FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 17-11

UNITED STATES DEPARTMENT OF THE ARMY FORT DETRICK, MARYLAND RESPONDENT AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, COLUMBIA LODGE 174 CHARGING PARTY	Case No. WA-CA-15-0485

Sarah J. Kurfis
For the General Counsel

Jeffrey B. Miller
For the Respondent

Charles E. Thomas
Joseph R. Compher
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON STIPULATION OF FACTS

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On September 11, 2015, the International Association of Machinists and Aerospace Workers, Columbia Lodge 174 (Union), filed an unfair labor practice (ULP) charge against the United States Department of the Army, Fort Detrick, Maryland (Respondent or Agency). Jt. Ex. 1(a). On May 10, 2016, the Acting Regional Director of the Washington Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute when it began assigning a supervisor to work the day shift

at the Respondent's power plant without first providing the Union with notice and an opportunity to negotiate over the impact and implementation of that change. Jt. Ex. 1(b). The Respondent filed an Answer to the Complaint on June 3, 2016, denying that it violated the Statute. Jt. Ex. 1(c).

On June 23, 2016, the parties filed motions for leave to file a stipulation of facts in lieu of a hearing and submitted a Joint Stipulation of Facts (Stip.), along with exhibits 1 through 11 (Jt. Exs. 1 - 11). In response to the motions, the hearing was indefinitely postponed. The parties filed timely briefs that were fully considered and the case is decided on the stipulated record.

Based on the entire record, I find that the unilateral change alleged to be an unfair labor practice in this matter was a de minimis change for bargaining unit employees that did not violated the Statute. In support of this determination, I make the following findings of fact, conclusions of law, and recommendation.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. Stip. ¶3. The Union 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 Respondent. *Id.* ¶4. The Union and the Respondent are parties to a collective bargaining agreement (CBA) covering the bargaining unit employees at issue in this case. *Id.* ¶5.

This case concerns Electric Power Controllers (controllers) who are responsible for operating uninterrupted power systems and generators at the Agency's power plant. Jt. Ex. 7(i) (Jt. Ex. page 196); Stip. ¶10. The controllers are bargaining unit employees and their typically assigned work schedule consisted of three eight hour shifts per day, seven days a week with two bargaining unit employees completing each shift. Stip. ¶8. This method of assigning work resulted in eighty-four controller shifts per two week pay period. *Id.* A controller must be scheduled to work ten shifts or 80 hours in a pay period in order to be eligible for overtime and overtime is assigned in accordance with Article 18 of the CBA. *Id.* ¶7, 9.

In the summer of 2015, the number of controllers working for the Agency was reduced through retirement. Prior to the end of July 2015 the Respondent employed and assigned nine controllers to cover the eighty-four shifts each pay period. *Id.* ¶23. This resulted in each controller being assigned an average of 9.33 shifts per pay period. *Id.* However, one of the nine bargaining unit controllers retired at the end of July 2015, leaving eight controllers to work an average of 10.5 shifts per pay period, the equivalent of 84 hours. *Id.* ¶¶24-25. As 10 shifts or 80 hours of work was required before overtime could be earned, this change in the number of employees available for shift assignments resulted in approximately four hours of overtime for each bargaining unit employee per pay period.

When a second controller retired on August 22, 2015, seven controllers were left to work an average of 12 shifts per pay period, which amounted to approximately 16 hours of overtime per pay period for each remaining controller. *Id.* ¶¶28-29. For obvious budgetary reasons, this opportunity for an additional 16 hours of overtime per pay period existed for only one pay period from August 22, 2015, to September 8, 2015, after which management altered the way shifts were assigned to bargaining unit controllers to reduce the amount of overtime necessitated by the loss of controller staff. *Id.* ¶¶21, 30, 33. Therefore, the increase in overtime opportunity from 4 hours to 16 hours per pay period was a temporary measure that existed for only a single pay period.

After the second controller retired, Richard Ardinger, the Electric Power Controller Supervisor (a former controller) reduced the number of bargaining unit controllers assigned to work the day shift on ten of the fourteen days in each pay period from two to one, with Ardinger performing the duties previously performed by the second bargaining unit controller. *Id.* ¶¶21, 30, 33. The Agency concedes that it implemented this change in the assignment of work on September 8, 2015, without giving the Union notice of the change and an opportunity to bargain over its impact and implementation. *Id.* ¶¶30, 37.

By assigning only one controller to work the day shift on ten of the fourteen days in each pay period, management reduced the total number of shifts assigned to bargaining unit employees from eighty-four per pay period to seventy-four per pay period. This reduced the average number of shifts required of each of the remaining seven controllers from 12 shifts per pay period, but only restored it to an average of 10.57 shifts per pay period, which was still slightly higher than the average caused by the first retirement at the end of July 2017. *Id.* ¶¶29, 35-36.

In other words, rather than restoring the bargaining unit employees to the historical average of 9.33 shifts per bargaining unit employee that existed before the retirements began at the end of July 2015, assigning some of the work to a supervisor only returned the bargaining unit to the level present after the first retirement had taken place; albeit a slightly higher average of 10.57 shifts per employee, as opposed to 10.5 shifts that existed after the number of bargaining unit controllers eligible for shift assignments was reduced from nine to eight. That slight increase resulted from Ardinger assuming responsibility for only ten of the fourteen shifts previously covered by eight bargaining unit controllers.

Three days after Ardinger began assigning himself responsibility for ten shifts per pay period, the Union filed the ULP charge in this case asserting that the agency had changed the schedule for bargaining unit employees by adding a supervisor to the scheduling process and alleging that he was performing bargaining unit work. Jt. Ex. 1(a).

With respect to the Agency's motivation for making the change, Gunnar G.F. Pedersen, Jr., the Deputy to the Garrison Commander, opined in March 11, 2016, that after August 22, 2015, when the number of controllers decreased from eight to seven, "[t]he power plant could not be effectively staffed without incurring excessive amounts [of] overtime." Jt. Ex. 2(a) at 1. Pedersen also asserted that having Ardinger perform work previously performed by a second controller on the day shift "reduced the amount of

overtime incurred, and allowed plant personnel to take leave without creating an undue burden on the rest of the workers." *Id.* at 2. I note in this regard that the Agency believed that it might be difficult to hire new controllers. Specifically, the GC and the Respondent stipulated:

> It was uncertain how long it would take for the command to address the manning situation caused by the departure of employees from the generator plant (which was exacerbated due to the fact that the positions were not identified as being "authorized" under the FY 2016 Table of Distribution and Allowances). . . .

Stip. ¶32.

Concern about safety was also a factor into the Agency's decision to implement the change. Specifically, the GC and the Respondent stipulated: "Considering the nature of the duties performed by the . . . controllers, the increased amount of time that the employees were working raised concerns regarding overwork of the workforce, which is a safety concern." *Id.* ¶31.

After the Agency implemented the change in September 2015, Ardinger continued to perform the duties of a controller on 10 day shifts per pay period through May 31, 2016, and the Agency continued to offer only seventy-four controller shifts to bargaining unit employees per pay period, through at least June 3, 2016. *Id.* ¶¶38, 40-42; *see also* Jt. Ex. 7(b).

The number of controllers in the bargaining unit was further reduced by additional retirements in 2016. One controller retired on January 1, 2016, leaving six controllers to work an average of 12.33 shifts per pay period. Stip. ¶¶39-40. Another controller retired on June 3, 2016, leaving five controllers to work an average of 14.8 shifts per pay period. *Id.* ¶¶41-42.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing the change without first giving the Union notice of the change and an opportunity to bargain over the impact and implementation of the change. GC Br. at 7. The GC asserts that the change caused bargaining unit employees to lose overtime opportunities and that the Authority has consistently held that changes affecting an employee's ability to earn overtime are more than de minimis. *Id.* at 7-8. The GC argues that because the change significantly reduced the average amount of overtime each controller worked, the change had a greater than de minimis effect on controllers' conditions of employment. *Id.* at 8. Further, the GC argues that it was reasonably foreseeable that the change would reduce the amount of overtime controllers could work, and that Pedersen admitted as much in his March 11, 2016, letter. *Id.* at 10 (citing Jt. Ex. 2(a)).

The GC requests that the change be rescinded. *Id.* at 14. (I note that the GC initially sought this remedy in its pre-hearing disclosure.) Jt. Ex. 1(f) at 2. The GC argues that a remedy requiring the Respondent to return to the status quo is warranted because: (1) the Respondent failed to notify the Union prior to implementing the change; (2) the Respondent has shown a willful disregard of its bargaining obligations; (3) the Respondent's unlawful actions caused controllers to suffer a significant financial loss; and (4) a status quo ante remedy would not disrupt or impair the efficiency or effectiveness of the Respondent's operations. GC Br. at 12. In addition, the GC argues that controllers should be awarded back pay for the lost overtime opportunities that occurred as a result of the change. *Id.* at 12-13. Finally, the GC requests that notices be posted on bulletin boards and distributed by email. *Id.* at 13.

Respondent

The Respondent argues that it did not violate the Statute, because the change had only a de minimis effect on conditions of employment. R. Br. at 1, 10 (citing *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.*, 59 FLRA 728 (2004) (*DHS*)). In this regard, the Respondent argues that the impact of the change should be measured by comparing the state of affairs at the beginning of August 2015 (when controllers worked an average of 10.5 shifts per pay period) with the state of affairs on September 8, 2015 (when controllers began to work an average of 10.57 shifts per pay period). Contending that the difference between working 10.5 shifts per pay period and 10.57 shifts per pay period is de minimis. *Id.* at 11. In addition, the Respondent argues that the change was de minimis because: controllers' worksites and duties remained the same; controllers continued to be assigned overtime in accordance with Article 18 of the CBA; and the change affected only seven employees. *Id.* at 11, 14. The Respondent also argues that under the de minimis test set forth in *Dep't of HHS, SSA, Region V, Chi., Ill.*, 19 FLRA 827 (1985) (*SSA Region V*), "concerns pertaining to potential overwork" of controllers should be considered in determining whether the change had de minimis effects on conditions of employment. R. Br. at 11. In this regard, the Respondent asserts that the "increased amount of time that the [controllers] were working" after the retirements in the summer of 2015 "raised concerns regarding overwork of the workforce, which is a safety concern." *Id.* at 6 (quoting Stip. ¶31). Further, the Respondent notes that controllers retired in January and June 2016 and asserts that the "amount of available work and the ever reducing numbers of [controllers] continues to create concern that the employees who are working are sufficiently rested before they perform [their] duties. Having Mr. Ardinger assist in this area reduces some of the overwork risk for the [controllers]." *Id.* at 14.

In addition, the Respondent contends that the change had only de minimis effects because it was a "temporary arrangement . . . ." *Id.* at 12; *see also id.* at 10 (citing *GSA, Region 9, S.F., Cal.*, 52 FLRA 1107 (1997); *SSA Region V*, 19 FLRA at 827). At the same time, the Respondent acknowledges that "it was uncertain how long it would take for the command to address the manning situation" after the controller retired on August 22, 2015, especially because the Respondent faced "manpower challenges that limit the ability to

backfill the vacated overhire positions[]" and was operating "without backfills available. . . ." R. Br. at 9, 11, 13; *see also* Stip. ¶32. The Respondent asserts that its scheduling "was . . . and continues to be viewed as a temporary arrangement until the manning situation can be addressed for these unauthorized overhire positions." R. Br. at 10.

DISCUSSION

Prior to implementing a change in conditions of employment, an agency is required, by § 7116(a)(1) and (5) of the Statute, to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a de minimis effect on conditions of employment. *U.S. Dep't of VA, Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004) (*Veterans*). Where an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency nonetheless has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a de minimis effect on conditions of employment. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*). In applying the de minimis doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *Veterans*, 60 FLRA at 318. In determining whether the reasonably foreseeable effects of a change are greater than de minimis, the Authority considers what a respondent knew, or should have known, at the time of the change. *Id.* Further, equitable considerations are taken into account in balancing the interests involved. *Dep't of HHS, SSA*, 24 FLRA 403, 408 (1986).

While a change that adversely affect an employee's ability to earn overtime pay can be more than de minimis, *Veterans*, 60 FLRA at 318; *see also PBGC*, 59 FLRA at 51; *U.S. Customs Serv., Sw. Region, El Paso, Tex.*, 44 FLRA 1128, 1129 (1992), the GC's focus upon that precedent is misplaced. In this case, the change that occurred for bargaining unit employees was an increased demand for overtime placed upon them by virtue of staffing losses that began at the end of July 2015. The GC's alleged violation instead relies upon the adverse impact on bargaining unit employees' ability to earn overtime that resulted from a temporary fluctuation in the amount of overtime required of employees who typically were not scheduled to work overtime. This temporary fluctuation is the epitome of a de minimis change, especially when the increase in overtime which the GC uses to establish a baseline existed for only a single pay period.

Before any controller retirements occurred at the Respondent's power plant, there were nine bargaining unit controllers to cover eighty-four controller shifts per pay period. Thus, an average of 9.33 shifts per pay period for each controller provided none of them with scheduled overtime as a controller had to be scheduled to work 10 shifts or 80 hours before establishing eligibility for overtime. Only after the initial retirement of a controller at the end of July 2015, did the average number of shifts per controller begin to exceed 10 shifts, and even then, it only rose to 10.5 shifts per pay period, or the equivalent of 4 hours.

The GC's entire argument relies upon the fact that one pay period later, the average number of shifts per pay period temporarily spiked for a single pay period when a second controller retired on August 22, 2015. Focusing upon the reduction from an average of 12 shifts per pay period required during one pay period, to the average of 10.57 shifts available after the Respondent assigned controller shifts to a manager in the next pay period, the GC contends that the supervisor's performance of duties previously performed by a retired bargaining unit member caused more than a de minimis impact upon the remaining bargaining unit employees' opportunity to earn overtime. However, that argument fails to acknowledge that what the supervisor actually did was assume responsibility for work previously performed by an employee no longer available due to retirement and thus, took nothing away from those employees who remained on the job. In fact, despite his efforts, the bargaining unit employees still had to undertake an additional .07 of a shift each pay period after the second retirement.

More importantly, the assignment of 10 controller shifts to a supervisor still did not restore the bargaining unit employees to the historical average of 9.33 shifts per pay period experienced prior to the initiation of retirements at the end of July 2015. Thus, rather than causing the bargaining unit to lose overtime opportunities relative to that historically available, assigning 10 controller shifts to a supervisor only partially reduced the temporary spike in demand that existed for a single pay period by restoring the need for overtime to the level present for the first time only one pay period before. In this regard, it should be noted that the GC's complaint did not allege that the Respondent changed the status quo for bargaining unit employees by imposing increased overtime demands over two pay periods, instead, the GC asserts that the Respondent violated the Statute by attempting to return the employees to some semblance of the status quo after the demand for overtime had spiked because the spike in the second pay period was larger than that present during the initial pay period. Of course, assignment of overtime work was already covered by the CBA so that change should not have resulted in an unfair labor practice allegation.

Under the GC's theory of the case, every reduction is staffing, whether the result of retirement, termination, leave, or death, would constitute a change in conditions of employment for the remaining bargaining unit employees if the absent employee's work was accomplished using any method other than paying the remaining employees overtime to perform the work previously provided by the now departed co-worker. This would not be an efficient and effective way of completing the agency's mission, and contending that once a level of overtime needed in a single pay period is established, that level cannot be reduced or restored to historical levels without notice and an opportunity to bargain that change would be an undue constraint upon management's right to assignment of work when responding to workforce fluctuations.

In short, the GC's theory of the case relies upon a two week temporary spike in the average number of shifts required of bargaining unit controllers to establish a baseline from which it extrapolates a violation of the Statute. However, the actual change in historical norms present in this case was not a loss of overtime opportunity; it was a temporary increase in the amount of overtime required of the bargaining unit. Thus, the GC's argument that the Respondent's attempt to restore the norm violated the Statute is unpersuasive.

While the Respondent is correct in asserting that returning the average number of shifts required of each controller to 10.57 per pay period was de minimis relative to the average of 10.5 shifts that existed after the first retirement, it is possible that the same would not be true relative to the 9.33 average that existed for the bargaining unit prior to retirements being initiated. However, the fact that the Respondent temporarily increased the overtime demands place upon bargaining unit employees by virtue of its personnel management was covered by the overtime provisions in the CBA and properly not a concern of the Union or the General Counsel.[1]

CONCLUSION

For the reasons set forth above, I find that assigning controller duties to a supervisor for 10 shifts each pay period in response to the retirement of a second controller did not reduce the bargaining unit employees' opportunity to earn overtime in more than a de minimis amount relative to the historical opportunity available. Therefore, the Respondent did not violate § 7116(a)(1) and (5) of the Statute when it assigned some controller duties to a supervisor without providing the Union with notice and an opportunity to bargain over the impact and implementation of that change.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

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

Issued, Washington, D.C., March 2, 2017

CHARLES R. CENTER
Chief Administrative Law Judge

[1] As a result of two additional retirements in 2016, the overtime burden placed upon the remaining bargaining unit employees continued to increase, reaching 14.8 shifts per pay period in June 2016, and the safety concerns caused by such excess expressed by the Respondent are meritorious and give legitimate reason to question the manner in which the Respondent has managed the situation.