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

OALJ 24-09

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MD

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 215, AFL-CIO

CHARGING PARTY

Case No. WA-CA-20-0257

Sarah J. Kurfis
For the General Counsel

Eddie Taylor
For the Respondent

Richard Couture
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

For most of its history, the Federal Labor Relations Authority has required agencies to negotiate with their unions when they make changes in conditions of employment that are "more than de minimis." In 2020, the Authority abandoned that standard, finding that it had been "drained of any determinative meaning," to the point that agencies were being required to bargain over "any decision, no matter how small or trivial."[1] Today's case, however, illustrates that there are indeed instances in which an agency's policy change is de minimis, and thus does not require bargaining.

[1] *U.S. Dep't of Education and U.S. Dep't of Agriculture*, 71 FLRA 968, 969 (2020) (*Education*).

The parties' dispute focuses on a newly-negotiated contractual requirement that employees utilize the Agency's instant messaging system (Skype) and ensure that their IM status, displayed on their laptops, accurately reflects their work status. The Union insisted that these requirements applied only when employees were teleworking, but the Agency insisted that they also applied when employees were working at their official duty station. One employee challenged this policy, and after ignoring several warnings from her managers to maintain her IM status accurately, she was suspended for three days. The Union filed a grievance challenging the suspension, and it also filed an unfair labor practice (ULP) charge, alleging that the Agency should have notified the Union and negotiated with it before changing its IM policy.

The case now before me presents two main issues: first, whether the previously-filed grievance bars the Union's ULP charge under Section 7116(d) of the Statute; and second, whether the Agency unlawfully changed conditions of employment by requiring employees to log into and maintain an updated IM status while working at their ODS.

On the first question, § 7116(d) does not preclude the ULP charge, because the aggrieved party in the grievance (an employee) was not the aggrieved party in the ULP (her union). Section 7116(d) prohibits an aggrieved party from (metaphorically) "taking two bites out of the apple" by litigating the same issue in two different forums, but it does not bar the Union here from invoking the ULP process to vindicate its institutional interests, which are separate from the employee's personal interests that were addressed in the grievance procedure.

On the second question, I find that any change in work procedures implemented by the Agency regarding the use of Skype IM technology did not have more than a de minimis impact on employees' conditions of employment. Thus it did not violate § 7116(a)(1) or (5) of the Statute.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On May 28, 2020, the American Federation of Government Employees, Council 215, AFL-CIO (the Union or Charging Party) filed a ULP charge against the Social Security Administration, Baltimore, Maryland (the Agency, SSA, or Respondent), alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union over a new requirement that employees maintain an updated Skype status while working at their official duty stations. GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Washington Region issued a Complaint and Notice of Hearing on October 18, 2022, on behalf of the Acting General Counsel (GC), similarly alleging that the Agency violated § 7116(a)(1) and (5). GC Ex. 1(c). The Agency filed its Answer to the Complaint on November 14, 2022, denying that it violated the Statute. GC Ex. 1(e).

On January 19, 2023, a hearing was held in this matter, with parties participating on the MS Teams platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses; a court reporter prepared a transcript of the hearing. The GC and the Respondent filed post-hearing briefs, which I have fully considered. Because the Respondent raised an issue in its post-hearing brief that it had not previously addressed, I granted the GC's Second Motion to File a Reply Brief, as well the Respondent's Motion for Leave to File Other Documents and to respond to the GC's Reply Brief. Upon receipt of the Respondent's Response to the General Counsel's Reply Brief on March 29, 2023, the record was closed.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of section 7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees. The Union, Council 215, is an agent of AFGE for the purpose of representing bargaining unit employees of the Agency, and it too is a labor organization within the meaning of the Statute. SSA and AFGE have been parties to a series of collective bargaining agreements (CBAs), the most recent of which took effect on October 27, 2019. Jt. Ex. 1.

In early 2020, Crystal McDade was a case manager assigned to the Case Pulling Unit (CPU) of the Agency's National Case Assistance Center (NCAC) in Baltimore; she was also a Union steward. Tr. 62, 140. The Agency's several NCACs provide remote support, including case preparation and decision writing, to SSA hearing offices around the country. Employees in the CPU perform prehearing development of disability case files for the Agency's administrative law judges, including obtaining medical records and other evidence and ensuring that the exhibits are properly filed in the case folders. Tr. 26, 140. McDade and other CPU employees in Baltimore were directly supervised by Gina Altidor, who was on a compassionate detail and working from Miami. Tr. 138-39. McDade's second-line supervisor, Gloria Richardson, worked in Baltimore and managed the Baltimore NCAC's CPU. Tr. 155-56.

The Social Security Administration has been using an instant messaging program on all its employees' computers since 2011. Tr. 125. The current program, Skype, was installed in 2018 and functions in much the same way as earlier programs did, allowing employees to communicate through instant messaging, audio calls, and video conferencing, as well as email. Tr. 31-32, 125-26. When an employee turns on his or her laptop, Skype loads automatically and immediately displays the employee's work status, which Skype determines based on the employee's keyboard and mouse activity: for example, green for available, yellow for inactive or away, red for busy or in a meeting. Tr. 31-32, 129, 131. The employee personally does not need to do anything for the appropriate status to show, and that status is visible to other employees and supervisors. Tr. 33, 129-31. The employee similarly does not need to do anything for the appropriate status to be updated, based on the

employee's work activity. Tr. 32. The system is also connected to the employee's calendar and to Microsoft Teams, so that the employee's Skype status will update to "busy" or "do not disturb" if he is in a meeting or videoconference. Tr. 32, 132. An employee also can manually change his status, such as by setting it to "do not disturb," or by logging off Skype, in which case the employee will not receive messages or calls until he resumes Skype activity. Tr. 88, 119

In recent years, even before the Covid pandemic, SSA employees had begun teleworking in increasing numbers, and when the Agency negotiated a new CBA with its AFGE-represented employees in 2019, the parties added Article 41, devoted to teleworking.[2] Among other things, Article 41 authorizes management to "require that employees use instant messaging, video, or similar technology while working at the ADS." Article 41, Section 6E.[3] It also requires employees to "ensure that the instant message or similar technology accurately reflects their work status," but this rule did not specify whether it applied to employees at their ADS, their ODS, or both. *Id.* The Union understood Section 6E to apply only when employees are working at their ADS, but it began hearing rumors in late 2019 from different parts of the country that management was applying it to both the ODS and ADS. Tr. 36. In January of 2020, these reports were confirmed, when Ms. McDade returned from extended leave: she met with her second-line supervisor Ms. Richardson, inquired about using Skype, and was told that employees were required to use Skype and to maintain an accurate Skype work status at both their ADS and ODS. Jt. Ex. 5.

Both Ms. McDade and the Union believed that management was improperly and unilaterally expanding the Skype requirement (*See* Jt. Exs. 2, 3), and McDade proceeded to ignore it. For the most part, unless her managers forced the issue, she kept her Skype status on "do not disturb" or "off" or similar functions that prevented other people from communicating with her, either by instant message, by voice mail, or by email – not only when working at her ODS but also when teleworking. Ultimately, she was suspended for this conduct. Jt. Exs. 6, 10. The Union filed a grievance on her behalf on May 20, 2020, challenging McDade's suspension,[4] but it ultimately decided not to arbitrate the grievance. Tr. 79. Then on May 28, 2020, the Union filed this ULP charge, alleging that the Agency should have notified the Union and negotiated before implementing this change in the Skype policy. GC Ex. 1(a).

POSITIONS OF THE PARTIES

General Counsel

Because the Respondent did not assert – either prior to or during the hearing – a defense based on § 7116(d) of the Statute, the GC did not address that issue in its post-hearing brief. Instead, it focused on the substantive allegation of its Complaint: that on

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[2] When teleworking, employees work at an Alternate Duty Station (ADS), which is usually their home; at other times, they work at their Official Duty Station (ODS), an SSA office. Tr. 28.

[3] The Collective Bargaining Agreement, effective from October 2019 to October 2025, is Joint Exhibit 1; Article 41, Section 6E is at page 219.

[4] The grievance is Attachment 1 to the Respondent's Motion for Leave to File Other Documents.

January 15, 2020, the Agency implemented a new Skype policy for employees in the Case Pulling Unit of the Baltimore National Case Assistance Center by requiring them to maintain an updated Skype status while they are working at their official duty stations.

In support of its contention that the Skype policy was new, the GC points to the telework article of the newly-negotiated October 2019 CBA, Article 41. *See* GC Brief at 7. Section 6E of that article authorizes management to require employees to use Skype or other forms of instant messaging while working at their ADS, but it does not explicitly refer to the use of Skype at employees' ODS; thus the GC asserts that since this is the "teleworking" article of the CBA, it "only applies when an employee is teleworking at their ADS." *Id.* The GC further insists that no provision of the CBA or Agency policy addresses the use of IM at employees' ODS. *Id.* Ms. Richardson's January 15, 2020 memo to her CPU employees crossed this boundary, however: it explicitly instructed employees to sign into Skype and to ensure that it accurately reflects their availability status for their entire workday, "regardless of your duty station." Jt. Ex. 5; GC Brief at 9.

The GC further notes that Richardson recognized that her instructions represented a change in NCAC policy. GC Brief at 9-10. At the hearing, she testified that supervisors and employees represented by other unions had already been required to stay on Skype, "but it just didn't reflect apparently the AFGE employees. . . . So when I actually sent this particular email, from my understanding, this is what had basically changed, and it was for our office to require them . . . we could actually require them to also be on Skype at their ODS." Tr. 173-74.

The General Counsel goes on to argue that the impact of this change on bargaining unit employees is substantial. The most obvious impact was that it was used as a basis for suspending Ms. McDade, and the GC cites *U.S. Dep't of Justice, U.S. INS, El Paso Dist. Office*, 34 FLRA 1035 (1990) (*INS El Paso*), for the principle that a change subjecting employees to discipline affects conditions of employment. Similarly, it cites cases such as *Defense Mapping Agency Aerospace Center, St. Louis, Mo.*, 40 FLRA 244, 245 (1991) (*Defense Mapping*), as holding that policies affecting means of employee communication cannot be changed without notice and bargaining. GC Brief at 13-14. The GC further argues that the new Skype policy is likely to affect employee performance appraisals. *Id.* at 16, citing *U.S. EEOC*, 40 FLRA 1147, 1155 (1991). Therefore, since the new Skype policy substantially affected employees' conditions of employment, the Agency was required to notify the Union and bargain before implementing it.

In order to remedy the Respondent's ULP, the GC requests that the Agency be ordered to rescind the Skype policy as well as any discipline imposed on employees for violating it, along with backpay. GC Brief at 17-18.

After the Respondent asserted in its Post-Hearing Brief that § 7116(d) barred the Union's ULP charge, the General Counsel sought to rebut this argument in its Reply Brief. Applying the oft-cited three-pronged analytical framework outlined in *U.S. Dep't of the Air*

Force, 62nd Airlift Wing, McChord AFB, Wash., 63 FLRA 677, 679 (2009) (*McChord*),[5] the GC asserts that the charge and the grievance here do not involve the same set of facts and do not involve the same issues. Reply Brief at 4.

Regarding the factual circumstances of the grievance and the ULP charge, the GC notes that the grievance was filed to challenge McDade's April 30, 2020 suspension, while the charge was filed to protest the Agency's failure to notify the Union and bargain before implementing the January 15, 2020 Skype policy. *Id.* The precipitating event for the charge occurred three months prior to McDade's suspension. Similarly, it argues that the legal theories behind the grievance and charge were quite different: the grievance alleged that the Agency had retaliated against McDade for her protected activity, in violation of Article 3 of the CBA and § 7116(a)(1) and (2) of the Statute, while the ULP charge alleged that the Agency had violated the Union's bargaining rights under § 7116(a)(1) and (5). *Id.* at 4-5. Counsel for the GC and the Respondent agreed at the hearing that the merits of McDade's suspension were not at issue here. Tr. 17-18. Moreover, the Union's efforts in the grievance were solely on McDade's behalf to overturn her suspension, while the Union and the GC are seeking in this ULP proceeding to vindicate the Union's right to notice and the opportunity to bargain, on behalf of the entire bargaining unit, before changes in conditions of employment are implemented. Reply Brief at 5-6. Therefore, the General Counsel insists that the ULP charge and complaint are not barred by 7116(d).

Respondent

The Respondent asserts that the ULP charge is barred by 7116(d) because all three prongs of the analytical framework have been satisfied: the grievance was filed before the charge; it arose from the same set of facts and raised at least some of the legal theories asserted in the ULP case; and both actions were initiated at the discretion of the same party. Response Brief at 1.[6] Respondent focuses its attention on the second of these points: that the factual and legal bases of the two actions are substantially the same, and it refers me to *AFGE Local 420 Council of Prison Locals, C-33*, 70 FLRA 742, 743 (2018), which emphasizes that the issues do not need to be identical, but merely "substantially similar." Response Brief at 2.

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[5] In *McChord*, the Authority stated that in order for a ULP charge to be barred by an earlier-filed grievance, all three of the following conditions must be met: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the charge; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same. 63 FLRA at 679. These requirements actually date back at least as far *as Federal Bureau of Prisons*, 18 FLRA 314, 315 (1985) (*Prisons*). The 7116(d) analysis is the same for grievances that are filed after a ULP charge. *See, e.g., U.S. Dep't of the Army, Army Finance & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1350 (1991) (*Army Finance*). The Authority also explained in *Army Finance* that in order to determine whether the issues are the same in the grievance and the charge, it examines whether they arise from the same set of factual circumstances and whether they advance substantially similar theories. *Id.* at 1350-51.

[6] Counsel for the Respondent asserted that he first became aware at the hearing that a grievance had been filed on the same issue as the ULP complaint. Motion for Leave to File Other Documents at 1-2. After learning of the grievance, Respondent sought permission to offer the grievance into evidence. Since the issue of § 7116(d) goes to our jurisdiction to hear the ULP complaint, I granted the Respondent's motion. *Lowry AFB, Denver, Co.*, 29 FLRA 566, 569-70 (1987). The grievance, marked as Attachment 1 to the Respondent's Motion for Leave to File Other Documents, is admitted into evidence and will be referred to as "the grievance."

Respondent disputes the GC's allegation that the grievance focused on retaliation against McDade's protected activity, while the ULP charge focused on the Agency's unilateral implementation of the Skype policy. Although Respondent agrees that the ULP charge objected only to the alleged unilateral change, it insists that the grievance alleged and discussed both the alleged retaliation against McDade and the unilateral change to the Skype policy. *Id.* at 2. It cites two separate places in the grievance where the Union argued the Agency had violated the Statute by changing the Skype policy without notice or an opportunity to bargain. First, at page 4 of the grievance, the Union stated, "The Baltimore NCAC managers did not give notice to the Union and they did not bargain changes concerning the use of Skype. As a result the Baltimore NCAC communications policy [which McDade was charged with violating] is not applicable or appropriate." Second, at page 5 of the grievance the Union asserted, "Article 1. Sections 1. and 2. of the Contract between SSA and AFGE was violated as well as 5 USC 7116, in part, because the NCAC managers attempted to changed [sic] conditions of employment related to the use of Skype without bargaining." In other words, while the GC sought to litigate only the issue of unilateral change, the Union and McDade had already made that argument as part of the grievance's challenge to McDade's suspension. Response Brief at 2-3. Although some of the facts concerning McDade's suspension may have differed from the facts alleged in the ULP charge, "the material facts at the heart of the General Counsel's case are the same as the material facts alleged in the grievance" concerning the unilateral change in the Skype policy. Response Brief at 3. Similarly, one of the legal theories underlying the grievance (unilateral change in the Skype policy) is the same as the GC's allegation in the ULP complaint. *Id.* at 3-4.

Regarding the substantive allegations of the complaint, the Respondent insists that the January 15, 2020 directive to employees at the Baltimore CPU to log into Skype and maintain an updated status did not trigger a bargaining obligation. This requirement does not require employees to take any action or extend any effort; therefore it did not constitute a change for employees. Similarly, the directive had no impact on employees' performance of their jobs. *Id.* at 16. The Agency takes issue with the GC's assertion that employees are affirmatively required to "log into Skype," because Skype automatically loads when an employee turns on his or her computer. *Id.* at 17. Similarly, as employees go through the workday, Skype automatically adjusts their status if they go into a meeting, go idle, or resume working on their computer. By contrast, it required conscious action for Ms. McDade to adjust her status to "Do Not Disturb" or to log off Skype. *Id.*

Respondent then asserts that any evidence of an impact on employees was purely speculative. Union officials who testified at the hearing offered second-hand, anecdotal evidence regarding potential disciplinary actions and productivity and rumors of employees' work being monitored, but nothing here was specific. *Id.* at 21-23. The Agency likens the facts of this case to those in *Soc. Sec. Admin.*, 69 FLRA 363 (2015), where the Authority found that the installation of a new call-routing system did not result in an obligation to bargain. Resp. Brief at 18.

As for the one employee who indisputably was disciplined – McDade -- the Respondent insists that her violation of the January 15 directive was the least of the several reasons she was suspended. *Id.* at 19-20. Only eight of McDade's twenty-seven cited violations of that policy involved days that she was working at her ODS, and even on those days her conduct involved her affirmative failure to respond to emails and phone calls, not merely a failure to maintain an accurate Skype status. The Agency notes that in Ms. Richardson's decision upholding McDade's suspension, she said that the suspension was justified even if employees could not be required to use Skype at their ODS. *Id.* at 20 (citing Jt. Ex. 10). There was no evidence that any other employee has been disciplined for violating the Skype policy, even though employees have resumed working regularly at their ODS since March of 2022. *Id.*

Although the Respondent insists it did not commit an unfair labor practice, it argues that a status quo ante remedy would not be appropriate even if a ULP were found, and that McDade's suspension should not be rescinded. *Id.* at 24-27.

ANALYSIS AND CONCLUSIONS

Section 7116(d) does not bar the Union's ULP charge.

The second sentence of § 7116(d) of the Statute provides, in pertinent part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures." 5 U.S.C. § 7116(d). Dating back at least to the *Prisons* decision in 1985, the Authority has explained that "the clear purpose and effect of section 7116(d) is to prevent relitigation of an issue in another forum after a choice of procedures in which to raise the issue has been made by the aggrieved party." 18 FLRA at 316. As the Authority noted in *U.S. Dep't of the Navy, Navy Region Mid-Atlantic, Norfolk, Va.*, 70 FLRA 512, 515 (2018) (*Navy Mid-Atlantic*), 7116(d) is meant to prevent parties from forum-shopping or getting "two bites at the apple."

In applying this statutory rule, the Authority has long utilized the three-pronged analytical framework that I described earlier, and which both parties cite. Disputes regarding the second prong of the test are rare, because it is generally clear whether the grievance or the ULP charge was filed first. By contrast, our case law is replete with disputes over the first prong, because litigants (and Members of the Authority) frequently disagree as to whether "the issues that are the subject" of the charge and the grievance are the same, or at least substantially similar. In making this determination, "the Authority looks at whether the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar." *Army Finance*, 38 FLRA at 1351. This determination remains the source of bitter dispute, as illustrated by the Authority's decision in *Navy Mid-Atlantic,* where one party's choices of forums is another party's "exercise in technical hair-splitting and artful pleading." 70 FLRA at 514-15.

Because most of the reported 7116(d) cases focus on the first prong of the test, the third prong sometimes seems to fall between the cracks, and that seems to have occurred in our case. Ironically, however, it is the identity of the aggrieved parties, or lack thereof, which is the determinative factor here, even though it received short shrift from both Respondent and General Counsel. Under the third prong, the aggrieved parties in the grievance and the ULP charge must be the same. *McChord*, 63 FLRA at 679.[7] Since it is the aggrieved party who has the choice of utilizing either the ULP process or the grievance procedure, 7116(d) cannot be invoked when the party asserting a grievance is not the same as the party asserting the ULP. *See Local 547*, 73 FLRA at 582, quoting *Cornelius v. Nutt*, 472 U.S. 648, 665 n.20 (1985). And as I will explain, § 7116(d) does not bar the charge here, because Ms. McDade was the aggrieved party in the grievance and the Union was the aggrieved party in the ULP.

In its Response Brief, the Respondent states, "There is no dispute that the grievance was filed before the ULP charge, and that the grievance and the ULP were initiated at the discretion of the Charging Party." Response at 1. It then moves on to address what it perceives as the main dispute -- whether the issue in the grievance was the same as in the ULP charge. In its Reply Brief, the GC does not even address the third prong; it simply asserts that since "the complaint and the grievance do not involve the same set of facts and do not involve the same legal theory . . . the complaint is not barred under section 7116(d)." Reply Brief at 4. Although technically Respondent is correct that the GC didn't dispute the identity of the aggrieved parties, that doesn't mean that the aggrieved parties are indeed identical.

Turning to the facts of our case, we see that the grievance, filed May 20, 2020, was filed by Greg Senden, Secretary of AFGE Council 215. Grievance at 1. It immediately referenced Ms. Altidor's proposal to suspend McDade and Ms. Richardson's affirmance of the suspension, and its entire thrust was toward demonstrating that the suspension was improper. It argued that there was no Agency policy requiring employees to use Skype at their ODS; that Article 41, Section 6 of the CBA does not address work at an employee's ODS; and that since the parties had not negotiated any policy changes regarding the use of Skype, the Baltimore NCAC policy was not applicable to McDade. *Id.* at 3-4. Since employees in other offices had not been disciplined for such conduct, the grievance argued that McDade was being treated unfairly and that the Agency failed to employ progressive discipline; finally, it alleged the discipline was retaliation for McDade's work on behalf of the Union. *Id.* at 5-6. While the grievance also alleged (as the subsequent ULP charge did) that the implementation of the Skype policy without bargaining violated § 7116 of the Statute, this was barely touched on in the grievance, and it was clearly overshadowed by the arguments relating directly to McDade and her allegedly unfair discipline. *Id.* at 5. At the end of the grievance, Senden requested that McDade "be made whole in every way possible, including back pay and the removal of any documents relating to the suspension." *Id.* at 6. Notably, the grievance does not request that the NCAC Skype policy be rescinded.

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[7] Alternatively, this has been phrased as requiring that "the selection of the ULP procedure must have been in the discretion of the aggrieved party." *Am. Fed'n of Gov't Emp. Local 547*, 73 FLRA 581, 582 (2023) (*Local 547*).

In contrast, the ULP charge was filed eight days later by Richard Couture, President of Council 215, and Council 215 was named as the Charging Party. GC Ex. 1(a) at 1, 2, 5. It focused entirely on the Agency's apparent policy of requiring employees to keep their Skype status updated at their ODS, which Couture insisted was a change in conditions of employment and could not be implemented without notice and bargaining. *Id.* at 3. Among several adverse impacts that this change would have on employees, the charge indicated that at least two employees had faced disciplinary action for violating the new policy,[8] but no employees were named. *Id.*

Given these facts, it is clear to me that although the grievance was filed by the Union, it was initiated on behalf of, and explicitly in the interest of, Ms. McDade. Its purpose was to overturn her suspension and make her whole. The charge, however – also filed by the Union – was initiated to pursue the institutional interests of the Union (the right to notice of a significant policy change and the opportunity to bargain over it) and only referenced McDade's suspension indirectly.

The Authority has addressed this question on a number of occasions, most recently and most pertinently in *Local 547*, where the facts closely parallel those in our own case, except that in *Local 547* the ULP charge preceded the grievance. As the agency conducted promotion interviews for a position, the union filed a ULP charge alleging that management had unilaterally changed a past practice, in violation of § 7116(a)(1) and (5); subsequently the union filed a grievance on behalf of several employees who were not promoted, alleging again that management had changed a past practice, among other things. Quoting from *Army Finance*, 38 FLRA at 1353, the Authority noted that in 7116(d) cases, the *aggrieved* party is not necessarily the *filing* party. 73 FLRA at 582 (emphasis in original). It then cited precedent demonstrating that "where a union filed a grievance alleging harm to a bargaining-unit employee, the employee, not the union, was the aggrieved party." *Id.*, citing *Army Finance*, 38 FLRA at 1354; *U.S. DOJ, INS*, 20 FLRA 743, 745 (1985); and *AFGE, Local 3475*, 55 FLRA 417, 419 (1999)). Just as in our case, the ULP charge in *Local 547* didn't name any individual employees or allege the violation of any individual rights, but instead focused on the union's institutional rights to notice and to bargain. 73 FLRA at 582. The grievance, by contrast, identified several employees and alleged that their rights in the promotion process had been violated, and it sought remedies specific to the employees. Accordingly, the Authority concluded that the employees were the aggrieved parties in the grievance, even though the union had filed it, but the union was the aggrieved party in the ULP charge. *Id.* at 583. Similarly, in our case, McDade was the aggrieved party in the grievance, while the Union was the aggrieved party in the charge.

Since I have concluded that the lack of identity of the aggrieved parties precludes the application of the 7116(d) bar, it is not necessary to determine whether the issues that were the subject of the grievance were substantially the same as the issues in the ULP charge. Instead, I will proceed to analyze whether the Agency was obligated to give the Union notice of the NCAC Skype policy and an opportunity to bargain over it.

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[8] Notwithstanding this reference to two employees being disciplined, there is no evidence in the record of anyone other than McDade being disciplined.

The Respondent was not obligated to bargain over the Skype policy.

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland AFB., N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland*); *Dep't of the Air Force, Scott AFB*, Ill., 5 FLRA 9, 9-11 (1981). Even when the change involves the exercise of a management right under § 7106(a) of the Statute, the agency still must bargain with the union over procedures for implementing the change and appropriate arrangements for employees adversely affected by the change. *Kirtland*, 64 FLRA at 173; *Soc. Sec. Admin., Office of Hearings & Appeals, Region II, N.Y., N.Y.*, 19 FLRA 328, 328-29 (1985) (*OHA Region II*).

When an agency is alleged to have unlawfully changed a condition of employment, the ULP analysis involves three questions: Does the alleged change involve a condition of employment? Was there a management-initiated change in that condition? And was the impact of that change significant enough to require bargaining? *See U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 58 FLRA 699, 700 (2003); *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704 (1995) (*Fairchild AFB*). The answer to the first question is clearly "yes," but the latter two questions are more complicated.

In applying § 7103(a)(14)'s definition of "conditions of employment" to the duty to negotiate changes therein, the Authority has looked to two basic factors: whether the subject matter of the purported change pertains to bargaining unit employees, and whether there is a direct connection between the subject matter and the work situation or employment relationship of unit employees. *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Baltimore, Md.*, 36 FLRA 655, 668 (1990) (citing *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 236-37 (1986). The Agency's policy regarding the use of Skype clearly meets these specifications, as it applies specifically to unit employees, and it relates directly to how those employees perform their jobs. Skype is a basic application on the computer operating systems of all employees; thus any policy concerning how employees are to utilize the application will affect how they perform their jobs. The use of Skype is a condition of employment for these employees.

As for whether the Agency changed its Skype policy in January of 2020, I believe the answer is "yes," but only in the most technical sense; in practice, Ms. Richardson was simply making explicit a rule that had previously been implicit, but widely understood and practiced by employees for years. One employee (Ms. McDade) questioned whether she was required to maintain her Skype status while working at her ODS, and this prompted Ms. Richardson to send the January 15 email (Jt. Ex. 5) to employees in her unit, explicitly requiring them to maintain an updated Skype status at both their ADS and ODS.[9] Prior to October of 2019, the

[9] In her email to McDade, Richardson attached the October 28, 2019 email from NCAC management, which advised employees that with the new collective bargaining agreement, they were required to use Skype while teleworking, to maintain an accurate Skype status, and to respond timely to instant messages. Jt. Ex. 6a at 2. Richardson's email reiterated what Associate Commissioner Julian had stated to Council 215 President Couture on January 6, 2020 – that employees were required to use Skype both at their ODS and their ADS. Jt. Ex. 4.

CBA did not contain a telework article at all, and it did not address Skype or instant messaging technology at all, either for employees working at their ODS or at their ADS. Tr. 34-35. While the new CBA authorized management to require employees to use Skype when they worked at their ADS, it didn't explicitly require this of employees working at their ODS. Nonetheless, Skype had been the basic platform for employee communications at the Agency, regardless of whether an employee was teleworking or not, prior to 2019, and it remained so afterward. The need to communicate with other employees does not meaningfully change, whether one is working at home or at an office,[10] and Skype had been the primary means of enabling such communication for years throughout the Agency. I find that prior to October 2019, employees utilized Skype regardless of where they were working and understood that it was necessary for everyday communications, even though it was apparently not explicitly required.

At the hearing and in its brief, the GC placed considerable emphasis on the text of Article 41 of the CBA, but the full context of that article undercuts the meaning ascribed to it by the Union and the GC. Article 41 is titled Telework, and it adds a variety of rules for employees to follow while working at their ADS, but the fact that the text refers explicitly to "working at the ADS" (as in the second line of Section 6E) doesn't necessary mean that those rules are **inapplicable** at the employee's ODS. Rather, it is clear to me that the full article is intended to apply the same basic rules and procedures for teleworking employees that applied when they worked at their ODS. Thus, Section 6D of Article 41 requires employees "working at the ADS" to be accessible by telephone and to retrieve and timely respond to voice mail. Section 6E contains three requirements and uses slightly different language in each one: it first requires employees to read and respond to emails "as if they were at the ODS;" it then says management "may require" employees to use instant messaging or similar technology "while working at the ADS;" and finally it requires employees to ensure that Skype accurately reflects their work status, without referring explicitly either to ADS or ODS. Section 9 of Article 41 provides that all policies relating to employee conduct at their ODS also apply at their ADS. In total, these provisions can only be reasonably understood as making the ADS as similar as possible to the ODS. It would be absurd to conclude that employees working at their ODS are **not** required to be accessible by telephone, or that employees are **not** required to respond to instant messages from management, simply because Sections 6D and 6E only cite such a requirement in the Telework article. It is similarly absurd to impose such a meaning on the requirements to use Skype and maintain an accurate Skype status. Employees throughout the Agency had been using Skype as their basic communications interface for years at their ODS, even though it was not explicitly required. Ms. Richardson's memo of January 15 simply made explicit what had long been understood and followed by employees.[11]

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[10] But when employees are teleworking, their supervisors cannot simply walk to their office to communicate. This likely was one of the reasons for adding an explicit Skype requirement in the new Telework article of the CBA, but it does not lessen the need to use Skype to communicate at a spread-out agency such as SSA, where employees such as McDade work hundreds of miles away from their supervisors and from the judges they assist.

[11] Richardson testified that she sent the January 15 email to her CPU employees in response to McDade's inquiry about Skype on January 13; she decided to send it to all her employees, rather than just to McDade, so that McDade would not appear to be singled out. Tr. 170-71.

Thus, to the extent that the memo issued by Ms. Richardson on January 15 made explicit and mandatory a policy that had been implicit yet widely followed, I find that it constituted a management-initiated change in a condition of employment.[12] The final question, then, is whether the change affected employees to a degree that it triggered a bargaining obligation on management's part. *Fairchild AFB*, 50 FLRA at 704.

For the past three years, the threshold at which a change triggers a duty to bargain has been in limbo. For most of the FLRA's history, the Authority has held that a change is negotiable "if the change will have more than a de minimis effect on conditions of employment." *Kirtland*, 64 FLRA at 173; *OHA Region II*, 19 FLRA at 328-29. But in *Education*, the Authority issued a General Statement of Policy which discarded the "more than de minimis" test in favor of a "substantial impact" test; in other words, an agency is not required to bargain over a change in conditions of employment unless that change has a substantial impact on a condition of employment. 71 FLRA at 971. However, in *AFGE v. FLRA*, 25 F.4th 1 (D.C. Cir. 2022) (*AFGE v. FLRA*), the U.S. Court of Appeals for the District of Columbia Circuit held that the Authority's rejection of the de minimis standard was arbitrary and capricious, and it vacated the decision. Since the court's decision, the Authority has yet to advise the federal labor relations community whether it will return to the de minimis test or the substantial impact test, or whether it will articulate a new standard -- leaving the federal labor relations community in considerable doubt as to where to draw the line in requiring bargaining.

Somewhat surprisingly, the parties in this case actually agree that, at least for the time being, a change must be substantial in order to require bargaining. The GC, who I might have assumed would argue for a lower threshold – i.e., the de minimis standard – since the *Education* decision is no longer binding, continues to assert in its brief that a substantial impact is required. GC Brief at 12-13 & n.2. This is consistent with the GC's allegation in the Complaint that the Skype policy had a substantial impact on conditions of employment. G.C. Ex. 1(c). Nevertheless, the GC insists that even using the higher threshold of "substantial impact," the Agency's change to its Skype policy had a substantial impact on employee working conditions. GC Brief at 14-16. For its part, the Respondent insists that since the Authority has not explicitly abandoned the substantial impact standard, and since the events of this case occurred outside the jurisdiction of the D.C. Circuit, the Authority's non-acquiescence policy should apply, and the substantial impact standard should be utilized here. Resp. Brief at 15.

I do not agree with either party on this point. Although I think it is admirable that the GC, having asserted in its Complaint that the Skype change was substantial, has not sought to shirk that heavier burden of proof, I do not believe that the law requires me to continue to apply a bargaining standard if it is unsupported by the case law. I also do not see any justification for me to assume (as the Respondent suggests) that the Authority would choose to continue to apply its substantial impact standard in the face of the D.C. Circuit's decision in *AFGE v. FLRA*. "Vacated" means vacated: poof – it's gone. The *Education* decision now

[12] Richardson did not initiate this policy on her own. She testified that she sent the January 15 memo after consulting with the Agency's labor relations staff. Tr. 171. It was sent only a few days after the Associate Commissioner had advised the President of Council 215 that employees were required to use Skype at their ADS and ODS (Jt. Ex. 4). Accordingly, Richardson was articulating an Agency-wide policy.

has no greater legal standing than the cases it overruled. In the absence of a binding standard for the threshold for bargaining, the best course of action for me is to apply the standard that I believe to be correct, as I understand the full scope of our Statute and FLRA case law.[13]

My understanding is that the Statute requires an agency to provide notice to a union and to bargain when it makes a change in a condition of employment that is more than de minimis. This is the rule that the Authority has applied for most of its four-plus decades of existence, and that has been endorsed and enforced by those Circuit Courts of Appeal that have examined the issue. *AFGE v. FLRA*, 25 F.4th at 9; *AFGE, Nat'l Border Patrol Council v. FLRA*, 446 F.3d 162, 165 (D.C. Cir. 2006); *Ass'n of Administrative Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) (*AALJ v. FLRA*). Indeed, in its recent decision in *AFGE v. FLRA*, the court did not simply reject the Authority's adoption of the substantial impact test; rather, it recognized "the clear appropriateness of a de minimis exception to the duty to bargain, as a matter of law." 25 F.4th at 9.

When the de minimis standard was first articulated by the Authority, it was framed as a narrow exception to § 7114(b)(2)'s unqualified language that parties have a duty to "negotiate on any condition of employment." *Dep't of Health & Human Servs., Soc. Sec. Admin.*, 24 FLRA 403, 406-07 (1986) (*SSA*), cited in *AFGE v FLRA*, 25 F.4th at 8; *see also Dep't of Health & Human Servs., Soc. Sec. Admin. Region V*, 19 FLRA 827, 834 (1985) (Member McGinnis concurring) (*Region V*). The Authority reasoned that since the Statute and other federal laws already narrowed the scope of bargaining considerably for federal employees and unions, the Authority should "not impose further limitations unless they are based on clear statutory authority and are buttressed by sound policy considerations." *SSA*, 24 FLRA at 406-07. Nonetheless, it stated that government could not properly function if management were "required to bargain over every decision it makes, regardless of the impact on unit employees." *Region V*, 19 FLRA at 834. Thus the default position in the statutory analysis is to require notice and bargaining over changes, unless the change "has no appreciable effect upon working conditions." *AALJ v. FLRA*, 397 F.3d at 962. And for nearly the entirety of the FLRA's history, the Authority struck that balance by applying the de minimis standard. Therefore, until the Authority fills the vacuum and adopts a new standard for when bargaining over a change is required, I will utilize the de minimis test.

In the case at hand, however, it is not actually necessary to choose between the de minimis and the substantial impact test. Examining the evidence regarding the Agency's requirement that employees use Skype while working at their ODS, I conclude that the impact of the policy on employees' work is so small that bargaining was not required, regardless of which test is used. Thus the General Counsel has not met even the lower

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[13] By undertaking this task, perhaps I have demonstrated the truth of the maxim that nature abhors a vacuum. While I have sought to apply the statutory and case law as I understand it, I would hope that the Authority will fill this legal vacuum by adopting – as quickly as possible -- a standard for when bargaining is required. Unions and agencies alike are floundering without necessary guidance on an issue that is fundamental to their daily relationships, even as the Senate neglects its duty to fill the current vacancy in the Authority's membership.

standard of proof to require bargaining here. Accordingly, regardless of whether the Authority ultimately endorses a de minimis test or a substantial impact test, SSA's Skype policy did not require notice or bargaining.

As I have already noted, Skype is the basic office communication infrastructure used by all SSA employees, whether they are working at home or at their office. Skype, or earlier versions of it, have been on Agency computers since 2011. It coordinates with employees' telephone, video, instant messaging, calendars, and other forms of communication, and it shows users the availability of other employees. As soon as an employee opens his computer, Skype is activated and shows other users the employee's status. If one employee wants to contact another, she can look on her laptop screen and see if he is available; if a CPU supervisor needs to assign work to a customer service specialist, she can immediately see who in her unit is available. Tr. 172-74.

As the Respondent and some witnesses noted, complying with the Skype rule requires no action or effort on the employees' part. Tr. 13, 127. Simply by logging onto his computer, an employee is complying with the policy requiring him to sign into Skype and ensure that it accurately reflects his work status. If the employee goes into a pre-arranged meeting or goes out to lunch, the system will automatically change his status accordingly; moreover, if someone else sends a text message or email to the employee or phones him, the system will show the employee the message, and the caller or sender will see that the message was received or that the employee was unavailable. None of this requires any affirmative effort on the employee's part. On the other hand, in order for an employee to block communication from a supervisor or another employee, the employee must affirmatively change his Skype status to "do not disturb" or some similar status. Tr. 132-33. As the Respondent notes in its brief, "Ms. McDade had to affirmatively take action in the Skype application to *not comply* with the directive, while she would have been *entirely compliant* with the directive had she taken no action whatsoever." Resp. Brief at 18 (emphasis in original). Moreover, employees throughout the Agency had been using Skype and its predecessors for years, even when almost all employees worked at their ODS, and even when its use was not mandatory in any location. Employees understood that they had to respond to email and other communications, and Skype was the basic operating system for doing so.[14]

The General Counsel offered evidence regarding the impact, or potential impact, of the mandatory Skype policy on employees. Mr. Couture testified that the Union wanted clarification, for instance, as to what constitutes an accurate Skype status, since employees may be actively working even though they are not using their computer, causing their status to show they are inactive. Tr. 46-47. Moreover, the Agency's policy could, and did, result in

[14] It is for this reason that I earlier concluded that the January 15 memo changed Agency policy in only the most technical sense. Although employees may not have been explicitly required to use and update Skype when working at their ODS, this was the widespread practice. The "change" was in making explicit a policy that had been implicit. And while such a change may in some cases result in significant impacts on how employees conduct their work (as in *Defense Mapping*, 40 FLRA at 256-57, and *INS El Paso*, 34 FLRA at 1044-45), that did not occur here.

an employee being disciplined for violating it. *Id.* Mr. Senden said employees were concerned that managers were using Skype to keep track of employees' work activities. Tr. 76.

I am not persuaded that the GC's evidence shows any appreciable impact on employee working conditions. As I have repeatedly noted, employees had been utilizing Skype, both while teleworking and while at their ODS, for years. Assuming managers were micromanaging employees through Skype, they would just as easily have been doing it prior to the 2019 CBA and prior to the use of Skype becoming mandatory. There was no evidence of the policy being utilized in employee performance evaluations, and such a possibility is too speculative to consider here. And while Ms. McDade was certainly suspended for violating the Skype policy (among other things), the evidence shows that she had to make a concerted, daily effort to totally ignore communications from her managers – twenty-seven days in a two-month period, most of them when she was working at her ADS – in order to warrant her suspension. She did not violate simply the policy of using Skype at her ODS, but every aspect of the Agency's rules for responding to emails, telephone calls, and other communications. After returning from leave in January and expressing her skepticism to Richardson about the Skype policy, she seems to have determined to shut herself off from all communications from her managers until they would discipline her. But by refusing to answer phone calls and emails, refusing to appear for scheduled Weingarten meetings, and failing to use Skype at her ADS, she has made it impossible to say that she was disciplined for refusing to use Skype at her ODS. And as a practical matter, in light of the absence of evidence of other employees having disciplinary or other problems with the Skype policy, it appears that the policy was applied and followed by other employees with little or no difficulty. They used Skype at their ODS in the same manner as they did when teleworking, and when employees would occasionally forget to update their Skype status, they would immediately correct it after a routine reminder from their supervisor. *See, e.g.*, Tr. 171-72. Such occasional violations did not result in their being disciplined. I therefore find that the Agency's Skype policy had no appreciable impact on employee working conditions, and that the Agency had no obligation to negotiate regarding it.

Since I have concluded that the Respondent did not commit an unfair labor practice, I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the Complaint in Case No. WA-CA-20-0257 be, and hereby is, dismissed.

Issued, Washington, D.C., January 30, 2024

RICHARD A. PEARSON
Administrative Law Judge