

67 FLRA No. 12

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929, AFL-CIO
(Charging Party/Union)

DA-CA-09-0393

DECISION AND ORDER

November 21, 2012

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of an Administrative Law Judge (the Judge) filed by the General Counsel (GC). The Respondent filed cross-exceptions to the decision, as well as an opposition to the GC’s exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute). The Respondent allegedly violated the Statute when it failed to provide the Union with notice and an opportunity to bargain over its decision to deny computer access to Border Patrol Agents (agents) assigned to administrative duty because they were under investigation. The Judge found that the Respondent’s decision to deny computer access to the agents was a change in conditions of employment, but concluded that the Respondent did not violate the Statute because the change was de minimis.

For the reasons explained below, we deny the Respondent’s cross-exceptions to the Judge’s findings that the denial of computer access to the agents constituted a change in conditions of employment. In addition, because the record supports finding that the change was more than de minimis, we grant the GC’s exceptions on that point. Accordingly, we find that

the Respondent violated § 7116(a)(1) and (5) of the Statute, and issue an Order consistent with this decision.

II. Background and Judge’s Decision

Agents employed by the Respondent perform law enforcement work in the El Paso Sector, which includes Border Patrol Stations in West Texas and New Mexico. Judge’s Decision (Decision) at 2. However, if the Respondent needs to investigate an agent’s conduct, the Respondent takes the agent out of the field, relieves the agent of his or her law enforcement duties, and assigns the agent to administrative duty. *Id.*

In April 2008, the Respondent assigned an agent that it was investigating to administrative duty. *Id.* at 2-3. The agent retained full access to his work computer until April 2009, when the Agency removed his access. *Id.* at 3. The Agency removed his access without notice or explanation to the Union. *Id.* In August 2009, the Agency assigned another agent to administrative duty. *Id.* That agent retained his computer access until the Agency removed it in February 2010. *Id.* Thereafter, the Agency continued to regularly deny computer access to employees assigned to administrative duty. *Id.* at 3-4.

Shortly after the Respondent denied computer access to the first agent in April 2009, the Union demanded bargaining. *Id.* at 4. The Union asserted that the denial was a change in conditions of employment for bargaining-unit employees in the El Paso Sector, and that the Respondent failed to provide the Union with prior notice and an opportunity to bargain over the change. *Id.* at 3-4. The Respondent did not respond to the Union’s demand, and the parties never bargained over the matter. *Id.* at 4.

Later, the Union filed a ULP charge against the Respondent, and the GC issued a complaint. The complaint alleged that the Respondent violated § 7116(a)(1) and (5) of the Statute¹ when it denied computer access to agents assigned to administrative duty, without giving the Union notice and an opportunity to bargain over the change. *Id.* at 2.

¹ Section 7116(a)(1) and (5) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

....

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.

5 U.S.C. § 7116(a)(1) and (5).

Before the Judge, the Respondent argued that since at least 2001, its practice was to deny computer access to agents assigned to administrative duty. *Id.* at 4. The Respondent argued that this practice was consistent with its “various policies” in effect before April 2009, providing for the security of its operations and property (including computers and computer systems). *Id.* at 6. The Respondent also contended that the work it assigned to these agents did not require computer access, and that it made accommodations for the agents by providing alternative means for them to obtain and submit information. *Id.* at 5. Specifically, the Respondent claimed that these agents:

- (1) “are able to receive current and reliable work-related information though their assigned supervisors, [staff] musters, and bulletin boards”;
- (2) “submit time and attendance by manually filling out blank forms. They submit requests for leave in the same manner”;
- (3) can submit “[a]ny required memorandum . . . in [a] handwritten form”;
- (4) can access “[o]ther information . . . online through non-agency computers.”

Id. at 5 (internal citations omitted).

The Judge found that the Respondent changed conditions of employment without giving the Union notice and an opportunity to bargain over the change. *Id.* at 8. However, the Judge found that the Respondent did not violate the Statute because the GC failed to prove that the impact of the change on bargaining-unit employees’ conditions of employment was more than *de minimis*. *Id.* at 10.

Regarding the change issue, the Judge found that “the Respondent implemented a change in April 2009 when it determined that employees on administrative duty would no longer have access to its computers and computer systems.” *Id.* at 8. In reaching this conclusion, the Judge rejected the Respondent’s claim that it was following a past practice going back to at least 2001 of denying computer access to employees assigned to administrative duty. *Id.* The Judge found that “[i]n this instance, it does not appear that the Union had any knowledge from the Respondent regarding” any policy or practice of denying computer access to agents assigned to administrative duty, “and did not learn of [such a] policy until contacted directly by affected bargaining-unit employees.”² *Id.* The Judge also found that this change

constituted a change in the bargaining-unit-employees’ conditions of employment. *Id.* at 9. Consequently, the Judge found that the Respondent’s decision to deny computer access to agents assigned to administrative duty amounted to a change in bargaining-unit-employees’ conditions of employment. *Id.* at 8-9.

Nevertheless, the Judge found that the Respondent did not violate § 7116(a)(1) and (5) of the Statute because the GC failed to prove that the change was more than *de minimis*. *Id.* at 10. The Judge cited evidence that agents on administrative duty obtained information through “supervisors and through musters” that they might otherwise have obtained through the Respondent’s e-mail system. *Id.* This included information regarding such matters as vacancies, training, and health benefits. *Id.* In addition, the Judge noted evidence that such information was also available through “other methods of communication available to the [agents on administrative duty], such as personal e[-]mail from non-government computers, websites, and telephone communications.” *Id.*

Looking further at the record, the Judge found no “specific evidence” that the agents’ “administrative[-]duty work was . . . affected in any way by the lack of access to the computers.” *Id.* The Judge acknowledged that the agents’ “ability to receive certain information may have been curtailed,” but found “no evidence that the employees were actually affected in any way by this.” *Id.* The Judge cited evidence that: (1) the Union had other means available to communicate with the agents; (2) the agents were able to fill out time-and-attendance information and leave requests by hand; and (3) the Respondent excused the agents from mandatory training accessible only through the computer system. *Id.* Thus, although the Judge found it “reasonable to assume that the denial of access to an agency’s computers and computer systems should have an impact on bargaining[-]unit employees,” the Judge found that the GC failed to demonstrate that the impact of the change was more than *de minimis*. *Id.* Consequently, the Judge recommended dismissing the complaint. *Id.* at 10-11.

administrative duty only when the Respondent decided to propose removing those agents. Decision at 8. For different reasons, the GC and the Respondent dispute the Judge’s finding. *See* Exceptions at 4-5; Cross-Exceptions & Opp’n at 18-19. Because the parties agree, as a basic factual matter, that the Respondent denies computer access to agents assigned to administrative duty – irrespective of whether the Respondent has decided to propose their removal – we need not address this aspect of the dispute further, as it is not dispositive of the issue here. That issue is: Did the Respondent’s decision to deny computer access to agents assigned to administrative duty constitute a change in bargaining-unit-employees’ conditions of employment over which the Union is entitled to notice and an opportunity to bargain?

² In resolving the change issue, the Judge found that the Respondent denied computer access to agents assigned to

III. Analysis and Conclusions

- A. The record supports the Judge's finding that the Respondent's denial of computer access to agents assigned to administrative duty constitutes a change in conditions of employment.

The Judge found that the Respondent's decision to deny computer access to agents assigned to administrative duty constituted a change in the agents' conditions of employment. *Id.* at 8, 9. For the reasons discussed below, we agree.

Citing its alleged practice since 2001 of denying computer access to agents on administrative duty, as well as "various policies [in effect before 2009] . . . indicative of the Respondent's objective to ensure the security of its operations and property, which includes computers, computer systems, [and] e-mail," the Respondent claims that the Judge erred in finding that it made a change when it denied the agents in this case computer access. Cross-Exceptions & Opp'n at 15-18. The Respondent further argues that even if the action constitutes a change, the change does not affect the agents' conditions of employment because agents assigned to administrative duty are not assigned work requiring access to computers, and because agents are not entitled to an "unfettered right to use . . . Respondent's computers, systems, and e-mail." *Id.* at 18.

In determining whether a Judge's factual findings are supported, the Authority looks to the preponderance of the evidence in the record. *See, e.g., U.S. Dep't of Transp., FAA*, 64 FLRA 365, 368 (2009) (*FAA*). The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and the employees' conditions of employment. *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704 (1995). Conditions of employment may be established for bargaining-unit employees either by past practice or agreement. *U.S. DOL, Wash., D.C.*, 38 FLRA 899, 908 (1990) (*DOL*) (citing *Dep't of the Treasury, IRS (Wash., D.C.) & IRS Hartford Dist. (Hartford, Conn.)*, 27 FLRA 322, 325 (1987)). In order for a condition of employment to be established through past practice, that practice must be consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *Id.* at 909. The parameters of, or limitations on, the condition of employment must be understood by both parties. *Id.*

The record supports the Judge's finding that the Respondent's denial of the agents' computer access was a change. As indicated above, to find that the Respondent's alleged past practice became a condition of

employment, the Respondent must have consistently denied computer access to agents assigned to administrative duty over an extended period of time, with the Union's knowledge and express or implied consent. *See DOL*, 38 FLRA at 908-09. The record in this case demonstrates that before the Respondent's denial of computer access to the first agent in April 2009, agents assigned to administrative duty had full access to the Respondent's computers and computer systems. Tr. 86-89, 98, 103-04. In fact, the agents at issue here retained full computer access until well into their administrative-duty assignments. Decision at 3, 8; Tr. 30-31, 98, 103-04, 152. For instance, one agent retained his access for almost a full year before his access was removed. Decision at 3; Tr. at 30-31. Additionally, the Respondent did not produce any evidence refuting the GC's claim that the Union had no knowledge of any such policy or practice. *See* Decision at 8. Accordingly, we deny the Respondent's cross-exception and adopt the Judge's finding that the Respondent's denial of computer access to agents on administrative duty constituted a change.

The Respondent also argues that even if there was a change, it does not affect conditions of employment because agents assigned to administrative duty are not assigned work requiring access to computers. Cross-Exceptions & Opp'n at 18. Additionally, the Respondent argues that agents are not entitled to an "unfettered right to use . . . Respondent's computers, systems, and e-mail." *Id.*

We disagree with the Respondent's broad assertion that access to computers in the workplace – where such access is not required as a part of an employee's job duties – cannot be a condition of employment. This is particularly true where the denial of access amounts to the denial of a form of communication that is heavily relied upon by employees to obtain general, but often critical, employment-related information. *Cf., U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173-74 (2009) (*Air Force*) (finding a change in working conditions where an employee's computer, telephone, and fax machine were not functional for two weeks following a move, negatively affecting his ability to communicate training information to agency employees); *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 53 FLRA 1664 (1998) (finding respondent's decision to move a telephone used by employees for personal calls within the duty to bargain and failure to notify the union and provide opportunity to bargain deprived union of its right to negotiate). We therefore deny the Respondent's cross-exception and adopt the Judge's finding that the Respondent's denial of the

agents' computer access is a change in conditions of employment.

- B. The record supports finding that the change is more than de minimis.

The Judge found that the Respondent made a change in the agents' conditions of employment without providing the Union with notice of the change and an opportunity to bargain over the change. Decision at 10-11. But the Judge concluded that the change was de minimis, and consequently, that the Respondent was not obligated to bargain with the Union before implementing the change. *Id.* at 10.

In its exceptions, the GC claims that the Judge failed to consider certain evidence showing that the change had more than a de minimis effect on the agents' conditions of employment. Exceptions at 7. Based on our review of the record, we agree with the GC and find that the change was more than de minimis.

When the Authority applies the de minimis doctrine, it looks to the nature and extent of either the effect, or the reasonably foreseeable effect of the change on bargaining-unit employees' conditions of employment. *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009) (citing *Veterans Admin. Med. Ctr., Phx., Ariz.*, 47 FLRA 419, 423 (1993)). Further, an analysis of whether a change is de minimis does not focus primarily on the actual effects of the change, but rather on a change's reasonably foreseeable effects. *E.g., Air Force*, 64 FLRA at 173; *U.S. Customs Serv. (Wash. D.C.) & U.S. Customs Serv. Ne. Region (Bos., Mass.)*, 29 FLRA 891, 899 (1987).

Here, the Judge focused primarily on the change's actual effects, finding that, although the agents' "ability to receive certain information may have been curtailed, . . . there was no evidence that [they] were *actually* affected in any way by this." Decision at 10 (emphasis added). However, the Judge neglected to consider adequately the change's reasonably foreseeable effects.

When the reasonably foreseeable effects of the change in the agents' computer access are taken into consideration, the record supports a conclusion that the effects of the change are more than de minimis. It is not disputed that access to the Respondent's computers and computer systems is an integral part of its communication system. Decision at 3; *see* Tr. 35-36, 45-47, 93-94, 104-112, 131-32, 350. Similarly, it is not disputed that the Respondent uses the system to communicate a great deal of critical agency and employment-related information that would be crucial to any employee – even even an employee on administrative duty. Decision at

10. Such information includes, among other things, information concerning training opportunities, detail opportunities, promotion opportunities, transfer opportunities, collateral-duty opportunities, agency-policy changes, and federal-employee benefits such as the open season for benefit applications. Decision at 3; *see* Tr. 45-47, 93-94, 104-112, 131-32, 350. Moreover, it is not contested that the Respondent's computer systems are the Union's primary means of communication with bargaining-unit employees, particularly given the employees' geographical distribution and shift work. Decision at 4, 10; Tr. 35-36.

Undisputed evidence in the record also demonstrates that the Respondent provides no uniform, reliable procedures to ensure that the affected employees receive all necessary information and communications. *See* Tr. 45, 94, 114-15, 218-19, 235-36, 384-86. Further, the Respondent does not dispute record evidence establishing that the Respondent does not advise the agents of the alleged alternative means from which they could obtain this information. Tr. 131, 136, 155-56. This places the burden on the agents to find out whether any critical information has indeed been communicated to agency employees, and to find out the content of the information itself. The reasonably foreseeable effects of the situation created by the Respondent's change are significant. It is reasonably foreseeable that agents on administrative duty will fail to receive at least some significant information and communications. For example, one of the agents in this case nearly missed an opportunity to participate in a dental plan because he was not notified of the health-benefit open season and its related deadlines. Tr. 114-15. The only reason that the agent did not miss the deadline is that a co-worker, coincidentally, notified him of the open season one day prior to the closing deadline. *Id.*

Based on the record before us, and for the reasons discussed above, we find that the change at issue here – the denial of computer access to agents assigned to administrative duty – has more than a de minimis effect on conditions of employment.³

The Respondent also argues in its cross-exceptions that the Judge erred by failing to find that, in denying computer access to employees assigned to administrative duty, the Respondent was properly exercising its right to determine its internal-security practices and its right to assign work under § 7106(a)(1) of the Statute. Cross-Exceptions & Opp'n at 12-15. The

³ In light of our determination that the change in this case was more than de minimis, there is no need to address the GC's argument that the Judge should have drawn an "adverse inference," Exceptions at 5-6, from the Respondent's failure to introduce a specific policy prohibiting agents on administrative duty from applying for promotions, details, collateral-duty assignments, and transfer or training opportunities.

Respondent further argues that under § 7106(b)(1) of the Statute, it is not required to bargain over the technology, methods, and means through which employees perform their work. *Id.* at 14-15. However, the GC does not dispute that the Respondent has the right to restrict access to its computers and computer systems, to assign work, and to determine the technology, methods, and means for performing such work. *See* Decision at 5, 7. Moreover, even where the substance of the decision is not itself subject to negotiation, an agency is nonetheless obligated to bargain over the impact and implementation of that decision if the resulting changes have more than a de minimis effect on conditions of employment. *See, e.g., Dep't of HHS, SSA*, 24 FLRA 403, 407-08 (1986). For the foregoing reasons, the Respondent's management-rights arguments do not provide a defense to its failure to give the Union notice and an opportunity to bargain over the impact and implementation of the change.

IV. Decision

We deny the Respondent's cross-exceptions alleging that there was no change in the agents' conditions of employment. And we grant the GC's exception challenging the Judge's finding that the change was de minimis. Consequently, we find that the Respondent violated § 7116(a)(1) and (5) of the Statute, and issue an Order consistent with this decision.⁴

⁴ As a proposed remedy, the GC requests that the Authority direct the Respondent to post a notice on all of its bulletin boards and "electronically disseminate[] [the notice] through [its] e-mail system." Exceptions at 15. The Respondent argues that an order requiring e-mail dissemination of the notice constitutes an unwarranted non-traditional remedy and would be "punitive." Cross-Exceptions & Opp'n, Attach., Respondent's Post-Hearing Brief at 29 & n.49 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Florence, Colo.*, 59 FLRA 165, 173-74 (2003)). Assuming without deciding that e-mail dissemination of the notice is a non-traditional remedy, we find that the present facts and circumstances demonstrate that it is appropriate here. As noted above, we find that the Respondent's primary means of communication with its employees is through its computer systems. Moreover, the ULP being remedied is the Respondent's failure to bargain over computer access for certain bargaining-unit employees, including their access to e-mail. Thus, e-mail dissemination of the notice is "reasonably necessary and would be effective to recreate the conditions and relationships with which the [ULP] interfered," and would "effectuate the policies of the Statute, including the deterrence of future violative conduct." *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (citation and internal quotation marks omitted) (applying test for awarding non-traditional remedies).

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, it is hereby ordered that the Respondent shall:

1. Cease and desist from:

(a) Implementing changes in the working conditions of unit employees represented by the Union without notifying the Union and bargaining to the extent required by the Statute, including bargaining over the impact and implementation of the denial of access to its computers by bargaining-unit employees assigned to administrative duty.

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

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

(a) Upon request, bargain in good faith with the Union to the extent required by law, over the impact and implementation of the denial of access to its computers by bargaining-unit employees assigned to administrative duty.

(b) Post a Notice to all employees containing the contents of this Order. The Notice is to be posted in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted at the Respondent's El Paso Sector. And it is to be signed by the Chief Patrol Agent in Charge.

(c) Disseminate a copy of the Notice signed by the Chief Patrol Agent in Charge through the Respondent's e-mail system to bargaining-unit employees in its El Paso Sector.

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

The Federal Labor Relations Authority has found that the United States Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (the Union), the exclusive representative of certain bargaining-unit employees, regarding changes in the working conditions of unit employees represented by the Union without notifying the Union and bargaining to the extent required by the Statute, including bargaining over the impact and implementation of the denial of access to our computers by bargaining-unit employees assigned to administrative duty.

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

WE WILL, upon request, bargain in good faith with the Union to the extent required by law, over the impact and implementation of the denial of access to our computers by bargaining-unit employees assigned to administrative duty.

Respondent/Agency)

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

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-6266.

Office of Administrative Law Judges

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXS
Respondent

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929, AFL-CIO
Charging Party/Union

DA-CA-09-0393

James P. Hughes
For the General Counsel

Judith M. Ubando
Peter P. Arcuri
Mark Hannig
For the Respondent

James A. Stack
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION**STATEMENT OF THE CASE**

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

On September 28, 2009, the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (Union/Charging Party) filed an unfair labor practice charge against the United States Department of Homeland Security, United States Customs and Border Protection, El Paso, Texas (Agency/Respondent). After investigating the charge, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing on November 29, 2010, alleging that the Agency denied access to its computer systems to a bargaining unit employee on administrative duty without providing the Union an opportunity to negotiate to the extent required

by the Statute, in violation of section 7116(a)(1) and (5) of the Statute. The Respondent filed its Answer to the complaint on December 27, 2010, admitting most of the factual allegations of the complaint, but denying that it committed an unfair labor practice.

A hearing was held in this matter on January 25, 2011 in El Paso, Texas. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel (GC) and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I 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. (G.C. Ex. 1(d), 1(f)). Victor Manjarrez occupied the position of Chief Patrol Agent for the El Paso Sector from approximately 2008 through 2010; he has since transferred to the Tucson Sector of U.S. Customs and Border Protection. Chris Clem has held the position of Patrol Agent in Charge at the Ysleta, New Mexico Station from December 2008 through May 2010 (Tr. 211; G.C. Ex. 1(d), 1(f)). At all times material to this matter, Manjarrez and Clem have been supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(d), 1(f)).

The American Federation of Government Employees (AFGE) represents a bargaining unit of all nonprofessional employees of the U.S. Customs and Border Protection. AFGE is a labor organization within the meaning of section 7103(a)(4) of the Statute. (G.C. Exs. 1(d) & 1(e)). The Union is an agent of AFGE for the purpose of representing bargaining unit employees within the El Paso Sector. The El Paso Sector includes Border Patrol Stations in West Texas and New Mexico. (Tr. 25). James Stack is a border patrol agent within the El Paso Sector and has served as President of AFGE, Local 1929 since January 1999. (Tr. 23).

Border Patrol agents generally work in the field, but when they come under investigation, they are often taken out of the field, relieved of their law enforcement duties and placed on administrative duties and assigned duties within their station. They are unable to carry a weapon and thus, unable to perform their law enforcement duties. Juan Rebollo, a Border Patrol agent, was first placed on administrative duties in April 2008 and continued to maintain his regular access to the agency computers at that time. (Tr. 100-01). In

April 2009, Rebollo heard from other employees that his access was going to be removed. When he attempted to log on to the computer, he was told that he was not authorized to use the system. (Tr. 101, 128). Rebollo remained without access to the Agency's computer systems from April 2009 through September 7, 2010, when he was returned to his regular law enforcement duties. (Tr. 102). His computer access was restored around September 9 or 10, 2010. Once his access was restored, he was able to read emails from that date forward, but all past emails were lost. (Tr. 103).

During that time period -- April 2009 through early September 2010 -- Rebollo was unable to access his government email account and did not receive routine information regarding promotion announcements (Tr. 103), possible details (Tr. 105), mandatory training through the Virtual Training Center (VTC) (Tr. 109), or information about any collateral duties, which were in addition to regular law enforcement duties, such as recruiting, career sustainment and peer support. (Tr. 109-10). He also was unable to access information regarding relocations and/or transfers (Tr. 112) and health care announcements (such as open season) (Tr. 113-14). He was also unable to access the Border Patrol Enforcement Tracking System (BPETS), which is used to request any type of leave and to submit time and attendance information. (Tr. 117). He was required to fill in his time and attendance by hand and submit it to his supervisor, who would input it into the system. (Tr. 117). There is no evidence that Rebollo was not correctly paid during the time he was on administrative duties and unable to access the computer systems. He did not face any disciplinary action for not taking any mandatory training and was excused since he did not have access to the system. (Tr. 123). He was eventually told that he could receive training through the VTC and that a supervisor would log him into the system. (Tr. 116).

Another Border Patrol agent, Samuel Hernandez, was assigned administrative duties in August 2009 and was not denied access to the agency's computer systems at that time. He was eventually denied computer access in about mid-February 2010, although he was never informed about the reasons for this denial. (Tr. 152-53). Since this time, Hernandez has not had access to emails nor received information regarding promotion announcements (Tr. 154); details (Tr. 155); training (Tr. 156); collateral duties (Tr. 157); healthcare (Tr. 158) and/or relocations (Tr. 159). He does not have access to the BPETS and handwrites his time and attendance forms. (Tr. 161). At the time of the hearing, Hernandez was expected to be returning to full law enforcement duties soon. (Tr. 153, 164).

In April 2009, Stack became aware that one of the Border Patrol agents (Rebollo) who was on administrative duties, had his computer access removed

by the Respondent. Stack testified that the Union was never given any notice that Rebollo, or any other employee on administrative duties, was going to be denied access to the Agency's computers and its systems. (Tr. 29-31). Rebollo was among the first of such agents whose access had been denied, and since April 2009, employees who are reassigned to administrative duties have had their computer access denied. (Tr. 33 -34). Stack testified that as a Union representative it is more difficult to represent employees who do not have computer access due to the nature of the work, including geographic diversity and shift work. The Union has used access to the computer and email to assist employees in drafting memos, etc., and also to conduct surveys and polls of employees. (Tr. 35-36).

On April 15, 2009, Stack submitted a demand to bargain on this issue to Chief Manjarrez, noting, in part:

On Thursday, April 9, 2009, the Local Union became aware of a unilateral change(s) to the bargaining unit employees' conditions of employment. According to Assistant Patrol Agent in Charge of the Ysleta, Texas Border Patrol Station, Elizabeth Rosales, there was a new, Sector-wide policy which revoked/suspended some employees' access to and use of the agency's computers, and associated systems, whenever a proposal of adverse action has been issued against an employee. . . .

Prior to this change, the Union has not received any notice from the agency detailing any proposed change(s) pertaining to employee access and use of the agency's computers, or associated systems, nor had the Union been afforded with any opportunity to bargain over any changes(s) to the policies and practices related thereto.

(G.C. Ex. 4).

Stack also requested that the policy be rescinded and that any further implementation be held in abeyance pending the completion of all phases of bargaining. (G.C. Ex. 4; Tr. 37-38). The Union made a data request (which is not an issue in this case) and indicated that it would submit proposals. (G.C. Ex. 4; Tr. 39).

The Agency did not respond to the Union's April 9 letter and the parties have not bargained over this matter. According to Stack, the Union was never given the opportunity to submit proposals in this matter. (Tr. 39).

According to the Respondent, it has had the practice of placing restrictions on computer and systems access for employees assigned to administrative duties on a number of occasions prior to the April 2009 and February 2010 restrictions. (Tr. 200, 340). John L. Hackworth, Special Operations Supervisor in Lordsburg, New Mexico, testified that he was aware that the Respondent had restricted computer access to agents in administrative duty status since at least 2006. (Tr. 199). He had been directed to remove the computer access to an agent on administrative duties three years ago (2008). (Tr. 199-200). The supervisors would then keep the employee apprised of information and they would be allowed to fill out time and attendance and any other requested action by hand. (Tr. 202).

Employees on administrative duty have been assigned duties or have responsibilities which do not involve accessing government property. This work includes working in the fleet office/garage (Tr. 172, 341), answering the phones and radio (Tr. 202), transporting vehicles to vendors (Tr. 202) and other miscellaneous administrative responsibilities. (Tr. 340-41). The Respondent has determined that these assigned duties would be performed without the use of the Agency's computer and systems. (Tr. 201, 340-41, 377).

Even when access is restricted, the Respondent provides alternative means for these employees to obtain and submit information and makes accommodations. Such employees are able to receive current and reliable work-related information through their assigned supervisors, musters and bulletin boards. (Tr. 91, 92, 104, 203, 378, 345-46). Employees submit time and attendance by manually filling out blank forms. (Tr. 118, 217-18). They submit requests for leave in the same manner. (Tr. 185, 203). Any required memorandum can be submitted in a handwritten form. (Tr. 239, 280, 281). Other information is accessible online through non-agency computers. (Tr. 240).

DISCUSSION AND ANALYSIS

General Counsel

Counsel for the General Counsel (GC) acknowledges that the Respondent has determined that it is appropriate and necessary to restrict access to its computer systems for employees assigned to administrative duties pending the outcome of an investigation or the resolution of a proposed adverse action. There is no dispute that the Respondent has the right to assign employees to administrative duties and the corresponding right to remove access to its computer systems from employees who have been assigned to administrative duties. The GC, however, asserts that the Respondent violated section 7116(a)(1) and (5) by failing to notify the Union of its decision regarding computer

access, and to bargain over the appropriate arrangements and procedures of that decision.

In support of its position, the GC first asserts that it is undisputed that the Respondent did not provide the Union with any notice prior to implementing the April 2009 change when it began to deny computer access to employees assigned to administrative duties.

The GC further argues that Respondent's denial of such access constituted a change in the employees' conditions of employment over which the Respondent had a duty to bargain. The GC notes that the Authority has held that even where a change involves an agency's internal security, that agency is still obligated under sections 7106(b)(2) and (3) of the Statute to bargain over appropriate arrangements and procedures for the change. *Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 56 FLRA 398 (2000); *Dep't of Veterans Affairs, VAMC, Tenn.*, 50 FLRA 220 (1995). And the Authority has held that bargaining unit employees' access to an agency's computers is a negotiable matter. *Nat'l Treasury Employees Union*, 38 FLRA 615 (1990)(*NTEU & Dep't of Treasury*); *Nat'l Treasury Employees Union*, 24 FLRA 249 (1986)(*NTEU & IRS*).

The GC finally argues that the Respondent's denial of access to its computers to bargaining unit employees assigned to administrative duties had more than a *de minimis* impact on the employees' working conditions. The Authority has held that changes to the lines of communication between employees constitutes more than a *de minimis* change in conditions of employment. *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 39 FLRA 999, 1010-11 (1991). *See also Air Force Logistics Command, WRALC, Robins AFB, Ga.*, 53 FLRA 1664 (1998)(change to access to telephones); *U.S. Dep't of the Treasury, IRS, ALJDR No. 137, Case No. CH-CA-70509* (Oct. 16, 1998) (new policy regarding email).

Taking all of this into consideration, the GC argues that the Respondent violated the Statute by failing to give the Union appropriate notice of the change in computer access to employees assigned to administrative duties and by failing to bargain over the impact and implementation of that decision.

Respondent

The Respondent asserts that it has not violated the Statute as alleged and that its restriction of computer and systems access to employees assigned to administrative duty status was a proper exercise of its protected management rights to determine its internal security practices and to assign employees and the means and methods of work. The Respondent denies that its conduct resulted in any changes to these employees'

conditions of employment. Even if there was some change, the Respondent asserts that such change was *de minimis* in nature and there was, therefore, no obligation to bargain.

In order to ensure the security of its operations and property, which includes computers and computer systems, various policies have been issued by the Department of Homeland Security (DHS), Customs and Border Protection and the U.S. Border Patrol. (Resp. Exs. 1 & 3-7). These policies were in effect prior to the April 2009 restrictions and remain the operative policies governing the Respondent's conduct in restricting computer and systems access to employees assigned to administrative duty status facing adverse action. The above policies provided the El Paso Sector Management the authority and guidance to restrict computer and systems access for employees assigned to administrative duty status where and when deemed appropriate or necessary. The agency has been restricting computers and systems in accordance with its established policies for some time, even prior to April 2009. (Tr. 200-01, 340-41).

The Respondent argues that its conduct did not change a condition of employment for those bargaining unit employees placed on administrative duty status. An employee's access and use of the Respondent's computers and systems has remained the same prior to April 2009 and thereafter. As far back as 2001, an employee's limited personal use of the Respondent's property remains subject to revocation or restriction upon the Respondent's determination that revocation or restriction is necessary and/or appropriate.

Further, employees on administrative duty status are able to receive current and reliable work-related information through their supervisors and musters, or shift meetings. They were also to submit information through alternative means, including filling out blank forms for time and attendance and leave requests. Employees could submit requests for compassionate transfer with either handwritten forms or having someone else prepare the memorandum. (Tr. 193, 187). For other requests and memoranda, the Respondent would accept handwritten documents. (Tr. 239, 280-81).

Even if there was a change in a condition of employment, there was no duty to provide notice and to bargain the matter with the Union because the Respondent's conduct only had a *de minimis* effect on bargaining unit employees. *Nat'l Treasury Employees Union*, 64 FLRA 462, 464 (2010)(citing *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000)(*Treasury, IRS*). Other than perceived inconvenience to the employees, the Respondent argues that the GC has presented no evidence that any bargaining unit employee was adversely affected as a result of not having access to the Respondent's

computer and systems for either government use or limited personal use.

DISCUSSION

Section 7106(a)(1) of the Statute states that: “[s]ubject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency -- (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and (2) in accordance with applicable laws -- (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]” In this matter, the General Counsel acknowledges the right of the Respondent, under section 7106(a) to restrict computer and systems access to bargaining unit employees who have been assigned administrative duties. *See Am. Fed. of Gov't Employees, Local 1712*, 62 FLRA 15, 17 (2007); *Nat'l Treasury Employees Union*, 53 FLRA 539, 581 (1997). The General Counsel does assert, however, that the Respondent violated the Statute by failing to give the Union notice and the opportunity to bargain the procedures and appropriate arrangements of this matter pursuant to section 7106(b) of the Statute. Section 7106(b) states that: “[n]othing in this section shall preclude any agency and any labor organization from negotiating . . . (2) procedures which management officials of the agency will observe in exercising any authority under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.”

The Respondent first argues that there has been no change and that it has previously removed computer and systems access from employees placed on administrative duties since at least 2001. In that regard, the removal of access from Rebollo in April 2009 and Hernandez in February 2010 was consistent with the Respondent's practice and therefore it was not obligated to bargain with the Union. The GC denies that there was any such past practice.

In support of its argument, the Respondent's witnesses testified regarding at least two incidents -- in 2001 and in 2007 -- in which employees assigned to administrative duties while investigations were pending, had their computer and systems access removed. The Union asserts that it had no knowledge of these events and its first awareness of such a policy was in April 2009.

The evidence reflects that employees placed on administrative duty pending the outcome of the investigation are assigned duties outside the normal Border Patrol agent duties. These employees have, however, continued to have access to the Respondent's computers and computer systems, up until the Respondent makes the determination to have this access removed. Apparently, this determination was triggered when the employee was given a notice of proposed termination. For instance, Rebollo was first placed on administrative duties in January 2008 and his access to the agency computers and systems remained intact until April 2009. Apparently, at some point in the investigation of his conduct, it was determined that he would be given a proposal to terminate his employment, which may have happened in early 2009. After the actual proposal was issued, the Respondent determined that computer and systems access would be denied. It is not clear how long the period of time was between the actual proposal to terminate and the denial of access. The same process seems to be in effect for Hernandez whose access was denied in February 2010.

The standard for determining the existence of a past practice is whether a practice was consistently exercised for an extended period of time with the other party's knowledge and express or implied consent. *U.S. Dep't of the Treasury, IRS, Louisville Dist., Louisville, Ky.*, 42 FLRA 137, 1142 (1991); *United States Dep't of Labor, OASAM, Dallas, Tex.*, 65 FLRA 677 (2011)(*DOL Dallas*). The practice must be "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *Soc. Sec. Admin., OHA, Montgomery, Ala.*, 60 FLRA 549, 554 (2005).

In this instance, it does not appear that the Union had any knowledge from the Respondent regarding this policy and did not learn of the policy until contacted directly by affected bargaining unit employees. The Respondent does not assert that it ever informed the Union of any such policy or offered it the opportunity to bargain regarding the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision. There is no evidence that the Union was aware of any such policy prior to April 2009. *DOL Dallas*, 65 FLRA at 677. Considering the record as a whole, I find that the Respondent implemented a change in April 2009 when it determined that employees on administrative duty would no longer have access to its computers and computer systems.

The Respondent next argues that the removal of access to its computers and computer systems did not involve a change in bargaining unit conditions of employment. The Respondent asserts that these employees at issue were assigned administrative duties and responsibilities for which they did not have an

operational need to access the Respondent's systems, databases and information. Further, employees do not have a right to use the Respondent's equipment for non-governmental purposes and have only a right to limited personal use. The GC argues that bargaining unit employees' access to an agency's computers is a negotiable matter and thus a condition of employment.

In order to determine whether the Respondent's action violated the Statute, there must first be a finding that the Respondent changed unit employees' conditions of employment. *See, e.g., United States Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customs & Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169 (2004); *Dep't of Labor, OSHA, Region 1, Boston, Mass.*, 58 FLRA 213, 215 (2002); *United States Immigration & Naturalization Serv., New York, N.Y.*, 52 FLRA 582, 585 (1996); *U.S. Immigration & Naturalization Serv., Houston Dist., Houston, Tex.*, 50 FLRA 140, 143 (1995)(*INS Houston*). The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the Respondent's conduct and employees' conditions of employment. *See 92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995); *INS Houston*, 50 FLRA at 144.

In this matter, the GC asserts that the Authority has held that bargaining unit employees' access to an agency's computers is a negotiable matter, citing *NTEU & Dep't of Treasury and NTEU & IRS*. Both of these cases specifically relate to proposals that the agency provide the Union with office space and access to government computers, for the primary use for labor-management relations. In both cases, the Authority found the specific proposals negotiable. Neither case involves the use of government equipment, i.e. computers, by individual employees. However, it appears that at least one of these employees was being represented by the Union while on administrative duties due to an investigation. Under these circumstances, I find that the denial of access to the computers and computer systems involved bargaining unit employees' conditions of employment.

The question then becomes whether the change had more than a *de minimis* impact on bargaining unit employees and thus required an obligation to bargain over the matter. *See HHS, SSA*, 24 FLRA 407-08 (1986); *Pension Benefit Guaranty Corp.*, 59 FLRA 48, 50 (2003)(*PBGC*); *Fairchild AFB*, 50 FLRA at 704. In applying the *de minimis* doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *Treasury, IRS*, 56 FLRA at 913; *PBGC*, 59 FLRA at 51.

As a result of the denial of access to its computers and computer systems, the affected bargaining unit employees no longer have access to their government email. There is no evidence that the work they were assigned to while on administrative duties was in any way affected by the denial of the access to the computers and the computer systems. The question then becomes whether denial of access to government email, under these specific set of circumstances, is more than *de minimis* in nature. If such denial is *de minimis*, the Respondent would owe no duty to bargain on the impact and implementation of this policy.

As stated above, the GC argues that denial of government email essentially isolates the bargaining unit employee from accessing various types of information that are primarily distributed by email -- information regarding vacancies, training, health benefits, etc. The Respondent argues that this information was made available through its supervisors and through musters, while the GC and the Union assert that these sources were inadequate. The primary testimony in this area concerned Rebello's access to information regarding health benefits and open season, and, although he almost missed a deadline, the record shows that he was, in fact, able to participate as needed. The Respondent noted that there were other methods of communication available to the employees, such as personal email from non-government computers, websites, and telephone communications.

With regard to communications with the Union, the Union representative testified that it was more difficult to represent employees without access to the email system due to geographical diversity, shift work, etc., but that there were other means of communication than with the government email. (Tr. 35, 89). There was no specific evidence that the lack of access had any impact on the representation of any employee on administrative duties.

There was considerable testimony that the employees were no longer able to fill out their time and attendance on the computer and were forced to rely on handwritten submissions to their supervisors. There is no evidence, however, that the handwritten time and attendance information was not utilized or that the employees did not correctly receive their pay during this time period. There is no evidence that they were denied the opportunity to submit requests for leave in a written form or that such written form, over a computer-generated request, was not considered and granted.

With regard to training, since the employees were not able to access the training system, they were excused from any mandatory training. Upon returning to work as a border patrol agent, there is no evidence that

they were not granted the opportunity to complete any required training or that it was held against them in any way.

Although it seems reasonable to assume that the denial of access to an agency's computers and computer systems should have an impact on bargaining unit employees, I find that the General Counsel has failed to demonstrate that the impact on the bargaining unit employees was more than *de minimis* in nature. Their administrative duty work was not affected in any way by the lack of access to the computers. Their ability to receive certain information may have been curtailed, but there was no evidence that the employees were actually affected in any way by this.

Under these circumstances, I find that the General Counsel failed to establish that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged. Accordingly, I recommend that the Authority issue the following Order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., February 21, 2012.

SUSAN E. JELEN
Administrative Law Judge