64 FLRA No. 25

SOCIAL SECURITY ADMINISTRATION
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3448, AFL-CIO
(Charging Party/Union)

CH-CA-04-0351

DECISION AND ORDER

September 30, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed cross-exceptions and an opposition to the Respondent's exceptions, and the Respondent filed an opposition to the General Counsel's cross-exceptions.

The amended complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by notifying unit employees assigned to the Painesville, Ohio office (local office) that they could no longer work after 5:45 p.m. each day, and by failing to provide the Union with notice or an opportunity to bargain over the change. The Judge found that to the extent the change concerned credit hours, the Respondent did not violate the Statute but, to the extent the change concerned overtime, the Respondent violated the Statute. The Judge recommended a *status quo ante* (SQA) remedy, but denied the GC's request for back pay.

Upon consideration of the Judge's decision and the entire record, we deny the Respondent's exceptions, and, with regard to the GC's cross-exceptions, we grant them in part, deny them in part, and remand in part to the Chief Administrative Law Judge for further proceedings consistent with this decision. [2]

1. Member Beck's opinion, dissenting in part, is set forth at the end of the decision.

II. Background and Judge's Decision

A. Background

The Respondent and the Union are parties to a National Collective Bargaining Agreement (CBA) that became effective on April 6, 2000 and applied during the time periods encompassed by this case. On January 30, 2004 (hereinafter the "change date"), the local office manager sent a memorandum to employees stating that: "'[s]tarting today you may work credit hours only during core hours 7:15-5:45.'" Judge's Decision at 6 n.7 (quoting memorandum). When the Respondent refused to bargain over the matter, the Union filed the unfair labor practice (ULP) charge giving rise to the instant complaint.

Before the Judge, the GC maintained that the Respondent violated the Statute by unilaterally changing the closing time of the local office from 7 p.m. to 5:45 p.m. without affording the Union advance notice or an opportunity to bargain over the change. Specifically, the GC claimed that: (1) the Respondent's action was contrary to a binding past practice that had been in effect since at least 1996; (2) Article 1, § 2 of the CBA specifically provides for the continuation of local past practices that do not detract from the CBA [3] ; and (3) the change in the closing time of the local office had more than a *de minimis* effect on unit employees because, absent the change, they would have been able to work more credit and overtime hours.

In contrast, the Respondent argued before the Judge that the alleged past practice is inconsistent with Article 10, Appendix A, § 5, which limits credit hours to a period ending one hour after the end of the normal workday. [4] According to the Respondent, since the nor-

2. Consistent with precedent, we issue an Order and Notice in connection with the violation found. *See SSA, Balt., Md.*, 60 FLRA 674, 674 (2005). With regard to the allegation that is remanded, as the Judge who conducted the hearing in this case is no longer with the Authority. we remand the allegation to the Chief Administrative Law Judge. *See id.* at 674 n.1.

3. Article 1, § 2 of the CBA provides that "prior . . . practices . . . which were in effect on the effective date of this Agreement . . . and which are not specifically covered by this Agreement [and] do not detract from it shall not be changed except in accordance with [the Statute].". Judge's Decision 5 - 6.

4. Article 10, Appendix A, § 5 of the CBA provides that the flexible band for the local (and other small) offices is:

> a 1-hour and 45 minute period starting 45 minutes before the normal start time and ending one hour after the normal start time. It will also be 45 minutes prior to the normal end of the workday to one hour after the end of the normal workday.

Judge's Decision at 5 - 6.

mal workday at the local office ends at 4:45 p.m., the contract prohibits credit hours beyond 5:45 p.m. Additionally, the Respondent noted that Article 1, § 2 of the CBA permits continuation of only those past practices that are not specifically covered by, and do not detract from, the CBA. Finally, the Respondent noted that the CBA incorporates laws and Government-wide rules and regulations, including the Federal Employees Flexible and Compressed Work Schedules Act (the Act), 5 U.S.C. § 6120, *et seq.*

B. Judge's Decision

The Judge found, as to credit hours, that the past practice permitting employees to work up to 7 p.m. was not binding. [5] In this regard, the Judge made three findings.

First, the Judge applied the Act, stating that 5 U.S.C. § 6121(4) defines credit hours as hours falling within a "'flexible schedule established under" 5 U.S.C. § 6122. Judge's Decision (Decision) at 11. The Judge examined 5 U.S.C. § 6122(a)(2), which provides, in pertinent part, that "each agency may establish" flexible schedules that include:

> designated hours during which an employee on such a schedule may elect the time of such employee's arrival at and departure from work, solely for such purpose or, if and to the extent permitted, for the purpose of accumulating credit hours to reduce the length of the workweek or another workday.

Judge's Decision at 11. Applying § 6122, the Judge found that the CBA provides that the flexible band for the local office runs until 5:45 p.m. The Judge concluded that "[s]ince the alleged past practice is contrary to the Act, there can be no duty to bargain." *Id.* at 12.

Second, citing *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 17 FLRA 1011 (1985) (*SSA I*), the Judge found that a past practice that departs from a national policy may not be found in the absence of evidence that national management condoned the practice. Judge's Decision at 12. According to the Judge, a binding past practice did not exist because national management "promptly terminated" the practice at the local office shortly after it first learned of it. *Id.*

Third, the Judge rejected the GC's reliance on Article 1, § 2 of the CBA, which provides for continuation of certain past practices. *See supra* note 3. In this regard, the Judge found that "the alleged past practice as to credit hours is 'specifically covered by [the CBA] and, if allowed to stand, would detract from it.'" [6] *Id.*

Contrary to his finding regarding credit hours, the Judge found, as to overtime, that permitting overtime to be earned up to 7 p.m. was not covered by statute or the CBA. Applying *United States Patent and Trademark Office*, 57 FLRA 185 (2001) (*PTO*), the Judge found a binding past practice regarding overtime that could not be changed without providing the Union with notice and an opportunity to bargain. The Judge noted that, as scheduling overtime is a management right, the Respondent was "only required to bargain [over] the impact and implementation of the change[.]" Judge's Decision at 15.

Applying the criteria set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*), for determining whether a SQA remedy is appropriate, the Judge found that such a remedy was appropriate. As to back pay, however, the Judge found that employees had sufficient opportunity to work overtime prior to 5:45 p.m. on weekdays and also on some Saturdays, and that there was no evidence "to even suggest that any employee was prevented from working all of the overtime available in spite of the [subject] change[.]" Judge's Decision at 17. According to the Judge, back pay was not warranted because, in the absence of "any evidence of proximate cause between the change in procedure and a reduction in any employee's overtime earnings, the award of back pay could only be based upon unsupported speculation." *Id.*

III. Positions of the Parties

A. The Respondent's Exceptions

Citing *United States Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809 (2000) (*Customs Service*), and *United States Dep't of Health and Human*

5. The Judge made no specific finding regarding the duration of the past practice. In this regard, the Judge stated that "for at least a year" prior to the change date, the local office was open as late as 7 p.m. for employees to work "credit hours and overtime." Judge's Decision at 8. The Judge also stated, however, that "for several years" prior to the change date, employees were allowed to work overtime up to 7 p.m. *Id.* at 12. Although the latter statement is limited to overtime, there is no argument or indication in the record that the past practice differed between overtime and credit hours. We note that, in its post-hearing brief, the Respondent conceded that employees were permitted to work credit hours up to 7 p.m. "for a number of years" prior to the change date. Respondent's Post-Hearing Brief at 3.

6. Although the Judge did not specify the provision on which he relied, we assume, for the purposes of this decision, that he relied on Article 10, Appendix A, § 5, set forth *supra* note 4.

Svcs., Soc. Sec. Admin., Balt., Md., 47 FLRA 1004 (1993) (*SSA II*), the Respondent argues that the hours in which overtime may be worked is covered by, and is in "direct conflict" with Article 10, § 5 of the CBA, which provides that "*[w]hen the administration decides to use overtime,* qualified volunteers will be used before non-volunteers." Exceptions at 8 (emphasis in original). Thus, the Respondent claims that the past practice would "detract" from the CBA, within the meaning of Article 1, § 2. *Id*. at 9. Moreover, the Respondent asserts that there was no past practice of employees working overtime past 5:45 p.m. because the alleged practice: (1) was not consistently exercised and followed by both parties; and (2) was not condoned by management.

In addition, the Respondent contends that the SQA remedy affects management's right to assign work under § 7106(a)(2)(B) by "mandating" that management bargain on decisions regarding when overtime is worked. *Id.* In this regard, the Respondent further contends that the SQA remedy "would impermissibly mandate bargaining on a managerial decision to change when overtime is worked." *Id.* at 10.

B. The GC's Opposition

The GC contends that the Judge properly found a past practice permitting employees to work overtime up to 7 p.m. GC's Cross-Exceptions and Opposition at 30 n.10. The GC also asserts that, although it agrees with the Judge that one year is a sufficient period to establish a past practice, "the fact is that the practice for both overtime and credit hours was in effect since 1996." *Id.* at 30 n.9. In addition, the GC claims that the subject of when overtime may be worked is not covered by the parties' CBA and that Article 1, § 2 preserves the past practice because the past practice does not "detract" from the CBA. *Id.* at 35.

With regard to the Respondent's management rights claim, the GC states that whether the decision to change when overtime may be worked is an exercise of a § 7106(a) right, as the Respondent claims, is not the issue here. The GC states that, even if the Respondent is correct, the Respondent failed to give the Union notice and an opportunity to bargain over the impact and implementation of the change. *Id.* at 36.

C. The GC's Cross-Exceptions

The GC excepts to the Judge's failure to: (1) find that the Respondent unlawfully refused to provide the Union notice and an opportunity to bargain over its decision to prohibit employees from earning credit hours up to 7 p.m; (2) conclude that the change in past practice involving overtime was substantively negotiable; and (3) award back pay with interest to the employees who lost overtime as a result of the implementation of the changes.

In particular, the GC asserts that the practice of permitting employees to earn credit hours until 7 p.m. "was in existence since 1996[,]" and that the practice was "known and condoned" by managers between 1996 and 2004. *Id.* at 10-11. Moreover, according to the GC, the Judge erred in concluding that the past practice of permitting employees to earn credit hours up to 7 p.m. is contrary to the Act. The GC asserts that "[n]owhere in [5 U.S.C. § 6122(a)(1)] does the language require an agency to establish a flexible schedule that must end at 5:45 p.m." *Id.* at 12.

The GC also asserts that the past practice is not contrary to national policy because, according to the GC, there is no evidence that a national policy on this subject exists. Moreover, the GC claims that the matter of earning credit hours after 5:45 p.m. is not covered by the CBA. In this regard, according to the GC, interpreting Article 10, Appendix A, § 5 as prohibiting employees from earning credit hours after 5:45 p.m. "ignores" that Article 10, Appendix A, § 14(F) provides that employees in the local office may earn up to 2 ½ credit hours per day. *Id.* at 19 (citing G.C. Exh. 2 at 65) [7] .

The GC asserts that, as the Respondent "admittedly" failed to provide the Union with notice and an opportunity to bargain over the change in past practice, the Respondent violated the Statute. *Id.* at 20. As relevant here, the GC requests a SQA remedy, claiming that the Judge erred when he concluded that the change in past practice concerning overtime was not substantively negotiable. In support, the GC cites *NAGE, SEIU, AFL-CIO*, 40 FLRA 657 (1991) (*NAGE*). The GC also asserts that the Judge erred when he failed to award back pay to employees who lost overtime as a result of the change. According to the GC, the record shows that one employee's overtime "decreased from 80 hours . . . in 2003 to . . . 45 hours in 2004[.]" GC's Cross-Exceptions and Opposition at 24.

7. Article 10, Appendix A, § 14(F) provides, in pertinent part:

> Earning Credit Hours
>
> An employee may earn up to two and one-half (2 ½) credit hours per workday. Credit hours may be earned in one-quarter (1/4)-hour increments. . . .

D. The Respondent's Opposition

The Respondent contends that the Judge properly found that the alleged past practice as to credit hours is contrary to the Act and is covered by the CBA. In particular, the Respondent asserts that: (1) the Act grants the Agency the authority to establish a flexible band; (2) the flexible band in the local office was established pursuant to the CBA; and (3) employees may only work (or earn credit hours) during those hours designated by the flexible band. The Respondent asserts that the GC's reliance on Article 10, Appendix A, § 14(F) is misplaced because the parties agreed that § 14(F) "means that employees can earn up to two and half credit hours if their office's flexible schedule allows it." Respondent's Opposition at 10-11. The Respondent further asserts that a practice allowing employees to work credit hours beyond 5:45 p.m. detracts from the CBA and, thus, under Article 1, § 2 of the CBA, is not binding.

According to the Respondent, a SQA remedy is not appropriate, even if a violation is found, because it would violate the Act and the CBA. Also according to the Respondent, back pay is not appropriate because it is not possible "to accurately calculate the amount of 'lost' credit or overtime hours employees would have earned." *Id.* at 11.

IV. Analysis and Conclusions

A. Analytic Frameworks – "Covered by" and *IRS*[8]

This case involves application of the "covered by" doctrine as well as the *IRS* doctrine. Precedent holds that both doctrines may apply in an individual case. *See United States Dep't of Energy, Western Area Power Admin., Golden, Col.*, 56 FLRA 9, 12 (2000) (WAPA). Nonetheless, the doctrines are distinct.

The "covered by" doctrine/defense, set forth in *SSA II*, 47 FLRA at 1018, applies *only* in cases alleging an unlawful refusal to bargain. In particular, the doctrine/defense is "available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue." *WAPA*, 56 FLRA at 12 . The doctrine has two prongs. *Customs Service*, 56 FLRA at 814. Under the first, a party properly may refuse to bargain over a matter that is expressly addressed in the parties' agreement. *Id.*. Under the second, a party properly may refuse to bargain if a matter is inseparably bound up with, and thus an aspect of, a subject covered by the agreement. *Id.* Although not expressly limited to situations where an agency refuses to engage in union-initiated, mid-term bargaining, the covered by doctrine derives from, and is most naturally applied in, that situation. *See, e.g.*, *SSA II*, 47 FLRA at 1015-17 (and decisions cited therein).

The *IRS* doctrine, on the other hand, applies when a party claims as a defense not only that it bargained over a matter but also that the results of that bargaining -- a specific contract provision -- permitted its action. *IRS*, 47 FLRA at 1103. Unlike the "covered by" doctrine, the *IRS* doctrine/defense applies in any ULP case, not only bargaining cases. *See IRS,* 47 FLRA at 1092 (respondent defended allegation that it improperly refused to recognize a particular union representative by relying on a contract provision concerning such recognition). Further, in the bargaining context, the *IRS* doctrine applies only "when a party 'relies on a contract provision *specifically concerning bargaining* (such as a reopener or zipper clause)' that relates to the parties' bargaining obligations." *WAPA*, 56 FLRA at 12 (emphasis added) (citing *Social Security Admin., Region VII, Kansas City, Mo.*, 55 FLRA 536, 538 (1999) (*SSA III*)).

Consistent with the foregoing, the covered by and *IRS* defenses have one common aspect: to be successful, both require a determination that a disputed matter is addressed in some matter in an agreement. Under the covered by doctrine, finding that a matter is addressed in or an aspect of a matter addressed in an agreement is sufficient to excuse further bargaining. Under *IRS*, however, finding that a matter is addressed in an agreement is not sufficient: it also is necessary to interpret the specific contract provision(s) relied on and determine whether it/they permitted the specific disputed action. Moreover, the "covered by" doctrine applies *only* in bargaining disputes, while the *IRS* doctrine applies in *all* disputes where a respondent is claiming that a particular contract provision permitted its disputed action.

B. Application of the frameworks; the Respondent violated the Statute as to overtime and credit hours.

1. Overtime

As set forth above, the Respondent maintains that the Judge erred in finding that it violated the Statute by changing the hours during which overtime may be worked on the grounds that, according to the Respondent: (1) the matter is covered by Article 10, § 5 of the CBA and (2) there is no binding past practice contrary to the change.

8. *Internal Revenue Service, Wash., D.C.*, 47 FLRA 1091 (1993) (*IRS*).

As for the first claim, the Respondent maintains that, consistent with Article 10, § 5, "it is within management's purview to decide when overtime can be worked." Respondent's Exceptions at 8. In this regard, the Respondent appears to be relying on the specific wording of Article 10, § 5 as permitting unilateral management action -- an *IRS* defense -- and not contending merely that the parties bargained over the subject matter of the change and, as a result, it is covered by the agreement. However, under either doctrine, the Respondent offers no evidence that Article 10, § 5 either addresses the specific hours within which overtime may be worked or otherwise permits the Respondent unilaterally to determine such specific hours. Among other things, the Respondent has not demonstrated that the word "when" in the provision encompasses anything more than a general determination that overtime is available.

In addition, examining the provision more broadly, Article 10, § 5 concerns the process for the assigning of overtime: how employees will be notified of and chosen to perform overtime. There is no mention of the hours within which overtime may be worked. Under Authority precedent, a subject matter must be more than "tangentially" related to a contract provision in order to establish that the subject matter is covered by the agreement under prong II of the "covered by" doctrine. *United States Dep't of the Treasury, Internal Revenue Service,* 56 FLRA 906, 911-12 (2000) (quoting *SSA II,* 47 FLRA at 1019). Thus, the Respondent has not shown that the hours in which overtime may be worked is so tied to Article 10 that "the negotiations are presumed to have foreclosed further bargaining . . . ." *SSA II,* 47 FLRA at 1018.

As to the Respondent's second argument, we reject, based on the reasoning set forth above, the Respondent's claim that any practice of permitting employees to work overtime beyond 5:45 p.m. is in "direct conflict" with Article 10, § 5 and, as a result, would "detract" from the CBA, within the meaning of Article 1, § 2 of the CBA. [9]

We also reject the Respondent's claim that the overtime practice was not binding because it was not consistently exercised and was not followed by both parties. In this regard, a past practice is not binding unless it has been exercised consistently over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *See, e.g., SSA, Office of Hearings and Appeals, Montgomery, Ala.*, 60 FLRA 549, 554 (2005) (*SSA, OHA*) and cases cited therein. "Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time." *Id.* As applied here, the Judge found, and the record supports, that for "several years" prior to the change date, employees were allowed to work overtime, if available, until 7 p.m. at their own volition. Judge's Decision at 12. Moreover, noting testimonial evidence to this effect, the Judge found it "undisputed" that the former district director, and another former district manager, signed employees' daily time sheets and were "aware" of the hours that employees worked. Judge's Decision at 7 n.10. This refutes the Respondent's claim that the disputed practice "was not condoned by management." Exceptions at 18.

Based on the foregoing, we reject the Respondent's exceptions to the Judge's finding that the Respondent violated the Statute by changing the hours in which employees may work overtime.

Nevertheless, we reject the GC's cross-exception asserting that the Respondent was obligated to bargain over the substance of the change. In this connection, the right to assign work under § 7106(a)(2)(B) encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *See, e.g.*, *Prof'l Airways Sys. Specialists*, 59 FLRA 485, 487 (2003). Moreover, management's right to assign work includes the right to assign overtime and to determine when the overtime will be performed. *Id.* Consistent with precedent, the Respondent's change concerning the hours in which overtime may be worked is an exercise of its right to assign work and, as a result, is bargainable only as to impact and implementation. Also consistent with this precedent, we reject as misplaced the GC's reliance on *NAGE ,* where the Authority found that a contract provision requiring the agency normally to schedule overtime in 8-hour blocks on Saturdays was negotiable as an appropriate arrangement. That a specific proposal may be negotiable as an appropriate arrangement for employees adversely affected by the exercise of a management right does not mean that the exercise of the right is substantively negotiable. *Cf.*

9. We assume for the purposes of this decision – consistent with the parties' arguments and the record as a whole – that a past practice "detracts" from the CBA if the practice is inconsistent with a CBA provision.

United States Dep't of Navy, Naval Aviation Depot, Jacksonville, Fla., 63 FLRA 365, 369 (2009) ("When . . . an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency has an obligation to bargain over[,]" among other things, "appropriate arrangements" if the change has greater than de minimis effects on conditions of employment) (PASS) (citing *Dep't of Health & Human Servs., Soc. Sec. Admin.*, 24 FLRA 403, 405-06 (1986)).

2. Credit Hours

According to the GC, the Judge erred in finding that the Respondent did not violate the Statute by changing the hours in which credit hours may be earned. As set forth above, the Judge found that the past practice as to credit hours is inconsistent with the Act, and that the practice "is specifically covered by [the CBA], and, if allowed to stand, would detract from it." Judge's Decision at 12. According to the GC, the past practice, which the GC claims was in existence since at least 1996, is: (1) not contrary to the Act; and (2) not inconsistent with, and would not detract from, the CBA.

With regard to the first argument, 5 U.S.C. § 6122(a)(2) permits a Federal agency to establish "programs which allow the use of flexible schedules, which include . . . designated [credit hours]." However, nothing in the Act either permits agencies unilaterally to determine hours during which credit hours may be earned or precludes agencies from establishing national programs that permit local modification. Accordingly, the Judge erred in finding that the local practice was contrary to the Act.

With regard to the second argument, we find that the same past practice that existed with regard to overtime existed with regard to credit hours. As set forth *supra* note 5, there is no argument or indication in the record that the past practice as to credit hours differed from the past practice as to overtime. As also set forth *supra* note 5, the Respondent conceded in its post-hearing brief that employees were permitted to work credit hours up to 7 p.m. "for a number of years" prior to the change date. Respondent's Post-Hearing Brief at 3. Moreover, the Judge differentiated between overtime and credit hours only on the basis that "[u]nlike the change with respect to credit hours, the hours within which overtime may be worked is not covered either by [the Act], regulations[,] or the CBA." [10] Judge's Decision at 12. [11] Accordingly, for the same reasons set forth above in connection with overtime, we conclude that there was a past practice, consistently exercised and condoned by management, permitting employees to work credit hours up to 7 p.m.

Resolving the remaining question, whether the past practice concerning credit hours is contrary to the CBA, requires factual findings that the Judge did not make. In these circumstances, and as discussed below, we remand this aspect of the case for further proceedings before an ALJ.

The required factual findings involve the interpretation of two contract provisions. One of the contract provisions, Article 10, Appendix A, § 5, was relied upon by the Judge when he found that the "alleged" past practice concerning credit hours was "covered by" and would "detract from" the CBA. [12] This provision limits credit hours to a period ending one hour after the end of the normal workday. *See supra* note 4.

The second contract provision, Article 10, Appendix A, § 14(F), provides the basis for the GC's opposing claim that the credit hours past practice is not contrary to the CBA. Section 14(F) provides that employees may earn up to 2 1/2 credit hours per workday. *See supra* note 7.

The Judge rejected the GC's claim that the credit hours past practice was not contrary to the CBA. In doing so, however, the Judge neither addressed nor resolved the GC's argument that relying solely on Article 10, Appendix A, § 5 would improperly "ignore" § 14(F). Absent factual findings interpreting the two contract provisions and construing their relationship, it is not possible to resolve the question whether the credit hours past practice is contrary to the CBA. These are factual findings that the Judge should make, in the first instance, during the remand proceedings. [13]

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10. As the Judge did not find the practice contrary to any regulations, we do not address that matter further.

11. The Judge also found, relying on *SSA I*, 17 FLRA 1101, that the past practice as to credit hours could not be found because it conflicted with national policy, set forth in the CBA. Judge's Decision at 12. As discussed below, the Authority is unable to determine whether such conflict exists. In any event, however, the Authority has held that reliance on the portion of *SSA I* on which the Judge relied is misplaced. *United States Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson AFB, Oh.*, 55 FLRA 968, 972 n.6 (1999).

12. Although the Respondent argues that the matter is covered by the CBA, the Respondent relies on a specific provision of the contract -- Article 10, Appendix A, § 5 -- as permitting its otherwise unlawful unilateral change. Thus, this is an *IRS* -- not a covered by – issue.

Based on the foregoing, we remand to the Chief Administrative Law Judge the issue of whether the CBA permitted the Respondent unilaterally to change the past practice whereby employees of the local office could earn credit hours up to 7 p.m. [14]

C. A SQA remedy with respect to the change in overtime hours, with back pay, is appropriate.

The right to assign work, under § 7106(a)(2)(B) of the Statute, encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *See PASS*, 59 FLRA at 487 and the cases cited therein. Management's right to assign work includes the right to assign overtime and to determine when the overtime will be performed. *Id.*

Where management has exercised its reserved rights under § 7106 of the Statute without fulfilling its duty to bargain with the exclusive representative over procedures and appropriate arrangements pursuant to § 7106(b)(2) and (3) of the Statute, a SQA remedy may issue. *FCI*, 8 FLRA at 605. The Authority listed specific criteria for determining whether a SQA remedy is appropriate in such circumstance. *See id.* at 606. Also, in situations where management 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 SQA remedy absent special circumstances. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 855 (1999).

As set forth below, the Respondent changed the local office practice of allowing employees to work overtime, if available, until 7 p.m. on weekdays without fulfilling its bargaining obligation. The Judge's SQA order remedies the Respondent's failure to fulfill such bargaining obligation. Therefore, the Judge's order is consistent with Authority precedent and does not affect management's right to assign work. *See Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1256 (2000) (Member Cabaniss dissenting as to other matters); *FCI*, 8 FLRA at 605.

Moreover, under the Back Pay Act, an award of back pay is authorized when an appropriate authority determines that: (1) an aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials. *See United States Dep't of Health and Human Serv.*, 54 FLRA 1210, 1218-19 (1998). As applied here, the record includes an employee's testimony that she would have worked more overtime had the office remained open. *See* Tr. at 33 (testimony of Victoria Carter) (answering "Yes[]" when asked, "Would you have worked more hours of overtime" between January 30, 2004 and October 2004 "had the office been open past 5:45 p.m.?").

Based on the foregoing, we find that a SQA remedy with respect to the change in overtime hours, with backpay, is appropriate.

V. Order

Pursuant to § 2423.41 of our Regulations and § 7118 of the Statute, the Social Security Administration shall:

1. Cease and desist from:

(a) Unilaterally changing the ability of unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays without giving prior notice to the American Federation of Government Employees, AFL-CIO (AFGE), either directly or through its agent, AFGE Local 3448, and affording AFGE the opportunity to bargain over the proposed change.

(b) In any like or related manner interfering with, restraining or coercing unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Promptly restore the practice of allowing bargaining unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays and maintaining that practice until AFGE or AFGE Local 3448 have been given notice of a proposed change to the practice and an opportunity to bargaining over the proposed change.

(b) Make whole any employees adversely affected by the change in overtime practice by paying them backpay, with interest, for all pay that they lost as a result of the change.

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13. We note that, in determining whether a judge's factual findings are supported, the Authority looks to the preponderance of the record evidence, not substantial evidence as stated in the dissent. *See United States Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirkland Air Force Base, N.M.*, 64 FLRA No. 24, slip op. at 10 (2009) (Member Beck concurring).

14. As noted previously, although we are remanding this allegation regarding credit hours, we are also issuing an Order and Notice in connection with the violation found regarding overtime.

(c) Post at the Painesville, Ohio District Office, where bargaining unit employees 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 Area Director for Northern Ohio, and shall be posted and maintained for 60 consecutive days thereafter 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) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

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

We hereby notify bargaining unit employees that:

WE WILL NOT unilaterally change the ability of bargaining unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays without giving prior notice to the American Federation of Government Employees, AFL-CIO (AFGE), either directly or through its agent, AFGE Local 3448, and affording AFGE the opportunity to bargain over the proposed change.

WE WILL NOT in any like or related manner interfere with, restrain or coerce unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL promptly restore the practice of allowing bargaining unit employees at the Painesville, Ohio District Office to work available overtime until 7:00 p.m. on weekdays, if they so desire, and will maintain that practice until AFGE or AFGE Local 3448 have been given notice of a proposed change to the practice and an opportunity to bargain over the proposed change.

WE WILL make whole any employees adversely affected by the change in overtime practice by paying them backpay, with interest, for all pay that they lost as a result of the change.

_____
(Agency)

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

This notice must remain posted for 60 consecutive days from the date of the 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 for the Federal Labor Relations Authority, Chicago Regional Office, whose address is: 55 West Monroe, Suite 1150, Chicago, IL, 60603-9729, and whose telephone number is: (312) 886-3465.