What Negotiators Must Know About Changes in Working Conditions

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It would be hard to find an agency or union negotiator who is not aware that before management makes a change in working conditions, it must notify the union and bargain. Moreover, most of them also know that a change does not create a bargaining obligation if it has a *de minimis* impact, is already covered-by the contract, is made pursuant to a contract right, or is not a condition of employment.

But, beyond these, there are a lot of change-related bargaining precedents that are not widely known or remembered. I have spotlighted some of the more frequently applicable ones below. If interested in testing the depth your understanding about when a change is negotiable–or just in avoiding potentially very costly violations of law, take this short True-False quiz. The answers follow.

QUESTIONS (True or False)

1. The union is entitled to notice even if the proposed change is favorable to or benefits employees.

2. There is no bargaining obligation if a court or employee appeals agency orders the agency to do something pursuant to an employee's appeal, e.g., change a condition of employment.

3. There is a bargaining obligation if there are changes in the process used to assess and hire applicants who are not yet federal employees.

4. An agency need not negotiate over a change that increases employee workloads if the increase is merely due to a change in the mix of an employee's regularly assigned work.

5. Changes that result from the movement of a unit employee into management need not be negotiated.

6. Changes that are recurring and cyclical due to the nature of the work carry a bargaining obligation.

7. A mere change in employee morale can be sufficient to overcome an employer's *de minimis* defense and require bargaining.

ANSWERS

1. The union is entitled to notice even if the proposed change is favorable to or benefits employees.

TRUE. There are two things to remember here.

First, adverse impact is relevant in negotiability matters, but not in obligation to bargain matters. "Contrary to the SEC's arguments, however, none of the above-cited decisions (indeed nothing in FLRA case law) indicates that a change is negotiable only when it has more than a *de minimis* 'adverse' impact or effect. The SEC's confusion apparently arises from the language of section 7106 of the Statute. Section 7106(a) lists those management rights concerning which an agency is not required to bargain, but even in those areas management must negotiate concerning 'procedures which management officials of the agency will observe in exercising any authority under this section' (so-called 'implementation' bargaining) and "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials" (emphasis added) (so-called 'impact' bargaining). In other words, the 'adverse impact' of a management decision is relevant only when an agency has exercised one of its section 7106(a) rights, and only in negotiating 'appropriate arrangements' for employees affected by the change." *SEC and NTEU*, 62 FLRA 432 (2008). See also 38 FLRA 770 (1990)

Second, often a change that is favorable to one group is unfavorable to another, as the second excerpt below highlights. "In this case, the record establishes that four VSIPs were paid to employees at the rate of $25,000 each. See Res. Exhibit 6. Employees who accepted a VSIP obtained a sizeable monetary benefit. In contrast, employees who were eligible and would have accepted a VSIP had they known about and been offered one were denied that financial benefit. It is clear to us, given the consequences attendant to the VSIP program, that the effect on the bargaining unit employees conditions of employment in this case was more than *de minimis*." *U.S. Department of the Air Force, Air Force Materiel Command and AFGE, Council 214*, 54 FLRA 914 (1998)

2. There is no bargaining obligation if a court or employee appeals agency orders the agency to do something as part of its decision in a case, e.g., change a condition of employment.

FALSE. "Nothing in the Statute or the Authority's precedent provides an exception to this general rule based on an agency's reasons or motivations for implementing a change in conditions of employment....As noted above, the obligation to bargain is triggered by a change in conditions of employment, regardless of an agency's reasons for effecting the change. Accordingly, whether the change results from a voluntary settlement or a court order, an agency must bargain over those changes to the extent required by law." *Dept. of Air Force, March Air Reserve Base, CA and AFGE, Local 3854*, 57 FLRA 392 (2001)

3. There is a bargaining obligation if there are changes in the process used to assess and hire applicants who are not yet federal employees.

TRUE, particularly if current employees can also apply using the non-employee external applicant process. "However, as shown above, the Respondent has failed to establish that a grievance regarding a recruitment open to bargaining unit and non-employee applicants is

precluded either by the definition of 'grievance' in section 7103(a)(9) or by section 7121(c)(4)." *HHS, HCFA and AFGE, Local 1923*, 56 FLRA 156 (2000)

That same case also identified a second reason why non-employee application processes are of legitimate interest to a union. "The Union asks for the information in order to fulfill its contractual role of advising a bargaining unit employee---a purpose ‘within the scope of collective bargaining.'" Finally, the FLRA formally rejected the idea that the employer has no bargaining obligation because a matter involves an OPM regulated process. "The fact that OPM delegated examining authority to the Respondent does not alter the fact that the Respondent exercised that authority by performing the selection process at issue in this case. Cf. *Internal Revenue Service (District Office Unit), Department of the Treasury*, 29 FLRA 268, 270-71 (1987) (agency must bargain with union over proposal related to OPM's delegation of examining authority to the agency)." *HHS, HCFA and AFGE, Local 1923*, 56 FLRA 156 (2000)

4. An agency need not negotiate over a change that increases employee workloads if the increase is merely due to a change in the mix of an employee's regularly assigned work.

FALSE. When Dale Cabaniss was chair of the FLRA, she twice issued decisions holding that a change in the mix of one's regularly assigned duties was not a negotiable event. She did so by drawing a distinction between changes in working conditions and conditions of employment. Only the latter carried a bargaining obligation and changes in the mix of an employee's work was an example of the former. "For example, in *United States Dep't of Veterans Affairs, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93 (2003) (Chairman Cabaniss concurring), a particular unit of the respondent's medical facility increased the number and type of patients being treated. As reflected in the record of that case, the facility sought referrals of patients "from the other hospitals" within a larger geographic area. Id. at 98.

The Authority found that nothing changed about ‘the type' of patients admitted to the unit and that although the increase in the number and acuity of patients demonstrated that the respondent ‘had more admissions of the type of patients it ha[d] historically admitted[,]' it did not establish that there was a change in the respondent's ‘admissions policy, practice, or standards concerning the acuity of patients admitted to [the unit].' Id. at 94. Similarly, in this case, the General Counsel's evidence and arguments support a finding that there was an increase in the number of aliens processed at Tucson Station. However, nothing in the record establishes that the Respondent changed the ‘type' of aliens that were being processed, the type of work that bargaining unit employees performed or, in any manner, the processing of alien apprehensions. As with the preceding case, the increase in the amount of work (i.e., individuals to be treated or processed) did not constitute a change in conditions of employment. *DHS, CBP , AZ. And AFGE, Local 2544*, 60 FLRA 169 (2004).

But, the FLRA recently repudiated that artificial distinction. In *U.S. Dep't of the Air Force, Davis-Monthan AFB, AZ and AFGE, Local 2924*, 64 FLRA 85 (2009) The FLRA "establishe[d] that, under court and Authority precedent, there is no substantive difference between ‘conditions of employment' and ‘working conditions' as those terms are practically applied."

5. Changes that result from the movement of a unit employee into management need not be negotiated.

FALSE. "Rather, the Union asserts, the award recognizes that the Union ‘had the right, as the exclusive representative, to be given notice and the opportunity to negotiate over the impact and implementation of the Agency's decision to reassign employees out of the bargaining unit, prior to the implementation of the decision and therefore while the employees were still bargaining unit employees.' Id. at 8 (emphasis in original).

Further, the Union argues that the Arbitrator's remedy ‘merely reflects that the employees would have still been bargaining unit employees if the Agency had negotiated prior to implementation as required by the contract and the Statute.' Id. at n.6 (emphasis in original)....The Agency's claims, that the Arbitrator's award requires it to bargain over the conditions of employment of supervisory positions, as well as procedures and appropriate arrangements for filling those positions, misconstrue the nature of the Arbitrator's award.

In this regard, the Arbitrator found only that the directed reassignments affected the conditions of employment of bargaining unit employees by depriving them of policies and practices that are applicable to them solely because they are members of the unit....Moreover, the Agency's citation of the Antilles test for the proposition that proposals pertaining to the conditions of employment of supervisory and other nonunit personnel are outside the duty to bargain is inapposite. The Arbitrator specifically found, and the Agency does not dispute, that the Union made no proposals in this case and the Arbitrator refused to speculate as to the matters that the Union could propose in the circumstances of this case.

Finally, the Agency fails to demonstrate that there are no matters concerning the conditions of employment of the reassigned employees prior to the reassignment about which the Union could bargain. Consequently, the Agency's exception fails to demonstrate that the Arbitrator erred as a matter of law in concluding that the Agency was obligated to bargain over the conditions of employment of the reassigned employees insofar as those matters pertained to their unit status prior to the directed reassignments." *U.S. Department of Homeland Security, Customs and Border Protection, Washington , D.C. and National Treasury Employees Union*, 63 FLRA 434 (2009)

6. Changes that are recurring and cyclical due to the nature of the work carry a bargaining obligation.

FALSE. When the union challenged an agency's decision to move seasonal employees to an inactive duty status, FLRA rejected the claim because occasional movement in and out of duty status was a condition of employment established before the employees entered the unit. "[W]here actions are taken consistent with pre-established conditions of employment agreed to at the time of hiring and the evidence is insufficient to establish that such pre-established conditions of employment have been changed by a subsequent practice or express agreement of the parties, such actions do not constitute changes in conditions of employment that require bargaining." *INS, New York , NY and AFGE Local 1917*, 52 FLRA 582 (1996). Of course, the union can

negotiate to set a different condition of employment, as the FLRA holding affirms. See also 50 FLRA 140 (1995) for the application of this concept to rarely used shift changes.

7. A mere change in employee morale can be sufficient to overcome an employer's *de minimis* defense and require bargaining.

TRUE. "As already shown, the practice of granting administrative leave for Employee Appreciation Day does concern a condition of employment within the meaning of the Statute. The Arbitrator found that the Agency's practice of granting administrative leave for Employee Appreciation Day fostered ‘a productive work relationship between employees and management[,]' which benefited employees in terms of ‘morale' and gave them ‘a sense of teamwork.' Award at 41 (citation omitted), 40. The Agency does not challenge these findings, which support a conclusion that ending the practice had more than a *de minimis* effect on bargaining unit employees' conditions of employment. See, e.g., *IRS, Wash., D.C., and Fresno Serv. Ctr., Fresno, Cal.*, 16 FLRA 98, 127 (1984) (adopting judge's decision finding change was more than *de minimis* where effect on employees was "largely a matter of morale"). Consequently, we deny the Agency's exception that the Arbitrator erred in concluding that it was required to give the Union notice and an opportunity to bargain over the change." *Dept. of Treasury, IRS and NTEU Chapter 19*, 62 FLRA 411 (2008).

While it is understandable that employers want to use the *de minimis* defense often, they would be wise not to forget that the courts and FLRA have limited it to situations where the change is trivial, of no value, or truly insignificant. "As long as the Congress has not been 'extraordinarily rigid' in drafting the statute…there is likely a basis for an implication of *de minimis* authority to provide [an] exemption when the burdens of regulation yield a gain of trivial or no value.… On the contrary, the Congress took the unusual step of prescribing a practical and flexible rule of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective and efficient Government,' 5 U.S.C. § 7101(b)—that clearly invites the Authority to exercise its judgment, as it has done in the order under review.

Effectiveness and efficiency in government can hardly be thought to require bargaining over truly insignificant conditions of employment." *Association of Administrative Law Judges, et al. v. Federal Labor Relations Authority*, 397 F.3d 957 (2005)

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The negotiable obligation around a change is equally important to the union and management. For the union, proper enforcement of the law means an opportunity to get to a bargaining table to help members. For the employer, it means the difference between a properly implemented change and one that not only must be undone but also corrected via financial remedies to employees.