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

U.S. DEPARTMENT OF LABOR OFFICE OF WORKERS' COMPENSATION PROGRAMS BOSTON, MASSACHUSETTS Respondent	Case No. BN-CA-90142
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 948, NCFLL, AFL-CIO Charging Party	

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 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 **FEBRUARY 7, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424

JESSE ETELSON
Administrative Law Judge

Dated: January 7, 2000
Washington, DC

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

MEMORANDUM DATE: January 7, 2000

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
BOSTON, MASSACHUSETTS

Respondent

and Case No. BN-CA-90142

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 948, NCFLL, AFL-CIO

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 service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges OALJ 00-11

WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR OFFICE OF WORKERS' COMPENSATION PROGRAMS BOSTON, MASSACHUSETTS Respondent	Case No. BN-CA-90142
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 948, NCFLL, AFL-CIO Charging Party	

Lawrence Kuo, Esquire
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For the General Counsel

David L. Peña, Esquire
Mark J. Maxin, Esquire
Henry L. Solano, Solicitor of Labor
Robert A. Shapiro, Associate Solicitor
For the Respondent

Scott Wilkinson
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

As amended, an unfair labor practice complaint issued by the Regional Director, Boston Regional Office, Federal Labor Relations Authority (the Authority), alleges that the U.S. Department of Labor, Office of Workers' Compensation Programs, Boston, Massachusetts (OWCP), violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by implementing a decision allowing a bargaining unit employee to move into a vacated workstation based on the employee's grade as opposed to seniority and/or lottery. The alleged violation is based on the implementation of that decision without providing the

Charging Party (the Union), the agent of the exclusive representative of a unit of employees at OWCP, with notice or an opportunity to bargain to the extent required by law.

OWCP's answer denies that the Union is a labor organization under section 7103(a)(4) of the Statute. The answer denies further that OWCP implemented a decision as alleged, that it did so without providing the Union with the requisite notice and opportunity, and that it committed the alleged unfair labor practice.

A hearing on the complaint was held on October 13, 1999, in Boston, Massachusetts. The Union's representative made a closing oral argument after the evidence presented by each of the parties had been received. Counsel for the General Counsel and for OWCP filed post-hearing briefs.

Findings of Fact

A. Jurisdictional and Background Facts

OWCP administers several programs, including the Federal Employees' Compensation Act (FECA) and the Longshore and Harbor Workers' Program (Longshore). The OWCP district office in Boston, Massachusetts, which administers both the FECA and the Longshore programs, is currently located in the John Fitzgerald Kennedy Federal Building (JFK Building). The Longshore Program employs Claims Examiners, Clerks, and Claims Assistants. Longshore Claims Examiners are responsible for monitoring longshore workers' compensation claims and mediating insurance claims disputes.

Kenneth Hamlett, the Regional Director for OWCP's Northeast Region, divides his time between the Boston office and OWCP's New York office, also under his jurisdiction. Marcia Finn is the District Director for the Longshore Program in the Boston office. Hamlett is her immediate supervisor. Ms. Finn, a former Senior Claims Examiner, was promoted to the District Director position in May 1997. She supervises the Claims Examiners and others employed in the Longshore Program.

The Union is a labor organization that represents employees of the U.S. Department of Labor throughout New England, as an agent of the American Federation of Government Employees, the certified exclusive representative of a national consolidated unit of employees, including the Longshore Claims Examiners at OWCP's Boston office.

B. History of Assignments of Workstations

Prior to about 1990, the Boston office was located on the 18th floor of the JFK Building. Around 1990, the JFK Building underwent an asbestos-removal project and OWCP moved across the street to office space located at One Congress Street. Frank Mahoney, then the District Director, asked the Claims Examiners how they wished to have the windowed workstations (or cubicles) that were available at One Congress Street assigned among the approximately eight Claims Examiners.

Apparently one or more of the Claims Examiners suggested a lottery system, and Mr. Mahoney agreed, except that Claims Examiners Finn and Paul Graycar, who were assigned temporarily to a special project for which Mahoney required them to be near his office, were excluded from the lottery. When the special project was completed, Mahoney assigned Finn and Graycar to non-window cubicles that had been vacated by two other Claims Examiners, whose regular workloads they were to assume. During OWCP's years at One Congress Street, no other cubicles for Longshore Claims Examiners became vacant.

In 1996 or 1997, OWCP moved from One Congress Street to its present location at the reconfigured JFK Building. The office is divided into two areas, one occupied by the FECA program and the other by the Longshore program. The Longshore Claims Examiners, their numbers having been reduced to six by the time of this move, occupy a block of six cubicles. One row of three cubicles faces the outside of the building. Each of these cubicles is located directly in front of one or more exterior windows. A second row of three inside cubicles is directly behind the first. At least some of the Claims Examiners continued to regard the windowed cubicles as more desirable work locations.

Before OWCP moved back to the reconfigured JFK Building, Randy Regula, who had replaced Frank Mahoney as District Director, asked the Claims Examiners if they wanted to use a lottery again to determine who received the windowed cubicles that would now be available at JFK. A lottery was conducted and, as a result, the windowed cubicles went to Finn, Graycar, and Claims Examiner Quaco Clouterbuck.

In May 1997, after the move back to the JFK Building, District Director Regula requested a downgrade and left the office on extended sick leave. Finn was promoted to the District Director's position and vacated the windowed cubicle she occupied as a Senior Claims Examiner, moving into the District Director's office. Soon after that, Charles Lizotte, a GS-11 Claims Examiner, approached the two

other Claims Examiners who then occupied non-window cubicles and asked them whether they were interested in Finn's vacated cubicle. Both of them told him they were not. Lizotte then informed Ms. Finn that he would like to move there.[1]

Finn's response to Lizotte's request is a matter of dispute here, although, as with some others of the relatively few matters of factual dispute, I find this dispute to be insignificant with respect to the disposition of the case. While it is undisputed that Finn permitted Lizotte to move into her vacated cubicle, Finn testified that she informed him that Regula would be returning to the office as a Claims Examiner and that, when he did, he would move into Finn's former cubicle and Lizotte would have to return to his former cubicle. According to Finn, Lizotte accepted that condition. According to Lizotte, Finn made no mention of Regula's return. He testified that, had he been aware that his move was to be temporary, he probably would have stayed where he had been.

I find that Finn did tell Lizotte that Regula either would or might be returning to a Claims Examiner position when he was well enough to do so, and that if and when he did, he would occupy Finn's former cubicle. Finn testified credibly that, as of the time of her conversation with Lizotte, in or around May 1997, Regula had been expected to return and was to have taken over Finn's former workload and, consistent with that, her work space. I find it unlikely that Finn would have withheld this information from Lizotte or from anyone else who was about to occupy that work space. In any event, Regula never returned to work. Instead, he took a disability retirement at the end of 1997 and Lizotte has remained in Finn's old cubicle.

C. Events Leading to the Current Dispute

On or about May 15, 1998, Claims Examiner Clouterbuck was terminated from his employment with OWCP. The Union filed a grievance and invoked arbitration over Clouterback's removal. Prior to his termination, Mr. Clouterbuck had been suspended since about February 1998. During this time, his windowed cubicle remained vacant and his work materials and personal possessions remained there.

[1] According to Lizotte, he told Finn at that time that he had checked with the other Claims Examiners, who had told him they had no objection to him moving there. Finn did not recall Lizotte having mentioned this to her. I credit Lizotte, who could reasonably be expected to have presented his best case to Finn in support of his request.

Also around this time, OWCP announced an opening for a GS-12 Senior Claims Examiner position in the Longshore program. District Director Finn interviewed applicants in June 1998 and Peter DeFazio, who was then a Claims Examiner in the FECA program and was located on the same floor in the JFK Building, was selected for the Senior Claims Examiner position. A disputed conversation between Finn and DeFazio, to be discussed later, allegedly occurred toward the end of June, shortly after DeFazio's selection. Finn went on extended sick leave on June 25, 1998 and remained out of the office until November 1998.

On or about July 13, 1998, Claims Examiner Christopher Piper observed Regional Operational Review Officer Barbara Colarossi boxing and moving the materials that Mr. Clouterbuck had left in his cubicle. Mr. Piper asked Ms. Colarossi if he could be seated in Clouterback's cubicle until his possible return. Ms. Colarossi replied that she did not have the authority to decide his request. Around the same time, Piper had asked Mary Ellen Mead, the only other Claims Examiner not seated by a window, whether she was interested in moving into Clouterbuck's cubicle. Ms. Mead replied that she was not.

On July 13, shortly after speaking with Colarossi, Piper sent the following e-mail message to Regional Director Hamlett:

> This morning at 11:15 Barbara Colarossi began cleaning Quaco Cloutterbuck (sic) work station/ desk area. If management is not planning on the possibility of Mr. Cloutterbuck returning to the office, and [in turn] to his previous work station, I would like to have the opportunity to move into that area . . . . I have made this request of Barbara, as acting district director, but she informs me that she is not in a position to say. She also added that she was unaware of me making this request to Marcia [Finn], but, as you are aware[,] Marcia's absence has made her unreachable by the staff. In the absence of Marcia, and in the absence of Barbara's authority, I'm asking you for said permission to move into Quaco's area.
>
> A prompt reply would be appreciated. (GC Exh. 4).

Hamlett responded to Piper on July 19 as follows:

> I have spoken to DD Finn about this request. She advises me that she has already authorized Senior CE DeFazio to relocate into the workspace previously occupied by Quaco. Given the configuration of the office and the assigned workspaces of the other Senior CEs, this decision seems appropriate. Consequently, I will simply confirm DD Finn's decision. (Jt. Exh. 1).

A factual issue, foreshadowed above, but again one that I do not consider dispositive, exists with respect to whether DeFazio had requested Clouterbuck's cubicle. Finn testified that he did so, in a conversation on June 24, after an awards ceremony. She testified that DeFazio came to her office and asked her whether anyone had asked for that cubicle. Finn responded that nobody had and that it was DeFazio's if he wanted it. DeFazio testified that he had (Tr. 207) or "possibly had" (Tr. 217, 225) a conversation with Finn about where he would be sitting when he moved over to Longshore, but denied that he requested Clouterbuck's cubicle. He testified that if he had a conversation with her around that time about his location he "probably" (Tr. 225) told her that he preferred another location. Although he did not request Clouterbuck's cubicle, according to DeFazio, he "[could not] say for certain that it never came up in the conversation" (Tr. 226).

Finn testified credibly that, at an unspecified time after July 5, while she was recuperating from surgery performed on July 2, Hamlett phoned her and told her that Piper had requested Clouterback's cubicle. Finn told Hamlett that DeFazio had already requested that cubicle. Hamlett responded, in Finn's paraphrase, that "[h]e was fine with that. He said that by putting Peter there, by allowing Peter to sit there, that all the senior examiner[s] would have window seats" (Tr. 175). However, Finn considered the space assignment to have been her decision (Tr. 186).

When Finn began her extended absence, DeFazio was in communication with Hamlett about certain matters in preparation for his move to the Longshore position. On July 22, three days after responding to Piper's request for Clouterbuck's cubicle, Hamlett sent an e-mail message to DeFazio concerning, principally, a prospective several-day training session in New York. The excerpt below concerns what DeFazio was expected to do before that trip:

> So, I am proposing that you remain in FECA until the first week in August. During that week, we will have you move to Longshore and settle into your workplace

(the one formerly occupied by Quaco--it is across the aisle from Charlie Lizotte). . . . (GC Exh. 5.)

DeFazio testified that the July 22 message was either his first or second notification of his new work location and that in either case the notification came by e-mail from Hamlett. DeFazio remembered his actual move to the cubicle in the Longshore section as having occurred in September.

Subsequent events that are not spelled out in the record, except for the fact that Clouterbuck returned to work, caused DeFazio to initiate a series of messages on July 6, 1999, the first of which states that he would not object to moving to another cubicle and that he would "actually prefer the location in FECA that was cleared out for Quaco's use" (GC Exh. 6). Hamlett responded with the following e-mail message also dated July 6, 1999:

> There is no reason for you to relocate. The use of the FECA location is completely temporary, so it is not a long-range location for anyone. The decision I made was that the GS-12s should have the prime - assuming that one considers windows prime - locations in the office. We will stand with that decision. We will be bringing in another [Claims Examiner] from another [Longshore] office to assist with the office's workload. That individual will sit in the location across from Chris [Piper]. After that, it may revert to Quaco.
>
> Rather than referring to it as Quaco's old cubicle, let's call it DeFazio's current cubicle. (GC Exh. 6.)

DeFazio followed up with a July 28, 1999, message stating that he had been "perhaps too equivocal in [his earlier] e-mail regarding this matter" and that:

> As much as I am loath to give Chris Piper and his goons a perceived victory of any sort, I really cannot tolerate being in this location any longer. I really need a change in venue if I am going to continue serving as a productive employee for Longshore. I find it increasingly difficult to get my work accomplished while being huddled amongst the motley crew of examiners in the Boston Longshore Office who spend more time talking than they do performing work. I am at my wits['] end.

> It has become even more intolerable since I filed a grievance against the union, with the FLRA.
>
> I would prefer to sit in another section of the Office. I am sure that you can arrange this if you choose to. (GC Exh. 6.)

Regional Director Hamlett apparently did not choose to, for at the time of the hearing DeFazio was still occupying what Hamlett had dubbed his "present cubicle." Although Hamlett, in his July 6, 1999, e-mail to DeFazio, purported to adopt the original decision to seat DeFazio in the windowed cubicle (the decision with which this case is concerned) as his own, I find that neither this after-the-fact version of what occurred a year earlier, nor any earlier statement by Hamlett, changes the fact that, as Finn credibly testified, she made the decision to place DeFazio in that cubicle.

Events more contemporaneous with the actual seat assignment support this conclusion. For whatever reason Finn had, and whatever might have been said between her and DeFazio in June 1998 (matters we shall return to later), she treated the assignment to DeFazio as having been decided upon by the time Hamlett called her to discuss Piper's request for the cubicle. Hamlett "was fine with that," but added, in conversation with Finn, that this would give all the Senior Claims Examiners--the GS-12s--window seats.

In responding to Piper in July 1998, Hamlett identified the decision to place DeFazio in Clouterbuck's former cubicle as having been "authorized" by Finn, adding that this decision seemed appropriate to him "[g]iven the configuration of the office and the assigned workplaces of the other Senior CEs." Thus, while Hamlett did nothing to hide the fact that he liked the idea of placing the three GS-12s in the three window seats, he did nothing more than to let stand the individual seating assignment that, as he affirmed, Finn was authorized to make. Having treated the decision as Finn's at the time, Hamlett also informed DeFazio that he would be placed in that cubicle. Whether or not DeFazio had any prior knowledge of this decision is, for purposes of this finding, irrelevant.

While I find it impossible to determine exactly what Finn and DeFazio had said to each other in June 1998 about DeFazio's seat assignment, I find, consistent with Finn's certainty and DeFazio's ambivalence, that they did discuss it. Thus I credit Finn that DeFazio came to her office and raised the question of where he would be located.

If, as DeFazio testified that he might have done, he then indicated a preference for a particular cubicle outside the two rows of cubicles in which the other Claims Examiners were located, or if he merely indicated that he was willing to relocate to that other cubicle, Finn could reasonably be expected to have vetoed or discouraged such a separation. Then, given the choice between a windowed cubicle and a non-window cubicle in the same area, DeFazio probably would have expressed a preference for the former.

Did any of this actually occur? Consistent with Finn's credited testimony that she so informed Hamlett when he phoned her in July 1998 about Piper's request, I conclude that she was then under the impression that DeFazio had, in some fashion, asked for that cubicle. I find the probabilities to be that her impression was well founded at least to the extent that, whether or not in the form described in the previous paragraph, the subject of Clouterbuck's cubicle did come up in their June conversation and DeFazio had expressed some interest in being located there.

After the Union learned of DeFazio's assignment to Clouterbuck's cubicle, it requested mid-term bargaining over the issue of who should occupy it, noting that the Union would view the unilateral implementation of the assignment as a violation of the Statute and of the parties' collective bargaining agreement. OWCP responded that the matter was not bargainable. It was stipulated that OWCP did not provide the Union either notice or the opportunity to bargain with respect to this work station assignment.

Analysis and Conclusion

The General Counsel's theory of the violation in this case is that OWCP made a unilateral change in a condition of employment established by past practice. The Union, in its closing argument, presented the case as involving the Union's right, and OWCP's obligation, to negotiate over work station assignments. However, the Union's formulation of the issue does not reflect the case that was litigated.[2] As this case involved only OWCP's obligation to negotiate before assigning a particular cubicle in the circumstances

[2] As the Statute is structured, that issue may not even have been capable of being litigated in an unfair labor practice proceeding. *But cf. U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky*, 42 FLRA 137, 143 n.2, 155 n.12 (1991)(*IRS Louisville*).

under which it was assigned, I believe that I need go no further than to decide the issue presented by the General Counsel.[3] It is, of course, the responsibility of the General Counsel to prove by the preponderance of the evidence that there was a change in a condition of employment. I conclude, for the following reasons, that the existence of a past practice that was changed when this work station assignment was made has not been established.[4]

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[3] I confess an inability to grasp the Authority's policy concerning a judge's obligation to go beyond the issues presented by the parties. (*Compare Social Security Administration, Region VII, Kansas City, Missouri*, 55 FLRA 536, 539 n.3 (1999) (complaint should not have been resolved on the basis of a defense not raised by the respondent) *with U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions*, 53 FLRA 1269, 1275 (1998)(*FDA*) (in "failing to address" an issue not addressed by the parties, the judge's decision "ignores the basic principle" that governs the case). *See also U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 968, 971 (1999) and *Department of Transportation, Federal Aviation Administration, Fort Worth, Texas*, 55 FLRA 951, 956 (1999) (*FAA*) (discussing the scope of a complaint and its relationship to the issues on which a case may be resolved). However, in the instant case, the parties made it unmistakably clear that they understood the case to rest solely on the existence of a past practice that was inconsistent with the action OWCP took. In these circumstances, the Authority's announced "due process" policies, no matter how loosely applied, *see U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC*, 55 FLRA 388 (1999), would seem to compel limiting the basis for resolving this complaint. *See Bureau of Prisons, Office of Internal Affairs, Washington, DC and Phoenix, Arizona et al.*, 52 FLRA 421, 431 (1996). *But see FDA.*

[4] OWCP has generously declined to seek a holding that the General Counsel was required to establish, "by a preponderance of the evidence," that OWCP took the action it did "in order to prevent the Union from carrying out its representational activities." *See U.S. Petitentiary, Leavenworth, Kansas*, 55 FLRA 704, 714 (1999). While I am not sure that OWCP's declination to rely on the quoted language can, by itself, relieve the General Counsel of such an obligation (if the Authority, by using such language, intended to impose one) I find it unnecessary to reach the issue of intent here.

As the Authority has stated recently, "[i]n order for the Authority to find the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals*, 55 FLRA 454, 456 (1999)(*Immigration Appeals*). Even more recently, the Authority stated further that, "in determining whether an agency has violated a past practice, it must be established, among other things, that the agency exercised a consistent policy . . . and that the agency acted inconsistent [sic] with that policy." *FAA*, 55 FLRA at 954.

In *Immigration Appeals*, the Authority (Member Cabaniss dissenting) found that a past practice of considering flexiplace requests on the merits had been established where, over a period of two years, employees had submitted nine flexiplace requests and management had considered each of these on their merits, granting eight of the nine. The Authority has also held that, by furnishing bottled water to its employees consistently for 16 months, an agency had established a condition of employment through past practice. *U.S. Department of Labor, Washington, DC*, 38 FLRA 899, 908-10 (1990).

On the other hand, in *IRS Louisville*, the Authority summarily dismissed this judge's inference that a practice of nonadherence to a GSA regulatory guideline regarding the assignment of cars to employees had been established. The guideline suggested limiting such assignments to employees who drove at least 12,000 miles a year. I had determined that, absent evidence that the guideline had been followed recently, if ever, the widespread nonadherence should be presumed to have gone on for an indefinite but extended period. The Authority required, instead, specific proof that the practice of nonadherence in effect at the time of the alleged unilateral change had existed during a period that the Authority describes only as "in the past." Thus, in the only instance I have discovered in which the opportunity presented itself overtly to use representative facts as a basis for inferring a condition necessary to establish the existence of a past practice, the Authority declined even to acknowledge the possibility of doing so in any circumstances.

The National Labor Relations Board (NLRB) has formulated a doctrine of past practice that is similar in at least some respects to the Authority's. *See, for example, Exxon Shipping Co.*, 291 NLRB 489, 493 (1988). The NLRB has

held that an established past practice was not demonstrated where the occurrences relied on to support such a finding were remote in time or intermittent. *Id.* I believe the Authority would be inclined to adopt a similar approach.[5]

In the instant case, I find that the evidence failed to demonstrate a sufficient pattern to the alleged practice and also failed to demonstrate the necessary consistency to have made the alleged practice a condition of employment. On two occasions, when all of the Claims Examiners were moved from one location to another, the responsible official consulted with the Claims Examiners with respect to the assignment of cubicles. On the first occasion, the suggestion of a lottery apparently came from the affected employees. On the second, the employees were asked if they wanted to use a lottery again. Meanwhile, the responsible official had decided who should and who should not be included in the first lottery, assigning two Claims Examiners to work spaces suiting management's needs and then reassigning them to vacant cubicles. Aside from the use of the lottery on two occasions, there was one instance in which a responsible official (Finn) placed an employee (Lizotte) in a vacant cubicle based on his own request and his representation that the other eligible employees had no objection.[6]

These facts do not lend themselves to the conclusion that there was an established practice of management deferring to the wishes of employees concerning the assignment of work spaces. They demonstrate, rather, or at least suggest as an equally reasonable interpretation, a series of ad hoc decisions by responsible officials to assign the employees as they deemed appropriate, deferring to the employees' desires whenever it suited them to do so. Thus, management adopted the employees' lottery suggestion when the office moved to Congress Street, but decided unilaterally to exclude two of them from the lottery. Management thus retained visible control over the seat assignments.

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[5] In *Letterkenny Army Depot*, 34 FLRA 606, 611-12 (1990), the Authority found that the preponderance of the evidence did not establish the alleged past practice where its exercise was sporadic in comparison to those instances where the alleged practice was not followed.

[6] Lizotte and Piper testified that, had the affected employees not agreed that Lizotte could have that cubicle, a lottery would have been conducted. Such speculation conveys a wish rather than a fact.

When it suggested another lottery on the occasion of the permanent return to the JFK Building, management was creating, at most, a self-limiting pattern for the purpose of completing the JFK-Congress Street-JFK circuit. But even if these events, separated by 6 or 7 years, could be said to have established a pattern for seat assignments in connection with office relocations, they tell us nothing about individual seat assignments to fill vacancies. In such situations, we have only one example of what the General Counsel characterizes as deferring to the consensus among the Claims Examiners. This unique example stands in contrast to the examples at Congress Street where management twice assigned each of two Claims Examiners to work spaces.

Finally, I find unpersuasive the claim that OWCP implemented a new policy of assigning cubicles according to the Claims Examiners' grade levels. It would be premature at best to find that such a policy was implemented when Hamlett affirmed Finn's assignment of DeFazio to Clouterbuck's old cubicle and later confirmed it as "DeFazio's current cubicle." Notwithstanding Hamlett's accompanying comments, the congruity of the higher-graded Claims Examiners with the available windowed cubicles was happenstance. Whether OWCP will act on Hamlett's expressed preference for placing the GS-12 Claims Examiners in the windowed cubicles in the future, and the legal implications of such action, must be left for another day.

I recommend that the Authority issue the following Order:

ORDER

The complaint in Case No. BN-CA-90142 is dismissed.

Issued, Washington, DC, January 7, 2000.

_____

JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by JESSE ETELSON, Administrative Law Judge, in Case No. BN-CA-90142, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS**:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JANUARY 7, 2000
WASHINGTON, DC