ARBITRATION AWARD

FEDERAL MEDIATION AND CONCILLIATION SERVICE

In the Matter of:	)	
	)	
American Federation of Government Employees	)	
National Veterans Affairs Council,	)	Grievance: (Prorating Attorney Work Credits)
Local Union No. 17	)	
	)	
Union	)	Hearing dates: June 3 and 4, 2013
and	)	
	)	Briefs: July 24, 2013
Department of Veterans Affairs,	)	
Board of Veterans' Appeals,	)	Decision: November 18, 2013
	)	
Agency	)	
	)	

Before: Arbitrator Blanca E. Torres

FOR THE UNION: William A. Preston, Esq.
Heather Gogola, Esq.

FOR THE AGENCY: Hensel J Cordeiro, Esq.
Tabatha G. Macko, Esq.

A hearing was held in this matter on June 3 and 4, 2013, at 810 Vermont Avenue, in the District of Columbia. This case involves a grievance filed by the American Federation of Government Employees, National Veterans Affairs Council, Local Union Number 17 (the Union) against the Department of Veterans Affairs, Board of Veterans' Appeals (the Agency, or the Board, or management). The Union alleges a violation of the Master Agreement (implemented on March 15, 2011), as well as OPM Guidance and FLSA provisions and also asserts the Board changed the implementation and manner of enforcing the annual quota for Attorneys, without giving notice to Staff Counsel or the Union.

The parties were unable to agree upon the issues in this case, therefore the arbitrator agreed to formulate the issues. The parties stipulated that the arbitrator's issues will encompass whether the Board's policies violate applicable provisions regarding approved leave. [1] Based on the entire record and the Agency's Motion to Dismiss, I have fashioned the issues as follows:

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1 At the hearing, the Union presented the following issue: Whether current procedures for measuring progress towards achieving a "fully successful" [performance rating] in the critical element of production violates various provisions of the Master Agreement, to include Articles 27[Performance Appraisals] and 35 [Time and Leave] and laws and regulations. Tr. p. 4. In its brief, the Union revised the issue as follows: "whether the Board's enforcement of a new weekly quota for attorney production, without consideration of approved leave and other non-case related activities, or without considering that attorneys have no control over when they receive credit for their

Issues

Whether this grievance is precluded from arbitration under the doctrine of collateral estoppel:

If not, whether the grievance is timely filed.

Whether the Agency violated provisions of the agreement, OPM guidance and federal regulations pertaining to performance appraisals, approved leave, overtime provisions and notice.

Whether the arbitrator can grant the remedies requested concerning performance appraisals.

Whether there was a change in the implementation and enforcement of the Attorneys' annual quota that gave rise to a duty to bargain.

Whether Management gave notice of the change pursuant to the collective bargaining agreement and federal statute. If not, what shall be the remedy?

<u>Relevant Provisions</u>

5 U.S.C. 7116(a)(1) and (5):

(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;

Article 27: (paraphrased)
Performance standards shall be fair and objective, reasonable, realistic, and attainable. Employees shall not be accountable for factors which affect performance that are beyond their control. Article 27, § 3(A), § 5(C), § 8(E).

Article 35: (paraphrased)
Improperly interfering with the ability of attorneys to take annual and sick leave. Article 35, § 1(E), § 2(C), § 2(F), and § 4(C).

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work, violates the Master Collective Bargaining Agreement between VA and AFGE ("Master Agreement"), as well as federal law and OPM regulation and guidance, and if so, what are the appropriate remedies."

Introduction

In presenting the facts underlying this case, I rely heavily on the factual presentations in the Agency's and Union's post-hearing briefs. The facts are largely uncontested.

The Board consists of a Chairman, Vice Chairman, Principal Deputy Vice Chairman, Veterans Law Judges, Senior Counsel, a Medical Advisor, more than 300 Board Attorneys (or Staff Counsel), and administrative and clerical staff. Nationwide, veterans seek disability compensation and other benefits from the Department of Veterans Affairs. If the benefit request is denied, veterans may appeal to the Board of Veterans' Appeals. The Veterans Law Judges (Judges) at the Board conduct hearings and render a final decision on the appeals of veteran benefit claims that were denied at the lower level (by the Department of Veterans Affairs). The Judges are supported by Board Attorneys (also called Staff Counsel or Attorneys) who review the record on appeal, conduct legal research, and prepare comprehensive draft decisions or remand orders for consideration by the Judges.

By federal mandate, the Board must conduct hearings and issue appellate decisions in a timely fashion. Thus, the Agency has developed performance standards for Staff Counsel so that the Board may "dispose of appeals [that are] properly before the Board in a timely manner." *See* 38 US.C. § 7101(a).

The performance of full-time Board Attorneys, Grades GS-9 through GS-14, is evaluated annually based on a 5-tier performance appraisal system. The performance tiers are: outstanding; excellent; fully successful; minimally satisfactory; and unacceptable. The basis of appraisal is the performance standards for Board Attorneys that are set forth in each Attorney's individual performance plan. One of the critical elements for Board Attorneys is the "productivity of decisions and other work assignments" (or "productivity element"). An Attorney is "fully successful" in the productivity element if he or she "produces a sufficient share of the Board's decisions and other work products, unless good cause is shown."

In 2003, a numerical standard for assessing Attorney productivity was established for Board attorneys. Attorneys would be determined to have contributed a sufficient share of the work load if they earned 152 credits over a performance year. Credits are earned for drafting decisions, remands, and requesting medical opinions. The Board states that when it established this annual quota as part of the attorneys' productivity element, the formula took into account 10 weeks of leave or other time spent by Attorneys on non-credit-producing work. In 2003, the Union grieved the Agency's establishment of this quota as part of the performance standards for Attorneys and lost. In 2006, the Agency increased the "sufficient share" definition to include 156 or more credits for the performance year after giving notice the change to the Union.

On October 15, 2012, the Union requested bargaining over changes in a chart that appeared to alter the Attorney production schedule for fiscal year 2013. The Board, denying that there had been any change in the performance standards, refused to bargain. In December 2012, there was an agency-wide reorganization. (The reorganization is not an issue in this case.)

In December 2012, the Union challenged a new management practice by filing a grievance. Although the actual quota was unchanged, the Agency switched from measuring progress on a quarterly basis to a weekly basis, thus requiring Attorneys to earn three credits each and every week. This is at the core of this grievance.

The Union asserts that the three-credits-a-week requirement has never been explicitly articulated in attorneys' individual performance standards. Rather, the quota is stated in terms of "156 credits annually." The Union states that pursuant to the Master Agreement, the Agency had an obligation to give notice to the Attorneys and to the Union when it abandoned the quarterly enforcement of a percentage margin of the quota and replaced it with a strict weekly enforcement of three-credits-a-week. *See* Article 27, § 5(A) and Article 27, § 5(E) (re: notice provisions).

The Board maintains that there has been no change in the quota as it remains at 156 credits annually. The Board stated that the formula used to establish this quota allows Attorneys 10 weeks a year for taking leave and for other non-credit-related events. The Agency states that it has an obligation to inform Attorneys if they are in jeopardy of not meeting their annual quota. Therefore, the Agency claims that supervisors have a duty to advise Attorneys when they fall behind three credits a week, and they have always done so.

This is the framework of the grievance before me. In addition, the Agency has filed a Motion to Dismiss. Also, the Agency had a standing objection to various issues, witnesses, testimony, exhibits and contract provisions raised by the Union at the hearing and in its post-hearing brief. With regard to this, I find that the exhibits, witnesses and issues and contractual provisions raised by the Union are integrally related to the issues raised in the grievance, i.e., they address issues already raised in the grievance document.

There must be a threshold determination that [an] agency made a change in a policy, practice, or procedure affecting unit employees' conditions of employment" before a finding that an agency violated 5 U.S.C. § 7116(a)(1) and (5) "by failing to provide a union with notice and an opportunity to bargain over changes to conditions of employment." *U.S. Department of the Treasury, Internal Revenue Service,* 66 F.L.R.A. 577, 579 (2012). "The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis." *Id.* I review the facts of this case in light of this background.

Factual Background

The Agency has consistently tracked attorneys' productivity requirements on a weekly basis since 2003. Tr., pp. 622, 594 - 96; 832 - 34, 836, 839. The tracking is done on color coded charts used by Board management. Tr., pp. 619 - 20, 832. The "Fair Share Production Goals" color-coded chart ("fair share chart" or "production schedule") helps management track Attorneys' progress in meeting the annual quota of 156 credits. These charts showed that Attorneys were considered "green" if they met the weekly goal, and were considered "yellow" or falling behind and in need of catching up with their productivity goal if they fell a certain percentage of credits behind what was considered "green." A column in the chart contained a margin reflecting that Attorneys had to be at 75% of goal for each week of the first quarter, 80% of goal for each week of the second quarter, 85% of goal for each week of the third quarter, 90% of goal for the first eight weeks of the fourth quarter, 95% of goal for the next five weeks of the fourth quarter, and 100% by week 52.

It is undisputed that in October 2012, the Agency issued the annual "fair share" chart for fiscal year 2012-2013, which completely eliminated any margin between the "green" and "yellow" zones. This meant that an Attorney would be deemed "yellow" within any given week should he or she fall a mere 0.5 credits behind what is considered "green."

Agency managers have consistently checked and followed up with employees who may not meet their annual productivity requirements based on these weekly charts. Tr., pp. 703 - 06. It is undisputed that the Agency should regularly monitor employees and provide feedback in terms of their performance and credits towards meeting their annual productivity element requirement. Tr., pp. 403 - 04. If an Attorney is unable to meet the productivity element, the Attorney may still be assigned a level of achievement in the element at the "fully successful" or "exceptional" level if the Attorney shows "good cause" why he or she was unable to meet the productivity element, as determined by the Board.

The determination of what constitutes "good cause" is made on a case-by-case basis by management and generally includes employee reassignment, special assignments for extended periods of time, military active duty, training obligations for Reserve and National Guard service, and leave taken under the Family and Medical Leave Act. An Attorney may ask his or her supervisor for a "good cause" waiver. An Attorney may also ask the Board's Chairman or anyone in the Attorney's chain of supervision for a "good cause" waiver. Steve Keller, the Board's former Acting Chairman, testified that he was unaware of a "good cause" waiver having ever been denied by the Agency. He was personally aware of only two or three requests having been made.

The Union's witnesses testified that they have never requested a good cause exception and such requests are rare. Attorneys testified that they do not request "good cause" exceptions because the Agency does not grant exceptions for writing complex or voluminous cases, nor administrative closings, nor the failure of Judges to approve completed drafts, nor other factors beyond the Attorney's control. Further, the Board does not consider annual leave to be "good cause" because the formula which resulted in 156 credits annually includes "10 weeks of leave or other time spent by attorneys on non-credit producing work." The record shows that if an Attorney does not seek a good cause waiver, he or she must produce three credits a week during each of the 52 weeks of the appraisal year, in order to meet the annual quota of 156 credits annually.

Further, Union witnesses credibly testified that the weekly enforcement of the quota does not allow for Attorneys to efficiently manage their own case load. Leave is unattainable unless Attorneys work unpaid overtime during nights and weekends. There is testimony that some Attorneys take annual leave to work on cases in order to accomplish the weekly quota and receive high performance ratings. Many disruptions to workflow are beyond the control of attorneys and are particularly marked during the beginning of the appraisal year, as eight of the eleven federal holidays occur during the first half of the appraisal year, with five occurring during the first three months. For example, government closings in the District occurred on October 29 and 30, 2012, due to Hurricane Sandy. Yet, despite their inability to control when the government closed due to weather, Attorneys were still required to produce three credits during that week. Attorneys do not receive credit for completed cases unless a Judge reviews and signs the case. The Judges sometimes travel to conduct hearings and do not always return the cases within the same week. Also, on a weekly basis, Attorneys who fall behind by .05 credits when working on lengthy, complex cases are subject to pre-disciplinary communications by supervisors, which may lead to lower performance ratings.

Motion to Dismiss

The Agency's Motion to Dismiss raises the question of whether the grievance is properly before me. The Hearing in this matter was held on June 3 and 4, 2013. On June 1, 2013, the Agency filed a Motion to Dismiss based, *inter alia*, on the doctrine of collateral estoppel. In the alternative, the Agency asserts that the grievance is untimely filed and does not pertain to a continuing violation. Further, the Agency asserts that pursuant to federal authority, the arbitrator is precluded from granting the remedies requested here, as the subject matter of performance appraisals is excluded from arbitration by federal authority.

The Union counters that the Agency's Motion to Dismiss was filed only three days before the arbitration hearing and should be precluded. However, inasmuch as issues impacting on jurisdiction may be raised at any time during the adjudication of a grievance, I shall consider the Agency's arguments. Further, I find that the Union has had an opportunity to respond to the Motion at the hearing and in its post-hearing brief.

Whether this grievance is precluded from arbitration under the doctrine of collateral estoppel:

The Agency would have me dismiss this grievance based on the doctrine of collateral estoppel. In order for a grievance to be dismissed on this basis, a party must demonstrate that:

1) the same issue was involved in both cases;
2) the issue was litigated in the first case;
3) resolving the issue was necessary to the decision in the first case;
4) the decision in the first case, on the issue to be precluded, was final; and
5) the party attempting to raise the issue in the second case, was fully represented in the first case.

A review of the development of the production standards and the parties' bargaining history reveals the following:

a) In 2003, the Agency implemented numerical performance standards.

b) The Union grieved the issue of including a numerical element in the production standards for Attorneys, stating that it was in violation of the local Memorandum of Understanding (MOU) and Article 26.2 of the Master Agreement. The grievance was appealed to arbitration.

c) The arbitrator found that the Agency violated a provision of the Master Agreement pertaining to fair evaluations and a provision of the parties' local MOU wherein the parties agreed that Attorneys would not be rated on the basis of a numerical production standard.

d) The Agency appealed the arbitration award to the Federal Labor Relations Authority (FLRA), alleging the arbitrator's findings resulted in a violation of its management rights.

e) In 2005, the FLRA overturned the arbitration award on *de novo* review, finding that the MOU and Article 26.2 excessively interfered with management's right to direct employees and assign work under 5 U.S.C. §7106(a)(2)(A) and (B) of federal statute.

The Agency contends that the same issues are presented in the current grievance, i.e., the establishment of a numeric element in the production standard.

I find that the issue litigated by the parties in 2003-2005 pertained to a change in the Performance Standards for Staff Counsel, i.e., the <u>establishment of an annual numerical production standard or quota</u> which allegedly violated a local MOU and related contractual provisions. In the present case, the Union concedes that the establishment of the annual quota is a management right and asserts that the 2003-2005 establishment of an annual numerical quota for Attorneys is not being challenged here.

Rather, in this grievance, the Union asserts that the Agency has <u>changed to a strict weekly implementation of the quota</u> and there has been a <u>change from quarterly enforcement to weekly enforcement of the quota,</u> without notice to the Union and in violation of various provisions of the Master Agreement and federal guidance.

Thus, I find that the issues raised in this grievance are not identical to the issue litigated in 2003-2005. The change to the performance standards that was litigated in 2003-2005 pertained to the establishment of an annual quota of 152 credits. The issues in the present case pertain to an alleged change to the annual quota of 156 credits in 2012, i.e., the implementation of a strict weekly quota and abandonment of the quarterly enforcement of the annual quota in favor of weekly enforcement.

Therefore, I find that the elements necessary for issue preclusion have not been met and the grievance is properly in this forum. To find otherwise would mean that the Union could never request impact and implementation bargaining over a change in the established quota.

Whether the grievance is timely filed.

The Agency asserts that the grievance is untimely filed because it alleges a change in working conditions that was raised by the Union on October 15, 2012, in a request to bargain that was denied by management and the Union never pursued the issue. The Agency also submits that the grievance does not meet the criteria for a "continuing violation." Motion, p.6. Further, the Agency argues that there has been no change in annual leave or overtime benefits.

Regarding the timely filing of a grievance, the Master Agreement provides that:

> an employee and/or the Union shall present the grievance to the immediate supervisor, in writing within 30 calendar days of the date that the employee or the Union became aware or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature.

The Agency asserts that the grievance does not allege that any specific Attorney was actually denied or effectively denied the opportunity to take annual leave or sick leave. The Agency argues, therefore, that no "act or occurrence" has taken place and thus "the Union has failed to comply with the [timeliness] requirements [of the] grievance procedure." Motion, p. 7. The Agency further asserts that the productivity element was initially implemented in 2003 and was revised in 2006. This grievance was filed in December 2012, over six years after the Board implemented the amended performance standards for Attorneys. Therefore, the Agency asserts that the grievance is untimely filed. Motion, p. 7-8.

I find that if the grievance were merely about the implementation of a change of the productivity element in 2003 or 2006, the grievance would be untimely under the 30-calendar-day deadline. However, here, the Union's arguments are based on an alleged change in 2012, i.e., a change from an annual quota enforced on a quarterly basis to a weekly quota enforced on a weekly basis. Since this change was not announced by the Board, the Union was not on notice to file a grievance.

The record shows that this grievance was filed on December 11, 2012, and revised on December 28, 2012. The grievance alleges that the Agency violated the Master Agreement, OPM guidance and FLSA provisions. In the grievance document, the Union raises, *inter alia*, the issues of (1) failure to prorate attorney quotas while attorneys are on approved leave, and (2) attorneys allegedly being forced to work unpaid overtime. At page 3, the grievance states as follows:

> While the February 21, 2006 memorandum indicates that attorney productivity will be reviewed periodically during the performance year to determine whether he or she is meeting the productivity standard on the pro rat[a] basis, there is no guidance or indication

> that "periodic review" means *3 credits per week*. Rather it has been *interpreted* to mean 3 credits per week. [Emphasis added.]

At the hearing, the Union presented evidence that three credits a week had been an established *goal* for all attorneys since the implementation of 156 credits annually, and had been enforced on a quarterly basis. But, by December 2012, the Agency was strictly requiring three credits a week:

(a) as the standard *quota*,

(b) enforced on a weekly basis,

(c) allegedly in violation of contractual provisions and OPM guidance and federal regulation because of the Agency's failure to prorate credits and/or pay overtime, and

(d) this establishment of a weekly quota and abandonment of the quarterly review (which was an exercise of a management right) was made without prior notice to the Union and the Attorneys.

The Agency cites *VA Medical Center Detroit, Mich*., 58 F.L.R.A. 480 (2003), (concerning hazardous duty pay) where the FLRA stated that where policy or rule is concerned, the union has 30 calendar days from the date that the policy or rule went into effect to grieve the policy or rule. Here, I find that in the face of management's stated position that the October 2012 elimination of the percentages in the color-coded chart did not constitute a change in the quota, the Union could not have known until well into the first quarter of the fiscal year (December 2012) of the Agency's abandonment of the quarterly enforcement of the quota.

Thus, I find that the Union did not know and could not have known until well into the first quarter of the fiscal year, of an abandonment of the quarterly enforcement of three-credits-a-week, that was replaced by strict weekly enforcement of a weekly quota. This means that the Union had until the end of December 2012 to file a grievance, the last month of the first quarter of the fiscal year. The grievance was filed on December 11, 2012. Therefore, I find that the grievance was timely filed on December 11, 2012 and that the Union has met the 30-day deadline, especially with regard to the Agency's failure to give notice of the change in enforcement. Further I accept this grievance, in part, as a request to bargain over the impact and effects of this change.

Based on the above, I deny the Agency's Motion to Dismiss.

Whether the Agency violated provisions of the agreement, OPM guidance and federal regulations pertaining to leave and overtime provisions and notice.
Whether the arbitrator can grant the remedies requested concerning performance appraisals.

In addition to requesting that I order the Agency to prorate attorney quotas during periods of approved leave, the Union's requested remedies included that the arbitrator order the Agency to: (1) re-establish a quarterly review (allowing attorneys more flexibility in their work schedule), (2) make attorneys whole for unpaid overtime, (3) review denials of within grade increases and award them retroactively where appropriate, and (4) order the Agency to assign credit to Attorneys upon submission of completed drafts to the Judges, and not upon a Judge's signature.

The Agency contends that an arbitrator may not establish or curtail a performance standard, since setting such a standard involves management's rights under 5 U.S.C. § 7106. *Dep't of Agriculture,* 47 F.L.R.A. 481, 486 (1993); *Newark Air Force Station,* 30 F.L.R.A. 616, 634 - 35 (1987). Thus, even if the arbitrator were to consider the issues posed by the Union at the arbitration, the Agency asserts that the arbitrator does not have the authority to grant the remedies requested by the Union.

Nonetheless, I note that the parties have negotiated various provisions in their collective bargaining agreement addressing some of the issues raised by the Union. In particular, the provisions pertaining to overtime (Article 21) and leave in Article 35, "Time and Leave" are not part of the performance appraisals section of the Master Agreement.

However, although the Union has established that there are Attorneys who refrain from exercising their leave benefits and/or overtime benefits in order to meet their weekly quota and protect their performance ratings, there is a requirement that employees request these benefits and there is no showing that these benefits have been denied upon request. Therefore, I can find no violation of the leave and overtime provisions in the Master Agreement, or FLSA regulations and I must deny the remedies requested.

While the record shows that the manner in which the Agency has begun implementing a weekly quota interferes with the ability of Attorneys to request these benefits, and that sometimes Attorneys are held accountable for matters beyond their control, contrary to OPM guidance, the remaining requested remedies by the Union pertain to performance standards and are subject to management rights. I cannot stand in the place of the Agency regarding these rights. However, under the appropriate circumstances, these remedies may be raised in impact and implementation bargaining upon a request to bargain.

Whether there was a change in the implementation and enforcement of the attorneys' annual quota that gave rise to a duty to bargain.

The FLRA has stated that arbitrators may examine performance standards and critical elements established by management in order to determine whether they comply with applicable law and regulatory requirements. As the FLRA allows arbitrators to consider performance standards in light of law, and regulation, it is within these constraints that I proceed with the analysis of this grievance.

The Agency asserts that only Board management has the right "to direct employees and assign work." *U.S. Dep't of Health and Human Services., Soc. Sec. Admin., Office of Hearings and Appeals, Falls Church, Va.*, 47 F.L.R.A. 705, 724 - 25 (1993). Determining the review period for a critical element of a performance standard and how attorneys are assigned work and credit under that standard involves management's rights. 47 F.L.R.A. at 724 - 25 (union's proposal that management account for leave when evaluating attorneys' performance "directly interfere[d] with management's rights to direct employees and assign work"); *AFGE Local 2879 and U.S. Dep't of Health and Human Services, Social Sec. Admin.,* 38 F.L.R.A. 244, 251 (1990) (management has a right to determine the methods and frequency within which to evaluate employees).[2]

I note that 47 F.L.R.A. 705, and the other cases cited contain bargaining proposals that were presented to the FLRA in negotiability appeals. When considering negotiability appeals, the FLRA determines whether *the language* contained in a bargaining proposal is, in fact, negotiable. In 47 F.L.R.A. 705, for example, while the language of some proposals were struck down, the FLRA also noted that certain wording such as "the agency will *consider* time spent performing other duties" was more acceptable language in that such a proposal would not interfere with management rights, rendering the proposal negotiable. As such, it is misleading to cite proposals that were struck down by the FLRA, without further explanation. In the case before me, while the Union is requesting remedies via the grievance procedure, it has not submitted proposals for bargaining to the Agency. However, the FLRA's finding that certain language was non-negotiable in negotiability appeals cited by the Agency, does not bar the Union in this case from making carefully worded bargaining proposals that contain no prohibitive language.

I find that management has the right to assign and direct the workforce without bargaining with the Union. However, here, there is no challenge to management's right to establish a weekly quota of three credits per week and enforce it on a weekly basis. The challenge goes to the impact on the conditions of employment of Attorneys, and whether the Agency failed to give notice of the change to the Union. Section 7106(b)(2) and (3) of the FLRA statute (the Act) provide that when there is an exercise of management rights, bargaining is mandatory on procedures designed for exercising those rights and on arrangements for employees adversely affected, i.e., bargaining is mandatory regarding the impact and implementation of the management decision.

The Agency maintains that there has been no change in the quota because three credits a week has consistently been enforced since 2003. However, I find this argument unpersuasive as the record shows that three credits-a-week was uniformly enforced <u>on a quarterly basis</u>, and not

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[2] In the same case, the F.L.R.A. Board specifically stated that "[p]roposals that *require* management to take into account specific factors in evaluating employee performance directly interfere with management's rights to direct employees and assign work." (Emphasis added.) Further, the FLRA determined that a provision which required that performance evaluations *take into account* all job functions and the amount of time available to employees, was negotiable as an appropriate arrangement under section 7106(b)(3) of the Statute.

In making negotiability determinations, the FLRA expressly stated that some proposals were found to be non-negotiable because of the mandatory language stated in the proposal. For example, the FLRA stated in *Treasury* that proposals that *prohibit* management from holding employees accountable for work performance directly interfere with management rights.

merely on a weekly basis, as evidenced by the percentage column in the color-coded chart prior to October 2012. There is no dispute that the October 2012 color-coded chart eliminated the percentage margin allowing attorneys to produce a certain percentage of credits <u>each quarter</u> toward their annual quota.

The Agency argues that the chart was merely a tool for management personnel and not for Attorneys. I find this argument equally unpersuasive, as it is undisputed that supervisors commonly shared the chart with the Attorneys and there is no challenge to the fact that the percentage margin was eliminated.

The Agency cites *U.S. Dept' of the Treasury, U.S. Customs Service*, F.L.R.A. Rep. No. 14, 2001 WL 36022699, *9 (F.L.R.A. 2001), for the premise that enforcement of a policy or procedure by an agency does not constitute a change to conditions of employment. In *Dep't of the Treasury*, the agency in that case ramped up enforcement of its policy prohibiting employees from storing items on top of their cubicles and filing cabinets. The FLRA held that the agency had attempted to enforce the policy in the past and that ramping up enforcement was not considered a change to conditions of employment. In find that *Dep't of the Treasury* is not on point with the facts presented in this case. Here, both parties agree that the Board has had a quota of 156 credits per performance year since 2006 and that has not changed. What has changed is that Attorneys are now *required* to complete three credits per week and quarterly enforcement has ended.

The Agency argues in the alternative that if there is a change in the conditions of employment it is *de minimis,* and therefore the Agency has no duty to bargain. In determining whether a change is *de minimis*, FLRA case law looks to the effects or reasonably foreseeable effects of a change in conditions of employment.

It is well settled that performance ratings have far-reaching consequences in the employee's employment relationship. An employee whose performance is determined to be unacceptable on one or more critical elements is subject to reduction in grade or removal. An employee whose performance rating is less than fully successful is subject to having his or her within-grade increase withheld. Further, an employee's rating of record is one of the factors that determines an employee's retention standing when determining who will be affected by a reduction-in-force. Also, an employee's performance appraisal can determine the employee's success when competing with other employees for promotion and career enhancement opportunities.

I find that having to meet the quota of three credits a week, each and every week - rather than by the end of each quarter of the year, is a <u>significant</u> change. This change took a policy whose application was reasonable, into a realm of strict application which adversely impacted on the employees. Attorneys must meet the weekly quota even while on sick leave or annual leave and/or during government closings. They must meet the quota even when a Judge is unavailable to process completed drafts. Some Attorneys work unpaid overtime in order to avoid a low performance rating. (*Paid* overtime allows an employee to complete a case, but the case does not count towards the annual quota. Also, working *paid* overtime results in management concluding that an Attorney is incapable of completing voluminous cases within the allotted work-hours and the perception is that this may affect the employee's performance appraisal negatively. Therefore, paid overtime is avoided by the Attorneys.)

The record shows that the recent enforcement of three credits *weekly* has impacted the bargaining unit as follows:

1) an increase in working unpaid overtime in order to keep high appraisal ratings;

2) limited exercise of leave benefits, because employees are required to produce three credits during the weeks they are on approved leave;

3) being unable to meet the three-credits-a-week quota when Judges do not review and return their drafts within the same week; and

4) increase in pre-disciplinary measures which may lead to reduced appraisal ratings; and

5) overall loss of management of Attorney's work time, balanced with leave benefits.

Thus, while the elimination of quarterly enforcement does not result in more work *annually* for the bargaining unit, I find that it results in a decrease in the availability of paid benefits such as annual leave and overtime, and – with the abandonment of quarterly enforcement - an increase in required work on a weekly basis which can result in negative performance appraisals if not met. These were reasonably foreseeable effects on the bargaining unit at the time of the change. Thus, I find that the change in enforcement of the quota had a substantial effect on the Attorney's conditions of employment that was significant, and not *de minimis*. As a result, I find that the Agency had a duty to give notice to the Union of the change in the quarterly enforcement of the quota.

Whether Management gave notice of the change pursuant to the collective bargaining agreement and federal statute.

The Agency argues that "[k]eeping in mind that the Union did not file [an unfair labor practice] with the FLRA about the [October 2012] demand to bargain nor did the Union frame its grievance in terms of a demand to bargain, this arbitration should not focus on the demand to bargain. Rather, it should focus on the issues raised by the Union in its grievance – whether the Board violated OPM guidance, the Master Agreement, and the FLSA by not prorating attorneys' required credits while such attorneys were on approved leave."

When, as here, an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency nonetheless has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a *de minimis* effect on conditions of employment. I have found that the change was significant and not *de minimis*.

The FLRA has held that prior to implementing a change in the conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. A violation of this process results in a failure to bargain in good faith, an unfair labor practice under federal law.

It is undisputed that the Agency gave no notice to the Union concerning this change. Further, in his January 15, 2013 response to the grievance, the Executive-in-Charge of the Agency rejected the grievance based on timeliness arguments, among other reasons, stating as follows at numbered paragraph 13:

> Per the provisions of the Master Agreement, your grievance of the implementation of the Productivity Element is untimely. You received the notice of the performance standard in March 2003. The standard was implemented in April 2003. I gave my … testimony before the arbitrator [in that case] and AFGE in 2004. The 2006 Guidance Memorandum was issued in 2006. Thus, I find that you received notice of the act you now grieve more than 30 days before you first filed the current grievance on December 11, 2012….

This reflects the Agency's continued denial that any change has occurred after 2006 with regard to the Attorneys' performance standards.

The record shows that the Union made a timely request for impact and implementation bargaining on October 15, 2012. The Agency denied, and continues to deny that it has implemented any change. I find that the Agency's failure to give notice of the change in the implementation and enforcement of the quota and its October 2012 refusal to bargain upon request, - on the basis that there was no change in the attorney production schedule - was in violation of its duty to engage in impact and implementation bargaining.

It would have been futile for the Union to renew its request to bargain in December, as management had denied making any changes and continues to do so. Thus, the Union was not required to insist on further negotiations in order to preserve its bargaining rights. *See Federal Bureau of Prisons*, 55 F.L.R.A. 848, 855 (1999). I accept this grievance, in part, as a renewed request to bargain. [3] I find that every issue raised by the Union in this grievance concerns the impact of the change on the bargaining unit.

Further, I find that management's refusal to bargain was an ongoing violation that continued through December 11, 2012, the date of this grievance filing, and continues to date, depriving the Union of the opportunity to engage in impact and implementation bargaining - -

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[3] I further note that the grievance was filed within the six-month period for filing an unfair labor practice charge before the Federal Labor Relations Authority.

resulting in a failure to bargain in good faith in violation of federal statute at 5 U.S.C. 7116 (a) (1) and (5).

The Union also argues that the Agency implemented the weekly quota and abandoned quarterly enforcement by December 2012 without fulfilling its notice and bargaining obligations to the Union under the negotiated provisions of the Master Agreement at Article 27, § 5(E). I find that Article 27, § 5 (E) is similar to federal statute and case law which requires notice of a change in conditions of employment and bargaining upon request: Article 27, § 5(E) provides as follows.

> The local union shall be given reasonable written advance notice (no less than 15 calendar days) when the Department changes, adds to, or establishes new elements and performance standards. Prior to implementation of the above changes to performance standards, the Department shall meet all bargaining obligations.

Therefore, as a separate matter, I find that the Agency fully completed the weekly implementation and enforcement of a weekly quota and had abandoned quarterly enforcement by December 2012 resulting in a change in the conditions of employment of Attorneys, without giving notice to the Union, in violation of Article 27, § 5 (E) of the collective bargaining agreement as well as federal statute. *See* 5 U.S.C. § 7116(a)(1) and (5). [4]

What shall be the remedy?

The remedy for failure to bargain in good faith is to order the parties to bargain. Sometimes the parties may be ordered to return to the *status quo ante*, i.e., to things as they were prior to the failure to bargain. In a unilateral change case in which the duty to bargain is limited to implementation procedures, as in this case, the following factors are considered in deciding whether *status quo ante* relief is appropriate:

1) whether and when management provided notice of the change to the union;

2) whether and when the union requested bargaining;

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[4] The Union argues that the Board also failed to fulfill its notice obligations to the Attorneys affected by the change to their performance standards at Article 27, § 5(A), which states as follows:

> All aspects of the performance plan, including numerical standards, measurement indicators, priorities and weightings, if applicable, will be communicated in writing to the affected employees at the time the employees receive his/her performance elements and standards. The local union may provide input into any changes to performance standards and/or establishment of new performance standards.

However, in light of my analysis based on federal law, I need not address this argument.

3) the willfulness of the Agency's conduct in failing to discharge its bargaining obligation;

4) the nature and extent of the change's adverse 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.

See, Federal Correctional Institution, 8 F.L.R.A. 604, 606 (1982).

In the case before me, management gave no notice of a change in the implementation and enforcement of the weekly quota and the abandonment of quarterly enforcement, and refused to bargain upon request. I have found that the impact on the bargaining unit was significant. Further, there is no showing that a return to the *status quo* will disrupt or impair the efficiency and effectiveness of agency operations. Therefore, I find that it is appropriate to return to the *status quo ante* until bargaining is completed.

The Union shall forward carefully-worded proposals to the Agency on matters impacted by the change discussed in this case, bearing in mind that no proposal may infringe on management rights. I retain jurisdiction for 30 days concerning the remedy awarded.

Award

1. The grievance is not precluded under the doctrine of collateral estoppel.

2. The grievance is timely filed.

3. The Union has not established a violation of Article 35 of the Master Agreement, OPM guidance or FLSA regulations concerning annual leave or overtime.

4. The arbitrator cannot stand in the place of the Agency to grant the remedies requested concerning performance appraisals.

5. I find there was a change in the implementation and enforcement of the attorneys' annual quota giving rise to a duty to bargain.

6. Management did not give notice of the change pursuant to the Article 27, § 5 (E) notice provisions and in violation of and federal mandate to bargain in good faith under 5 U.S.C. 7116 (a) (1) and (5).

7. The parties are Ordered to return to the *status quo ante*, i.e., enforcement of the quota on a quarterly basis, upon receipt of this award, until bargaining is completed.

8. The parties are Ordered to bargain over the impact and implementation of the change from quarterly enforcement to weekly enforcement of "three credits a week" towards the annual quota.

9. The Union is Ordered to present bargaining proposals to Management on matters impacted by the change discussed in this case by December 2, 2013.

10. The Agency and the Union shall meet to discuss these proposals by December 16, 2013.

11. I hereby retain jurisdiction for 30 days in the event there are any questions regarding the remedy awarded.

Blanca E. Torres, LLC
Arbitrator