



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

OALJ 16-45

DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
VETERANS AFFAIRS REGIONAL OFFICE 317
ST. PETERSBURG, FLORIDA

RESPONDENT

Case No. AT-CA-15-0833

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1594

CHARGING PARTY

Brian R. Locke
For the General Counsel

Kristin Langwell
For the Respondent

Javier Soto
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On September 14, 2015, the American Federation of Government Employees, Local 1594 (Union) filed an unfair labor practice (ULP) charge against the Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida (VA/Respondent). After investigating the charges, the Regional Director of the FLRA's Atlanta Region issued a Complaint and Notice of Hearing on January 20, 2016, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by failing to bargain with the Union prior to implementing changes to its telework program and by failing to respond to the Union's request to bargain about the changes. (G.C. Ex. 1(a)). The Respondent timely filed an Answer to the Complaint admitting some factual allegations, but denying that it violated the Statute. (G.C. Ex. 1(c)).

A hearing in this matter was held on March 2, 2016, in Clearwater, Florida. The parties were afforded an opportunity to be represented and heard, to examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel and Respondent filed timely post-hearing briefs which have been fully considered.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Exs. 1(b) & (d)). The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the VA. (G.C. Exs. 1(b) & (d)). The Local 1594 is an agent of AFGE for purposes of representing bargaining unit employees at the VA. (G.C. Exs. 1(b) & (d)).

The Respondent processes veterans' benefits claims. (Tr. 16, 53-55). The Respondent's approximately 900 employees work in three organizational divisions or "business lines", Vocational Rehabilitation, Loan Guaranty and the Service Center. (Tr. 35). Employees of the Respondent began teleworking (i.e., working at alternate duty stations, usually their homes) in 1999, with numbers increasing significantly as technology has facilitated remote work. (Tr. 35-36; Jt. Ex. 4). Approximately 200 employees currently telework between 1-4 days per week. (Tr. 38, 55).

In June 2015, the Respondent began issuing Letters of Expectation (LE) to teleworkers.¹ (G.C. Exs. 1(b) & (d); Tr. 14, 42). The LE lists numerous rules applicable to employees participating in the telework program with a line next to each rule. (Tr. 14, 42; Jt. Ex. 3).² Supervisors asked employees to initial each rule and sign the LE.³ (*Id.*). The

¹ The Respondent did not issue the LE to Loan Guaranty employees. (Tr. 37).

² Joint Exhibit 1 differs slightly from Joint Exhibit 3 and appears to be a draft of the LE. Therefore, I will cite to Joint Exhibit 3, issued to Reilly.

³ Reilly testified that she declined to sign the LE and that the Respondent took no action against her for refusing to sign the document. (Tr. 38). But, some employees were counseled for not signing the LE. (*Id.*). Because the Respondent has not asserted that employees were not required to comply with the LE and there is no record evidence to support such a finding, whether employees signed the LE is irrelevant to the inquiry of whether the Respondent implemented a change in working conditions.

LE states that employees would be subject to disciplinary or administrative action if they failed to adhere to the listed “work assignments” (Jt. Ex. 3 at 1). The LE contains two rules that are alleged in the Complaint as changes in working conditions necessitating bargaining: (1) A requirement that employees respond to phone calls or e-mails from their supervisors within 15 minutes of the supervisor’s communication; and (2) A requirement that employees “make up” missed on-site work days. (Jt. Ex. 3 at 1-3).⁴

The response-time requirement is most easily comprehended in the context of the work being performed by the employees and their work environment. Employees working at home process veterans’ disability claims remotely on VA computers equipped with two monitors. (Tr. 24-25, 36). On occasion, a supervisor may have a question about an employee’s work on a claim or may need to respond to a time-sensitive Congressional inquiry about a veteran’s claim. (Tr. 56-57). When this happens and the employee is working on site, the supervisor stops by the employee’s desk, calls, e-mails or “messages” the employee. (*Id.*). If the employee is away from his/her desk, the supervisor leaves a note. (*Id.*). Service Center Assistant Manager Sandra Smith testified that in each of these circumstances, she expects the employee to respond promptly. (*Id.*). Smith did not testify that the employee is required to contact her within a specified time if the employee is working on site.

When an employee is working remotely and a supervisor has a question, the supervisor calls the employee or sends the employee an e-mail message or “Lync” instant message. (Tr. 58). Undisputed record evidence establishes that teleworking employees were required to respond to employees in a reasonable amount of time prior to the issuance of the LE, but were not held to a time-specific requirement.⁵ (Tr. 43-44). The LE does not specify whether employees must respond within 15 minutes of their supervisors’ messages arriving in their inboxes or when employees see the communications. (Tr. 26-27; Jt. Ex. 3).

⁴ Specifically, the requirements at issue state:

1. If you are not able to report to the office your assigned in-office day (ODS), you must coordinate with your supervisor to come in another day the same week. (only applicable if an ODS is established);

....

5. The ability for your supervisor to communicate with you during your tour of duty should be parallel to that of employees in the office. Since the supervisor is unable to physically come to your desk on the days you telework, you are required to respond to communication (email, phone, Lync) from your supervisor within 15 minutes of receipt, unless you are on a designated lunch break. If the message is sent during your designated lunch, you are expected to respond within 15 minutes, upon your return to duty.

⁵ Delgado-Jenkins testified unequivocally that this was the case. (Tr. 43, 44). Smith’s testimony that she expects employees on site and teleworking to respond in the same manner does not dispute Delgado-Jenkins’ testimony – Smith did not testify that a 15 minute rule applies at the office; nor did she testify that such a rule existed for teleworking employees prior to the Respondent’s issuance of the LE.

Several factors may bear on the immediacy of a teleworker's response to a supervisor's inquiry.⁶ Based on the two-monitors set up, it makes sense that employees running Outlook, the Respondent's e-mail program, would see their supervisors' messages while working. (Tr. 15). However, employees working with Outlook closed would not learn of their supervisors' e-mails until they opened the program (Ms. Reilly testified that some teleworkers employees work with their e-mails program closed because it slows down their computers). (*Id.*). In both instances, employees' responses to supervisors' communications may be delayed if their work prevents them from responding immediately. (Tr. 44). Prior to the June 15 LE, teleworking employees were not required to respond to supervisors' phone calls and e-mails within a specified period of time. (*Id.*). However, they were, required to reply to supervisors' inquiries within a reasonable amount of time. (*Id.*).

The second alleged change in working condition in the LE concerns how employees' leave usage on "in-office days" affects their telework arrangements.⁷ All employees sign a telework agreement when they commence teleworking. (Tr. 32; Jt. Ex. 4). Employees' telework agreements require them to work at their regular duty stations (i.e., the VA facility) once per week. (Tr. 62). Employees who enter into "regular and recurring" telework arrangements specify their in-office and alternate duty station days. (Jt. Exs. 3 & 4). Respondent's June 2015 LE states that employees must arrange to work at their regular duty stations an alternate day any time they miss a scheduled "in-office day" (Jt. Ex. 3). Before the Respondent issued the LE, teleworkers were not required to "make up" a missed in-office day. (Tr. 15, 44).

The General Counsel offered evidence of impact as a result of the in-office "make up" requirement on two fronts, employees' home lives and their work situations. Reilly testified that she schedules medical appointments, normally in the vicinity of her home, on telework days to diminish travel time and leave usage. (Tr. 17). According to Reilly, she would lose these benefits if she were required to forego her work-at-home day because she used leave. (*Id.*). As an example, Reilly testified that if she took sick leave on a day that she was scheduled to work in the office, she could not schedule a medical appointment to coincide with her work-at-home day, thereby diminishing her leave usage. She would have to use additional leave to travel to her appointment from the VA facility rather than from her home. (*Id.*).

Employee Delgado-Jenkins testified about the impact of employees working at the VA facility on days that they are not regularly scheduled to be there. Most employees share desks based on alternating telework days. (Tr. 45). Therefore, an employee working at the VA facility on a regularly scheduled telework day must find an alternate workspace. (*Id.*).

⁶ I make these observations in measuring the impact of the alleged change in working conditions. My comments have no bearing on the validity of the response-time requirement.

⁷ The parties presented no evidence demonstrating that the LE would apply in any situation other than when an employee takes leave.

Delgado-Jenkins testified that on some occasions when she reported to work at the VA on her telework day, she could find nowhere to sit within her team. (*Id.*). Sitting apart from her team required Delgado-Jenkins to call a computer assistance phone number to request reconfiguration of her computer, phone and printer, a process that takes 2-3 hours. (Tr. 45-46). Delgado-Jenkins could not commence work until her equipment was reconfigured. (*Id.*).

Uncontroverted record evidence establishes that the Respondent gave the Union no notice before issuing the LE to teleworkers. (Tr. 14; Jt. Ex. 2). On June 29, after learning about the LE from employees, Local President Reilly requested to bargain, stating that the LE “changes conditions of work without advance notice to AFGE and an opportunity to bargain.” (Jt. Ex. 2). Reilly stated in her June 29 letter that the Union would consider the Respondent’s failure to respond to the request by June 30 as a refusal to bargain. (Jt. Ex. 3). Reilly described the June 30 reference as a “scrivener’s error” mistakenly indicating that the Respondent should reply to the Union’s bargaining request by June 30 rather than July 30. (Tr. 21, 31). The record does not establish when Reilly discovered this error. The Respondent did not respond to the Union’s July 1 request to bargain. (Tr. 21). Reilly testified that she re-submitted a written bargaining request on July 20 and that the Respondent also failed to respond to this request. (Tr. 22). For reasons I discuss below, I do not credit this assertion.

The Collective Bargaining Agreement

Because the Respondent has raised a “covered by” defense to the allegations of the Complaint, certain provisions of the contract are relevant to my review of this matter. Article 20 of the collective bargaining agreement addresses telework in significant detail. The Respondent argues that Sections 1(A), (B), and (C) of the Article’s “General” provision bear on my determination of whether it violated the Statute as alleged. Section 1(A) addresses the relationship between the telework program and the Respondent’s accomplishment of its mission (“parties . . . acknowledge the needs of the Department to accomplish its mission. The primary intent of the telework program is to support the mission of the Department in an alternative work setting.”); Section 1(B) establishes that employee participation in the program is voluntary, and Section 1(C) states “employees participating in telework are performing the same duties as their counterparts working at VA facilities.” (Jt. Ex. 4 at 76).

Also, the Respondent asserts that Section 9(B), "Temporary Recall from ADS" is pertinent, and that provision states:

Employees may also be required to report to their ODS for valid operational needs to perform agency work which cannot otherwise be performed on another workday, at the ADS, via telephone, or other reasonable alternative methods. In such cases, employees will be provided reasonable advance notice and be provided a reasonable time to report. Employees should make every effort to report as soon as possible.

(Jt. Ex. 4 at 82).

I find Article 20, Section 18, "Local Telework Negotiations" to be germane. This provision delegates authority to local parties to negotiate local telework agreements and specifies the topics that local-level parties may address in their negotiations. (*Id.* at 84). Relevant here, Section 18(g) states that local parties may negotiate over "[a]ny . . . issues affecting the bargaining unit not otherwise covered in this Article." (*Id.*).

The parties are currently bargaining a local supplement to the collective bargaining agreement. (Tr. 19-20). During negotiations, the Union rejected the Respondent's proposal requiring teleworkers to respond their supervisors' communications within 15 minutes (i.e., one of the alleged changes that the Respondent implemented in the LE). (*Id.*). The parties' tentative agreement requires teleworkers to respond to supervisors' communications within "a reasonable amount of time." (Tr. 19-20). This accord between the parties remains tentative because local supplement negotiations are not complete. (*Id.*).

POSITIONS OF THE PARTIES

General Counsel

As stated in the General Counsel's (GC) prehearing disclosure (Prehrg. D.), the Respondent violated § 7116(a)(1) and (5) of the Statute by implementing changes in its telework program without providing the Union notice and an opportunity to bargain over the impact and implementation of the changes. (G.C. Prehrg. D. at 2). Further, the GC asserts that two items of the LE warrant impact and implementation bargaining: (1) the requirement that teleworking employees respond to supervisors' communications within 15 minutes of receipt and (2) the requirement that teleworkers "make up" missed in-office days. (G.C. Prehrg. D. at 2; G.C. Br. at 6-9).

According to the GC, the 15 minute response mandate changes employees' working conditions because notwithstanding what response requirements may be when an employee works at his/her official duty station, employees were not required to respond to their supervisors within any specified period of time while teleworking prior to the Respondent's issuance of the LE. (G.C. Br. at 4-5). The GC maintains that taken together, the threat of

discipline and factors affecting employees' ability to meet the requirement (i.e., e-mails or phone calls not received due to technological issues or other work requirements) compel the conclusion that the Respondent's response-time requirement has more than foreseeable de minimis impact. (*Id.* at 7). The GC argues also that the 15 minute response mandate has more than de minimis foreseeable impact on employees because it will "invariably reduce their productivity." (*Id.*). In this regard, the General Counsel asserts that employees' work will inevitably be disrupted if they must turn on their e-mail program that slows down other work. (*Id.*). Also, the General Counsel argues that employees' ability to accomplish their work will be adversely affected by having to constantly monitor their computers for supervisors' messages. (*Id.*).

The GC argues that the Respondent's requirement that teleworkers make up missed in-office days is a change in working conditions necessitating bargaining also. (*Id.* at 5). The GC claims that the directive amounts to a change in working conditions because the Respondent never required teleworkers to make up missed in-office days prior to its issuance of the LE. (*Id.*). The GC asserts that making employees come to the office because they took leave on a regularly scheduled telework office day has more than de minimis impact because the requirement will affect employees' appointments that they have scheduled to coincide with their telework days, arrangements that employees made assuming they would travel from their homes. (*Id.* at 8-9). Also, the GC argues that requiring teleworkers to make up missed in-office days will adversely affect their productivity because employees have to find an alternate work space when they work in the office on a day they are scheduled to telework from home. (*Id.* at 8). This is because of the Respondent's policy of desk-sharing among teleworking employee. (*Id.*). The GC points out that record evidence establishes that desk-sharing among teleworkers is widespread, and that witness Delgado-Jenkins testimony shows an employee may lose 2-3 hours of productivity making arrangements to work in an alternate work space, demonstrating adverse impact. (*Id.*).

Finally, the GC argues also that the Respondent violated the Statute by failing to respond to the Union's requests to bargain about changes to its telework policy. (*Id.* at 10-11; citing *Army & Air Force Exch. Serv., McClellan Base Exch., McClellan AFB, Cal.*, 35 FLRA 764, 769 (1990) (*McClellan AFB*) and *U.S. DHS, Border & Transp. Directorate, Bureau of Customs & Border Prot.*, 59 FLRA 910, 915 (2004) (*Customs*), the General Counsel maintains that because an agency's duty to bargain in good faith includes the obligation to respond to bargaining requests, the Respondent violated the Statute by not responding to the Union's July 1 and July 20 bargaining requests. (G.C. Br. at 10-11). The GC acknowledges that the Union's July 1, bargaining request was flawed but asserts that the Union's desire to negotiate the telework changes was apparent. Therefore, according to the GC, Respondent's requirement to respond to the request persists. (*Id.* at 11). The GC asserts that the Respondent violated the Statute in this regard irrespective of whether it had a duty to bargain over the alleged changes in its telework policy raised by the Complaint. (*Id.* at 10-11).

In terms of remedy, the General Counsel believes that the facts support a finding that a status quo ante remedy is appropriate. (*Id.* at 12). The General Counsel argues that applying the factors of *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (*FCI*) weighs in favor of a status quo remedy because: (1) the Respondent did not notify the Union of the changes to the telework policy; (2) the Union requested to bargain soon after learning of the changes; (3) the Respondent knew the Union opposed the 15 minute rules from local supplement negotiations, its actions must be deemed intentional; (4) the telework policy changes affected hundreds of employees; and (5) the Respondent has failed to establish that returning to the status quo would disrupt or impair the efficiency and effectiveness of its operations. (G.C. Br. at 12-14).

Respondent

The Respondent does not dispute that it failed to bargain the LE requirements raised in the Complaint. (R. Prehrg. D. at 2; Tr. 11-12). The Respondent's denial that it violated the Statute by implementing new telework requirements in its LE rests on its assertions that: (1) the requirements in the LE that the General Counsel alleges as changes in working conditions are not changes or, to the extent they are changes, they should be deemed de minimis in nature not engendering a bargaining obligation; and (2) the subject matter of the alleged changes in working conditions is "covered by" the collective bargaining agreement, extinguishing any bargaining obligation that might otherwise exist.⁸ (R. Br. at 3-4; Tr. 11-12).

Generally, the Respondent asserts that the LE requirements raised in the Complaint do not amount to changes because they are merely prerequisites if employees choose to telework. (R. Br. at 4). The Respondent reasons that employees may choose the "alternative," which is "not to telework." (*Id.* at 4).

Also, the Respondent discounts the possibility of any impact because the record does not demonstrate that employees have been disciplined for either not signing the LE or failing to comply with the LE. (*Id.* at 4-5).⁹

⁸ The Respondent argued "covered by" as its primary defense. But, inasmuch as the "covered by" defense is a waiver argument, it only applies in the event that a duty to bargain otherwise exists.

⁹ With respect to the LE requirement that teleworkers make up missed office days, the Respondent argued in its brief that the change was analogous to *Immigration & Naturalization Serv.*, 58 FLRA 626 (1995) (*INS*), where "the authority (sic) found that where an agency has a practice of reassigning and assigning employees to different tours of duty in response to workload requirements, assigning employees to an established though seldom used tour of duty did not change their conditions of employment." (R. Br. at 5). A case with the name "*INS*" does not match the Respondent's case citation, as cited in Respondent's brief. However, the case corresponding to the Respondent's cited case is actually *U.S. Dep't of the Air Force, HQ, 96th Air Base Wing, Eglin AFB, Fla.*, 58 FLRA 626 (2003) does not match the Respondent's account of the facts and subject matter. As such, I have not considered this argument.

Also, the Respondent argues that the telework programs are “covered by” Article 20, Sections 1(A), (B) and (C). (*Id.* at 3-4). The Respondent concedes that the matters in dispute are not expressly addressed in these provisions. (*Id.* at 3). Respondent maintains, however, that the provisions are “inseparably bound up with” the matters. (*Id.*). The Respondent fails to explain how, in its view, these provisions extinguish any bargaining obligation under a “covered by” analysis. (*Id.* at 3-4). In its brief, the Respondent refers to the language of Section 1(C), and notes Smith’s testimony that she expects employees to respond to her in the same manner, whether they are working at home or the office. (*Id.* at 4). Referring to Delgado-Jones’ testimony that employees may be required to report to the office if there is an operational need, Respondent asserts that, “This concept was negotiated in the original Master agreement and the Agency’s ‘telework expectation’ letter did not change that.” (*Id.*). Respondent likens the LE’s requirement that teleworkers make up missed in-office days to the Respondent’s ability to require teleworkers to report to the VA facility for operational needs, an existing condition of employment.

Regarding the allegation that it unlawfully failed to respond to the Union’s bargaining request, the Respondent argues that it had no obligation to respond to the Union’s request to bargain because it included a response date that had already passed. (*Id.* at 5-6). Citing the Union’s duty to bargain in good faith under *U.S. Dep’t of Labor, Wash., D.C.*, 60 FLRA 68, 70 (2004), the Respondent asserts that the incorrect response date along with the numerous ULPs, grievances, and requests for information that the Union alludes to in its charge demonstrate the Union’s failure to bargain in good faith with the Respondent. (R. Br. at 5-6). The Respondent concedes that possibly it would have been required to respond to the Union’s “alleged” July 20 bargaining request but asserts that the charge does not raise such a request. (*Id.* at 6).

ANALYSIS AND CONCLUSIONS

It is well settled that an agency must give the exclusive representative notice and an opportunity to bargain before implementing changes that have more than de minimis impact on conditions of employment. *U.S. Dep’t of the Air Force, 355th MSG/CC Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 89 (2009) (*Davis-Monthan*); *U.S. Dep’t of the Treasury, IRS*, 56 FLRA 906, 913 (2000). The nature and extent of the effect or the reasonably foreseeable effect of the change determines whether a change in working conditions is more than de minimis. *U.S. Dep’t of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*). When an agency exercises a reserved management right under § 7106 of the Statute, it need not bargain the substance of the change, but must bargain over the impact and implementation of the decision, if it has more than a de minimis effect. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*).

Respondent Changed Teleworkers' Working Conditions

First and foremost, there is the question of whether the Respondent implemented a change in working conditions. This is determined by analyzing the Respondent's conduct in the context of employees' conditions of employment, a review conducted on a case-by-case basis. *U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 173 (2004).

Based on my review of record evidence, I find that the Respondent changed employees' conditions of employment when it issued the LEs requiring teleworking employees to reply to their supervisors' e-mails, phone calls and messages within 15 minutes and to make up missed in-office days. Uncontested record evidence establishes that neither requirement applied to employees prior to the Respondent's issuance of the LEs.

The Respondent's general explanation of why these requirements are not changes, that employees may simply avoid the requirements (and as a result the changes in working conditions) by not teleworking is perplexing. First, I am compelled to point out the obvious: Even if some employees stopped teleworking to avoid the new rules, employees who persisted on exercising their contractual right to telework would still be subjected to them. Moreover, the Respondent's argument that employees would avoid the changes in working conditions if they abandoned their telework arrangements flies in the face of the Respondent's establishment of a telework policy, its telework agreement with the Union and government-wide policy supporting telework. I know of no Authority precedent, and the Respondent has cited none, supporting the premise that an employee's ability to avoid application of a change in working conditions bears on the question of whether the Respondent implemented a change.

The Respondent failed to explain why the 15 minute response requirement is not a change in working conditions when undisputed record evidence indicates otherwise. Respondent's witness Smith testified that she expects employees working at home and those working in the office to be subject to the same work rules. But, record evidence does not establish that employees working in the office are subject to the 15 minute response requirement. In any case, I agree with the General Counsel that the Respondent fails to address working conditions of teleworkers simply by showing the applicability of the rules at the VA facility. The fact that the Respondent and parties at the national and local have bargained agreements addressing conditions of employment for teleworkers points to the inaccuracy of this assertion. Based on record evidence, I conclude that the Respondent changed teleworkers' working conditions when it mandated in the LE that teleworkers must respond within 15 minutes of receiving a message from their supervisors by phone, e-mail or instant message.

Requiring teleworkers to make up missed office days when they take leave on their regularly scheduled office day amounts to a change in working condition also. Record testimony establishing that the requirement did not exist prior to the Respondent's issuance of the LE is uncontroverted. In its brief, the Respondent suggests that employee Delgado-Jenkins' testimony that she has, on occasion, worked with her supervisor to come

up with an alternate day when she has missed her in-office day demonstrates it did not change working conditions by requiring employees to make up missed in-office days. But, neither Delgado-Jenkins' testimony nor any other record evidence shows that employees were *required* to make up missed office days before the Respondent issued the LE to employees in June 2015. Also, I am not persuaded by the Respondent's assertion that the requirement is not a change in working conditions because teleworkers were already subjected to being called back to work for operational reasons. Calling employees back to work on a case-by-case basis to address a specific matter in no way compares to a permanent requirement to make up a missed in-office days notwithstanding whether work demands necessitate the employee's presence in the office. The record establishes that the LE requirement that teleworkers make up missed office days was a new work rule changing working conditions.

Telework Program Changes Are More Than De Minimis

As the General Counsel points out, the Respondent is only required to bargain with the Union about the telework program changes it has raised in the Complaint if the impact or foreseeable impact of the changes is more than de minimis. *Davis-Monthan*, 64 FLRA at 89. Because the Authority's standard mandates a review of the foreseeable impact of the change, I reject the Respondent's assertion that the impact of the changes is de minimis because the General Counsel failed to submit evidence of actual impact. *See AFGE, Nat'l Council 118*, 69 FLRA 183, 187-88 (2016). Upon review of the impact and reasonable foreseeable impact of the Respondent's changes to its telework program, I conclude the changes were more than de minimis.

The General Counsel argues that the Respondent's new 15 minute response requirement for teleworkers has more than de minimis impact because it affects teleworkers' productivity. The General Counsel connects the 15 minute response requirement to teleworkers' productivity in its brief, but fails to address why reduced productivity *matters* to employees. Moreover, the record is void of any evidence on this topic. I recognize that in view of the work performed by the Respondent's employees, it is unlikely that the Respondent does not hold its employees to productivity standards. But, I am unable to attribute information that I believe to be true to the record. Without evidence demonstrating how a change in working conditions that adversely affects employees' productivity impacts them (i.e., such as performance standards addressing employees' productivity), I am disinclined to find more than de minimis impact because of reasons related to employee productivity.

Though I am not persuaded by the General Counsel's claim of more than de minimis impact because of employees' lost productivity, I nevertheless conclude that the impact or the foreseeable impact of the 15-minute response requirement is more than de minimis. Two things, in my view, dictate a finding that the impact of this change is more than de minimis. First, the LE states that employees who fail to comply with the LE and, as relevant here, the 15 minute response requirement are subject to "administrative and/or disciplinary action." (Jt. Ex. 3). As discussed above, Respondent's 15 minute response rule is a new requirement

at the Respondent. The LE establishes a new basis for disciplining employees who telework. The Authority has found that changes in establishing a new basis for discipline have more than de minimis impact. See *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875, 881-82 (1990); *U.S. DOJ, INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 35 FLRA 1039, 1048-49 (1990). Because the 15 minute response rule for teleworkers is a new basis for disciplining employees, I find this change in working conditions to be more than de minimis. Also, I note the uncertainty of how Respondent will apply the new rule in finding the change has more than de minimis impact. The record demonstrates that the 15 minute rule lacks clarity in terms of its application, placing employees in the precarious position of being disciplined for non-compliance with a rule subject to interpretation. These circumstances magnify the impact of the change.

The Respondent's requirement that teleworkers make up missed office days has more than de minimis impact also. For the reasons discussed above, the disciplinary component attached to this new condition of employment establishes that the change has more than de minimis impact. (*Id.*). Moreover, the impact of the change on employees' work environment and home life is more than de minimis. Employees' inability to secure workspace and functioning equipment demonstrates more than de minimis impact. See *Kirtland AFB*, 64 FLRA at 173-74. Also, the impact on employees' home lives, having to change medical appointments that they have made to coincide with telework days, supports the conclusion that the impact of the change is more than de minimis. See *Veterans Admin. Med. Ctr., Prescott, Ariz.*, 46 FLRA 471, 475 (1992).

As discussed above, the telework changes implemented by the Respondent in the June 2015 LE had more than de minimis impact. Therefore, the Respondent had an obligation to give the Union notice and an opportunity to bargain before implementing the changes, unless it successfully raises a defense. I turn now to the Respondent's assertion that the changes are "covered by" the contract.

The Respondent's "Covered by" Defense¹⁰

The Respondent argues that it has no duty to bargain about the changes it implemented in its telework program asserting a "covered by" defense. The "covered by" doctrine absolves a party from additional bargaining over subject matter that it has addressed in an agreement. See *Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009). Under the Authority's

¹⁰ The General Counsel maintains that I should not consider the Respondent's "covered by" defense because the Respondent did not state that it was raising the defense in its prehearing disclosure or opening statement. (G.C. Br. at 9, n.8). However, the General Counsel admits that the Respondent indicated at the prehearing conference where parties "discuss, narrow or resolve the issues" that it would raise the defense. (*Id.*; 5 C.F.R. 2423.24(d)). A party may not raise a "covered by" defense for the first time in its post-hearing brief. *PBGC*, 58 FLRA at 52. Here, the General Counsel concedes that the Respondent raised the defense at the prehearing conference. (G.C. Br. at 9, n.8). I will consider the Respondent's argument that it had no duty to bargain about the changes it implemented in its telework program because the matter is "covered by" the collective bargaining agreement.

two-prong test, a party may refuse to bargain about matters: (1) expressly addressed in the agreement or (2) “inseparably bound up with” a subject “covered by” the agreement. (*Id.*). If the parties’ agreement preserves bargaining on a matter, a party may not successfully assert a “covered by” defense. See *U.S. Dep’t of HUD*, 66 FLRA 106, 109 (2011) (*HUD*).

Here, the Respondent’s “covered by” defense fails because, contrary to its contention, the telework program changes raised by the Complaint are not “covered by” Article 20, Sections 1(A), (B), and (C). Moreover, even if the changes were “covered by” these provisions, the changes would still be negotiable because the agreement preserves bargaining on the matters.

The Respondent concedes that the Article 20, Section 1 provisions that it relies upon do not “expressly” cover the telework program changes in dispute. But, the Respondent argues that analyzing the changes along with these sections demonstrates that it has no duty to bargain under prong two of the “covered by” standard. The Article 20, Section 1 provisions generally affirm the importance of accomplishing the VA’s mission in a telework setting; that the program is voluntary, and that teleworking employees will perform the same duties as employees working in VA facilities. (Jt. Ex 4). It is not apparent how these contract terms relate to new telework program rules requiring teleworkers to respond to supervisors within 15 minutes and to make up missed office days, and Respondent has failed to articulate why it believes they do. So, I reject the Respondent’s assertion that it has no duty to bargain the telework program changes under prong two of the “covered by” standard.

Citing *U.S. DOJ, Fed. BOP, FCI Williamsburg, Salters, S.C.*, 68 FLRA 580 (2015) (*FCI Williamsburg*), the General Counsel argues that the subject matter of the changes raised by the Complaint is not “covered by” the agreement because, “A matter is not covered by the collective bargaining agreement if the agreement specifically states that the parties may negotiate over it.” (G.C. Br. at 9-10).¹¹ I agree with the General Counsel that the contract contemplates bargaining over the subject matter raised by the Complaint. Article 20, Section 18(g) states that local parties may negotiate over “any . . . issue affecting the bargaining unit not otherwise covered in this Article.” The plain language of the contract reserves local bargaining on all telework “issues”, except those covered in the Article. I find nothing in Article 20 addressing the LE’s response-time requirement or how, if at all, missing an in-office day affects employees’ telework arrangements. I conclude that Section 18(g) preserves bargaining on these “issues”. Because the agreement contemplates bargaining on the telework program changes that the Respondent implemented in the LE, a “covered by” defense is not available to the Respondent. See *FCI Williamsburg*, 68 FLRA at 582-83; *HUD*, 66 FLRA at 109.

¹¹ I do not consider the General Counsel’s arguments on this issue citing to Article 47 of the contract because the provision is not part of the record.

As discussed above, Respondent implemented more than de minimis changes to its telework program requiring bargaining. The Respondent has failed to demonstrate that the changes are "covered by" an agreement, absolving it from any bargaining obligation. Therefore, as the Complaint alleges, the Respondent violated § 7116(a)(1) and (5).

The General Counsel correctly states that the duty to bargain in good faith includes the obligation to respond to bargaining requests, and that a party violates § 7116(a)(1) and (5) when it ignores a bargaining request. *McClellan AFB*, 35 FLRA at 769; *Customs*, 59 FLRA at 915. But, I reject the General Counsel's argument that the Respondent violated the Statute by not replying to a bargaining request under the facts of this case.

The Union admits that its July 1 bargaining request was flawed, containing a "scrivener's error." (Tr. 21, 31). I reject the Respondent's unsubstantiated assertion that the Union's request was "insincere . . ." (Tr. 12). Reilly's testimony that the incorrect response deadline was an error is controverted. But, Reilly's mistake is an important one – a demand that the Respondent reply to the request on a date that had already passed. (Jt. Ex. 2; Tr. 21, 31). The General Counsel argues that the Respondent should have contacted the Union to clarify the request. But, likewise, it may be argued that the Union, having committed the error, bore the burden correcting it. Under the circumstances presented, I find insufficient evidence that the Respondent's failure to respond to the Union's request evidences a failure to bargain in good faith in violation of the Statute.

This brings the discussion to the July 20 bargaining request that Local President Reilly testified she submitted. Undoubtedly, the Union reiterating its bargaining request bolsters the General Counsel's argument that the Respondent violated the Statute by not responding to the Union's bargaining request. But, considering the totality of the circumstances, as well as Ms. Reilly's demeanor, I do not credit Reilly's testimony that she submitted a bargaining request on July 20. First, I note that the General Counsel relies upon Ms. Reilly's testimony only in support of its assertion that the Union submitted the July 20 bargaining request, even though Ms. Reilly testified that the request was written. There may be an explanation why the document was not available for inclusion in the record, but the record contains none. Second, crediting Reilly's testimony about this request calls her testimony concerning the July 1 into question. Reilly testified that she meant to set a July 30 response deadline in her July 1 request but stated June 30 in error. But, if that is true, there is no reason for Reilly to re-state the bargaining request because her deadline on the July 1 request had not passed. Re-submitting the request would make sense if Reilly discovered her error. But, Reilly did not testify that was the reason she sent the July 20 letter, or that she mentioned the error at all. Under these circumstances, I do not credit Reilly's testimony stating that she re-submitted the Union's request to bargain Respondent's LE telework program changes on July 20.

Because I have discredited Reilly's testimony that she submitted a bargaining request on July 20, the General Counsel's evidence supporting this allegation rests solely on the Union's July 1 request with admitted errors. As I stated above, I am disinclined to find a failure to respond violation based on this request. I conclude that the Respondent did not violate the Statute by failing to respond to the July 1 bargaining request as alleged in the Complaint.¹²

REMEDY

The Respondent did not address whether a status quo order would be appropriate in the event I concluded it had violated the Statute by implementing the telework program changes without bargaining. The General Counsel urges that a status quo remedy is appropriate under the standards of *FCI*. In *FCI*, the Authority established factors to consider in determining whether a status quo remedy is appropriate in cases involving impact and implementation bargaining. Those factors are: (1) whether, and when, management provided notice of the change; (2) whether, and when, the union requested to bargain; (3) the willfulness of the agency's failure to bargain; (4) the nature and extent of the change's negative impact on bargaining unit employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of agency operations. *FCI*, 8 FLRA at 606.

Applying the *FCI* factors, I concur with the General Counsel's assessment that a status quo ante remedy is warranted. In this regard, I note that the Respondent never gave the Union notice of the change and though, as discussed above, the Union made a critical error in its bargaining request, it put the Respondent on notice that it wanted to bargain about the changes. (Tr. 14; Jt. Ex. 2). Additionally, I find a degree of willfulness in Respondent's actions in view of uncontroverted record evidence establishing that the Respondent proposed one of the changes in local supplement negotiations and, after failing to secure the policy through bargaining, implemented the change unilaterally. (Tr. 14, 19-20).

Also, as the General Counsel points out, the impact of the changes is far-reaching, affecting approximately 200 teleworking employees. (Tr. 38). Furthermore, the nature of the changes is significant in view of the Respondent's threat of discipline for non-compliance. (Jt. Ex. 3).

A finding that a status quo remedy would disrupt or impair the efficiency and effectiveness of the Respondent's operations must be supported by record evidence. *Army & Air Force Exch. Serv., Waco Distrib. Ctr., Waco, Tex.*, 53 FLRA 749, 760 (1997). Here, the record does not demonstrate that returning to the status quo until the completion of

¹² I note that my conclusion that the Respondent did not violate the Statute by failing to respond to the Union's bargaining request has no bearing on my determination that the Respondent violated the Statute by implementing the telework program changes without bargaining. The Respondent implemented the LE requirements (thereby engaging in ULP conduct) before the Union learned of the change in working conditions and requested to bargain.

bargaining would disrupt or impair the efficiency and effectiveness of the Respondent's operations. With respect to the 15 minute response rule, Respondent has explained how the rule will assist it when managers need information from employees quickly. (Tr. 59, 63). However, the Respondent has failed to show or address how *not* having the rule in place while it fulfills its bargaining obligation would affect its operations. The same is true about the change requiring teleworkers to make up missed office days. The evidence shows that on occasion an employee may have to make a date adjustment on a document to accommodate leave usage or ask a supervisor working on-site to change a document. (Tr. 48). But, the evidence does not demonstrate that this occurs on a scale that would meet the *FCI* standard requiring a showing of disruption or impairment of the effectiveness or efficiency of its operations. Finally, the fact that the Respondent has operated its telework program since 1999 without these rules and submitted no evidence rising to the level of the *FCI* standard of operation disruption or impairment lends credence to the conclusion that a status quo ante remedy is appropriate considering this factor as well.

Upon consideration of the *FCI* factors, I find that it is appropriate to order the parties to return to the status quo.

The Respondent is further ordered to cease and desist from changing conditions of employment without satisfying its bargaining obligations. The Respondent is directed to bargain, upon the request of the Union, over the impact and implementation of any proposed changes to its telework program requiring 15 minute responses to supervisors' communications and make-up missed telework days. I will incorporate an electronic dissemination into the Order in accordance with the Authority's decision that ULP notices should, as a matter of course, be posted both on bulletin boards and electronically. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla., 67 FLRA 221 (2014).*

CONCLUSION

The Respondent was obligated to notify the Union of changes it made to its telework program, requiring employees' to respond to supervisors' communications within 15 minutes and to make up missed in-office days, and to negotiate with the Union, upon request, over the impact and implementation of its decision. The Respondent's failure to do so constitutes a violation of § 7116(a)(1) and (5) of the Statute. Also, for reasons I have explained above, I conclude the Respondent did not violate the Statute by failing to respond to the Union's bargaining request.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes to working conditions of bargaining unit employees represented by the American Federation of Government Employees, Local 1594 (Union), including telework policy changes requiring teleworkers to respond within 15 minutes of receiving supervisors' communications and requiring them to make up missed in-office days, without first providing the Union with notice and an opportunity to bargain to the extent required by the Statute.

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

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

(a) Rescind the requirements that teleworkers must respond to any communication from their supervisors within 15 minutes and come to Respondent's facility on regularly-scheduled telework days when they are absent from work on regularly-scheduled in-office days.

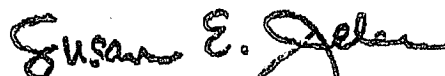
(b) Notify, and upon request, bargain with the Union over the impact and implementation of proposed telework policy changes requiring teleworkers to respond to any communication from their supervisors within 15 minutes and to come to Respondent's facility on regularly-scheduled telework days when they are absent from work on regularly-scheduled in-office days.

(c) Post at all facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, Veterans Affairs Regional Office 317, St. Petersburg, Florida, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) In addition to physical posting of paper notices, notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

(e) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 30, 2016

Handwritten signature of Susan E. Jelen in cursive script.

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Veterans Benefits Administration, Veterans Affairs Regional Office, St. Petersburg, Florida, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement changes in telework policies applicable to employees represented by the American Federation of Government Employees, Local 1594 (Union), without giving the Union advance notice and an opportunity to bargain to the extent required by the Statute.

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

WE WILL rescind the requirement that teleworking employees respond within 15 minutes of receiving communications from their supervisors.

WE WILL rescind the requirement that teleworkers come into Respondent's facility on regularly-scheduled telework days when they are absent from work on regularly-scheduled in-office days.

WE WILL notify and, upon request, bargain with the Union over the impact and implementation of proposed telework policy changes requiring teleworkers to respond to any communication from their supervisors within 15 minutes and to come to Respondent's facility on regularly-scheduled telework days when they are absent from work on regularly-scheduled in-office days.

(Respondent/Activity)

Dated: _____

By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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 any of its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.