

TJAGS Practice Notes

Labor Law Note

De Minimis Conditions of Employment: Must Management Always Bargain?

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*“De minimis non curat lex: the law does not concern itself with trifles.”*¹

Introduction

The Federal Service Labor-Management Relations Statute (FSLMRS)² requires agencies to negotiate with the exclusive representative regarding any change to a condition of employment.³ Conditions of employment that are subject to negotiation include:

[P]ersonnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—(A) relating to political activities . . . (B) relating to the classification of any positions; or (C) to the extent such matters are specifically provided for by Federal statute.⁴

Nothing in the plain language of the statute suggests that a de minimis change is excluded from the obligation to bargain.⁵

Until recently, it was commonly accepted that a management change to a substantively negotiable condition of employment triggered the agency obligation to negotiate, “no matter how trivial the change.”⁶ The Federal Labor Relations Authority (FLRA) held that “where an agency institutes a change in a condition of employment and the change is itself negotiable, the extent of the impact of the change on unit employees is not relevant to whether an agency is obligated to bargain.”⁷ There was no requirement for a threshold analysis of the extent of the change before an obligation to bargain arose—a de minimis test.⁸ Simply put, if a condition of employment was changed, an obligation to bargain arose, no matter

¹ BLACK'S LAW DICTIONARY 433 (7th ed. 1999).

² 5 U.S.C. § 7101-7135 (LEXIS 2004).

³ *Id.* § 7102 (providing that employees have the right to engage in collective bargaining with respect to conditions of employment).

⁴ *Id.* § 7103(a)(14). Matters specifically excluded from the bargaining obligation by federal statute include the management rights identified in 5 U.S.C. § 7106.

⁵ *See id.*

⁶ Soc. Sec. Admin. Office of Hearings and Appeals, Charleston, S.C. and Ass'n of Admin. Law Judges Int'l Fed'n of Prof'l and Technical Engr's, 59 F.L.R.A. 646, 650 (2004) [hereinafter SSAOHA]. *See also* Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga. And Am. Fed'n of Gov't Employees, 53 F.L.R.A. 1664, 1669 (1998) (stating that the de minimis standard has never been applied to “a change in conditions of employment that is substantively bargainable” under the FSLMRS).

⁷ 92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash. and Nat'l Fed'n of Fed. Employees Local 11, 50 F.L.R.A. 701, 704 (1995). *See also* Dep't of Veterans Affairs Veterans Admin. Med. Ctr., Veterans Canteen Serv., Lexington, Ky. And Nat'l Ass'n of Gov't Employees, 44 F.L.R.A. 179 (1990) (finding that the degree to which the agency's actions changed the vending room did not determine whether or not there had been a change). The FLRA general counsel issued specific guidance stating that “where an agency institutes a change in conditions of employment and the change is itself substantively negotiable, the agency *must* negotiate over the decision to make the change, rather than just procedures and appropriate arrangements.” Memorandum, Joseph Swerdzewski, FLRA General Counsel, to Regional Directors, subject: Executive Summary: Guidance in Determining Whether Union Bargaining Proposals Are Within the Scope of Bargaining Under the Federal Service Labor-Management Relations Statute, *available at* http://www.flra.gov/gc/b_scope_x.html (last visited Oct. 19, 2004).

⁸ Air Force Logistics Command Warner Robins Air Logistics Center, Robins Air Force Base, Ga., 53 F.L.R.A. at 1669 (“The duty to bargain over negotiable conditions of employment is not eliminated by the degree to which unit employees are affected by a change in such conditions”).

how trivial the change.⁹ The only time a de minimis test was applied was in the limited situation in which the substance of the change itself involved a reserved management right.¹⁰

In *Social Security Administration Office of Hearings and Appeals, Charleston, South Carolina & Association of Administrative Law Judges International Federation of Professional and Technical Engineers, AFL-CIO (SSAOHA)*, the FLRA decided that the degree of a change to a condition of employment is relevant to whether or not the change requires negotiation pursuant to the FSLMRS.¹¹ This decision to apply a de minimis standard to the substantive negotiability¹² of a change to a condition of employment represents a stark departure from the previously understood obligation to bargain any change to a condition of employment regardless of its significance or impact.

Facts

In *SSAOHA*, the Office of Administrative Appeals of the Social Security Administration (SSA) reduced the number of reserved parking spaces for union members in the Association of Administrative Law Judges from twelve to six.¹³ Although the original six reserved spaces were not the result of formal bargaining, all parties agreed that the change in the number of reserved parking spaces represented a change in a condition of employment.¹⁴ The SSA argued that the change in the number of reserved parking spaces was de minimis, because there were ample unreserved parking spaces available for all employees.¹⁵

The FLRA decided that the de minimis standard, previously applied only to reserved management rights,¹⁶ should also apply to substantively negotiable changes to conditions of employment.¹⁷ The FLRA held that “no interests are served by requiring ‘bargaining over every single management action, no matter how slight the impact of that action.’”¹⁸ Accordingly, the FLRA declared that the de minimis standard would apply to all “future cases to determine whether an agency has a duty to bargain in situations in which it changes unit employees’ conditions of employment.”¹⁹ The FLRA further stated that the method for determining whether a substantively negotiable change is de minimis is the same method applied to impact and implementation negotiations following the exercise of a management right.²⁰ The majority asserted that applying this already developed standard would not only promote consistency, but would provide “ample guidance to the parties to determine when a bargaining obligation is incurred.”²¹

⁹ *Id.* Where management is “required by law to bargain over the substance of a change in conditions of employment, they must do so without regard to the impact of the change.” *SSAOHA*, 59 F.L.R.A. at 656 (Pope, dissenting).

¹⁰ *See id.* at 649-50; *infra* notes 44-54 and accompanying text.

¹¹ *SSAOHA*, 59 F.L.R.A. at 654.

¹² Throughout this note, the author uses the phrase “substantive negotiability” or “substance case” to refer to a matter in which the change at issue did affect a condition of employment, but for which the impact of the change has not yet been determined through application of the de minimis test. *SSAOHA*, 59 F.L.R.A. at 656 (Pope, dissenting). Under previous FLRA precedent, all “substance cases”—all “substantively negotiable” matters—triggered the duty to bargain. *Id.* Under *SSAOHA*, the duty to bargain over the change is triggered only if the substantively negotiable condition of employment changed is more than de minimis. *Id.* at 653-54.

¹³ *Id.* at 646.

¹⁴ *Id.* at 649.

¹⁵ *Id.* at 654.

¹⁶ *See infra* notes 44-54 and accompanying text.

¹⁷ *SSAOHA*, 59 F.L.R.A. at 653-54.

¹⁸ *Id.* at 653 (citing Dep’t of Health and Human Servs. SSA and Am. Fed’n of Gov’t Employees, Local 1760, 24 F.L.R.A. 403, 406 (1986) [hereinafter Dep’t of Health and Human Servs. SSA]) (revising the criteria for assessing whether the impact of a change in an employee’s conditions of employment, under a reserved management right, was de minimis).

¹⁹ *Id.* at 654.

²⁰ *Id.* at 653; *see also infra* notes 44-54 and accompanying text.

²¹ *SSAOHA*, 59 F.L.R.A. at 654.

Discussion

Justification for the Decision

The FLRA based its decision in *SSAOHA* on a somewhat unexpected analysis of cases involving the Executive Order that managed federal labor relations before the FSLMRS.²² The FLRA held that labor-relations cases decided under Executive Order 11,491 by the Assistant Secretary of Labor for Labor-Management Relations (Assistant Secretary of Labor)²³ were binding on cases arising under the FSLMRS unless specifically reversed. This includes the Assistant Secretary of Labor decision to apply a de minimis test to substantively negotiable changes to conditions of employment.²⁴ The dissent described this rationale as “simply wrong”²⁵ and as “scrap[ping] a bright-line rule that is firmly rooted in the Statute and well known to the parties.”²⁶

Prior to enactment of the FSLMRS, labor-management relations within the federal sector were governed by Executive Order 11,491.²⁷ Like the FSLMRS, the plain language of Executive Order 11,491 did not set a threshold level of impact that a changed condition of employment must reach before triggering an agency’s obligation to bargain.²⁸ When reviewing this language, the Assistant Secretary of Labor exercised his authority to interpret the executive order²⁹ and determined that bargaining was not required over every change to a condition of employment. Rather, bargaining was required over only “those matters which *materially affect*, and have a *substantial impact* on, personnel policies, practices, and general working conditions.”³⁰

After assuming responsibility for interpreting the executive order,³¹ the FLRA reaffirmed the Assistant Secretary of Labor’s application of a de minimis test to substantive changes in conditions of employment.³² When interpreting the corresponding provision of the FSLMRS, however, the FLRA stated that “the extent of impact of any unilateral change in conditions of employment” is not relevant to the substantive negotiability of the change.³³ The FLRA did not offer any explanation for why they interpreted the FSLMRS language different than the similar language in the executive order.

²² *Id.* at 650-53.

²³ *See infra* notes 27-30 and accompanying text.

²⁴ *SSAOHA*, 59 F.L.R.A. at 651; *see also infra* notes 27-30 and accompanying text.

²⁵ *SSAOHA*, 59 F.L.R.A. at 657.

²⁶ *Id.* at 656 (Pope, dissenting). Pope further stated that the newly changed rule will impede efficient and effective government decision making because it will create “an entirely new generation of bargaining disputes” and increase litigation “over whether parties should be required to bargain over relatively insignificant matters.” *Id.* at 658 (Pope, dissenting).

²⁷ Exec. Order No. 11,491, 34 Fed. Reg. 17605 (Oct. 29, 1969). The first executive order to manage Labor-Management Relations government-wide, was signed in 1962. *See* Exec. Order No. 10,988, 34 Fed. Reg. 17605 (Jan. 17, 1962).

²⁸ *Compare* Exec. Order No. 11,491, § 11(a) (providing that the negotiation obligation covers “personnel policies and practices and matters affecting working conditions”) with 5 U.S.C. § 7103(a)(14) (2000); *see also* Fed. Aviation Admin. and Nat’l Air Traffic Controller’s Ass’n, 55 F.L.R.A. 254, 259 (1999) (noting that the duty to bargain under the executive order and under the FSLMRS is “virtually identical”).

²⁹ Exec. Order No. 11,491, §§ 6 and 19 (stating that the Assistant Secretary of Labor for Labor-Management Relations shall resolve complaints regarding a refusal to consult, confer or negotiate with respect to personnel policies and practices and matters affecting working conditions).

³⁰ Dep’t of Defense, Air Nat’l Guard, Tex. Air Nat’l Guard Camp Mabry, Austin, Tex., 6 A/SLMR 591, A/SLMR No. 738 (1976) (emphasis added) [hereinafter DOD Tex. Air Nat’l Guard].

³¹ The FLRA was created by the Civil Service Reform Act of 1978. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended at 5 U.S.C. § 7101-7135. (2000)). The responsibility to interpret Executive Order 11491 was transferred to the FLRA pursuant to section 304 of Reorganization Plan No. 2 of 1978. 43 Fed. Reg. 36,040 (Aug. 15, 1978). *See also* 44 Fed. Reg. 44,741 (July 30, 1979).

³² Soc. Sec. Admin., Bureau of Hearings and Appeals and Am. Fed’n of Gov’t Employees, 2 F.L.R.A. 238, 239 (1979) (stating that the condition of employment changed “did not have any substantial impact on personnel policies, practices or general working conditions”).

³³ United States Army Reserve Components Pers. & Admin. Ctr., St. Louis, Mo. and Am. Fed’n of Gov’t Employees, Local 900, 19 F.L.R.A. 290 (1985). This decision was actually consistent with dicta in *Social Security Administration Bureau of Hearings and Appeals and American Federation of Government Employees* in which the FLRA stated that:

In conformity with section 902(B) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided *solely* on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. *The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new statute or the result which would have been reached by the Authority if the case had arisen under the statute rather than the Executive Order.*

2 F.L.R.A. 238 n.2 (emphasis added).

Nevertheless, every subsequent case considered by the FLRA reaffirmed the inapplicability of the de minimis test to substantively negotiable changes under the FSLMRS.

In *SSAOHA*, the FLRA stated that the decision by the Assistant Secretary of Labor establishing a “material affect and a substantial impact”³⁴ test for evaluating changes to substantively negotiable conditions of employment remained in effect when the FSLMRS was enacted.³⁵ Essentially, the FLRA was relying on the last clause of the FSLMRS which stated that:

Policies, regulations, and procedures established under and decisions issued under Executive Order[] 11491 . . . shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.³⁶

Additionally, the majority in *SSAOHA* relied on a literal interpretation of a 1985 District of Columbia Circuit Court case which stated that “the FLRA *must* acknowledge [Assistant Secretary of Labor] precedent and provide a reason for departure, just as it must when it reappraises its own precedent.”³⁷ Since none of the FLRA decisions abandoning the de minimis test under the FSLMRS provided a specific reason for departing from the Assistant Secretary of Labor’s interpretation of the executive order, the majority in *SSAOHA* disregarded all of the FLRA precedent.³⁸

The dissent in *SSAOHA* objected to the majority reliance on the executive order to support their decision. The dissent pointed out that “the legislative history of the statute makes clear that Congress intended the Authority to abandon the ‘haste to restrict the scope of bargaining’ present under the executive order.”³⁹ In further differentiating the executive order from the FSLMRS, the dissent noted that while the executive order did not set forth a specific requirement to engage in collective bargaining, the language of the FSLMRS specifically required “collective bargaining with respect to conditions of employment . . . [e]xcept as otherwise provided.”⁴⁰ According to the dissent, “except as otherwise provided” means that all changes to substantively negotiable conditions of employment required bargaining unless the statute specifically excluded them as a management right or a permissive management right.⁴¹ Furthermore, the dissent noted that “[t]he limited scope of Federal sector bargaining caused by external laws, rules, and regulations also demands that the Authority not impose further limitations unless they are based on clear statutory authority and are buttressed by sound policy considerations.”⁴²

³⁴ The “material affect and substantial impact” test described in *DOD, Tex. Air Nat’l Guard*, evolved in subsequent management rights cases to be called the “substantial impact” standard, the “impact” standard, and finally, the de minimis standard. See *SSAOHA*, 59 F.L.R.A. 646, 652 n.9 (2004) (citations omitted).

³⁵ *Id.* at 651 and n.8.

³⁶ 5 U.S.C. § 7135(b) (2000).

³⁷ *SSAOHA*, 59 F.L.R.A. at 653 (citing *Nat’l Treasury Employees Union v. FLRA*, 774 F.2d 1181, 1192 (D.C. Cir. 1985)) (emphasis added).

³⁸ *Id.* The majority also asserted that applying a de minimis standard to collective bargaining under the FSLMRS would make the federal system more like labor-management relations in the private sector as governed by the National Labor Relations Act. *Id.* at 651. The majority never explains why the federal system of labor management should mirror the private sector, but asserts consistency between the two systems as good for its own sake. Regarding this issue, the dissent noted the following:

[T]he degree of relevance of private sector case law to public sector labor relations will vary greatly depending upon the particular statutory provisions and legal concepts at issue . . . [and that] . . . the bargaining status of any given subject is determined [in the public and private sectors] by different statutory provisions and by different policy considerations.

Id. at 657 (Pope, dissenting) (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983)).

³⁹ *Id.* (Pope, dissenting) (citing 124 CONG. REC. H9638 (daily ed. Sept. 13, 1978) (statement of Rep. Clay)); see also *New York Council, Ass’n of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d Cir. 1985) (providing that in enacting the Statute, Congress intended to expand the scope of bargaining from that under the executive order).

⁴⁰ *SSAOHA*, 59 F.L.R.A. at 656 (Pope, dissenting) (citing 5 U.S.C. § 7102 (2000)) (emphasis added).

⁴¹ *Id.* (Pope, dissenting). Although not addressed by the dissent, there are several other potential problems with the FLRA’s justification in *SSAOHA*. First, the FLRA is not bound by the decisions of any single judicial Circuit. *Headquarters, Nat’l Aeronautics & Space Admin. and Nat’l Aeronautics & Space Admin., Office of the Inspector Gen.*, 50 F.L.R.A. 601, 612-14 (1995), *enforced*, 120 F.3d 1208 (11th Cir. 1997), *aff’d*, 527 U.S. 229 (1999) (stating that the FLRA declined to follow the D.C. Circuit Court’s interpretations of the FSLMRS as it pertains to representatives of the agency). Second, even assuming *National Treasury Employees Union v. FLRA* imposed the requirement that the FLRA specifically identify and justify overturning precedent decided by the Assistant Secretary of Labor, there is nothing which suggests the remedy for failing to do so is to render meaningless the twenty-five years of overruling opinions. Third, and perhaps most important, the FLRA abandoned the “material affect and significant impact” test before the decision in *National Treasury Employees Union v. FLRA*, and therefore was not obligated to specifically “acknowledge the precedent . . . and provide a reason for departure” before adopting a new rule for determining substantive negotiability. *SSAOHA*, 59 F.L.R.A. at 652 (quoting *Nat’l Treasury Employees Union v. FLRA*, 774 F.2d at 1192). Compare *United States Army Reserve Components Pers. & Admin. Ctr., St. Louis, Mo. and Am. Fed’n of Gov’t Employees*, 19 F.L.R.A. 290 (July 25, 1985) with *NTEU v. FLRA*, 774 F.2d 1181 (Oct. 11, 1985).

⁴² *SSAOHA*, 59 F.L.R.A. at 656 (quoting *Dep’t of Health and Human Servs. SSA*, 24 F.L.R.A. 403, 406-07 (1986)).

The nuances of the justification for the decision in *SSAOHA* are important, because the FLRA's general counsel filed a petition for review in the Circuit Court for the District of Columbia.⁴³ Labor counselors need to be aware of the impact of that potential decision on the assertion of a de minimis defense.

Application of the De Minimis Standard to Management Right Changes

As discussed previously, *SSAOHA* held that the de minimis test to be applied to substantively negotiable changes would be the same as the de minimis test that is applied to changes pursuant to management rights.⁴⁴ Accordingly, in order to understand the applicability of the de minimis test to substantively negotiable changes, it is necessary to first understand the de minimis test as it has been applied to changes made pursuant to management rights.

When an agency initiates a change to a condition of employment under a reserved management right,⁴⁵ the decision is not negotiable.⁴⁶ Still, the agency is required to negotiate over the impact and implementation of the decision.⁴⁷ The requirement for impact and implementation negotiation, however, is limited to those situations in which the change has more than a de minimis effect on the unit employees' conditions of employment.⁴⁸ The FLRA established this minimum threshold for impact and implementation negotiations because the interests of the FSLMRS were not served by "bargaining over every single management action, no matter how slight the impact of that action."⁴⁹

The FLRA first articulated a clear standard for determining whether a change under a management right was more than de minimis in *Department of Health and Human Services, SSA, Region V, Chicago, Ill. and American Federation of Government Employees, Local 3239*.⁵⁰ In that case, the FLRA adopted a list of five criteria for assessing whether a change was de minimis:

(1) [t]he nature of the change as it affects or foreseeably affects unit employees as individuals or as a whole (e.g. the extent of the change in work duties, location, office space, hours, employment, loss of benefits and/or wages, etc); (2) [t]he temporary, recurring or permanent nature of the change (i.e., the duration and the frequency with which it affects unit employees); (3) [t]he number of unit employees affected or foreseeably affected by the change; (4) [t]he size of the bargaining unit; (5) [t]he extent to which the parties may have established through negotiation or past practice, procedures and appropriate arrangements concerning analogous changes in the past.⁵¹

Just over one year later, the FLRA "reassessed and modified" this standard.⁵² In *Department of Health and Human Services, SSA and American Federation of Government Employees, Local 1760*, the FLRA held that application of the de minimis standard to changes under a management right would be determined by carefully examining the "pertinent facts and circumstances" of the change, with "principle emphasis on such general areas of consideration as the nature and extent of the

⁴³ *SSAOHA, petition for review filed*, No. 04-1129 (D.C. Cir. Apr. 12, 2004). Oral Argument is currently scheduled for 9 December 2004.

⁴⁴ *SSAOHA*, 59 F.L.R.A. at 653-54.

⁴⁵ Decisions made pursuant to the following management rights do not require negotiation with the union: mission, budget, organization, number of employees, internal security practices, hiring, assigning work, directing, layoffs, removal, reduction in grade or pay, disciplinary action, and determinations with respect to contracting out. 5 U.S.C. § 7106 (2000).

⁴⁶ For example, where a commander reasonably believes that security concerns require the placement of jersey-barriers around the command headquarters in such a fashion that it will block numerous parking spaces, there is no obligation to negotiate whether or not such jersey-barriers can be placed, although there is an obligation to negotiate the impact and implementation of the decision.

⁴⁷ Impact and implementation negotiations are also referred to as appropriate arrangements by the FLRA. See Memorandum, Executive Summary, *supra* note 7.

⁴⁸ The FLRA specifically stated that "no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimis." Dep't of Health and Human Srvs., Soc. Sec. Admin., Chicago Region and Am. Fed'n of Gov't Employees, 15 F.L.R.A. 922, 924 (1984); see also Office of Program Operations, Field Operations, Soc. Sec. Admin., San Francisco Region and Council of Dist. Office Locals, Am. Fed'n of Gov't Employees, San Francisco Region, 5 F.L.R.A. 333, 336-37 (1981); Dep't of Transp., Fed. Aviation Admin. and Prof'l Airways Sys. Specialists, 19 F.L.R.A. 472, 476 (1985).

⁴⁹ Dep't of Health and Human Srvs. SSA, 24 F.L.R.A. 403, 406 (1986).

⁵⁰ 19 F.L.R.A. 827 (1985).

⁵¹ *Id.* at 834-35 (McGinnis, concurring) (stating that the FLRA members had mutually agreed to use these five criteria in all future cases when applying the de minimis test).

⁵² See *Dep't of Health and Human Srvs. SSA*, 24 F.L.R.A. at 407 (offering no explanation for why the standard needed to be "reassessed and modified").

effect or reasonably foreseeable effect of the change on . . . bargaining unit employees.”⁵³ In distinguishing the five criteria, the FLRA stated that the number of employees affected by the change and the parties’ bargaining history would not be controlling factors in applying the de minimis test, and that the size of the bargaining unit would not be a factor at all.⁵⁴ The de minimis standard articulated in *Department of Health and Human Services, SSA and American Federation of Government Employees, Local 1760* is vaguer than the five criteria articulated in *Department of Health and Human Services., SSA, Region V, Chicago, Ill. and American Federation of Government Employees, Local 3239*, but it has served as the defining standard for analyzing the degree of changes pursuant to reserved management rights.

Application of the De Minimis Standard to Substantively Negotiable Changes

The application of the de minimis standard to management rights cases since 1985 has not always resulted in predictable outcomes,⁵⁵ and it is therefore unlikely that this standard will provide “ample guidance”⁵⁶ in cases involving substantively negotiable matters. The defined standard in management rights cases is so vague and circumstance dependent as to provide little actual guidance. Based on the FLRA’s decision in *SSAOHA*, however, successful application of the de minimis test appears to require convincing the FLRA that the “major characteristics” of the condition of employment changed have not really changed.⁵⁷

In applying the de minimis test to the substantively negotiable change in *SSAOHA*, the FLRA compared the relevant major characteristics of parking before and after the change. Specifically, the FLRA stated that:

Before the change in the number of reserved parking spaces, the record established that the unit employees had access to parking in the facility at their place of employment; they did not have to pay for that parking; they had “in and out” privileges; and they had no difficulty in finding spaces in which to park; either at the beginning of the workday or during the workday itself.

After the change in the number of reserved parking spaces, the record establishes that the unit employees have had access to parking at their place of employment; they have not had to pay for that parking; they have had “in and out” privileges; and they have had no difficulty in finding spaces in which to park, either at the beginning of the workday or during the workday itself.⁵⁸

Although the FLRA does not use the phrase “major characteristics” in its application of the de minimis standard to the facts in *SSAOHA*, identifying these characteristics is obviously crucial. Determining which characteristics of the condition of employment have or have not changed, and determining why those characteristics that have not changed are the most important characteristics, is the implicit foundation of a successful application of the de minimis standard. Labor counselors making a de minimis argument are well advised to frame the application of the standard to the facts in their case exactly as the FLRA did in *SSAOHA*—as a “before and after” comparison of the major characteristics of the condition of employment

⁵³ *Id.* at 407-8; *see also* United States Dep’t of the Treasury, IRS and Nat’l Treasury Employees Union, 56 F.L.R.A. 906, 913 (2000) (stating that in applying the de minimis doctrine, the FLRA looks to the nature and extent of the effect or the reasonably foreseeable effect, of the change on bargaining unit employees’ conditions of employment).

⁵⁴ *Dep’t of Health and Human Servs. SSA*, 24 F.L.R.A. at 407-08.

⁵⁵ The FLRA has found a management right change to be greater than de minimis where it affected the following: the amount of employee travel, *FAA, Washington, D.C. and Prof’l Airways Sys. Specialists*, 19 F.L.R.A. 436 (1985); an employee’s ability to earn overtime, *United States Customs Serv., S.E. Region, El Paso, Tex. and Nat’l Treasury Employees Union*, 44 F.L.R.A. 1128 (1992); the equipment used by an employee, *United States Dep’t of the Treasury, IRS and Nat’l Treasury Employees Union*, 56 F.L.R.A. 906 (2000); loss of access to a window, *United States Dep’t of HHS, SSA, Balt., Md. and SSA, Fitchburg, Mass.*, 36 F.L.R.A. 655 (1990); and smaller offices, *EPA and Am. Fed’n of Gov’t Employees*, 25 F.L.R.A. 787 (1987). The FLRA has found a management right change to be less than de minimis where it affected the following: the employee’s duties and promotion potential, *Dep’t of Health and Human Servs. SSA*, 24 F.L.R.A. 403; change in duties that have ambiguous effects on overtime, *United States Dep’t of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Washington, D.C. and Nat’l Treasury Employees Union*, 59 F.L.R.A. 728 (2004); access to the photocopier, *United States Dep’t of the Air Force Combat Command, Seymour Johnson Air Force Base, Goldsboro, N.C.*, FLRA ALJ Dec. Rep. No. 181 (Jan. 20, 2004); temporarily moving an employee from one building to another. *Gen. Servs. Admin., Region 9, San Francisco, Cal.*, 52 F.L.R.A. 1107, 1111 (1997).

⁵⁶ *SSAOHA*, 59 F.L.R.A. 646, 654 (2004); *see also supra* note 21 and accompanying text.

⁵⁷ *SSAOHA*, 59 F.L.R.A. at 647 (finding that in describing the positions of the parties to the case, the FLRA stated that the agency was arguing that “the major characteristics of employee parking . . . remained unchanged (easy access, available at no cost to ALJs, indoors, secure, sheltered, direct office access)”).

⁵⁸ *Id.* at 654.

that was changed.⁵⁹ If the labor counselor can identify how the major characteristics of the changed condition of employment did not change, it is likely they will have a winning de minimis argument.

Labor counselors, however, should rely on the de minimis argument only after measured deliberation. The decision in *SSAOHA* is likely to have a tremendous impact on labor management relationships because parties will inevitably disagree over whether or not the impact of a particular negotiable change is sufficiently large enough to trigger negotiations.⁶⁰ This in turn will “create an entirely new generation of bargaining disputes.”⁶¹

One possible approach to handling de minimis changes is to engage in a collaborative discussion with unions prior to implementing the changes.⁶² As with negotiations associated with management permissive rights, initiating collaborative discussions would not preclude management from implementing the original change if the discussions are not fruitful.⁶³ Where the discussions are successful, however, and the union agrees to the proposed change, a potential cause of controversy is avoided.

The National Security Personnel System

The National Defense Authorization Act for Fiscal Year 2004 directed the Secretary of Defense to create a new human resources management system for Department of Defense (DOD) civilians, known as the National Security Personnel System (NSPS).⁶⁴ The NSPS is intended to modify the current labor-management relations system to better accommodate the DOD national security mission. On 6 February 2004, the DOD published an *Outline of Proposed NSPS Labor Relations System Concepts (NSPS Concepts)*.⁶⁵ The *NSPS Concepts* included a proposal that bargaining would only be required when a change to a condition of employment has a “significant impact on the bargaining unit.”⁶⁶ Following the decision in *SSAOHA*, the DOD published *Background Material With Respect to Potential Options for the National Security Personnel System (Potential Options)* for Department of Defense unions.⁶⁷ The *Potential Options* kept the “significant impact” language and specifically distinguished this phrase as establishing a higher standard for determining a negotiable obligation than the de minimis standard articulated by the FLRA in *SSAOHA*.⁶⁸

Even if the *Potential Options* are implemented, DOD attorneys are well advised to defend their cases by arguing both the significant impact language of the NSPS and the de minimis standard of the FLRA. The United DOD Workers Coalition, a

⁵⁹ See generally *id.* at 646. Identifying the “major characteristics” of a changed condition of employment is analogous to identifying the “essential functions” of a position pursuant to a claim of disability discrimination under the Rehabilitation Act. 29 U.S.C. § 794 (2000).

⁶⁰ *SSAOHA*, 59 F.L.R.A. at 656 (Pope, dissenting). Labor counselors should be aware that application of the de minimis test to substantively negotiable changes will presumably maintain the burden of proof on the moving party, usually the union. Pension Benefit Guar. Corp. and Nat’l Ass’n of Gov’t Employees, Local R3-77, 59 F.L.R.A. 48 (2003) (stating that the union must identify the adverse affects associated with a decision exercised under a management right); see also Am. Fed’n of Gov’t Employees, Local 940 and U.S. Dep’t of Veterans Affairs, Philadelphia, Pa, 52 F.L.R.A. 1429 (1997).

⁶¹ *SSAOHA*, 59 F.L.R.A. at 656, 658 (Pope, dissenting). Member Pope noted that the majority decision in *SSAOHA* was likely to cause the exact problem the decision was designed to avoid—“an increase in litigation over whether parties should be required to bargain over relatively insignificant matters.” *Id.* Various unions representing federal employees have specifically identified this case as one which is “in contempt of collective bargaining rules.” See Elizabeth Newell, *Rallying Over Rulings*, GOV’T EXECUTIVE MAG., July 16, 2004, available at <http://www.govexec.com/dailyfed/0704/071604lb.htm>. While the types of de minimis changes where bargaining disputes are possible is limited only by the imagination of the parties, there are some areas that appear ripe for disagreement, such as: temporary changes that affect a condition of employment (*i.e.* temporary office displacement, temporary changes to parking caused by construction); and changes to the conditions of employment of only one bargaining unit member.

⁶² The majority opinion in *SSAOHA* anticipates such a course of action in any mature bargaining relationship: “even if an agency does not have a duty to bargain over a change, there may well be situations where an agency may decide, for any of a variety of reasons, to work collaboratively with the exclusive representatives of the unit employees regarding the change.” *SSAOHA*, 59 F.L.R.A. at 654 n.12.

⁶³ Nat’l Ass’n of Gov’t Employees, Local R4-75 and U.S. Dep’t of the Interior, Nat’l Park Serv., Blue Ridge Parkway Agency, 24 F.L.R.A. 56 (1986) (management may terminate negotiations on a permissive subject any time short of agreement).

⁶⁴ Pub. L. No. 108-136, § 1101 (2003) (codified at 5 U.S.C. § 9902 (LEXIS 2004)). In creating this new civilian personnel system, the law permits the DOD to waive certain laws and regulations that currently apply to civilian employees. The purpose of the NSPS is to allow flexibility in managing civilian employees while insuring compliance with the principles of the merit system and collective bargaining while also giving the DOD flexibility to accomplish its mission of national security. See National Security Personnel System, *Frequently Asked Questions*, at <http://www.cpms.osd.mil/nsps/faq.html> (last visited Oct. 26, 2004).

⁶⁵ DEPARTMENT OF DEFENSE, OUTLINE OF PROPOSED NSPS LABOR RELATIONS SYSTEM CONCEPTS (2004), available at http://www.govexec.com/pdfs/NSP_Sunionmemo.pdf.

⁶⁶ *Id.* at 5.

⁶⁷ DEPARTMENT OF DEFENSE, BACKGROUND MATERIAL WITH RESPECT TO POTENTIAL OPTIONS FOR THE NATIONAL SECURITY PERSONNEL SYSTEM (2004), available at http://www.cpms.osd.mil/nsps/pdf/UDWC_13Sep2004.pdf.

⁶⁸ See generally *id.*

coalition of unions representing federal employees working for the DOD, suggested that this change, among others, exceeds the legal authority granted to the DOD under the NSPS implementing statute.⁶⁹ Accordingly, it is likely that the United DOD Workers Coalition will challenge the statutory authority of any change in this area. Department of Defense attorneys who include a de minimis argument with their significant impact argument, will be better protected if the NSPS provision on which the significant impact change is based, is later overturned.⁷⁰ In any event, DOD attorneys should stay abreast of the possibility of further change in this area.

Conclusion

The emergence of a de minimis standard as an element of substantive negotiability determinations is a radical change in the federal labor-management relations landscape. Properly argued, this new standard has the potential to be a powerful tool for implementing minor managerial decisions in the federal workplace. In theory, Army managers will no longer have to negotiate over small or trivial changes to conditions of employment. It will allow managers to implement such changes without the sometimes contentious and time-consuming process of bargaining.⁷¹ In practice however, because it is likely that unions will contest every management claim that a particular change is de minimis, labor counselors should carefully select those cases where they make a de minimis argument and exercise caution before implementing decisions in reliance on this theory.

⁶⁹ See United DOD Workers Coalition, *Response and Questions to the Department of Defense Regarding the Potential Options for the National Security Personnel System* (2004) (on file with author).

⁷⁰ This, of course, also assumes that the FLRA decision in *SSAOHA* is not overturned by the D.C. Circuit Court. See *SSAOHA*, petition for review filed, No. 04-1129 (D.C. Cir. Apr. 12, 2004).

⁷¹ Since *SSAOHA*, the new de minimis standard has been applied to dismiss at least two cases in the Army. See Letter from Robert P. Hunter, Regional Director for the FLRA, Washington DC Region, to Jeffrey Slater, President, American Federation of Government Employees (March 24, 2004) (on file with author) (outlining the investigation of the following cases: *United States Army Med. Research & Material Command and Am. Fed'n of Gov't Employees, Local 2484*, Case No. WA-CA-03-0351 and *United States Army Med. Research Acquisition Activity & Am. Fed'n of Gov't Employees, Local 2484*, Case No. WA-CA-03-0564, which concluded that ceasing to provide bottled water where drinking water remains available is a de minimis change to a condition of employment and bargaining is not required).

Survivor Benefits Note

Deadline Approaching for Reinstatement of DIC for Remarried Surviving Spouses

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The deadline is 15 December 2004 for certain remarried surviving spouses to apply for restoration of Dependency Indemnity Compensation (DIC) benefits. Veterans' surviving spouses who reached age fifty-seven and remarried *before* 16 December 2003 must apply by 15 December 2004, or they will lose their eligibility for reinstatement of DIC benefits.

Dependency Indemnity Compensation is a monthly payment made to an eligible surviving spouse of the following: (1) a military service member who died while on active duty; (2) a veteran whose death resulted from a service-related injury or disease; or, in certain circumstances, (3) a veteran whose death resulted from a non service-related injury or disease and who was receiving, or was entitled to receive, Veterans Administration compensation for service-connected disability that was rated as totally disabling.¹ Dependency Indemnity Compensation is paid for the life of the surviving spouse, unless he or she remarries.² The current monthly payment for surviving spouses, without dependents or other conditions that qualify for increased payment, is \$967.³

Before 16 December 2003, all surviving spouses who remarried were barred from receiving DIC unless the remarriage was terminated by death or divorce.⁴ The Veterans Benefits Act of 2003, signed into law on 16 December 2003,⁵ created a provision to allow surviving spouses who remarry after age fifty-seven to continue to be eligible for DIC payments.⁶ Although retroactive benefits are prohibited,⁷ for a one-year period, any surviving spouse who remarried after age fifty-seven and before the date of the Act may apply for restoration of DIC payments.

¹ 38 U.S.C. § 1310 (2000).

² *Id.* § 1311.

³ The monthly rate specified in 10 U.S.C. § 1311 is \$948; however, this amount is increased based on inflation. *Id.*

⁴ *Id.* § 103(d)(2)(B).

⁵ Pub. L. No. 108-183, 117 Stat. 2653 (2003).

⁶ *Id.* § 101(c) (codified at 38 U.S.C. § 103(d)(2)(B) (LEXIS 2004)).

⁷ *Id.* § 101(e) (providing "No benefit may be paid to any person by reason of the amendments made by subsections (a) and (b) [amending 38 U.S.C. §§ 103(d)(2)(B) and 1311] for any period before the effective date specified in subsection (c)).