

101 FLRR 1-1034

U.S. Department of the Treasury, Internal Revenue Service and NTEU

Federal Labor Relations Authority

CH-CA-80709; 56 FLRA No. 151; 56 FLRA 906

September 29, 2000

Judge / Administrative Officer

Before: Wasserman, Chair; Cabaniss, Member

Related Index Numbers

72.6 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment

72.617 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Bargaining Over Impact and Implementation of Change

72.663 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Impasse

Case Summary

THE AUTHORITY FOUND THE AGENCY COMMITTED AN UNFAIR LABOR PRACTICE WHEN IT MOVED UNIT EMPLOYEES WITHOUT BARGAINING WITH THE UNION OVER IMPACT AND IMPLEMENTATION.

The Agency moved 9 unit employees from the ninth floor to the third floor of the Detroit Computing Center building without bargaining. The Agency notified the Union of the move, but refused to negotiate saying the move was covered by the parties' agreement. The Union filed an unfair labor practices case. The Administrative Law Judge found the parties' agreement did not cover a local move, the Agency was obligated to bargain over the impact and implementation of the move and the Agency's actions violated sections 7116(a)(1) and (5) of the Statute. The Agency excepted to the ALJ's decision.

The Authority found the Agency's interpretation of the parties' agreement flawed and the local move was not covered by the parties' agreement. The

Authority found the interest arbitrator did not address a move of this type and therefore there was no bargaining waiver here. The Authority noted the ALJ found several problems occurred during and after the move, which had a significant impact on employees. Therefore the move had more than a *de minimis* effect and the Agency's exception was denied. As for the scope of the posting, the Authority found the issues here concerned the interpretation and application of the parties' national agreement and therefore the Commissioner of the IRS should be the person to sign the notice and it should be posted nationwide. The Agency's exceptions were denied.

Full Text

Decision and Order

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (ALJ) filed by the Respondent. The National Treasury Employees Union (Charging Party/Union) and the General Counsel (GC) each filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to bargain impact and implementation of a local office move. The ALJ concluded that the Respondent had violated the Statute as alleged.

Upon consideration of the ALJ's decision and the entire record, we find that the Respondent violated the Statute by refusing to bargain over the impact and implementation of a local move. We adopt the ALJ's findings, conclusions, and recommended order for the reasons stated below.

II. Background

The Charging Party filed an unfair labor practice (ULP) charge against the Respondent, alleging that the Respondent had violated section 7116(a)(1) and (5) by moving nine Statistics of Income (SOI)

bargaining unit employees from the ninth to the third floor of the Detroit Computing Center (DCC) without providing the Union an opportunity to bargain over the matter. While the Respondent did notify the Union of the move, it refused to negotiate over its decision by asserting, among other things, that the move was a "reassignment" covered by Article 15 of the parties' national agreement.

The GC issued a complaint and notice of hearing and a hearing before an Authority ALJ took place. The ALJ rendered a decision, finding that the Respondent had committed a ULP by failing to bargain over the impact and implementation of the decision to move these employees. As a remedy, the ALJ ordered the Agency, upon request, to bargain with the Union over this and similar moves, and required a posting nationwide to be signed by the Commissioner, Internal Revenue Service (IRS).

III. Administrative Law Judge's Decision

The ALJ found that the Agency unilaterally implemented a move of nine employees from the ninth floor to the third floor of the DCC. Prior to the move, the Union requested a briefing as to the reasons for its necessity. Thereafter, the Union submitted to the Agency a proposal which stated, "All employees remain in their current seating." Decision at 9. The Agency responded by stating that this move constituted a realignment within a post of duty (POD) which would be implemented without negotiation under the parties, current national agreement, NC-V. *Id.* 1

The move took place during a 2 week period. After the move, the affected employees experienced a number of temporary problems, including computers and telephones not operating, and an inability to gain access to the computer security system to retrieve files on which they had been working. Furthermore, one of the employees had to give up her two new storage cabinets on the ninth floor and received two small, older cabinets on the third floor following the move. *Id.* at 10, 11.

The ALJ reviewed Article 15,2 and found that

Article 15 reassignments cover only position description "changes of duties (position descriptions) or a change of POD." *Id.* at 12. Therefore, the ALJ determined that this local move was not a reassignment within the definition of Article 15. Moreover, the ALJ rejected the Respondent's assertion that an interest arbitrator had found that local moves were covered by Article 15. The ALJ concluded that the arbitrator never specifically addressed the definition of reassignment. *Id.* at 13.

The ALJ further concluded that Article 15 did not cover local moves because under the previous national agreement NC-IV, local movement of employees had resulted in local negotiations, and the definition of reassignment under NC-V remains identical to that of NC-IV. Moreover, the ALJ noted that the impact and implementation of a similar local move had recently been negotiated in another facility at the local level in Ogden, Utah, under NC-V. *Id.* at 12.

Therefore, the ALJ concluded that this matter was not precluded from negotiations based on Article 15. Accordingly, the ALJ found that the Respondent was obligated to bargain the impact and implementation of this move and by failing to do so violated sections 7116(a)(1) and (5) of the Statute. *Id.* at 14.

As a remedy, the ALJ issued an Order to address the Respondent's violations. The ALJ further required the Respondent's Commissioner to sign and post that Order. *Id.* at 15, 16.

IV. Positions of the Parties

A. Respondent's Exceptions

1. The Affirmative Defense of "Covered By"

The Respondent asserts that the parties' collective bargaining agreement covers negotiations of local moves and, as such, is an affirmative defense to the alleged unfair labor practices. The Respondent contends that, in resolving such claims, the Authority will attempt to determine if the matter in dispute was expressly contained or inseparably bound up in the contract, or whether the bargaining history and record

of evidence would lead to a conclusion that the parties "knew or should have known that the agreement would preclude further negotiations regarding the disputed subject matter." Exceptions at 5, citing *Department of Veterans Affairs Medical Center, Denver, Colorado and Veterans Canteen Service, Denver, Colorado*, 52 FLRA 16 (1996).

The Respondent states that the movement of employees within a POD is "expressly contained in NC-V, Article 15, Section 2(A)." Exceptions at 6. The Respondent further asserts that the ALJ erred by relying on a "technical" definition of "reassignment". *Id.* According to the Respondent, the ALJ "ignored the evidence of record" when he concluded that the move was not covered by Article 15 because of how out of kilter the terms position and reassignment were defined in the article. *Id.* at 7. In that regard, the Respondent asserts, in reliance on the testimony of its lead negotiator, that during negotiations the parties agreed that there was a need for flexibility to move employees from one floor to another within a POD for the purpose of compressing or consolidating work groups. Moreover, the Respondent argues that the parties did not restrict the meaning of the terms "reassignment" or "realignment" to their technical definitions. *Id.*

The Respondent also contends that negotiation concerning the local move of employees was not required because the subject matter is so "commonly considered to be an aspect of the matter. . .in the agreement that the subject is inseparably bound up with and plainly an aspect of the subject expressly covered by the contract."*Id.* at 9. The Respondent compares the situation here to that in *U.S. Department of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois*, 49 FLRA 1444 (1994)(*Scott*), *motion for reconsideration denied*, 50 FLRA 84 (1995).

In summary, the Respondent argues that the decision "misinterpreted and misapplied" the Authority's covered by doctrine. Exceptions at 3, citing *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*,

47 FLRA 1004, 1018 (1993) (*SSA, Baltimore*). According to the Respondent, the ALJ erred by failing to specifically discuss the "covered by" defense and because, even if the defense was applied, it was applied too narrowly. Exceptions at 3, citing to *SSA, Baltimore*, 47 FLRA at 1018.

2. The Requirements of the Administrative Procedures Act

The Respondent argues that the ALJ failed to conform with the Administrative Procedures Act (APA) and should, therefore, be overruled or remanded. The Respondent contends that its negotiator testified that, while bargaining with the Union over NC-V, he openly discussed the Agency's desire to establish a mechanism in the contract that would preclude local negotiations of moves within a POD, while at the same time, establish logical and fair procedures to deal with the reassignment of employees. Respondent's Exceptions at 11-12. Therefore, the Respondent asserts that the parties did not use the technical definition of "reassignment" as found in Article 15 during contract negotiations. *Id.* at 7; Tr. at 72. Accordingly, the Respondent argues that the ALJ erred by focusing solely on the testimony of the Union negotiator in concluding that a different definition of "reassignment" was never discussed.

Based on the above, the Respondent alleges that the ALJ's failure to discuss the testimony of the Respondent's negotiator, or explain why the Union negotiator's contrary testimony was credible, is arbitrary and capricious and thus fails under 5 U.S.C. § 7118(a)(6) as applied in 5 U.S.C. § 557(c)(3)(A) and defined and applied in *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 384 (4th Cir. 1994); *CNA Insurance Company v. Legrow*, 935 F.2d 430 (1st Cir. 1991); and *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 968 (1999) (*Materiel Command*).³ The Respondent argues that "The Authority need not be bound by incomplete conclusions of an ALJ and may overrule his/her findings, or remand the case back to the ALJ for reconsideration." Exceptions at 13.

3. Bargaining Waiver

The Respondent asserts that an interest arbitration decision affects the outcome of this case as well. The Respondent contends that the interest arbitrator found that local moves were covered by Article 15 and, thereby, "created a bargaining waiver on the part of the Union." *Id.* at 13. The Respondent cites the following language of the interest arbitrator's decision:

The evidence is that the IRS will likely continue to undergo shifts in personnel assignments as the pending reorganizations continue. The ability of the agency to respond within a post of duty with a minimum of "red tape" and delay is important. The present provision for reassignments does not include bargaining. The Employer's proposal better preserves management's flexibility.

Id. at 14-15.

As such, the Respondent asserts that the matter of allowing the Agency flexibility when moving its employees was argued from the inception of the negotiations. The Respondent also claims, based on the above language, that the arbitrator found in favor of the Agency and local moves were precluded from bargaining under Article 15. *Id.* at 16.

Accordingly, the Respondent argues that the ALJ "ignored the intent of the Arbitrator's decision in favor of applying technical definitions that were not even used by the parties during negotiation of the Article." *Id.* at 16-17. The Respondent argues that the Union "clearly and unequivocally waived its right to negotiate over moves such as the SOI move" and urges the Authority not to "overrule the arbitrator's decision by upholding the findings of the Administrative [Law] Judge." *Id.* at 17. Finally, the Respondent contends that the award is arbitrary and capricious because the ALJ ignored the arbitrator's award.

4. De Minimis Impact on a Condition of Employment

The Respondent incorporates its Post-Hearing brief in its exceptions and argues that the move had

only a *de minimis* effect on the employees. Accordingly, it argues that it did not violate the Statute by refusing to bargain. *Id.* at 18-20.

5. Scope of Posting

The Respondent argues that the ALJ erred when he ordered the Commissioner of the IRS to sign the Order and to post it nationwide. Exceptions at 18. The Respondent contends that the Commissioner "played no role in the charges against Respondent." *Id.* at 20. Therefore, the Respondent argues that the Director of the DCC, the unit where the move took place, should sign the Order. *Id.*

The Respondent further asserts that since this violation, if proven, was local in nature, the Order should be posted only locally. *Id.* at 18. The Respondent notes that it has not refused to negotiate local moves anywhere else in the country, including Ogden, Utah. Moreover, the Respondent argues that there is no indication it would continue to so interpret Article 15 in the future. *Id.* at 19, citing *National Treasury Employees Union*, 10 FLRA 519 (1982); *see also Federal Aviation Administration*, 23 FLRA 209 (1986); *Federal Aviation Administration, Washington, D.C.*, 17 FLRA 142 (1985). Accordingly, the Respondent contends that the remedy is overly broad and punitive in nature. Exceptions at 18.

B. General Counsel's Opposition

1. "Covered By" Defense

The GC agrees that the "covered by" doctrine is an affirmative defense, and that in order to find that a matter is "covered by" the collective bargaining agreement, at least one of three prongs needs to be satisfied. The prongs include: (1) whether the express language of the contract reasonably encompasses the subject in dispute; (2) whether the subject in dispute is inseparably bound with a subject expressly covered in the contract; (3) the parties' intent. GC Opposition at 2-3, citing *Department of the Treasury, United States Customs Service, El Paso, Texas and Department of the Treasury, United States Customs Service, New Orleans, Louisiana*, 55 FLRA 43, 46-47

(1998); *Navy Resale Activity, Naval Station, Charleston, South Carolina*, 49 FLRA 994, 1002 (1994); *SSA, Baltimore*, 47 FLRA at 1018.

Addressing the first prong of the "covered by" defense, the GC asserts that Article 15 does not expressly address office moves. It argues that reassignment is defined as requiring a change in a position description or POD. Accordingly, absent such change Article 15 would not cover this local move.

Under the second prong, the GC argues that a forced office move is not inseparably bound up and plainly an aspect of a reassignment or a voluntary relocation as addressed by Article 15. The GC asserts that the Respondent's analysis of *Scott* is faulty. According to the GC, in *Scott* the reassignment was expressly dealt with in the parties' contract, whereas, NC-V does not specifically deal with office moves. GC Opposition at 6.

With respect to the final prong, the GC argues that the intent of the parties is demonstrated through the definition given "reassignment" in NC-V. Moreover, the GC asserts that the bargaining history does not support the Respondent's argument. According to the GC, the testimony provided by the Respondent's negotiator was vague and failed to establish that the parties knew or should have known that Article 15 encompassed office moves that did not involve changes in position descriptions or POD's. *Id.* at 7. Furthermore, the GC argues that a party cannot rely on an alleged oral understanding to vary the express and unambiguous provision of a written agreement. *Id.* at 8, citing *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 772 F.2d 571, 574 (9th Cir. 1985); *Kal Kan Foods*, 288 NLRB 590 (1988).

Moreover, the GC reiterates the testimony of the Union's negotiator, who stated that the parties never discussed the type of move involved during negotiations of NC-V. The GC contends that this is logical given that the parties had history of negotiating these moves at a local level. GC Opposition at 9-10. Additionally, the GC asserts that

the main contention of the parties during negotiations of Article 15 focused on reassignments involving staffing imbalances and POD changes, "not office moves." *Id.* at 8.

Finally, the GC argues that the parties, past conduct demonstrates that local moves were not covered by the national agreement. The GC refers to the record and notes that on two separate occasions under the current national agreement, the Agency and a Union local in Ogden, Utah, had negotiated local moves. Accordingly, the GC argues that the Respondent has not shown by a preponderance of the evidence that the local moves are covered by Article 15. *Id.* at 13.

2. The Administrative Procedures Act

The GC argues that the testimony of the Respondent's chief negotiator only establishes that the "parties intended and in fact agreed that the reassignments and realignments are 'synonymous' for purposes of Article 15." *Id.* at 8. It further argues that the Agency negotiator's testimony did not set forth that the parties "also intended to or agreed to include in that definition office moves which do not involve changes in position descriptions or post-of-duties." *Id.* at 7. Moreover, the GC notes that during the hearing, the Respondent, through the testimony of its negotiator, failed to produce a single proposal from either party that was on the table during negotiations which concerned office moves. *Id.* at 9. Similarly, the GC asserts that even if a proposal was discussed during negotiations that pertained to this matter, it would merely reflect ongoing negotiations instead of establishing the final intent of the parties, citing *24th Combat Support Group, Howard Air Force Base, Republic of Panama*, 55 FLRA 273, 280 (1999).

Finally, the GC reiterates the testimony of the Union negotiator that the parties never discussed the type of move involved here during the negotiations of NC-V because the parties had a history of negotiating these moves at a local level. GC Opposition at 9-10.

3. Bargaining Waiver

The GC argues that the interest arbitrator did not

resolve the issue of local moves, rather, the arbitrator only resolved portions of Article 15 that do not affect the outcome in this case. Specifically, the GC asserts that the arbitrator did not deal with the definition of reassignment, nor did the arbitrator discuss office moves similar to that which occurred in the instant case. *Id.* at 15. The GC contends that the argument raised by the Respondent should carry little weight since the only evidence introduced from this arbitrator's hearing and decision related to moves within a commuting area rather than to local moves where there was no change in an employee's POD. *Id.* at 15-16.

4. De Minimis Impact

The GC did not raise any argument concerning *de minimis* impact in its opposition.

5. Scope of Posting

The GC contends that the decision not to negotiate office moves pursuant to a national agreement affects all employees nationwide. Accordingly, the GC asserts a nationwide posting is necessary.

Moreover, the GC contends that the decision to refrain from negotiating local moves was made by management in the highest levels of the Agency, citing the testimony of the IRS Commissioner. *Id.* at 17-18. Furthermore, the GC notes that a directive was sent from the IRS's National Labor Relations office to all field offices that local moves did not need to be negotiated because they were covered by Article 15 of NC-V. Accordingly, the GC argues that a nationwide posting is warranted, citing *U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and American Federation of Government Employees, Council of Prison Locals*, 55 FLRA 388, 394-95 (1999) (*Prison Locals*).

Finally, to the extent that the Respondent argues the penalty is punitive, the GC asserts that the penalty is merely remedial in nature. GC Opposition at 18-19.

C. Charging Parties Opposition

1. Covered By Defense

The Charging Party asserts that since the definition of reassignment is specifically set forth in NC-V and does not include moves of the sort involved in this case, there is no need to proceed to the other prongs under the covered by test. According to the Charging Party, review of the parties, bargaining history is not warranted, Respondent's exceptions amount to nothing more than mere disagreement with the ALJ's conclusions, and thus should be summarily dismissed. The Charging Party cites *U.S. Department of the Air Force, Lowry Air Force Base, Denver, Colorado and National Federation of Federal Employees, Local 1497*, 48 FLRA 589, 594 (1993).

2. The Administrative Procedures Act

The Charging Party generally argues that the ALJ applied the proper analysis and, accordingly, the Respondent's exceptions are without merit. Charging Party Opposition at 5.

3. Bargaining Waiver

The Charging Party also asserts that the interest arbitrator never determined definitions for "position" or "reassignment". Moreover, the Charging Party contends that the arbitrator had "'no specific or intended authority,' to waive the Union's right to bargain." *Id.* at 6.

4. De Minimis Impact

The Charging Party did not raise any argument concerning *de minimis* impact in its opposition.

5. Scope of Posting

The Charging Party asserts that the effect of the Agency's decision not to bargain concerning local moves was nationwide, since the decision affects employees regardless of their current location. *Id.* at 6-7.

V. Analysis and Conclusions

A. The Matter at Issue was not Covered By the Parties' Agreement

The Authority has recently clarified its test to determine whether a matter subject to bargaining is "covered by" the parties' agreement. *See U.S. Customs*

Service, Customs Management Center, Miami, Florida, 56 FLRA No. 136 (September 29, 1999). As such, the Authority will first determine whether the matter is expressly encompassed within an agreement provision, thus continuing analysis consistent with our recent prong I analysis. If the agreement provision does not expressly encompass the matter, the Authority moves to the next part of the analysis, prong II, to determine whether the matter sought to be bargained is inseparably bound up with, and thus plainly an aspect of a subject covered by the contract. The analysis, under prong II, will, as deemed necessary, include consideration of the parties, bargaining history or intent. As we explained in 56 FLRA No. 136 the "intent" portion of the examination of the record evidence is no longer a separate, independent criterion. Rather, it is an integral component of that part of the "covered by" analysis to determine whether the matter sought to be bargained is inseparably bound up with and thus is plainly an aspect of a subject covered by the contract.

In analyzing this matter under prong I, the ALJ specifically found that the local move in question was not a reassignment because it did not include either a change in POD or a change in position. This interpretation comports with NC-V's plain wording, including the definition of reassignment. Moreover, in interpreting this agreement the ALJ determined that the definition of the term reassignment was identically worded in the previous national agreement, and that under the previous agreement using this same definition, local moves were negotiated. Decision at 13.

As such, the ALJ's interpretation of Article 15 is supported by both the provision's plain wording and the parties' practice of negotiating local moves under identical language in their previous national agreement.⁴ Accordingly, the Respondent's assertion that this matter is expressly contained in Article 15 lacks support. The Authority has previously held that "basic principles of contract interpretation presume that the parties understood the import of their agreement and that they had the intention which its

terms manifest." *Social Security Administration*, 55 FLRA 374, 377 (1999). Therefore, the ALJ did not err by concluding, that the type of move which took place here was not expressly addressed in the parties' agreement.

Under the second prong, Respondent argues that the ALJ should have found that local moves were inseparably bound up in Article 15, based on *Scott*, 49 FLRA at 1452-53.

In *Scott*, two employees were reassigned within the agency's commissary under a reduction-in-force (RIF) provision that required the Agency to attempt to avoid or minimize the effects of a RIF through a number of means including reassignment. The union asserted that the agency committed a ULP because it refused to negotiate the impact and implementation of the reassignments. Upon review, the Authority found that because the parties had specifically agreed that reassignments such as this may take place while failing to indicate in the contract language that these reassignments would face impact and implementation bargaining, the matter sought to be negotiated by the union was inseparably bound up with the parties' agreement. Moreover, the Authority determined that under the circumstances the parties contemplated or should have contemplated that the provision would be interpreted as foreclosing further impact and implementation bargaining over these reassignments. As noted by the GC, the contract language in *Scott* dealt precisely with the subject matter the union was attempting to negotiate. In contrast, in the instant case, Article 15 is limited to reassignments, which do not include the type of move that occurred here.

Moreover, under our precedent, the subject matter in dispute must be more than "tangentially" related in order to satisfy prong II. *SSA, Baltimore*, 47 FLRA at 1019. The Authority stated that, "If the subject matter in dispute is only tangentially related to the provisions of the agreement and, on examination, we conclude that it was not a subject that should have been contemplated as within the intended scope of the provision, we will not find that it is covered by that provision." *Id.* Upon review of this record, the

Respondent has not shown that local moves, which are not reassignments, are "so commonly considered to be an aspect [of Article 15]. . .that the negotiations are presumed to have foreclosed further bargaining over the matter." *Id.* at 1018. This conclusion is supported by the previous practices of the parties under NC-IV in which they negotiated similar moves under the identical definition of reassignment.

Furthermore, to the extent the parties' intent and bargaining history bear on the outcome in this matter, the ALJ acknowledged that "[t]here is no question that the Respondent sought, in negotiating NC-V, flexibility to move employee[s] and effectuate reorganizations," and that Article 15 was changed to allow the Respondent greater flexibility. Decision at 11. However, the ALJ also observed that despite the Respondent's contentions, local negotiations over a similar local move took place under NC-V in Ogden, Utah. The ALJ further found the testimony of the Union negotiator credible. That testimony established that the negotiations concerning NC-V never dealt specifically with moves that did not involve either a change in POD or a change in an employee's position. Finally, the ALJ's decision is based squarely on the plain wording of Article 15. Accordingly, the bargaining history offered by the Respondent as proof that the parties intended Article 15 to cover local moves is unpersuasive.

For the above reasons, the Respondent has failed to show its refusal to bargain was permissible under the "covered by" defense and, as such, its exception is denied.

B. The Requirements of the APA are Satisfied

The Authority has stated that an unfair labor practice hearing must be conducted "in accordance with the provisions of subchapter II of chapter 5 of this title. . .," *i.e.*, the APA. 5 U.S.C. § 7118(a)(6). Under the APA, all decisions—including "initial. . .decisions" by administrative law judges---must include "findings and conclusions" on all the "material issues of fact, law or discretion presented on the record." 5 U.S.C. § 557(C)(3)(A) (1966). We have also said, "[t]his provision requires that an

administrative law judge 'faced with evidence in the record contradicting his conclusion. . .must affirmatively reject the contradictory evidence and explain his rationale for so doing.'" *Materiel Command*, 55 FLRA at 970, quoting *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 384 (4th Cir. 1994) (citing *CNA Insurance Company v. Legrow*, 935 F.2d 430, 436 (1st Cir. 1991) (additional citations omitted)). Moreover, the Authority has held that an ALJ should state and explain the basis of credibility determinations. *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, D.C.*, 54 FLRA 987, 1007 n.12 (1998) (then Member Wasserman dissenting in part).

Here, as reflected in the Decision, the ALJ made an affirmative determination that the Union witness, whose credibility the Agency challenged by presenting conflicting testimony, was "credible."5 Decision at 7, 12. In explaining why he believed that the parties had not agreed to an interpretation of "reassignment" that differed from that found in the contract, the ALJ specifically pointed to such record evidence as the express language in the contract defining "reassignment" to not pertain to such local moves, and the fact that the parties had recently negotiated the impact and implementation of a similar local move under NC-V in Ogden, Utah. *Id.* at 12. These facts support the ALJ's determination that the Union's witness' testimony was credible. Therefore, we find that the ALJ's resolution of the conflicting witness testimony satisfies the requirements of the Administrative Procedures Act and our precedent.

3. Bargaining Waiver

The Authority has previously held that waivers of bargaining rights may be established by express agreement or bargaining history. When looking at the bargaining history to make a determination as to whether a union waived its rights, the Authority focuses on whether the matter has been fully discussed and consciously explored during negotiations and whether the union has consciously

yielded or otherwise clearly and unmistakably waived its interest in the matter. *U.S. Department of the Interior, Washington, D.C. and U.S. Geological Survey, Reston, Virginia*, 56 FLRA 45, 53 (2000), citing *Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan*, 46 FLRA 582, 585 (1992). Moreover, the Authority has stated that a "covered by" defense does not necessarily preclude raising a waiver defense based on the bargaining history of the parties. *Social Security Administration, Region VII, Kansas City, Missouri*, 55 FLRA 536, 540 (1999).

The Respondent fails to identify where the interest arbitrator's decision directly discusses local moves that do not encompass a change in POD or position. Moreover, the record does not establish that the arbitrator in any way interpreted "reassignment" in an inconsistent manner with its specific definition in NC-V. Instead, the Respondent asserts only that the arbitrator's ultimate conclusions pertained to "reassignments/realignments" within a POD as opposed to interpreting the term reassignment. Respondent's Exceptions at 14-15.

The ALJ found that under Article 15 of the parties' national agreement, "reassignment" is specifically defined as limited to circumstances where an employee either changes positions or POD. Since the arbitrator did not address this definition, his award is not relevant to this matter.

Accordingly, the Respondent has failed to show evidence of a clear and unmistakable waiver by the Union of its statutory right to bargain over office moves that do not involve a reassignment under Article 15. Additionally, as it is apparent that the ALJ did not ignore the interest arbitration award. As such, this is exception is denied.

4. De Minimis Impact

It is an unfair labor practice to deny the exclusive representative an opportunity to bargain over the impact and implementation of a change in unit employees, conditions of employment, provided that the change has more than a *de minimis* effect.

See, e.g., General Services Administration, Region 9, San Francisco, California, 52 FLRA 1107, 1111 (1997) (GSA). In assessing whether the effect of a decision on conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees, conditions of employment. *United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998); *GSA*, 52 FLRA at 1111.

The ALJ found that several problems occurred with the move itself including some computers being inoperable and the denial of some security access to retrieve computer files. Furthermore, the ALJ noted that one employee was originally denied storage cabinets to replace the storage cabinets that she lost in the move. Only after some delay did management allow her to have replacement storage cabinets that were smaller and in poor condition. Decision at 10-11.

In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 36 FLRA 655, 668 (1990), the Authority found that because an employee lost a window seat and the seating assignments of four employees were changed, the change in the condition of employment was more than *de minimis*. The facts of this case reveal an even greater impact on employees, working conditions.

Moreover, while the Respondent argued that the impact of this move was *de minimis*, it does not dispute the ALJ's findings of fact regarding the impact of the move, and offers no additional arguments based on these specific findings that would support its position that this Agency action was *de minimis*. Therefore, this exception is denied.

5. Scope of Posting

In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. *Prison Locals*, 55 FLRA 388, 394 (1999); *U.S. Department of Justice, Office of the Inspector General, Washington, D.C.*, 47

FLRA 1254, 1263-64 (1993) (*DOJ*), citing *U.S. Department of the Treasury, Customs Service, Washington D.C. and Customs Service, Region IV, Miami, Florida*, 37 FLRA 603, 605 (1990). First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. Second, in many cases the posting is, the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. *Prison Locals*, 55 FLRA at 394-95. Moreover, to further these purposes, the Authority has determined that there are circumstances where it is appropriate to require that notices be posted in areas other than the particular locations where the violation occurred. *Id.* at 395.

The GC notes that because this affects a national agreement provision, the issue is of import to bargaining unit employees nationwide. In *DOJ*, the Authority determined that if the matter involves an issue of import to members of the bargaining unit who are located outside the facility where the ULP occurred, posting need not be limited to the location of the ULP. *DOJ*, 47 FLRA at 1263; *Prison Locals*, 55 FLRA at 394; and *National Park Service*, 54 FLRA 940, 946-47 (1998).

Here the Respondent refused to negotiate based on an article in the parties' national agreement. Moreover, the Respondent's refusal to negotiate was established by the Respondent's national labor relations office. Decision at 14-15. Furthermore, the central issue in this matter, *i.e.*, the negotiability of local moves and the interpretation of the national agreement, would be of import to bargaining unit employees nationwide. Therefore, the Respondent's contention that this notice should be posted only at the DCC facility is not persuasive.

Finally, the Respondent argues that the Commissioner of the IRS should not be the Agency representative who signs the notice. Instead, the Respondent contends that the appropriate official to sign this notice would be the director of the DCC.

Because this matter involves actions taken by the Respondent's national labor relations office, affecting

the interpretation and application of the parties' nationwide agreement, the local director of the DCC would not be an appropriate agency representative to sign the notice. Moreover, the Respondent does not set forth another individual who would be better suited to perform this role. Accordingly, the Commissioner is the appropriate Agency representative to sign this notice for nationwide posting.

VI. Order

Pursuant to section 2423.41 of our Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of the Treasury, Internal Revenue Service, shall:

1. Cease and desist from:

(a) Implementing office moves which do not involve a change of employees' duty or a change of Post of Duty (POD) and which are not, therefore, "reassignments" /or "realignments" within the meaning of Article 15 of NC-V, the parties' current national collective bargaining agreement, without first affording the National Treasury Employees union, Chapter 78, the employees, exclusive collective bargaining representative, notice and an opportunity to negotiate.

(b) Failing and refusing to bargain with the National Treasury Employees Union, the employees, exclusive collective bargaining representative, concerning office moves which are not "reassignments" /or "realignments" within the meaning of Article 15 of NC-V.

(c) In any like or related manner, interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Upon request, bargain with the National Treasury Employees Union, Chapter 78, the employees' exclusive bargaining representative, concerning the office move implemented in July 1998

at the Detroit Computing Center.

(b) Notify and, upon request, bargain with the National Treasury Employees Union, the employees' exclusive bargaining representative, concerning office moves, which are not "reassignments" /or "realignments" within the meaning of Article 15 of NC-V, and other changes in conditions of employment.

(c) Post at all facilities of the Respondent, nationwide, where bargaining unit employees are employed, 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 Commissioner of the Internal Revenue Service, and they shall be posted and maintained for 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) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Notice to all Employees

Posted by Order of the

Federal Labor Relations Authority

The Federal Labor Relations Authority has found that the U.S. Department of the Treasury, Internal Revenue service violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

We hereby notify employees that:

WE WILL NOT implement office moves at the Detroit Computing Center, or at any other facility covered by NC-V, our current collective bargaining agreement, which do not involve a change of duty or

a change of Post of Duty and which are not, therefore, "reassignments" /or "realignments" within the meaning of Article 15 of NC-V, without first affording the National Treasury Employees Union, the exclusive representative of our employees, notice and an opportunity to negotiate.

WE WILL NOT refuse to bargain with the National Treasury Employees Union, the exclusive representative of our employees, concerning office moves which are not "reassignments" /or "realignments" within the meaning of Article 15 of NC-V.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL Notify and, upon request, bargain with the National Treasury Employees Union, the employees' exclusive collective bargaining representative, concerning proposed office moves which are not "reassignments" /or "realignments" within the meaning of Article 15 of NC-V.

Activity

Dated

By

Signature

Title

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729 and whose telephone number is: (312) 353-6306.

1 The parties agree that "realignment" has the same meaning as "reassignment," the term used in the parties' national agreement. Decision at 12; Charging

Party's Opposition at 3.

2 Article 15 is set forth in the Appendix as found in the ALJ's decision at 3-6.

3 *CNA Insurance Company v. Legrow*, 935 F.2d 430, was a 1991 1st Circuit decision, not a 1994 4th Circuit decision as cited by the Respondent.

4 The Authority has previously stated that in cases where the judge's interpretation of the meaning of the parties, collective bargaining agreement is challenged, the Authority will determine whether the judge's interpretation is supported by the record and by the standards and principles of interpreting collective bargaining agreements applied by arbitrators and the Federal courts. *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA at 9, 12 n.7 (2000)(applied to "covered by" defense along with defense of "contract interpretation") citing *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091, 1111 (1993) (which only applied to the defense of contract interpretation).

5 Where an ALJ, confronted with conflicting witness testimony, affirmatively declares that one witness is credible, absent evidence to the contrary, we will construe that to also be a determination by the ALJ that the opposing witness testimony is *not* credible.