



U.S. Department  
of Transportation  
**Federal Aviation  
Administration**

# Memorandum

Subject: **ACTION:** LMR Bulletin No. 04-01

Date: MAR 16 2004

From: Director of Labor and Employee Relations

Reply to  
Attn. of:

To: All LMR POC's

On February 19, 2004, the FLRA issued a decision in *SSA, Office of Hearings and Appeals Charleston, South Carolina, and Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO, 59 FLRA No. 118*, expanding the application of the "de minimis test" to substantive bargaining. Prior to this ruling, the defense that a change was *de minimis*, and therefore, creating no duty to bargain, applied only to matters subject to impact and implementation bargaining pursuant to §7106(b)(2) and (3) of the Statute. The rationale for this reversal of a long standing FLRA precedent, was predicated on the Authority's acknowledgement that the Statute, which sets forth the parties duty to bargain, does not establish different standards to be applied based on whether or not the change involved the exercise of a reserved management right. The Authority concluded that the *de minimis* standard is the appropriate threshold standard to apply to both substantive bargaining and impact bargaining.

This ruling expands the application of the *de minimis* standard but it does not expand what constitutes a *de minimis* change. Quoting from *DHHS, SSA, 24 FLRA at 407-08*, the Authority held:

In order to determine whether a change in conditions of employment requires bargaining in this and future cases, the pertinent facts and circumstances presented in each case will be carefully examined. In examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

As to the number of employees involved, this factor will not be a controlling consideration. It will be applied primarily to expand rather than limit the number of situations where bargaining will be required. For example, we may find that a change does not require bargaining. However, a similar change involving hundreds of employees could, in appropriate circumstances, give rise to a bargaining obligation. The parties' bargaining history will be subject to similar limited application. As to the size of the bargaining unit, this factor will no longer be applied.

"In applying the *de minimis* doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *United States Dep't of the Treasury, IRS, 56 FLRA 906, 913 (2000) (IRS)*. In determining whether the reasonably foreseeable effects of a change are greater than *de minimis*, the Authority addresses what a respondent knew, or should have known, at the time of the change. See *VA Med. Ctr., Phoenix, Ariz., 47 FLRA 419, 423 (1993)* (citation omitted)."

The analysis in 59 FLRA 118 provides an excellent example of what determinants the Authority will review in determining the nature and extent of the effect. The issue in this case concerned the reduction of

reserved parking spaces for the ALJs from 6 to 2. Some of the factors weighed in determining if the impact from the change was *de minimis* was the availability of parking, the location and the cost, as well as the continuance of "in and out" privileges.

To better understand the implications of this ruling as it pertains to the agency's obligation to enter into substantive bargaining, it is instructive to review case law for examples of the utilization of the *de minimis* defense that have been both successful and unsuccessful with regard to impact bargaining. These cases will provide insight into several factors that influence the Authority's reasoning, such as the criteria used in determining the scope of the change or the balancing of equitable considerations. For your benefit, a few of these types of cases are highlighted below.

#### FLRA CASE LAW:

*Dept. of Air Force, AFLC, Robins AFB and AFGE Local 987*, 53 FLRA 1664 (1998)

The Authority held that the relocation of a telephone used by employees to make and take personal calls, from inside the supervisor's office to a small table outside the office, was *de minimis*. Factors weighed included the distance the phone was moved, the impact on the employee's ability to hear and communicate over loud noises and privacy. Another factor taken into consideration was the fact that the move was made necessary by the supervisor's decision to start locking the office at night. *See also FAA and PASS*, 20 FLRA 112 (1985) wherein the removal of a commercial phone line was held to be *de minimis* as it did not eliminate phone service in the office but merely decreased the number of lines available to employees for outside calls.

*SSA and AFGE Local 1760*, 21 FLRA 546 (1986) wherein a permanent office relocation of two agency offices several blocks brought about changes in building structure and office space was found to be more than *de minimis*. Other factors noted included noise levels, wall coverings, availability of water coolers, lunchrooms, and day care. *See also Army Reserve Components Personnel and Admin. Ctr. And AFGE Local 900*, 20 FLRA 117, (1985). A relocation of 23 unit employees from one section of a building to another, was held to be *de minimis* even though the move resulted in less space per person, fewer light fixture, no windows and increased noise. The Authority noted that their duties did not change.

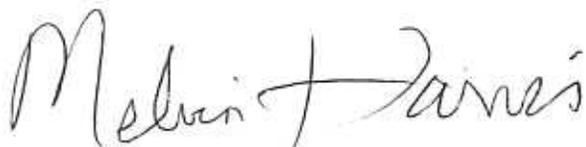
*Dept. of Commerce, Patent and Trademark Office and POPA*, 53 FLRA 858 (1997) In this case the agency argued that the change (term appointments) did not affect the bargaining unit as it applied to applicants. The Authority found that it did effect the bargaining unit since the applicants would be bargaining unit employees after they were selected for the term appointments and that upon the expiration of their 2 year appointment that these bargaining unit employees would have to compete for permanent employment. The effect was not considered *de minimis* as it impacted tenure and status. *See also Nat'l Guard Bureau and ACT*, 57 FLRA 240 (2001) holding a change that permitted fewer opportunities (advancement) for employees was more than *de minimis*.

*Dept. of Defense, Air Logistics Ctr., Tinker AFB and AFGE Local 916*, 25 FLRA 914 (1987) A change in equipment that resulted in reasonably foreseeable safety problems held to be more than *de minimis*. *See also Dept. of Treasury, IRS and NTEU, Cleveland Joint Council*, 20 FLRA 403 (1985) in which a change in office furniture that resulted in less space was held to be *de minimis*.

## CONCLUSION

The *de minimis* defense should be utilized where appropriate; however, it remains to be seen whether it will result in a significant decrease in those instances where a duty to bargain exists. Traditionally, the Authority's rulings have favored bargaining on the basis that collective bargaining safeguards the public interest, contributes to the effective conduct of public business and promotes the amicable resolution of workplace disputes. However, this decision underscores the Authority's recognition that there must be a balance between the employees' right to participate in the decisions that affect them and the agency's need to manage itself efficiently.

Before making a determination that a change is *de minimis* a thorough analysis must be made of the potential effect(s) of the change upon unit employees. In some instances you may conclude that the change is clearly *de minimis* and proceed to implement. In others, you may decide to take the more cautious approach of notifying the union of your intention to implement a change and inviting comment. If, at any point, you conclude that the change is *de minimis*, you may then choose to implement without further bargaining. See *United States Dep't of Housing and Urban Development, 58 FLRA 33, 34 (2002)* (if pending proposals are outside duty to bargain, an agency does not violate the Statute by implementing a change without bargaining over those proposals). Regardless of your approach, any decision that it is not necessary to bargain with the union over a change in working conditions is likely to result in either a ULP or a grievance. We anticipate considerable litigation throughout the Federal service that will clarify the breadth of this decision. In the interim, before proceeding with workplace changes, or if you have questions about this guidance, please contact your servicing AHR labor relations representative.

A handwritten signature in cursive script that reads "Melvin Harris". The signature is written in black ink and is positioned above the printed name.

Melvin Harris