UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	Case No. WA-CA-80267

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 7, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: March 8, 1999
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 8, 1999

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: JESSE ETELSON
ADMINISTRATIVE LAW JUDGE

SUBJECT: SOCIAL SECURITY ADMINISTRATION

Respondent

and Case No. WA-CA-80267

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the transmittal form sent to the parties, and the service sheet. Also enclosed are the transcript, exhibits and briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
OALJ 99-18
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES Charging Party	Case No. WA-CA-80267

Thomas F. Bianco, Esquire
Beth Ilana Landes, Esquire
For the General Counsel

Wilson Scheurholz, Labor Relations Specialist
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint in this case alleges that the Respondent, Social Security Administration (SSA), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute). The substance of the alleged violation is that SSA combined "index of dollar accuracy reviews" with "stewardship reviews," resulting in reducing the time within which bargaining unit employees must complete stewardship reviews, without responding to a bargaining request from the Charging Party (the Union) and without giving the Union appropriate notice and an opportunity to bargain over implementation procedures and appropriate arrangements for adversely affected employees.

SSA's answer admitted all the jurisdictional and factual allegations of the complaint except that it denied that the combining of the reviews resulted in reducing the completion

period as alleged. SSA also denied that it implemented the "change" without responding to the bargaining request and without giving the Union appropriate notice and an opportunity to bargain. However, SSA actually admits that it responded to the bargaining request by stating that there was no need for negotiations. SSA's defense is that there was no change in employees' conditions of employment or, in the alternative, that any such change was *de minimis* in nature.

A hearing on the complaint was held in Washington, DC, on November 18, 1998.[1] Counsel for the General Counsel and for SSA filed post-hearing briefs.

Findings of Fact

A. Background

SSA has a component called the Office of Quality Assurance (OQA). Its functions are to (1) measure the accuracy of SSA's program, payments, and performance and (2) to develop recommendations for program enhancements--policy simplifications and ways to make the program work better for the people who receive benefits. OQA operates through regional offices, where its employees conduct the quality reviews that provide the information used to report on the accuracy of the programs. (Tr. 107-08.)

OQA conducts two types of reviews. One, the "stewardship review," is a measure of the accuracy of all payments to a cross-section of beneficiaries of the program. Such a review is designed to identify and quantify errors in payments. In order to relate such errors to actions that SSA employees were taking, OQA designed a second type of review, called an "index of dollar accuracy review" (IDA review). An IDA review focuses on current actions taken by employees in SSA field offices throughout the country, in an attempt to determine (1) the accuracy of payments and (2) what happened in the course of developing information in individual cases that led to any errors that were found. (Tr. 43, 108-09.) Both types of reviews are conducted in "stratified random samples" of benefit recipients--samples that reflect the geographical distribution of the recipients (Tr. 110-13.)

1
The transcript of the hearing is hereby corrected as follows: On the "Index" page, Mr. Bianco should be listed as appearing on behalf of the General Counsel, Mr. Scheurholz on behalf of the Respondent. On page 35, line 22, the objection was made by Mr. Bianco. On page 58, line 13 should begin: "would *not* be getting the folders . . . ."

The employees who conduct these reviews are social insurance specialists, typically at the GS-12 grade level. These employees work out of OQA's ten regional offices.

B. Pre-October 1997 Procedures

IDA reviews have been conducted in stages. First, the social insurance specialists did "process reviews," consisting of examining the selected benefit recipients' files maintained by the field offices that had processed those recipients' claims. These files contained information about the recipients' income, resources, and property. The specialists then conducted "field reviews," traveling through the states covered by their respective regional offices to interview recipients and "collateral contacts," such as employers, family members, and financial institutions, to verify the information in the files. Finally, back in the regional offices, the specialists combined the information they had received and "wr[o]te up" each case by completing a 26-page form called an "8508" that included an interview questionnaire and the information they had acquired from other sources, including the field office file and computerized data. The specialists then entered data in the OQA database and, finally, turned the 8508 over to their team leaders. (Tr. 43-50, 91.)

Stewardship reviews were conducted in a similar manner, except that no field office file was provided to the social insurance specialists. When conducting both types of review, the specialists attempted to obtain all the information required from "collateral contacts" as part of the field review. However, they were not always able to obtain the requested information while still in the field and had to await it, after returning to their regional offices, before completing their 8508's. (Tr. 47-48, 53-54, 65-66.)

The databases for each IDA review "closed" at the end of the fiscal year in which that review was initiated. The specialist conducting such a review was required to complete it within a period of a few months after the fiscal year ended and the database closed. Thus, a review assigned in October 1996 had to be completed around

February 1998, and so would a review assigned anytime later in fiscal year 1997. (Tr. 52-3.)[2]

C. Announcement and Implementation of the Alleged Change

SSA and the Union (the exclusive representative of an appropriate unit of SSA employees) have both a national collective bargaining agreement and a national partnership agreement. The partnership agreement contemplates periodic meetings of the parties' National Partnership Council (NPC). At an NPC meeting on September 4, 1997, management representative Patty Robidart briefed the participants on "Combining the IDA/Stewardship Review" (Jt. Exh. 1). According to the minutes of the meeting (Jt. Exh. 1), prepared by management but subject to approval after review by both parties, this item was addressed as follows:

> The purpose of this activity is to develop a common database that will have common information from both reviews. The common information will be used to enhance and enrich any analysis and reports associated with these two reviews.
>
> In addition, the combining will enable reviewers to plan their travel schedules.
>
> It was noted that the current sample size for IDA and stewardship will not change. Furthermore this activity will be transparent to the reviewers.
>
> Finally, all members recognized that this briefing does not in any way compromise the union's or management's contractual obligations under the national agreement.

Earl Tucker is the president of the Union's Council 224, which represents OQA employees. Tucker was one the Union's participants at the September 4 NPC meeting. He testified that he understood from the briefing that combining the reviews meant placing both reviews in a single database (Tr. 23-24). Tucker also testified that he did not know what was meant by Robidart's statement that "this activity will be transparent to the reviewers" (Tr.

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[2] According to the transcript of the hearing, Social Insurance Specialist Steven Miller testified (Tr. 52) that a review assigned in October 1996 had to be completed "about February of *1997*." However, the testimony surrounding this statement convinces me that the correct date is February 1998.

33). OQA Dallas Regional Director Dave Crawford, who attended the September 4 meeting as a management participant, testified that he understood the statement to mean that the "activity" of combining the database did not relate to the number of cases to be reviewed or the way the reviewers (the social insurance specialists) process cases, so that the reviewers "would never have known that [the combination of databases] had happened, had this briefing not occurred, or some other communication gone out to them" (Tr. 122-23).

On September 30, 1997, Tucker wrote to Sheila Brown, a facilitator in SSA's Office of Labor-Management and Employee Relations, requesting formal notice to the Union and bargaining on the agency plan "to combine [IDA] and stewardship reviews." Tucker's letter states that, "[i]n addition to combining the samples, you are also considering reducing the size of each sample. Once this is accomplished, the savings could then be transferred to other SSA components. If true, I am appalled by [this] turn of events especially in light of the possible adverse impact on employees." (Jt. Exh. 2.) Tucker testified that, although Robidart had stated at the September 4 briefing that the size of the samples would not change, Union officials had told him that the sample size was to be reduced (Tr. 34).

Sheila Brown responded to Tucker's letter, reiterating some of the points included at the September 4 briefing, including the statement that there were no plans to change the sample sizes. Brown's response concludes:

> Considering the information that has [al]ready been shared, we do not believe any further discussions are warranted. Also[,] since there is no impact on the employees, the need for any negotiations is obviated.

According to the pleadings (paragraph 11 of the complaint, which is admitted) SSA combined the IDA reviews and the stewardship reviews on October 1, 1997. What the combination actually involved is in dispute, and this dispute is what this case is all about.

D. The Nature and Effect of the Combination

1. The General Counsel's Evidence

Social Insurance Specialist Steven Miller testified that, about the end of October or the beginning of November 1997, his team leader, Troy Donlow, called a team meeting at which she announced that the time frames for both the

IDA and the stewardship reviews were being shortened so that they were expected to be completed soon after the end of the quarter-year following the quarter-year in which they were assigned. Thus, a review assigned during the first calendar quarter would be due "around" July. (Tr. 55-57.) Although no official document codified the new deadlines, "banners" were placed in the Dallas regional office, where Miller worked, announcing successive deadlines as, for example, 7/31/98 and 10/31/98 (Tr. 85).

Miller testified further that he was told that, in some cases, the reviewers would no longer be getting the recipients' files when they conducted IDA reviews--that IDA reviews would be treated basically the same as stewardship reviews. The information the reviewers received from within SSA would, from then on, come from computer screens. This information was not, in many cases, as complete or the same as the information in the files, and required verification. The files may still be obtainable, but at an extra expenditure of time. Nor are the field office files always available. (Tr. 58-59, 73-76, 92-98.)

From Miller's prospective, these developments "[d] rastically" changed the way the specialists conducted the IDA reviews (not the stewardship reviews). Although the IDA field reviews were unchanged, the inputting of data was affected. When the deadlines approach, there is "a great push just to input cases," entering cases as "no error" cases (cases in which there had been neither overpayment nor underpayment), after which such cases are considered "cleared," although information received later indicated that there had been "error." (Tr. 59-61, 69-72). Miller testified that he felt obliged to close cases within the deadline even when the verification of information he was inputting was incomplete (Tr. 67-68).

Because of the shorter "deadlines," it is not unusual for information about a case to be received after it has "cleared." This results in the specialists having to make changes in the database, thus continuing to work on old cases while assigned to new cases. (Tr. 61-66.) Further, according to Miller, IDA reviews require more time because the specialists no longer receive the field office files and must go to the computer database to obtain comparable information (Tr. 67). Miller testified that these effects represented not only his personal experience but also that of other employees who have so informed him, both as a

Union steward and as a fellow employee (Tr. 68).[3] One further result of this change, according to Miller, has been that employees from another team have been assigned to help Troy Donlow's team (Tr. 68-69).

2. SSA's Evidence

Dave Crawford, Director of OQA's Dallas Regional Office, testified that the IDA and stewardship reviews remained distinct after October 1997 and were not changed. What changed was that the databases for the two types of review were combined into a single database, providing a larger sample for extracting information about particular classes of recipients. There was no change in the number of reviews to be conducted. (Tr. 119-21.) The duties, work locations, daily breaks, lunch schedules, appraisals, and opportunities for awards were unchanged (Tr. 128-29). Nor was there any reason for the social insurance specialists to work on either type of review differently after October 1997 than before (Tr. 124).

OQA began to use computerized information before the databases were combined, but gradually increased its reliance on its computerized system so that, by late 1997 or early 1998, OQA had, in its system, such information "on virtually every [Supplemental Security Income] case" (Tr. 124-26). The use of this information was in no way connected with the combining of the IDA and stewardship databases (Tr. 127).

Crawford was unable to answer directly whether reviewers have less time in which to complete cases than they did before the combination of the databases (Tr. 129). He testified that the period over which cases are worked is determined by an "ongoing interactive process between the Grade 12's and the team leaders," in which they agree upon an itinerary and the information needed to finish the

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[3] Miller became a GS-12 Social Insurance Specialist in February 1998. His testimony about procedures before October-November 1997 was based on his limited experience, on special assignment from his team leader, in conducting some IDA reviews and completing others for the specialists who had performed the field reviews on these cases (Tr. 77-82, 87-91, 103-04). Regional Director Crawford disputed Miller's pre-1998 work on IDA review cases. I credit Miller, who seemed to have had a clearer and more reliable recollection of the work he actually did. The facts concerning pre-October 1997 procedures are not, however, materially in dispute.

cases, always trying to get them completed as soon as possible (Tr. 129-30).

Crawford characterized the quarterly schedules for completing cases as "goals" for management. Those goals, he testified, existed prior to October 1997 and did not change. (Tr. 130.) The quarterly goals are designed only to ensure that the agency will have the information it needs at the end of the fiscal year to report "to the Congress and the world[.]" This, Crawford, testified, "has no relationship to employees completing cases, and even the quarterly goals are goals that management uses, just to make sure that we are on track to get our cases completed, at a time frame that says we can expect that we will get our work done when it needs to be done at the end of the year." (Tr. 130-31.) Asked whether anything in the performance standards for the social insurance specialists indicates how much time they have to work either a stewardship or an IDA review case, Crawford responded (Tr. 131-32):

> The Social Security Administration stopped using numerics a number of years ago. We do not use any standards for case completions in any of our areas. It is, as I said earlier, there is an interactive process between the team leader and the individuals working cases, and it is, I would say, almost exclusively, that cases are worked, they are finished, there is no question, everything is done. If in fact, if I am a Grade 12, and half of my work is not done, and it is getting close to the end of the quarter, there will be involvement by my team leader to see if I can be assisted, or whatever has happened, maybe I have been sick, and we will work to find a way to get the cases done. That is not held against somebody. That is not a process of saying, you have got to do your exact number in a prescribed period of time. And we do not say, if you are a day faster, than the person next to you, you win, that person loses. No, we don't do that.

On cross-examination, Crawford insisted that a specialist's failure, in any given year, to complete *any* of his or her cases within the quarterly goals, would not be reflected on his or her performance appraisal. Crawford reframed the question as hypothetical, however, testifying that he was not aware of such a situation. He testified that the employees are fully aware that their failure to meet the goals will have no adverse consequences on their appraisals. (Tr. 132-34.) The following colloquy ensued:

Q. Have you conveyed that to employees?

A. I would not convey that to employees.

Q. And why wouldn't you?

A. Why would I tell the people that they should not do the work that they are paid to do? I mean, I think that is a bad message.

Q. But it is true.

A. Well, it has not happened, so it is, theoretically, it is true.

Crawford also testified that he believed there had been no change with respect to requesting and receiving the field office files of recipients whose cases were to be included in IDA reviews (Tr. 136-37.)

3. Resolution of Disputed Facts

Specialist Miller's testimony that his team leader told his team of specialists that the timeframes for the reviews were shortened is uncontradicted, and I credit it. I also credit his testimony that, after the meeting at which this was announced, "banners" setting forth the quarterly deadline dates went up. Whether or not quarterly targets that Director Crawford called management "goals" existed before the databases were combined, or whether or not it is accurate to call these target dates "deadlines," I find it difficult to dispute that they were given a new emphasis when the combination occurred.

Moreover, notwithstanding Crawford's belief that the providing of field office files was unchanged, Miller's uncontradicted testimony that he was told that the files would no longer be provided in all IDA review cases is consistent with the fact that the IDA databases were being combined with the stewardship databases, which historically did not include field office files. I credit Miller in this and in his testimony to the effect that there was, in fact, a substantial reduction in the number of field office files the specialists received to begin their IDA reviews. This reduction, again, appears to be consistent with the combination of the databases and OQA's increased reliance on its computerized system. I also find it not merely coincidental that the increased reliance on the computerized system, accompanied by a reduction in the use of field office files, occurred at the time that it did. Rather, the reduced reliance on paper files appears to have

been an important part, if not the centerpiece, of the combination of the two databases.

I find Miller to be generally credible in the respect that the unavailability of field office files added at least some burden to the reviewers. In addition to his uncontradicted testimony that the computer-based data was unverified, and that the field office files, if they even were available, took time to obtain, it is reasonable to infer that the reviewers were affected variously by having to rely more heavily on a computer-based retrieval system, depending on their respective proficiencies in using such a system, among other things.

I find Crawford to be unconvincing in his assuredness that a specialist's consistent failure to meet what Crawford called the "goals" of quarterly completion of review cases would have no effect on his or her performance appraisal. Crawford's testimony was at least somewhat speculative, given that this situation had not arisen to his knowledge. Moreover, I infer one important reason that it had not arisen: Consistent with Miller's testimony, the specialists understand that they are expected to comply with these "goals." At best, the effect of their noncompliance is uncertain. It would be reasonable for them to believe that, at least in some circumstances, there would be an adverse effect. As Crawford testified, he would not want to convey the opposite message to the employees.

Finally, I credit all the other evidence presented by the parties, as summarized above, to the extent that such evidence has not been discredited, either expressly or by implication.

Discussion and Conclusions

A. Applicable Principles

Section 7106 of the Statute, subtitled "**Management rights**," provides, in pertinent part, that:

> (a) Subject to subsection(b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> * * * * *
>
> (2) in accordance with applicable laws--

* * * * *

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

* * * * *

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating-

* * * * *

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Negotiations over "procedures," as defined in subsection(b)(2), have come to be known as "implementation" bargaining and those over "appropriate arrangements," as defined in subsection (b)(2), as "impact" bargaining. *See Department of the Air Force, Air Force Systems Command, Electronic Systems Division*, 14 FLRA 390, 402 (1984). However, they are customarily referred to, collectively, in reverse order--"impact and implementation." This usage dates from pre-Statute interpretations of Executive Order 11491. *See Internal Revenue Service and IRS Richmond District Office*, 2 FLRA 333, 334 n.1, 341 (1979).

A duty to engage in "impact and implementation" bargaining arises when an agency has decided to exercise its management rights under section 7106(a) in a manner that effects a change in established conditions of employment, provided that the change is more than *de minimis*. *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 405-08 (1986)(*SSA*). In *SSA*, the Authority reassessed and modified its previous standard for determining whether a change in conditions of employment was more than *de minimis* and thus required bargaining.

The standard announced in *SSA* places "principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees.[4] Equitable considerations will also be taken into account in balancing the various interests involved." *Id.* at 408. The number of employees involved will not be a controlling consideration but "will be applied primarily to expand rather than limit the number of situations where bargaining will be required." *Id.* Another significant aspect of the Authority's standard is that the effect of the change on bargaining unit employees may be considered "more than *de minimis*" even if it cannot properly be characterized as "substantial." *Portsmouth*, 45 FLRA at 575 n.2.

The direct "effect or reasonably foreseeable effect" of the change involved in the instant case pertains to the social insurance specialists' workload. Increases or realignments in workload are considered changes, and as such may give rise to obligations to bargain over their impact and implementation. *See, for example, United States Department of Veterans Affairs Regional Office, San Diego,* California, 44 FLRA 312, 320, 337 (1992)(*VA San Diego*); *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut*, 41 FLRA 1309, 1318 (1991)(*SSA Baltimore*); *United States Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 34 FLRA 1035, 1046, 1072-73 (1990)(*INS I*), *modified in other respects*, 39 FLRA 1431 (1991). In fact, the Authority exhibited what is perhaps the clearest illustration of this proposition in one of its earliest applications of the *SSA* standard. Thus, in *Internal Revenue Service*, 24 FLRA 999, 1001-02 (1986), the

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4 The Authority has reaffirmed, more recently, that it will look to the nature and extent of *either* the actual effect *or* the reasonably foreseeable effect of the change. *General Services Administration, Region 9, San Francisco, California*, 52 FLRA 1107, 1111 (1997); *Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 45 FLRA 574, 575 n.1. (1992)(*Portsmouth*). *But cf. Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena,* California, 51 FLRA 797, 822 (1996)(*Olam Southwest*); Veterans *Administration Medical Center, Prescott, Arizona*, 46 FLRA 471, 475 (1992)(*VAMC Prescott*)(inquiry does not focus primarily on the actual effects but on the reasonably foreseeable effects of the change).

Authority, finding an impact on bargaining employees sufficient to require bargaining, assigned primary importance to the conclusion that the agency's new program, which removed certain employees from their normal duties for a period of months, "could have a foreseeable impact on the workload of remaining employees as well as on the selected employees' ability to perform their duties upon return to their bargaining unit duties." *See also Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas*, 39 FLRA 1325, 1331-32 (1991); *Overseas Education Association and Department of Defense Dependents Schools*, 39 FLRA 153, 159-60 (1991).

In determining whether the impact ("effect or reasonably foreseeable effect") of a change in workload is more than *de minimis*, the Authority looks not only to the direct effect on the difficulty of performing the job, but also to the potentiality for an indirect effect on employees' appraisals or other variables that could, in turn, affect their job security or opportunity for promotion. *See VA San Diego; INS I; U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts*, 38 FLRA 770, 783, 820 (1990).

On the other hand, the addition of some duties does not, by itself, require bargaining. The impact of the addition must be examined to determine whether it reaches the "more than *de minimis*" level. *See U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Chicago, Illinois*, 30 FLRA 572, 579-80 (1987); *Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 20 FLRA 481, 484 (1985)(a pre-*SSA* decision that may still have some vitality to the extent that it relies on factors other than the number of employees affected--in particular, whether the change was temporary or permanent).

Of course, changes in work assignments may trigger a bargaining obligation for reasons other than an increase in the workload. A change in the distribution of work, for example, may have effects that trigger such an obligation. *See SSA Baltimore,* 41 FLRA at 1318. Nor must such effects be directly related to work requirements or job security and advancement. Effects of a change may meet the *SSA* standard even if they relate only to intangible, immeasurable, or subjective factors such as "more pleasant and relaxed" (*Id*.) work environments or to the outside-of-employment lives of the affected employees. *See, for example, Olam Southwest*, 51 FLRA at 822; *VAMC Prescott*, 46

FLRA at 475-76. I conclude, by analogy, that the "more than *de minimis*" inquiry must also include the consideration of factors that contribute to or detract from employees' job satisfaction.

B. Application to this Case

I find no real contest over the occurrence of a change in the specialists' conditions of employment. The procedure for conducting IDA reviews was changed, that change involved a change in the tools provided for conducting those reviews, and there was at least a change in emphasis as to how soon the reviews were to be completed. The main issue here is whether any of the changes were more than *de minimis*.

Not much need be said about the "reasonably foreseeable" effect of these changes. For purposes of this decision I take at face value that management intended the combination of the databases to be "transparent" to the specialists--that absent any announcement the specialists would not have known that it had happened. In the event, regardless of how well or ill that scheme was laid, it suffered the fate described by Robert Burns and reprised by John Steinbeck. For sufficient reasons exclusive of the partnership briefing, neither the combination nor its related changes turned out to be transparent. They were, rather, all too apparent, and they had certain apparent effects that were real enough to the specialist notwithstanding any reservations by management as to the consequences of its policies. *Cf. Department of Defense Dependents Schools*, 50 FLRA 197, 205-06 (1995)(change had more than *de minimis* impact notwithstanding contention that the alleged change was only the subject of an intramanagement memorandum that was not directive and had not been seen by any bargaining unit employee).

Perhaps the most significant change, with respect to the nature and extent of its effect, was the transformation of what may previously have been a management goal into a series of quarterly time targets for the completion of the reviews.[5] This had the actual effect of encouraging if not forcing the reviewers to close cases before they were able

[5] The complaint alleges that the period for completion of the stewardship reviews was reduced, and says nothing in this respect about the IDA reviews. However, in his opening statement, Co-counsel for the General Counsel stated that the timeframes for completing both types of review were shortened. I find that SSA had adequate notice and that this broader allegation was fully litigated.

to verify all the necessary information. It also had the secondary effect of their having to reopen cases and work on them while carrying a full load of new cases that were, likewise, subject to the quarterly time targets. These effects probably did not have the same impact on all the specialists. It is reasonable to infer, however, that at least some of them experienced a heightened level of stress.[6] Further, whether or not they believed that their failure to meet the quarterly time targets would affect their performance appraisals, the specialists could hardly be certain that it would not.

The partial or total elimination of being provided with field office files as a matter of course was also bound to have a variable effect. Some specialists may have felt perfectly comfortable with this change, and have navigated the necessary adjustments to their operating procedures seamlessly. Others, I infer, would have had, or at least would have anticipated with various degrees of anxiety, some difficulty in adjusting to the change. For those specialists who continued to find it useful to obtain the files, the additional time required to do so, even if this involved only a few minutes for each file, could add up to a burden of more than *de minimis* proportions. *See Social Security Administration, Malden District Office, Malden, Massachusetts*, 54 FLRA 531, 536-37 (1998)(*SSA Malden*).

These changes were intended to be permanent, a factor pointing toward "more than *de minimis*." On the other hand, it is arguable that none of their effects is "substantial." Given the Authority's repeated and emphatic rejection of such a standard, this becomes irrelevant, at least with respect to the finding of a violation, as would a finding that the changes were "slight." *Id.* at 537.

SSA, having admittedly made these changes without giving the Union an opportunity to bargain about their impact and implementation, has violated sections 7116(a)(1) and (5) of the Statute.

The Remedy

Counsel for the General Counsel request, in addition to the usual cease-and-desist order, bargaining order, and posting of notices, a *status quo ante* remedy. Except for this bare request, neither party has addressed or argued

6 I believe it is appropriate to employ an objective analysis of the probable impact of the effect of these changes, rather than require the testimony of witnesses as to their subjective reactions to each of the changes and effects.

the issue of the appropriate remedies in the event that the complaint is found to have merit.

Where an agency changes a condition of employment without fulfilling its obligation to bargain over the substance of the decision to make the change, the Authority orders a *status quo ante* remedy in the absence of special circumstances. A respondent claiming such special circumstances bears the burden of establishing that they exist. *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 84-85 (1997)(*COE Memphis*). No such presumption of the appropriateness of a *status quo ante* remedy exists, however, where the bargaining obligation pertaining to the change is limited to the impact and implementation of the decision. In that event, the Authority applies the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982)(*FCI*). *COE Memphis*, 53 FLRA at 84.

Some of the *FCI* criteria appear to call on the party seeking the remedy to demonstrate their applicability, while at least one (disruption or impairment of efficiency or effectiveness) is up to the respondent to establish. In the first instance, however, I conclude that the party seeking the remedy must make a persuasive case for the imposition of such a remedy, as is true with respect to other remedies that do not enjoy a presumption of appropriateness.[7] If such a case is made, the respondent must assume a burden, similar to that set forth in *COE Memphis*, to show why the factors militating against such a remedy outweigh or at least counterbalance those factors in its favor. Here, no case has been made for a *status quo ante* remedy, nor is its appropriateness so obvious that it defies rejection.

SSA notified the Union, albeit in a nontraditional forum, before it made the change alleged in the complaint. Although the Union then requested bargaining, SSA responded. While SSA's response was to the effect that there was no obligation to bargain, it is not clear whether the Authority would find this refusal to constitute "willfulness," one of the *FCI* factors favoring imposition of a *status quo ante* remedy.

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[7] *Cf. F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 161 (1996)("As with other factual questions, the General Counsel bears the burden of persuasion, and the Judge is responsible for initially determining whether the remedy is warranted").

In one line of cases, the Authority has found a respondent's conduct not to be willful if its refusal to bargain had a colorable, or good-faith, basis. *See, for example, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 53 FLRA 1092, 1108 (1998); *U.S. Department of Transportation and Federal Aviation Administration*, 40 FLRA 690, 719 (1991); *Veterans Administration Central Office, Washington, DC and Veterans Administration Regional Office, Cleveland, Ohio*, 20 FLRA 199, 200 (1985). In other cases, the Authority has, in effect, treated as willful any *intentional* refusal to bargain, regardless of the basis for the refusal. *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky*, 38 FLRA 647, 649 (1990); *United States Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 20 FLRA 548, 563 (1985), *remanded as to other matters sub nom. Professional Airways Systems Specialists v. FLRA*, 809 F.2d 855 (D.C. Cir. 1987). Recently, the Authority exhibited some impatience with the latter approach. *See Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas*, 53 FLRA 749, 759-60 n.13 (1997)("It is not apparent, and the Authority did not explain in *Lexington-Blue Grass,* how an agency could *unintentionally* refuse to bargain over a RIF").

With respect to the nature and extent of the impact experienced by adversely affected employees, one of the other significant *FCI* factors, I assess the impact to be less than devastating. Thus, while a more than *de minimis* impact has been shown, nothing in the record cries out for immediate rescission of the changes or suggests that irreparable harm is likely in its absence during the relatively brief period that should be required to complete bargaining over the impact and implementation of the change.

More likely to cause harm is the protracted pursuit of a remedy that, as far as has been presented to me, would not significantly change the bargaining landscape in this instance. When I refer to a protracted pursuit, I have in mind the prospect of creating an additional reason for SSA to file exceptions with the Authority even if it might not have done so otherwise. Should that occur, not only would the affected employees be denied the immediate relief that such a remedy promises, but the standard remedies that are clearly appropriate and necessary predictably would be delayed for an extended period, perhaps beyond endurance. To hold out the promise for such immediate relief, therefore, would be to perpetrate a cruel hoax on the affected employees. Absent more compelling reasons to impose that risk, I choose not to initiate such a

travesty.[8] I therefore recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Social Security Administration, shall:

1. Cease and desist from:

(a) Implementing changes to terms and conditions of employment of bargaining unit employees without providing the American Federation of Government Employees with the opportunity to negotiate concerning the procedures to be observed in implementing the change and appropriate arrangements for adversely affected employees.

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

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

(a) Upon request, bargain with the American Federation of Government Employees over the impact and implementation of the changes in the terms and conditions of employment of bargaining unit employees occasioned by the combination of the databases used for conducting stewardship reviews and index of dollar accuracy reviews.

(b) Post at its facilities wherever bargaining unit employees represented by the American Federation of Government Employees are located, copies of the attached Notice on forms furnished by the Federal Labor Relations Authority. Upon receipt of the such forms, they shall be signed by the Commissioner, Social Security Administration, and shall be posted and maintained for 60 consecutive days in conspicuous places, including all 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.

[8] Given the opportunity, the Authority may, without prompting, substitute an alternative to a *status quo ante* remedy, such as a retroactive bargaining order. *See United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 922-24 (1998). I am free to recommend such a remedy. I prefer, in this instance, to withhold a sua sponte recommendation.

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

Issued, Washington, DC, March 8, 1999.

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JESSE ETELSON
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 has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT implement changes to terms and conditions of employment without providing the American Federation of Government Employees with the opportunity to negotiate concerning the change to the extent required by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees over the impact and implementation of the changes in the terms and conditions of employment of bargaining unit employees occasioned by the combination of the databases used for conducting stewardship reviews and index of dollar accuracy reviews.

____

(Agency)

Dated: ____________________ By: __________________________________
(Signature)
____
(Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 800 K Street, NW., Suite 910, Washington, DC 20001, and whose telephone number is: (202)482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-80267, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS**:

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MARCH 8, 1999
WASHINGTON, DC