

70 FLRA No. 153

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
SACRAMENTO, CALIFORNIA
(Respondent)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
ASSOCIATION OF ADMINISTRATIVE JUDGES
(Charging Party)

SF-CA-16-0226

DECISION AND ORDER

August 17, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

Decision by Member Abbott for the Authority

I. Statement of the Case

We remand this case for Federal Labor Relations Authority Administrative Law Judge Charles R. Center (the Judge) to apply our decision in *U.S. DHS, U.S. CBP, El Paso, Texas (El Paso)*,¹ in order to determine whether the Respondent's purported "changes" affected working conditions or conditions of employment.

In the attached decision, the Judge found that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)² by changing the employees' conditions of employment without first bargaining the impact and implementation of that change.

II. Background and Judge's Decision

As the Judge's decision sets forth numerous facts in detail, we will only briefly summarize them here.

¹ 70 FLRA 501, 502-04 (2018) (Member DuBester dissenting); see also *NTEU*, 70 FLRA 691, 693 (2018) (Member DuBester dissenting).

² 5 U.S.C. § 7116(a)(1), (5).

This case concerns approximately fifteen administrative law judges (ALJs) who hear and decide disability cases for the Social Security Administration and twenty-five clerks who assist the ALJs with scheduling and preparing for hearings. The ALJs are expected to schedule a certain number of hearings each month. If they do not schedule an adequate number of hearings, they may lose privileges, such as telework and earning credit hours while teleworking.

Previously, a clerk was assigned to each ALJ, and worked exclusively for that ALJ. In December 2015, the Respondent announced that it was changing the way clerks were assigned work. Instead of working exclusively for an ALJ, they would be assigned to one of four teams: TRIM (telephone, reception, intake, and mail); Scheduling; Pre-hearing; and Post-hearing. The Respondent explained that it had entered into a memorandum of understanding (MOU) with the union representing the clerks that allowed them to telework three days a week instead of one.

Shortly thereafter, the Charging Party demanded to bargain. In January 2016, the Respondent announced that it was implementing the change and that it had no duty to bargain with the Charging Party. The Charging Party then filed this charge.

Before the Judge, the General Counsel (GC) argued that the Respondent changed the ALJs' conditions of employment by implementing the team model for clerks, which increased the amount of time that ALJs spent monitoring cases and correcting clerks' errors. The GC also argued that the effects and reasonably foreseeable effects of the change were greater than *de minimis*, as ALJs spent considerable time – thirty to ninety minutes daily – addressing and correcting these errors, which reduced the number of hearings they could schedule and threatened their ability to telework. The Charging Party argued that a status-quo-ante remedy was warranted.

The Respondent contended that it had no duty to bargain because it did not change the ALJs' conditions of employment when it implemented the team model, or, in the alternative, that changes were not greater than *de minimis*. The Respondent argued that it was not reasonably foreseeable that implementing the team model would increase ALJs' workloads. The Respondent also argued that the matter was covered by the collective-bargaining agreement as "the parties previously bargained over 'all of the procedures and appropriate arrangements of the Respondent's statutory right to assign work.'"³ The Respondent maintained that

³ Judge's Decision at 11.

a status-quo-ante remedy was unwarranted and would interfere with its ability to comply with the MOU.

In his decision, the Judge found that the Respondent changed the ALJs' conditions of employment because the office was restructured. Further, the ALJs were adversely affected when they were deprived of their "right-hand person[s]" and clerks were no longer accountable for their mistakes.⁴ The change also reduced productivity in the office. He found that the changes were "significant" and that the impact should have been reasonably foreseen by the Respondent.⁵

The Judge found that the change was not covered by the collective-bargaining agreement. Specifically, he found that the Respondent did not demonstrate that the dispute was covered by Articles 3, 13, or 15 under either prong of the covered-by doctrine. As a remedy, he directed a return to the status quo ante and, upon request, to bargain with the Charging Party over the impact and implementation of the team model.

The Respondent filed exceptions to the Judge's decision on July 6, 2017. The GC and the Charging Party both filed oppositions on August 9, 2017.

III. Analysis and Conclusion: We remand the decision for the Judge to apply *El Paso*.

In its exceptions, the Agency argues that no change in conditions of employment occurred, or that in the alternative, any change was de minimis.⁶ The Agency disputes the Judge's evidentiary findings that: clerical errors increased, ALJs' administrative workload increased leading to a decline in their ability to schedule hearings, productivity declined, and ALJs were at risk of losing their telework privileges.⁷ The Agency contends that any changes were not reasonably foreseeable and the dispute is covered by Articles 3 and 13 of the parties' collective-bargaining agreement.⁸ The Agency also objects to the status-quo-ante remedy.⁹

In April 2018, subsequent to the Judge's decision, the Authority clarified in *El Paso* that there is a distinction between the terms "conditions of employment" and "working conditions" under the Statute.¹⁰ The decision explained that "the distinction between these two terms lies at the very foundation of differentiating between purported changes that are, and are not, subject

to a duty to bargain."¹¹ Working conditions are "the day-to-day circumstances under which an employee performs his or her job."¹²

Accordingly, we remand this case to the Judge to apply *El Paso* and to make appropriate findings as to conditions of employment and working conditions.¹³ On remand, the parties should have the opportunity to present evidence, obtain an additional hearing if requested, and brief the new framework.

IV. Order

We remand this case to the Judge for further findings and consideration consistent with this decision.

⁴ *Id.* at 13.

⁵ *Id.* at 14.

⁶ Exceptions at 13-16.

⁷ *Id.* at 15-23.

⁸ *Id.* at 23-28.

⁹ *Id.* at 28-36.

¹⁰ 70 FLRA at 503.

¹¹ *Id.* (emphasis added).

¹² *Id.* (quoting *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645-46 (1990)).

¹³ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176, 180-82 (2016) (award remanded when legal standard had changed in the interim); see also *U.S. DOD, Missile Def. Agency, Redstone Arsenal, Ala.*, 70 FLRA 611, 613 (2018) (Member DuBester dissenting) (remanding case to judge for hearing and further findings); *U.S. Dep't of the Air Force, 325th Mission Support Grp. Squadron, Tyndall Air Force Base, Fla.*, 65 FLRA 877, 881 (2011) (case remanded to judge to make further findings on whether changes to conditions of employment had occurred); *SSA, Balt., Md. & SSA, Office of Hearings & Appeals, Kan. City, Mo. & SSA, Office of Hearings & Appeals, St. Louis, Mo.*, 60 FLRA 674, 681 (2005) (case remanded to judge to determine whether matter was covered by parties' agreement).

Member DuBester, dissenting:

Accordingly, I dissent.

Consistent with my opinion in *U.S. DHS, U.S. CBP, El Paso, Texas (El Paso)*,¹ I dissent. I disagree with the majority's conclusion to remand the decision. Instead, I would deny the Respondent's exceptions and adopt the Judge's recommended decision and order.

As I said in *El Paso*, the majority's attempt to distinguish "conditions of employment" and "working conditions" cannot withstand scrutiny.² The majority's misguided approach is contrary to the Statute's legislative history,³ as well as Authority⁴ and judicial precedent.⁵

The record supports the Judge's decision that the Agency's reassignment changed the ALJs' conditions of employment, and that these changes were not de minimis. The reassignment resulted in "an increase in the number of clerk errors,"⁶ and added thirty to ninety minutes of work each day for the ALJs.⁷ Additionally, I agree with the Judge that the reassignment is not covered by the parties' agreement,⁸ that the Agency failed to satisfy its duty to bargain, and that a status quo ante remedy is appropriate until impact-and-implementation bargaining is complete.⁹

¹ 70 FLRA 501, 504-07 (2018) (Dissenting Opinion of Member DuBester).

² *Id.* at 505.

³ *Id.* (citing *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 75 (2014) (*GSA*)); *see also* Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 31, 1969), as amended by Exec. Order Nos. 11,616, 36 Fed. Reg. 17,319 (Aug. 28, 1971), 11,636, 36 Fed. Reg. 24901 (December 24, 1971), and 11,838, 40 Fed. Reg. 5,743 (Feb. 7, 1975), *reprinted* in Subcomm. on Postal Personnel & Modernization of the Comm. on Post Office & Civil Service (Comm. Print 1979) 96th Cong., 1st Sess. (1979), Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1342 (Sec. 2(e) (referring to "working conditions")), 1345 (Sec. 11(a)-(b) (referring to "working conditions")), 1348 (Sec. 19(a)(2) (referring to "conditions of employment"))).

⁴ *GSA*, 68 FLRA at 77 (there is "no substantive difference between 'conditions of employment' and 'working conditions' as those terms are practically applied").

⁵ *U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011) (working conditions and conditions of employment are "effectively synonymous").

⁶ Judge's Decision at 14.

⁷ *Id.* at 15.

⁸ *Id.* at 18; *see also Fed. BOP v. FLRA*, 654 F.3d 91, 95-97 (D.C. Cir. 2011) (relying on evidence of intent and parties' negotiation history in analyzing whether proposed change was covered by parties' collective bargaining agreement).

⁹ Judge's Decision at 19-20.

Office of Administrative Law Judges

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND
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SACRAMENTO, CALIFORNIA
RESPONDENT

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INTERNATIONAL FEDERATION OF
PROFESSIONAL
AND TECHNICAL ENGINEERS, ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
CHARGING PARTY

SF-CA-16-0226

Vanessa G. Lim
For the General Counsel

Teresa Bowen
For the Respondent

Michael Blume
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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 January 26, 2016, the International Federation of Professional and Technical Engineers, Association of Administrative Law Judges (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Social Security Administration, Office of Disability Adjudication and Review, Sacramento, California (Agency/Respondent). C Ex. 1(a). After investigating the charge, the acting San Francisco Regional Director issued a Complaint and Notice of Hearing on July 20, 2016, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by changing bargaining unit employees' conditions of employment without first bargaining with the Union over the impact and implementation of the change. GC Ex. 1(b). On August 11, 2016, the Respondent filed an Answer to the Complaint admitting

some factual allegations, but denying that it violated the Statute. GC Ex. 1(c).

A hearing on the matter was conducted on October 4, 2016, in Sacramento, California. All parties were represented and afforded an opportunity to be heard, introduce evidence, and examine witnesses. The General Counsel, Charging Party, and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing a change that had greater than de minimis effects on employees' conditions of employment without first bargaining over the impact and implementation of the change.

In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. At all material times, Odell Grooms, was the Hearing Office Chief Administrative Law Judge (HOCALJ), and was a supervisor and/or management official within the meaning of § 7103(a)(10) and (11) of the Statute. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of the non-supervisory administrative law judges (ALJs) assigned to the Office of Disability Adjudication and Review (ODAR), a component within the Social Security Administration (SSA). GC Exs. 1(b), 1(c). The Agency and the Union are parties to a national collective bargaining agreement (CBA). Jt. Ex. 1(a).

There are approximately fifteen ALJs assigned to the Sacramento Hearing Office (SHO), who hear and decide disability cases for the SSA. The ALJs are responsible for reviewing evidence, holding evidentiary hearings, and issuing written decisions. The ALJs hold hearings at least two days a week and are expected to resolve 500 to 700 cases each year. Tr. 18, 180. In the SHO, the ALJs have issued "standing orders," reflecting personal procedural rules to be applied in the cases assigned to them. The rules include the number of hearings to be scheduled each hearing day and the times those hearings will begin. The ALJ also directs how many hearings requiring an interpreter or medical expert can be scheduled on a given hearing day. Tr. 26, 88-90.

ALJs are expected to schedule a certain number of hearings each month. In February 2014, the Chief Administrative Law Judge for ODAR issued a

memorandum stating that, consistent with Article 15, Section (7)(l)(3) of the CBA, judges were expected to schedule an average of fifty hearings per month, beginning October 2015. GC Ex. 4 at 2-3. Article 15, Section (7)(l)(3) of the CBA provides that if the employer determines that a judge has not scheduled a “reasonably attainable” number of cases for hearing, the employer may restrict the judge’s ability to utilize the telework provisions of the CBA.¹ Jt. Ex. 1(a). It was understood that memorandum meant that ALJs who were not scheduling a reasonably attainable number of hearings by October 2015 could lose telework privileges, including the ability to telework from home on weekends while earning credit hours. Tr. 36, 38-39. (By September 2016, the requirement was slightly reduced, with ALJs expected to schedule an average of at least forty-five hearings per month.) GC Ex. 6.

There are approximately twenty-five hearing office clerks assigned to the SHO. These clerks assist ALJs with hearing scheduling and preparation. Tr. 18. They are responsible for preparing dockets, marking exhibits, sending hearing reminders to unrepresented claimants, collecting hearing documents, performing post-hearing development (for example, ordering additional documents and placing them into the record), and closing and mailing cases. Tr. 162-63, 193. While the clerks work closely with the ALJs, their immediate supervisor is a Group Supervisor (GS) and the group supervisors report to the Hearing Office Director (HOD). Tr. 18, 190. Because the clerks assist with hearing preparation and document management of evidence provided at the hearings, they need to be present

¹ In addition to Article 15, two other CBA provisions were entered into evidence. Article 3 of the CBA, which is entitled “Management Rights” and is nearly identical to § 7106 of the Statute. Article 3 provides that management has the right to assign work, but that management is not precluded from negotiating procedures or appropriate arrangements. Jt. Ex. 1(a). The parties also submitted Article 13 of the CBA, entitled “Judicial Function in the Office of Disability Adjudication and Review.” Article 13 of the CBA states:

Judges play a vital role in the accomplishment of the ODAR mission and make a significant contribution to the mission of issuing hearing decisions that are timely and correct determinations by the Commissioner of the Social Security Administration. In making hearing decisions, a Judge may determine when a case is ready to be scheduled for a hearing, conduct a full and fair hearing when required, and must issue a legally sufficient decision. The ODAR has the authority to provide necessary support staff for the Judges.

Jt. Ex. 1(a).

in the office the day before and the day of the hearings for which they are assisting. Tr. 180, 192, 208.

For several years prior to January 2016, when the “team model” of clerk assignments was implemented within the SHO, a hearing office clerk was assigned to each ALJ, and that clerk worked only on that ALJ’s hearing docket. Tr. 20, 85. Two of the General Counsel’s main witnesses described with specificity the benefits of this system. Judge Mary French, testified that her clerk acted as her “right-hand person” and her “docket manager” someone who was “watching out for everything on my docket list[]” of over 100 cases. Tr. 23-24. Judge French also testified that her clerk made things work as if they were “automated.” Tr. 23. “[A]s soon as the case was assigned to me . . . my . . . clerk would look everything over, bring to my attention anything that was a problem . . . [and] troubleshoot [it],” Judge French testified. *Id.* “If there were problems that came up, . . . she would go and track that down for me. If she needed to talk to one of the [administrative] supervisors, she would [do so]. Then she would just get back to me when it was all resolved . . .” *Id.* at 23. Further, Judge French testified that her clerk was “responsible for that case, from a clerical point of view, all the way until . . . it was closed.” *Id.* Judge French noted that she talked with her clerk on a daily basis and could reach her “pretty much anytime.” Tr. 40, 44. Judge French added that “[e]verything was automatic” with her clerk “because she knew she was responsible for all of my cases.” Tr. 23.

Judge French acknowledged that her clerk occasionally made mistakes. When that happened, Judge French would communicate with her clerk directly to correct the error, and after that, “it wasn’t a problem.” Tr. 40. In addition, Judge French indicated that it was rare for her clerk to make such mistakes. She testified: “If I said the case was going to be dismissed, we dismissed it. . . . [S]he always sent the Notice of Hearing reminder. She took care of the development. So, generally, yes, I don’t remember her not following any of my standing orders.” Tr. 41.

Judge Carol Buck, similarly testified that she and her clerk worked as “a team”. Tr. 84. Judge Buck elaborated that her clerk helped prepare the record for the hearing, dealt with claimants and their representatives, and alerted Judge Buck to any problems that would come up. *Id.* Judge Buck testified that it was “very easy to communicate[]” with her clerk, and that “problems that came up were resolved quickly.” Tr. 85. Judge Buck testified that her clerk had worked with her for a long time and was “very familiar with [her] standing orders.” *Id.*

However, every ALJ in the SHO did not report a similar experience. The HOCALJ testified that prior to the implementation of the team model, his assigned clerk was “challenged” and “difficult.” Tr. 164. He testified, “I told the clerk . . . to send this particular child claimant to a pediatrician. She sent him to a psychologist.” Tr. 165. He added that the clerk was slow in her post-hearing processing. *Id.*

In November 2015, the HOCALJ learned that ODAR had entered into a memorandum of understanding (MOU) with the union that represented the hearing office clerks which allowed them to utilize telework three days a week rather than the usual arrangement of one day per week. Tr. 169. The HOCALJ determined that this change meant there would not be enough clerks physically present in the SHO to sustain the practice of assigning a clerk to each ALJ who worked exclusively for that ALJ. *Id.* (He testified in this regard that “we would not be able to allow an individual to telework [three] days a week and still support a one-to-one clerk to judge model.”) Tr. 187-88. Accordingly, the HOCALJ testified, that management determined that it needed to “restructure[] the office.” Tr. 160. Management did this by implementing a team model system with hearing office clerks working on cases for all of the ALJs within the SHO. *Id.* Under the team model, each clerk was assigned to one of four teams: the TRIM team responsible for telephone, reception, intake, and mail; the Scheduling team, which scheduled cases; the “Pre Team,” responsible for pre-hearing matters; and a “Post Team,” responsible for post-hearing matters. Jt. Exs. 1(b), 1(e); Tr. 20-22, 170. Under this Team model, clerks worked on a case file for only one portion of the process as the file was worked to completion, and they were not responsible for checking to see whether the work completed by an earlier team was done correctly. Tr. 198.

On December 4, 2015, the HOCALJ held two meetings, one with the hearing office clerks and one with the ALJs, in which he announced that management would be implementing this team model system. Tr. 20, 170, 195. During the meeting with judges, Judge French testified that many judges were asking questions about how clerks would perform work under the team model. Tr. 20-21. For example, one of the ALJs said that in the past if he needed a medical expert to appear at an upcoming hearing, he would just email his clerk. The judge asked how he would get that done under the new system. Tr. 21. Management informed the judges that they could send all such messages to an email address for administrative supervisors, and the administrative supervisors would communicate the judges’ messages to the clerk or clerks working on the matter. *Id.* In addition, management stated that it planned to rotate clerks through the four different teams

every six months. Tr. 22. (Management subsequently decided to postpone clerk rotations indefinitely.) Tr. 193.

On December 21, 2015, the HOCALJ sent a letter to the Union’s Regional Vice President, informing him that the team model would be implemented at the Sacramento Hearing Office in January 2016, and that the Agency had no obligation to bargain over the implementation of the team model system. Jt. Ex. 1(b); *see also* GC Exs. 1(b), 1(c).

On December 23, 2015, the Union responded with an email demanding to bargain over the implementation of the team model. Jt. Ex. 1(c).

On January 7, 2016, the HOD sent an email to employees and the Union announcing that the transition to the team model would begin on January 11, 2016, and that the team model would be implemented on January 19, 2016. Tr. 190; Jt. Ex. 1(e).

On January 11, 2016, the HOCALJ reconfirmed in a letter to the Union that that the Respondent would not bargain with the Union over the implementation of the team model. Jt. Ex. 1(d). The HOCALJ asserted that the Respondent had no duty to bargain over the implementation of the team model, because there was no change to judges’ conditions of employment. Alternatively, he contended that any change would have a de minimis effect on the judges’ conditions of employment. *Id.*

The Respondent implemented the team model on January 19, 2016. Tr. 21; Jt. Ex. 1(e).

Reaction to the team model was overwhelmingly negative. The HOCALJ testified that he received more than 3,000 emails from ALJs complaining about the new team model. Tr. 173. “[A]lmost without fail, every email started with or ended with, ‘When I had my clerk’ or ‘If I had my clerk.’” *Id.*

Judge French and Judge Buck testified in great detail about problems they experienced using the team model system. Judge French testified that she encountered “numerous errors,” including improperly marked exhibits and overlooked withdrawal requests. Tr. 24-25. She also noticed that cases were not being updated and developed for hearing, and that aspects of her standing orders were not being followed. Tr. 26, 46. It was difficult to correct errors under the team model because supervisors did not respond to emails and it was not possible to determine which clerk was committing the errors. Tr. 24-25. In this regard, Judge French testified that she once reported an error to a supervisor and was told that the error could have been committed by “any number of people at any number of different times.”

Tr. 46-47. Similarly, Judge French testified that while the office computer system is supposed to indicate the clerks working on a particular case, the system is not accurate, as “[p]eople can work on the case [when] the case is not in their name.” Tr. 58-59.

Judge French indicated that the team model increased the amount of time she has to work on a claim file. In this regard, Judge French testified that she has had to spend extra time marking up exhibits, organizing documents, resolve issues pertaining to defective notices, and correct errors pertaining to case dismissals. Tr. 25, 64-65, 70-71. Reporting such problems also takes time, she testified, as it involves writing an email to a supervisor describing the problem and then spending more time to “wait to hear back from them to see which one of them is going to handle it and whether it’s going to be handled.” Tr. 25. The team model has also required Judge French to spend “time and attention managing my own docket because there is no one else to manage it.” *Id.* Finally, Judge French testified that the team model has made it more difficult to obtain assistance during a hearing. Prior to implementation of the team model, Judge French indicated that it was easy to get in touch with her clerk and have her come to the hearing room to resolve problems. But after the team model was implemented, judges had to rely on a “clerk of the day.” Sometimes the clerk of the day is unavailable, and the judge must “keep calling [others] until you can find someone.” Tr. 33-34.

With respect to the amount of extra work the team model has caused her to perform, Judge French testified that after the team model was implemented, she spent “a half hour to an hour per day” doing work that she hadn’t had to do before the team model was implemented. Tr. 26.

The increase in work caused by the team model has led Judge French to reduce the number of hearings she schedules. While she once scheduled an average of forty-nine hearings per month, she decided in July 2016 to schedule an average of forty-two hearings per month, because she was “spending so much extra time on dealing with clerical tasks and supervising [her] own docket.” Tr. 37. Given that this is lower than the forty-five hearings per month deemed “reasonably attainable” by ODAR’s chief ALJ, Judge French testified that she was concerned that her telework privileges are “in jeopardy.” Tr. 66-67.

Judge Buck’s experience under the team model was similar to Judge French’s. In this regard, Judge Buck testified that prior to implementation of the team model, she rarely had problems with her clerk failing to follow her standing orders or failing to mark exhibits. Tr. 88, 90-91, 105. After the team model was implemented,

Judge Buck encountered clerk errors “at least every other day.” Tr. 86. These errors included a failure to mark exhibits (a problem that has arisen at least once a week), a failure to follow her standing orders regarding the number of medical experts to appear on a hearing day, and a failure to use updated standing orders. Tr. 88-90. In addition, Judge Buck testified that there were hearings for which clerks failed to order interpreters. Tr. 93; GC Ex. 8. Those errors required Judge Buck to reschedule the hearings, making it more difficult for her to meet the scheduling expectation of forty-five hearings per month. GC Ex. 8. Judge Buck testified that clerks had failed to alert her to matters that required her attention. Tr. 93-94. Had the clerks acted properly, it might have been possible to resolve the matter without a hearing. Tr. 94. Judge Buck informed the HOCALJ of these problems in a September 16, 2016, email. GC Ex. 8. (The HOCALJ testified that the clerk acted correctly in one of the interpreter cases, but he otherwise agreed that the report of the clerks’ errors was accurate.) Tr. 143-46; *see also* Resp. Ex. 5.

Like Judge French, Judge Buck testified that the increased error rate under the team model required her to spend extra time reporting the problems and monitoring them to make sure they were resolved. Tr. 85-87. Judge Buck also indicated that errors in the marking of exhibits has required her spend extra time entering the exhibit numbers in draft decisions. Tr. 88. Overall, Judge Buck testified that after the team model was implemented, she has spent “an hour to an hour and a half a day . . . doing . . . tasks that I didn’t do before.” Tr. 87. Judge Buck added that she has not met the requirement that she average forty-five to fifty scheduled hearings a month, and that she is “very worried” about the possibility of losing her telework privileges in the future. Tr. 97.

Robert Tronvig, an ALJ in the SHO and a Union representative for the office (Tr. 115, 119-20), testified that, in his role as a Union representative, he has seen a number of written complaints from judges about the team model. Tr. 115-16. With respect to the effect that the team model has had on productivity, Judge Tronvig testified that he and other judges have reduced the number of hearings held, from seven per hearing day to six per hearing day. Tr. 120.

In addition, Judge Tronvig presented case processing data indicating that ALJ productivity decreased after Respondent implemented the team model. Comparing the data for the first eight months of 2015, before the team model was implemented, with the first eight months of 2016 (excluding June 2016, because Judge Tronvig was out on a long period of leave), ALJ Tronvig found that the average number of cases closed per month per judge dropped from 39.28 cases in

2015 to 31.07 cases in 2016. Tr. 117-18, 130; GC Ex. 9. Judge Tronvig acknowledged that his analysis was “simplistic” and did not account for “other variables that came into play.” Tr. 118. For example, while Judge Tronvig excluded the month of June 2016 from his count because he was on extended leave, he did not account for any other ALJ’s use of leave. Tr. 120. In addition, Judge Tronvig acknowledged that one of the ALJs listed in the February 2016 case processing data appeared to be an outlier, as he had only one case pending. Tr. 125. Nevertheless, Judge Tronvig argued that the data provided a “good indication of productivity” before and after the team model change was implemented. Tr. 118.

For his part, the HOCALJ acknowledged that ALJs now have to spend time correcting errors and resolving problems, but he asserted that “that’s the same as it was in the past,” before the team model was implemented. Tr. 176. When asked if implementation of the team model negatively impacted case process times, the HOCALJ testified: “I did not see any diminishing of my case preparations.” Tr. 172. While the HOCALJ acknowledged that other ALJs had raised legitimate complaints, he asserted that they were attributable to specific personnel, rather than implementation of a team model. *Id.*

The HOCALJ also testified that after the team model was implemented, it was discovered that some procedures set forth in the ALJs’ standing orders did not comply with ODAR policies (including the Electronic Business Process or EBP, which was introduced in 2009 or 2010) with respect to tasks assigned to clerks. Judge Buck and Judge Tronvig countered that the HOCALJ had not told them that their standing orders did not comply. Tr. 112, 131. Similarly, Judge French testified that she was not told that her standing orders regarding dismissals violated policy. Tr. 79. In addition, the HOD testified that no ALJ was disciplined for failing to follow the EBP. Tr. 206.

With respect to whether judges are at risk of losing their ability to telework, the HOCALJ testified that he has never officially counseled anyone about the loss of telework and has not terminated or reduced anyone’s use thereof. Tr. 137. Further, the HOCALJ testified that no ALJ was in jeopardy of losing telework approval. Tr. 138. However, the HOCALJ acknowledged that he has sent emails to ALJs reminding them that telework opportunities could be lost for failing to schedule enough hearings under Article 15 of the CBA. *Id.*

As for productivity at the SHO, the HOCALJ acknowledged that the data shows a decrease in the number of dispositions per day per judge, hearings held per day per judge, and scheduled cases per day per judge,

after the team model was implemented. Tr. 178-79; *see also* Resp. Ex. 3. However, the HOCALJ argued that these downward trends were attributable to four ALJs within the SHO. Tr. 178-79. With respect to hearings held per day, the HOCALJ testified that “for most of the judges the numbers have actually gone up.” Tr. 178.

When asked if the Respondent had sufficient personnel to go back to assigning each judge his or her own clerk, the HOCALJ indicated that the Respondent had sufficient personnel to do so only if clerks were not teleworking three days a week. Tr. 187-88.

The Respondent submitted a number of exhibits of email exchanges, most of which include complaints from judges about the team model and responses from management to the judges’ complaints.² *See* Resp. Ex. 4.1-4.33. For example, Respondent Exhibit 4.10 involves a June 9, 2016, email exchange that began with Judge French’s complaint to management that she had seen a number of cases with mislabeled records since the implementation of the team model. Haire responded:

Thank you for alerting us to the mislabeling of these records; we will bring it to staff’s attention.

However, this problem was as frequent under the traditional model as it is now under the [T]eam model. You may not have experienced this before, because the [clerk] who previously supported you is diligent in following . . . the [EBP]. Other experienced clerks are less conscientious in properly identifying records, and ALJs, such as yourself, are only now seeing their work product. . . .

While such errors may have been acceptable to the ALJs they previously supported, it is not acceptable to other ALJs or to management. Having you identify this as problematic helps dispel the misperception that this is a minor matter, which only management and some writers care about, and which doesn’t really affect the ALJ.

. . . .

² Some of the exhibits do not involve judges’ complaints about the team model. For example, one exhibit is an email conversation between managers. Resp. Ex. 4.5. Another exhibit is an email conversation between a manager and a clerk. Resp. Ex. 4.14. And several exhibits are email conversations about security guards, a matter unrelated to the team model. *See* Resp. Exs. 4.24 through 4.28.

Now that clerks are not assigned to support ALJs individually, no one ALJ is more impacted by a clerk's work than another. ALJs now provide feedback more regularly

Resp. Ex. 4.10 at 3.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) argues that by refusing to bargain over the impact and implementation of the team model, the Respondent violated § 7116(a)(1) and (5) of the Statute. GC Br. at 2. In this regard, the GC contends that when the Respondent implemented the team model, it ended the practice of assigning a clerk to each judge. Because the team model altered the way clerks interacted with and assisted ALJs, and because the team model increased the amount of time judges needed to spend monitoring cases and correcting clerk-related errors, the implementation of the team model changed judges' conditions of employment. *Id.* at 6.

The GC asserts that the effects and reasonably foreseeable effects of this change were greater than de minimis. In this regard, the GC contends that the Respondent should have known that under the team model, clerks would face a more complex environment. Specifically, clerks would be working for multiple judges with "different standing orders . . . and different needs and desires," and clerks would no longer be familiar with (or responsible for) all aspects of a given case. *Id.* at 7. Given this added complexity, the GC argues, it was reasonably foreseeable that clerk errors would increase under the new team model. *Id.*

Further, the GC argues that the actual effects of the change were greater than de minimis, as the team model requires judges to spend a significant amount of extra time – thirty to ninety minutes each day – monitoring their cases and resolving clerk-related errors. *Id.* at 7-8. Moreover, the GC argues that the extra work that the team model requires of judges caused them to reduce the number of hearings they hold each month, which in turn has puts them at risk of losing telework privileges. *Id.* at 8. The GC adds that the fact that ALJs have sent thousands of complaints to management about the team model provides further indicates implementation of the team model had greater than de minimis effects on conditions of employment. *Id.*

The GC contends that the Respondent failed to support its claim that it had no duty to bargain because the change was "covered by" the CBA. In this regard, the GC asserts that the Respondent failed to cite a

specific provision in the CBA that relates to the assignment of clerks, and that the Respondent failed to elicit testimony or provide other evidence indicating that the change was covered by the CBA. *Id.* at 9-10.

With respect to the remedy, the GC requests a retroactive bargaining order. *Id.* at 11.

Charging Party

The Charging Party contends that a status quo ante remedy is warranted because: the Respondent presented the implementation of the team model to the Union as a fait accompli; the Union requested bargaining; the Respondent willfully refused to bargain with the Union; the team model altered and significantly increased the amount of work judges must perform; and a return to the status quo would not cause disruption to the efficiency and effectiveness of Agency operations. CP Br. at 1-4. With respect to the last point, the Charging Party asserts that other hearing offices within the San Francisco region function without adopting the team model, and that under the MOU, management is allowed to increase telework opportunities for the clerks, but is not required to do so when the work of the Agency is impeded. *Id.* at 5-6. The Charging Party adds that the Respondent may not defend its actions on any good-faith belief that it had no duty to bargain over the implementation of the Team model. *Id.* at 2.

Respondent

The Respondent contends that it did not violate the Statute. Resp. Br. at 40. In this regard, the Respondent asserts that it did not change judges' conditions of employment when it implemented the team model, and that the "only difference is that the [j]udges are now supported by a team of [clerks] . . . rather than having one assigned clerk to support an individual [j]udge." *Id.* at 13-14 (citing *Nat'l Treasury Empls. Union*, 66 FLRA 577, 579 (2012) (*NTEU I*); *U.S. DHS, Border & Transp. Sec. Directorate, U.S. Customs & Border Prot. Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 173-75 (2004) (*Customs Tucson*); *U.S. Immigration & Naturalization Serv., Hous. Dist., Hous., Tex.*, 50 FLRA 140, 144 (1995) (*INS*)).

The Respondent argues that it was not reasonably foreseeable that the team model would increase judges' workloads and processing times, because a clerk should be expected to follow standing orders whether he or she is working for one judge or many judges, and because the team model impacted clerks, not judges. *Id.* at 18, 34. Further, the Respondent contends that the GC failed to demonstrate that implementation of

the team model resulted in ALJs losing telework privileges. *Id.* at 22-26.

The Respondent asserts that the implementation of the team model did not have greater than de minimis effects on judges' conditions of employment. *Id.* at 15-16. In this regard, the Respondent contends that there was "no actual . . . impact on the [judges'] workload," and that judges' testimony to the contrary was "speculative . . ." *Id.* at 16. In addition, the Respondent argues that the claim that the team model caused judges to do more work is inconsistent with data regarding the Sacramento Hearing Office's productivity. *Id.* at 19. Moreover, the Respondent claims that Judge Tronvig's calculations regarding judges' productivity are not reliable as he admitted that his calculations were simplistic. *Id.* at 20.

The Respondent contends that Respondent Exhibits 4.1-4.33, which it describes as "a sample of the thousands of complaints" from judges to management concerning the team model, are really complaints about the failure of clerks to follow either the EBP or judges' "personal idiosyncrasies." *Id.* at 32. The Respondent adds that "most of the complaints" pertain to problems that existed prior to implementation of the team model. *Id.* (citing Resp. Ex. 4.10 at 3).

The Respondent argues that to the extent judges were told that their standing orders did not comply with the EBP, any changes to those standing orders had nothing to do with the implementation of the team model. *See id.* at 30-31.

To support its "de minimis" arguments, the Respondent cites: *Nat'l Treasury Empls. Union*, 64 FLRA 462, 464-65 (2010) (*NTEU II*); *AFGE, Local 1164, AFL-CIO*, 63 FLRA 292, 298 (2009) (*AFGE*); *Customs Tucson*, 60 FLRA at 173-75; *SSA, Office of Hearings & Appeals, Nashville, Tenn.*, 58 FLRA 363 (2003) (*SSA OHA*); *U.S. Dep't of HHS, SSA, Balt., Md.*, 36 FLRA 655, 677 (1990) (*SSA Balt.*); *U.S. Dep't of Labor, Wash. D.C.*, 30 FLRA 572, 579-80 (1987) (*DOL*).

In addition, the Respondent argues that it had no obligation to bargain because "the assignment of work and providing necessary support to the [j]udges" are covered by the CBA. Resp. Br. at 35-36 (citing *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) (*BOP*)). In this regard, the Respondent asserts that the parties previously bargained over "all of the procedures and appropriate arrangements of the Respondent's statutory right to assign work . . ." *Id.* at 36. Similarly, the Respondent asserts that the CBA "sets forth the procedures and appropriate arrangements the Agency will follow when assigning work and

permitting Judges to telework." *Id.* at 37. At the same time, the Respondent asserts that it is "not positing that any time it assigns work, it will never have a duty to bargain." *Id.* at 36.

The Respondent argues that a status quo ante remedy is unwarranted. *Id.* at 38. In this regard, the Respondent asserts that ordering the Agency to return to assigning each ALJ a specific clerk would "interfere with management's responsibility to comply" with the MOU allowing clerks to telework three days a week. *Id.* at 39. The Respondent asserts that denying clerks the privilege of teleworking three days a week would "deflate the moral[e] of [the] staff," which in turn "could negatively affect the efficiency of claims moving through the hearings process . . ." *Id.* The Respondent adds that there is no evidence that its conduct was willful. *Id.*

PRELIMINARY MATTER

At the hearing Judge French testified about an email that was not in the record and the parties were granted leave to submit additional exhibits for the record through November 4, 2016. Tr. 53-54, 220. On October 13, 2016, the parties submitted additional exhibits. There was no controversy with respect to two of the documents, which are entered into the record as General Counsel Exhibit 10 and Respondent Exhibit 5.

However, the exhibit marked Respondent Exhibit 6, was a post-hearing email exchange between Teresa Bowen, one of the Agency's representatives in this case, and Shelley Ganaway, an administrative supervisor. Tr. 143. In the October 7, 2016, email, Bowen asked Ganaway whether Judge French's statements set forth in General Counsel Exhibit 10 were accurate. In her response dated October 12, 2016, Ganaway asserted that Judge French's statements were accurate, but also contended that the statements were overly broad. The General Counsel and the Charging Party argue that Respondent Exhibit 6 should be excluded from the record because the emails were exchanged post hearing and because the Respondent could have called Ganaway to testify at the hearing, where she would have been subject to cross-examination.

The Authority has held that it is proper to exclude a person's post-hearing written statement when that person could have been called to testify at the hearing. *VA Med. Ctr., Phx., Ariz.*, 24 FLRA 758, 758 n.* (1987). Here, the Respondent could have called Ganaway to testify at the hearing, but the Respondent did not do so and offers no reason for that failure. Thus, admitting a post hearing response from Ganaway would prejudice the General Counsel and the Charging Party,

because neither party had an opportunity to cross-examine Ganaway. *See Id.* at 758 n.*. Moreover, the leave to file exhibits post-hearing was not granted for the purpose of generating new evidence, it was to allow submission of documents referenced in testimony that were not in the record. Based on the foregoing, I deny the Respondent's motion to have exhibit 6 entered into evidence.

ANALYSIS AND CONCLUSIONS

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *See U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999). When, as here, 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 impact and implementation of that decision, if the resulting change has more than a de minimis effect on conditions of employment. *U.S. DOI, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015).

The Agency Changed Conditions of Employment

The Respondent argues that it did not change judges' conditions of employment when it implemented the team model, and that it therefore had no duty to bargain with the Union over the implementation of the new team model. The determination of whether a change in conditions of employment occurred requires a case-by-case analysis and inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment. *Customs Tucson*, 60 FLRA at 173.

As the HOCALJ admitted, the Respondent's implementation of the team model "restructured the office" Tr. 160. The testimony presented at hearing also demonstrated that ALJs working within the office were adversely affected by the restructuring. Specifically, the implementation of the team model changed judges' conditions of employment by depriving each judge of his or her own clerk, someone who, as Judge French testified, could operate as a judge's "right-hand person" Tr. 24. Many aspects of the way judges worked and were assisted by clerks were altered as a result of this change. Prior to the implementation of the team model, judges and clerks communicated regularly and directly, making it easy for them to work as a team to spot issues and resolve problems within a particular case quickly and efficiently. If a judge needed a clerk's help at a hearing, it was easy to contact the clerk and have him or her come to the

hearing room. Each judge could rely on his or her clerk to assist with managing the judge's docket. Further, because each clerk worked only for a single judge, it was easy for a clerk to learn and follow his or her judge's standing orders and procedures. Moreover, each clerk was responsible for all clerical aspects of each case, and responsibility was obvious when a clerk made a mistake. In addition, a judge could easily correct his or her clerk so that the error would not happen again. Thus, clerks were highly accountable for their work product.

After the team model was implemented, each judge lost his or her clerk, or "right-hand person," and instead had to rely on a pool of clerks. If a problem arose, a judge could not just troubleshoot the matter with his or her clerk. Rather, the judge would have to send an email to an administrative supervisor and then wait for the administrator to report back to see if the problem was resolved. Tr. 25. Similarly, if a problem arose at a hearing, a judge had to rely on the "clerk of the day," a system that proved unreliable. Tr. 33-34. Judges no longer had a clerk to assist with managing his or her own docket. Tr. 25. Further, because clerks worked for all judges in the SHO, it was more difficult for clerks to become familiar with each judge's specific standing orders and procedures, resulting in errors. *See Tr.* 85-86. In addition, clerks under the team model were responsible only for portions of each case, and if an error occurred, it was sometimes difficult to determine which clerk committed it. As such, and as clerks did not work directly for a specific judge, clerks under the team model were less accountable than they were before implementation of the team model. *See Tr.* 23-25, 198. In sum, the team model changed the way judges worked with and were assisted by clerks, and this change altered a number of aspects of judges' conditions of employment.

To support its claim that no change occurred, the Respondent cites several decisions in which no change to conditions of employment was found. *See NTEU I*, 66 FLRA at 580 (increase in employee workload not caused by agency-implemented change); *Customs Tucson*, 60 FLRA at 173-74 (while employees' workload increased, respondent did not change employees' duties, and the respondent did not implement policies or practices that changed employees' conditions of employment); *INS*, 50 FLRA at 144 (because the respondent had routinely reassigned employees to different shifts, the assignment of employees to a specific shift did not change employees' conditions of employment). Obviously, these cases are factually distinguishable from the present case, where the Respondent's change altered the ALJs' conditions of employment. Because the facts in the decisions cited by the Respondent are unlike the facts in this case, the Respondent's reliance upon those decisions is misplaced.

Based on the foregoing, I find that the implementation of the team model changed the conditions of employment for ALJs assigned to the SHO.

The Change Had Greater Than De Minimis Effects on Conditions of Employment

The Respondent asserts that the effects, or reasonably foreseeable effects, of implementing the new team model were not greater than de minimis.

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. 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 employees' conditions of employment. *AFGE, Nat'l Council 118*, 69 FLRA 183, 187-88 (2016).

The Authority has found changes to have only a de minimis effect where they have little significance and impact, such as the reassignment of an employee from one position back to the employee's previous, substantially similar, position, or the discontinuation of an assignment involving only a small amount of work. Conversely, the Authority has found a change to have a greater than de minimis effect when it involves a change in conditions of employment that is more significant, such as where: employees are assigned additional tasks which they did not perform before, employees' workloads are increased significantly, or employees' regular schedules or work hours are altered. *NFFE, IAMAW, Fed. Dist. 1, Fed. Local 1998*, 69 FLRA 586, 589-90 (2016).

It should have been clear to the Respondent that depriving each judge of his or her clerk, or "right-hand person," would have significant effects on the judges' conditions of employment. Under the team model, judges no longer had a dedicated assistant to help them spot issues, resolve problems, and manage dockets, and thus would have to perform more clerical work for themselves. It also should have been apparent that the team model would make clerical errors more likely and require the judges to spend more time fixing and reporting on those errors. Specifically, the Respondent should have known that with a single clerk no longer responsible for all aspects of a case, and no longer directly answering to a single judge, accountability would suffer and make it more likely that errors would increase. That clerks would rotate teams every six months, and that clerks would have to be familiar with the standing orders of every ALJ in the SHO, also made it more likely that clerical errors would increase.

Further, it should have been clear to the Respondent that it would be harder under the team model for judges to correct such errors, because instead of talking directly with his or her assigned clerk, each judge had to email an administrative supervisor and resolve the problem indirectly. Accordingly, the Respondent should have known that implementation of this team model would increase the amount of clerical work judges had to perform and thereby reduce their ability to hear and decide cases timely. Thus, I find that it was reasonably foreseeable that the implementation of the team model would have more than a de minimis effects on the judges' conditions of employment.

The team model had significant effects on judges' conditions of employment. The changes prompted by the team model led to an increase in the number of clerk errors (including a failure to follow standing orders), and judges had to spend a significant amount of time fixing those errors and reporting those errors to management. The team model increased the amount of time judges had to work in other ways as well. For example, in the absence of an assigned clerk, judges had to manage their dockets on their own. Similarly, without an assigned clerk, it has been harder for judges to obtain assistance during a hearing. I fully credit Judge French's and Judge Buck's detailed testimony indicating that the team model resulted in judges working an extra thirty to ninety minutes each day. Tr. 26, 87. And even while the HOCALJ reported no increase in the clerical work required of him, he acknowledged that other ALJs experienced problems with the team model, causing them to submit thousands of complaints to management. Tr. 172-73.

With more clerical work to perform and more clerk errors to resolve, judges working under the team model had less time to hold hearings, and thus have been at a greater risk of failing to hold enough hearings and jeopardized the option to use telework. Tr. 37, 66-67; see also Tr. 120; GC Ex. 8. And while the HOCALJ asserted that judges are not at risk of losing their telework privileges, the fact remains that Agency guidance makes it clear, that judges can lose telework privileges for failing to schedule enough hearings.

The Respondent argues that any change caused by the team model had only de minimis effects on judges' conditions of employment, but that argument is unconvincing. The Respondent asserts that the ALJs' testimony is contradicted by the Agency's productivity data. However, the productivity data actually demonstrates that the team model reduced productivity in the SHO. Decreasing the dispositions per day per judge, hearings held per day per judge, and scheduled cases

per day per judge. Resp. Ex. 3. Because the Agency's data generally shows that there were decreases in office productivity after the team model was implemented, the Agency's data confirms, rather than contradicts, the testimony of the ALJs. Further, while I agree that Judge Tronvig's calculations were not especially sophisticated, it is nevertheless notable that his data matched the Agency's data in showing a decrease in productivity since the implementation of the team model, providing additional corroboration of Judge French's and Judge Buck's testimony. While the HOCALJ testified that the productivity of most ALJs increased, that assertion is difficult to credit as it was not supported by the actual data. See Tr. 178-79. To the extent the Respondent attempted to demonstrate no loss of productivity by comparing the SHO to national averages, this methodology ignores the clear reduction in year-to-year productivity numbers within the SHO. The fact that the SHO remains more productive than the national average means little when it ceases to exceed the national average by the same amount previously achieved within the same office. Frankly, given the demonstrated reduction in performance within the SHO from year-to-year, the most vexing question is why a ULP complaint is even needed for the Agency to conclude that implementation of the team model was a mistake that needs to be fixed, as it is clear that this office's decision to allow additional telework for the hearing office clerks has made the hearing office less productive.

The Respondent also asserts that the emails in the record show that the team model did not change judges' conditions of employment. As an initial matter, I note that my decision does not rely heavily on the emails in the record, as they represent bits of conversations, sometimes taken out of context, and mostly containing back and forth accusations that shed little light on the issues in dispute. Moreover, the emails submitted by the Respondent represent only a small sample of the thousands of complaints management received about the team model. Resp. Br. at 32. With that said, I find one of Haire's June 2016 emails to Judge French to be most revealing. After asserting that mislabeling errors occurred at the same rate before and after the implementation of the team model (a self-serving and unsubstantiated claim), Haire indicates that the team model impacted the ALJs' conditions of employment, stating: "Now that clerks are not assigned to support ALJs individually, no one ALJ is more impacted by a clerk's work than another." Resp. Ex. 4.10 at 3. An equitable impact is an impact nonetheless, and the fact that the ALJs bore the brunt equally does not demonstrate that no adverse impact occurred.

The Respondent contends that any changes experienced by the ALJs were due to the Respondent

enforcing the EBP, rather than the implementation of the team model. However, the Respondent has failed to demonstrate how the changes judges experienced after implementation of the team model were attributable to the EBP. See Tr. 159, 167-68. Further, Judge French, Judge Buck, and Judge Tronvig all indicated that the changes they experienced were unrelated to the EBP. See Tr. 79, 112, 131; see also Tr. 206. Accordingly, I find that the Respondent's argument is without merit.

The Respondent cites a number of Authority decisions in which changes were found to be de minimis to support its claim that the implementation of the team model had only de minimis effects on judges' conditions of employment. But these cases are factually distinguishable from the case at bar. Several of these decisions involve changes that did not clearly increase employees' workloads, or changes that increased employees' workloads only slightly, or were otherwise trifling. See *NTEU II*, 64 FLRA at 465 (little evidence that change resulted in additional work); *AFGE*, 63 FLRA at 297 (agency caused change that caused a "relatively small" increase in workload); *SSA, OHA*, 58 FLRA at 363-64 (mere change in the method of identifying and locating documents in a file were de minimis); *DOL*, 30 FLRA at 579-80 (assigning employee a small amount of additional typing duties, while proportionally reducing employee's former duties, only a de minimis change). These minor changes are obviously different from those present in this case, where the team model increased the amount of clerical work judges had to perform each day.

The Respondent also relies on *Customs Tucson*, where the Authority found that a change that increased employees' workloads was nevertheless de minimis, in part because the respondent took steps to mitigate the increased workload, and in part, because the change did not require employees to perform new duties. 60 FLRA at 175-76. In our case, however, the Respondent did nothing to mitigate the increase in judges' workloads. Moreover, while the Respondent did not formally assign judges new duties, the change did require judges to perform new tasks which judges previously had not had to perform by themselves. See Tr. 23-24. Given these differences, the Respondent's reliance on the above case is misplaced.

Finally, the Respondent cites *SSA Balt.*, a case in which the Authority held that a change affecting work relationships was de minimis, since those relationships were unrelated to the actual performance of employees' work. 36 FLRA at 666-67. In this case, however, the team model changed the ways judges worked with and were assisted by clerks, and as shown above, these changes have significantly affected the ways judges have to perform their work. For this reason, *SSA Balt.*, is

factually distinguishable from our case, and the Respondent's reliance on the above case is misplaced.

Based on the foregoing, I find that the implementation of the team model had greater than de minimis effects on judges' conditions of employment.

The Change Was Not Covered by the CBA

The Respondent argues that it had no obligation to bargain over the implementation of the team model because the change was covered by the CBA.

The "covered by" doctrine provides a defense to a claim that an agency violated the Statute by unilaterally changing conditions of employment. Under the Authority's covered-by doctrine, a party is not required to negotiate over terms and conditions of employment that have already been resolved through bargaining. The covered-by doctrine consists of two prongs. Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in the agreement. The Authority does not require an exact congruence of language. Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute. *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 69 FLRA 512, 515-16 (2016). If the agreement does not expressly contain the matter, then, under the doctrine's second prong, the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 69 FLRA 261, 264-65 (2016). In evaluating the second prong of the doctrine, the Authority will examine all record evidence to determine whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000). This includes a consideration of the parties' intent and bargaining history. In order to satisfy the second prong, a matter must be more than tangentially related to the contract provision. Rather, the party asserting the "covered by" argument must demonstrate that the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the agreement that the negotiations that resulted in that provision are presumed to have foreclosed further bargaining over the matter. *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 126 (2011).

The Respondent asserts that converting the SHO to the team model was covered by the CBA because Article 3 of the CBA addresses management rights, including the assignment of work. *See* Resp. Br. at 35-36; Jt. Ex. 1. While Article 3 states generally that management has the right to assign work

and that the right to assign work shall not bar negotiations over procedures and appropriate arrangements, Article 3 does not describe the ways that management should assign clerks within a hearing office, and thus does not contain language expressly related to the team model. Jt. Ex. 1(a). Moreover, while the implementation of the team model implicates management's right to assign work, no reasonable reader would conclude that Article 3, a generic management rights provision, settles all matters implicating management rights. Indeed, the Respondent admits as much in its brief. Resp. Br. at 36. For these reasons, I find that the team model is not covered by Article 3 of the CBA under the first prong of the covered-by doctrine.

As for the second prong of the doctrine, there is no indication that the assignment of clerks under the team model is inseparably bound up with, and thus plainly an aspect of, the generic management rights provision of Article 3. In this regard, there is no evidence, and the Respondent cites none, indicating that the parties intended Article 3 to foreclose bargaining over the assignment of clerks within a hearing office. Indeed, it is a stretch to say that the assignment of clerks under the team model is even tangentially related to the generic management rights provision of Article 3. Finally, because Article 3 of the CBA is a generic management rights provision, Article 3 is completely unlike the contractual provisions at issue in *BOP*, which pertained to the specific procedures for the scheduling and assignment of work at the respondent's facilities. 654 F.3d at 93-96. Accordingly, the Respondent's reliance on *BOP* is misplaced. Based on the foregoing, I find that the implementation of a team model for office operations was not covered by Article 3 of the CBA under the second prong of the covered-by doctrine.

The Respondent also asserts that the team model was covered by the CBA because Article 13 of the CBA provides that management "has the authority to provide necessary support staff for the Judges." Jt. Ex. 1(a) at 50. While this clause indicates that management has the authority to provide support staff (including clerks), and while the team model pertains to the assignment of clerks, Article 13 does not expressly describe the ways in which management will assign clerks within an office, and thus does not contain express language pertaining to the assignment of clerks under the team model. Further, because Article 13 is silent with respect to the ways management will assign clerks within an office, no reasonable reader would conclude that Article 13 settles a dispute about how clerks are assigned under the team model office system. For these reasons, I find that implementation of the team model was not covered by Article 13 of the CBA under the first prong of the covered-by doctrine.

As for the second prong of the doctrine, the assignment of clerks under the team model is not inseparably bound up with, and thus plainly an aspect of, Article 13, which is silent with respect to the assignment of clerks. Further, there is no evidence, and the Respondent cites none, indicating that Article 13 was intended to foreclose bargaining over the assignment of clerks within a hearing office. And while the team model and Article 13 pertain to clerks, at most there is a tangential connection between the team model and Article 13. For these reasons, I find that implementation of the team model is not covered by Article 13 of the CBA under the second prong of the covered-by doctrine.

Finally, the Respondent argues that implementation of the team model was covered by Article 15 of the CBA, which pertains to telework, because the team model system “sets forth the procedures and appropriate arrangements the Agency will follow when . . . permitting Judges to telework.” Resp. Br. at 37. But the Respondent does not support this claim. Specifically, the Respondent does not cite any language in Article 15 that expressly pertains to the assignment of clerks within a hearing office, and the Respondent does not cite any evidence indicating that the assignment of clerks within a hearing office is a matter that is inseparably bound up with matters pertaining to telework. To the extent the Respondent is arguing that the team model is covered by Article 15, Section (7)(l)(3) of the CBA, the argument is also unfounded. As noted above, Article 15, Section (7)(l)(3) of the CBA provides that if the employer determines that a judge has not scheduled a “reasonably attainable” number of cases for hearing, then the employer may restrict the judge’s telework. Jt. Ex. 1(a) at 66. Obviously, this clause does not expressly pertain to the ways in which management will assign clerks within an office. Moreover, there is no evidence that the parties intended this clause to pertain to the assignment of clerks within an office, such that bargaining over the subject would be foreclosed. That implementation of the team model negatively affected the ability of judges to schedule hearings is at most, a tangential connection between the team model and Article 15, Section (7)(l)(3) of the CBA, and is not enough to establish that the team model was covered by that provision. For these reasons, I find that implementation of the team model was not covered by Article 15 under both prongs of the covered-by doctrine.

REMEDY

With respect to the remedy, the General Counsel asks for a retroactive bargaining order, while the Charging party requests a return to the status quo. For the reasons below, I find a status quo ante remedy to be appropriate.

Where an agency has changed a condition of employment without fulfilling its obligation to bargain over the impact and implementation of that decision, the Authority applies the criteria set forth in *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (*FCI*), to determine whether a status quo ante remedy is appropriate. The Authority examines requests for status quo ante relief by balancing the nature and circumstances of the violation with the degree of operational disruption that the remedy would have on the agency. *Id.* Specifically, the Authority examines: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining; (3) the willfulness of the agency’s conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency’s operations. *Id.*

Nearly all the *FCI* factors favor a status quo ante remedy. While the Respondent notified the Union that it planned to implement the team model (Jt. Ex. 1(b); see also GC Exs. 1(b), 1(c)), the Respondent provided that notice just weeks before the transition to the team model was to begin, and less than a month before the team model was implemented. Upon receiving written notice of the change, the Union promptly requested bargaining, even though the Respondent presented the implementation of the team model as a *fait accompli* at their December 4, 2015, meeting and in the December 21, 2015, letter. The Respondent acted willfully, as it intentionally refused to bargain with the Union. Jt. Ex. 1(d). Further, the fact that the Respondent erroneously believed that it had no obligation to bargain does not indicate that its actions were not willful. *U.S. Dep’t of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000). As discussed above, the implementation of the team model negatively affected judges in the SHO in significant ways. It increased their workload by thirty to ninety minutes a day, leaving them less time to hold hearings and make decisions, which in turn put them at risk of losing their telework privileges.

Moreover, a status quo ante remedy will not disrupt or impair the efficiency and effectiveness of the Respondent’s operations. The HOCALJ acknowledged that there were sufficient personnel to support a return to the status quo if clerks were not given increased telework opportunity, and it is likely that office productivity will increase and return to the level it was prior to the team model implementation. Tr. 187-88; Resp. Ex. 3.

The Respondent asserts that a status quo ante remedy would “interfere with management’s responsibility to comply” with the MOU. Resp. Br. at 39. It is difficult to evaluate that claim, however, since the MOU is not in the record. And while the HOCALJ asserted that “we would not be able to allow an individual to telework [three] days a week and still support a one-to-one clerk to judge model,” (Tr. 187-88), it is unclear whether a status quo ante remedy would require the Agency to significantly reduce the number of telework opportunities for clerks. More importantly, the Respondent’s other hearing offices did not implement changes to office operations in response to the MOU relied upon by this HOCALJ. Thus, the conflict between the MOU and prior office operations appears to have been created by the HOCALJ’s interpretation of the MOU, rather than Agency-wide guidance regarding the implementation thereof. In short, the MOU relied upon by the Respondent apparently provided a flexibility that other hearing offices elected to not apply precisely because doing so would have impacted employees in other bargaining units within the office.

Based on the factors set forth in *FCI*, and the absence of reasons to the contrary presented by the Respondent, a status quo ante remedy is appropriate in this case. Given the Respondent’s willingness to present the change in office operations as a *fait accompli*, and its flawed understanding of its bargaining obligations, I believe that a status quo ante remedy will deter the Respondent from failing to satisfy its bargaining obligations in the future. Accordingly, a status quo ante remedy is ordered.

CONCLUSION

I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing the team model without first bargaining over the impact and implementation of that change.

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Social Security Administration, Office of Disability Adjudication and Review, Sacramento, California, shall:

1. Cease and desist from:

(a) Implementing changes affecting the working conditions of bargaining unit employees without

first providing the International Federation of Professional and Technical Engineers, Association of Administrative Law Judges (Union), with notice and an opportunity to bargain to the extent required by the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Rescind the January 19, 2016, implementation of the team model office process.

(b) Upon request, bargain with the Union over the impact and implementation of the team model office process.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, and shall be posted and maintained for sixty (60) consecutive days in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) In addition to physical posting of paper notices, notices shall be distributed electronically, on the same day, as the physical posting, by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

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

Issued, Washington, D.C., May 22, 2017

CHARLES R. CENTER
Chief Administrative Law Judge

**NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Social Security Administration, Office of Disability Adjudication and Review, Sacramento, California, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement changes affecting the working conditions of bargaining unit employees without first providing the International Federation of Professional and Technical Engineers, Association of Administrative Law Judges (Union), with notice and an opportunity to bargain to the extent required by the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL rescind the January 19, 2016, implementation of the team model office process.

WE WILL upon request, bargain with the Union over the impact and implementation of the team model.

(Agency/Respondent)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 470, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.