de minimis, the Majority would rather that a factfinder rely on the perceived fears of the union "*at the time of* [*a purported*] *change*[]."[53] no matter how baseless and even when the facts of the case later prove that those fears never materialized.

In any context, that is a *significant* change.

As a consequence of this decision, moving forward, any federal agency will effectively be precluded from implementing any new policy or directive, or any perceived or purported change to any policy or directive, unless it first bargains with the union, so long as the union conjures up any plausible, potential, or conceivable impact that might just possibly occur, no matter how unlikely or baseless and without any consideration for whether those impacts actually occur.

In some respects, the Majority's decision reminds me of the infamous *Chicago Tribune* headline of November 3, 1948 – *Dewey Defeats Truman*[54] – which erroneously trumpeted the election results the Tribune's editors believed *would occur* rather than the results *which actually occurred*. It makes no more sense, in this case, to send this case back to the Arbitrator, implicitly suggesting that ICE had an obligation to bargain over concerns that never materialized, than it would have made sense for Governor Dewey to set up a transition team, based on the *Tribune's anticipated* results, even *after* the *actual* results were known.

In contrast, I believe the federal-labor-management-relations community is better served when the Authority bases its decision on facts which *actually occur* rather than a myriad of fears that *may or may not ever materialize*.

In *Home Care Ass'n of America v. Weil*,[55] the U.S. Court of Appeals for the District of Columbia Circuit held that an administrative agency (such as the Authority) may depart from its precedent and establish

[47] *VAMC Prescott*, 46 FLRA at 476.
[48] 67 FLRA 46 (2012).
[49] *Id*. at 46.
[50] *Id*. at 47 (emphasis added) (citation omitted).
[51] *Id*. at 47 (emphasis added) (citation omitted).
[52] *Id*. at 49.
[53] Majority at 11.
[54] *Dewey Defeats Truman*, *Chi. Trib.*, Nov. 3, 1948 at 1.
[55] 799 F.3d 1084 (D.C. Cir. 2015).

new policy, if it first provides a "reasoned explanation" for that departure, and the agency "display[s] awareness that it *is* changing position" and "show[s] that there are good reasons for the new policy."[56]

But my colleagues failed to give any forewarning of this change or to provide a "reasoned explanation" for it.[57]

Although I disagree with my colleagues that the Arbitrator was required to consider reasonably foreseeable effects after ICE proved that the immigration officers suffered no adverse impacts to their conditions of employment and even applying the new test adopted herein by the Majority, I would still conclude that the Arbitrator sufficiently considered potential impacts, and that she concluded they were ***not*** *reasonably foreseeable*.

On this point, the Arbitrator found that Council 118's witnesses were unpersuasive and that their concerns were based on nothing more than "mere speculation."[58] Once again, the Authority has consistently held that anticipatory concerns, which are merely "speculative," are not "reasonably foreseeable" and do not create an obligation to bargain under 5 U.S.C. § 7106(a)(5).[59]

Accordingly, I would deny Council 118's contrary-to-law exception concerning the purported changes which occurred in 2011.

One additional aspect of this case concerns me even though it was overlooked by both parties.

The directions which ICE gave to its immigration officers have far more to do with ICE's responsibilities to comply with legal-detention requirements than it has to do with any condition of employment of immigration officers. Those officers are responsible for enforcing immigration laws, as well as existing laws which protect the due-process rights of any persons detained under those laws. As such, the determination as to whom a detainer form, which explains the legal bases for the detention, must be served is part of that due process.

For the same reasons, that I explained in *GSA, Eastern Distribution Center, Burlington, New Jersey*,[60] ICE's directions concerning the service of the detainer form is more accurately characterized as a *working condition*, rather than as a *condition of employment*.[61] Consequently, I would conclude that ICE had no obligation to bargain at all.[62]

Thank you.

[56] *Id*. at 1094-95 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (internal quotation marks omitted).

[57] *Id.* at 1094 (quoting *FCC*, 556 U.S. at 515) (internal quotation marks omitted).

[58] Award at 12.

[59] *Portsmouth Shipyard*, 45 FLRA at 576 (union's argument that a proposed reduction in force would result in any reduction in any particular position is "speculative at best" not "reasonably foreseeable.").

[60] 68 FLRA 70 (2014) (Member Pizzella dissenting).

[61] *Id*. at 80 ("[W]orking conditions, as used in 5 U.S.C. § 7103(a)(14), more naturally refer, in isolation, only to the circumstances or state of affairs attendant to one's performance of a job . . . [i.e.] the day-to-day circumstances under which an employee performs his or her job and that the term, conditions of employment, refers to the qualifications demanded of, or obligations imposed upon, employees.") (emphases omitted) (citations omitted) (internal quotation marks omitted).

[62] My colleagues in the Majority believe that my "opinion" – concerning the important distinction between *working conditions* and *conditions of employment* – "lacks merit," Majority at 15 n.112, even though 5 U.S.C. § 7103(a)(14) treats the terms separately. Even though my colleagues refuse to examine this point, I would remind my legally trained colleagues that our nation's jurisprudence has long-recognized the value of separate opinions. Justice Ruth Bader Ginsburg (while serving on the U.S. Court of Appeals for the District of Columbia Circuit) wrote that "when to acquiesce and when to go it alone *is a question our system allows each judge to resolve* for herself." William D. Blake & Hans J. Hacker, "*The Brooding Spirit of the Law*": *Supreme Court Justices Reading Dissents from the Bench*, 31 *Jus. Sys. J.* 1, 1 (2010) (emphasis added) (citation omitted) (internal quotation marks omitted). In 1960, Justice William Douglas similarly wrote that "[i]t is *the right of dissent*, not the right or duty to conform [without which] . . . *the affairs of government could not be conducted*." *Id*. (emphasis added) (citation omitted) (internal quotation marks omitted). But Chief Justice Hughes said it best when in 1936 he wrote that a dissenting opinion plays an essential role because it is "an appeal to the brooding spirit of the law, to the intelligence of a future day, *when a later decision may possibly correct the error* into which the dissenting judge believes the court *to have been betrayed*." *Id*. (emphasis added) (citation omitted) (internal quotation marks omitted). I am fully aware that the Authority's existing precedent does not support my view on this significant point. As a Member of this body, however, my viewpoint is not a simple claim which may be summarily dismissed by the Majority. *See* Majority at 15, n. 112. There is no "technical trapfall" here. *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella). There is however a Member's opinion, based on his reasoned interpretation of the Statute, with which my colleagues do not agree. But that opinion does not "lack[] merit," Majority at 15 n.112, no matter how often the Majority tries to dismiss it.