BEFORE ARBITRATOR
DAVID P. CLARK

In the matter of arbitration

American Federation of Government Employees (AFGE), Council of NARA Locals UNION, v. National Archives and Records Administration AGENCY.	)	June 12, 2017

UNION'S POST HEARING BRIEF

Representing the Union:
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Representing the Agency:
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Pursuant to the parties' stipulation to submit post-hearing briefs, in lieu of closing arguments, at 5PM on June 12, 2017, the Union, by and through the undersigned representative, hereby submits the following brief in support of its position that the Agency violated the parties' Collective Bargaining Agreement and the Federal Service Labor-Management Relations Statute in implementing changes to time and leave policy in the Office of Research Services - Office of the Access Coordinator for Washington DC (RD).

A. Background

On September 21, 2016 the Union filed a grievance concerning changes to time and leave policy and procedures in the Office of Research Services - Office of the Access Coordinator for Washington DC (RD). The Union charges that the Agency violated the collective bargaining agreement and the Federal Service Labor-Management Relations Statute when it implemented new time and leave procedures. The grievance has both group and institutional components. For the institutional aspects of the grievance, the Union is the grievant. For the group aspects of the grievance, the Union is the grievant on behalf of a defined group of unit employees, in this case all unit employees in RD. On October 5, 2016, the Agency's deciding official, Acting Executive for Research Services Ann Cummings, denied the grievance, Joint Exhibit 4, claiming that it was not timely filed and did not demonstrate a violation of the National Agreement. The Agency did not respond to the charge that it violated 5 U.S.C. § 7116(a)(1) and (5).

The Union invoked binding arbitration on October 20, 2016. The parties' representatives selected Mr. David P. Clark, who serves on the panel of arbitrators the parties have established for the Washington D.C. area, to arbitrate the dispute. The Agency challenged the procedural arbitrability of the grievance on the basis of timeliness and on the basis that the Union waived bargaining in the matter under dispute. The parties argued arbitrability before the arbitrator, and on February 18, 2017, the arbitrator denied the Agency's motion to dismiss, without prejudice. On May 12, 2017, the arbitrator held a hearing on the merits at the National Archives at College Park, Maryland.

B. Statement of Issue

The parties stipulate to the statement of issue:

1) Did the union timely file its grievance?

2) Did the Agency provide the Union adequate notice of changes affecting time and leave policy?

3) Did the union waive their right to Impact and Implementation bargaining?

4) Did the Agency violate the collective bargaining agreement and/or the Federal Service Labor-Management Relations Statute in promulgating new time and leave procedures in the Office of Research Services, Washington DC. If so, what shall be the remedy?

C. Statement of Facts

On September 1, 2016, the Agency notified the Union of several upcoming formal discussions with bargaining unit employees regarding work hours and leave procedures in RD. At these meetings, management distributed to unit employees a document entitled "RD Units Core Time and Leave Procedures," Joint Exhibit 3. Management reinforced a number of existing and uncontested policies and procedures, and also announced some changes. The Union was represented at these meetings. At the meetings, management representatives claimed that the Union had been notified of the changes and given an opportunity to negotiate.

Prior to these meetings, on August 8, 2016, a NARA management official in RD, Supervisory Archivist Deborah Lelansky, had sent an email to multiple recipients requesting review of the RD Core Time and Leave Procedures Document. The list of recipients included a general institutional email address for AFGE Council 260. The message stated that the purpose of the discussions was to announce that "the RD management group has agreed to procedures

for all RD staff and managers relating to the administration of work hours and leave procedures," and to share these procedures with staff members.

On September 15, 2017, Union Representative Ashby Crowder met with then-Acting Research Services Executive Ann Cummings about the recently promulgated RD Time and Leave procedures. Cummings did not agree to withdraw the RD Units Core Time and Leave Procedures Document, and on September 21, 2016, the Union filed a grievance alleging that some of the changes to leave and credit time procedures were violative. The Union held that adequate notice and the opportunity to bargain was not given to the Union, and that some of the changes affected matters specifically covered by a master agreement.

D. Applicable Collective Bargaining Agreement Provisions

Article 1, Section 3. Computing Time limits

Article 6, Section 1. Basic Work Schedule

Article 24, Section 7. Steps of the Grievance Procedure

Article 32. Mid-term Negotiations

Article 33. Duration and Termination

Article 7. Alternative Work Schedules

Article 9. Leave

I. The Union's grievance was timely filed.

Article 24, Section 7 provides that a "grievance must be filed in writing within 20 calendar days after the event giving rise to the grievance, or 20 days after the date the grievant becomes aware of the event giving rise to the grievance." There are several dates on which the

countdown clock could reasonably start ticking. The grievance filed on September 21, 2016 was timely filed under all of them. First, the employer announced the change to employees in a series of meetings that started September 8, 2016. Assuming the Union had not received adequate notice of the change -- a point argued in detail below -- the September 8 date would be an appropriate starting point for the date the Union became aware of the event giving rise to the grievance.

Alternatively, as Union witness Amidon testified, the Council President became generally aware of the event giving rise to the grievance on September 1, 2017, when she informed him during a phone call of the upcoming meetings to present to employees new time and leave procedures.[1]

Finally, because the group components of the grievance are filed on behalf of all affected bargaining unit employees, the portions of the grievance alleging that the new RD Time and Leave Procedures violate Articles 7 and 9 of the National Agreement are ongoing violations. The 20 day period therefore renews each and every day that the policy is in effect. A violation is on ongoing violation so long as the situation giving rise to the grievance is maintained. Arbitrators and the FLRA have recognized the concept of ongoing violations as applying when the violations are "of a continuing nature," or are "continuous and ongoing." *See Dep't of Veterans Affairs, Regional Office, Winston Salem N.C.* and *American Federation of*

[1] The Union's January 12, 2017 brief opposing the Agency's motion to dismiss erroneously stated that Council President Munsey became aware of the changes after RD management's meetings with employees beginning September 8th had taken place. Further investigation revealed that Munsey in fact became aware of the new RD procedures on September 1st, in a telephone discussion with Council Secretary Amidon. Although the Union filed its grievance within 20 days under both timelines, the Union's advocate apologizes to the arbitrator and to NARA's representative for the error.

Government Employees, Local 1738, 66 F.L.R.A 34 (2011); and *Dep't of Defense, Dependents Schools* and *Federal Education Association,* 55 F.L.R.A 1108 (1999).

Although the Union's grievance was timely filed, the employer has not provided timely responses to the grievance. Because the grievance contains both group and institutional components, it was submitted to two separate deciding officials, one to address the group aspect, and one to handle the institutional aspect, per Article 24 of the National Agreement. Nothing in the parties agreement precludes this type of combination into one document, and the Agency did not remand the grievance as procedurally deficient under Article 24, Section 7. The Agency received only one response, from the Executive for Research Services. However, rather than addressing the group aspects of the grievance, the response reads as an institutional response, asserting that NARA gave Article 32 notice and that the grievance is therefore untimely. The Union never received a response from the Chief of Labor/Employee Relations, who is the appropriate deciding official on the institutional matters. Nor did it receive a substantive consideration of the charge that the employer violated Articles 7 and 9.

II. The Agency did not provide the Union with adequate notice of changes affecting time and leave policy in RD.

The Agency did not provided the Union with adequate notice of changes in working conditions. This failure is a violation of the specific terms of Article 32 of the National Agreement, as well as a refusal to consult or negotiate in good faith with a labor organization as required in 5 U.S.C. § 71. In Article 32, Section 2 of the parties' agreement, the "Agency agrees to provide *the Council President, unless otherwise specified by the Union,* (emphasis

mine) with written notifications of changes in working conditions." The Union having not specified another official to whom notice should be given, and there being no past practice under which an official other than the council president is notified to initiate mid-term negotiations, it is the Union's position that no Article 32 notice has occurred. The August 8 message was not sent to the email address of the Council President, at the time Darryl Munsey, nor did the message include a salutation to the Council President.

The Federal Labor Relations Authority (FLRA) has recognized that an exclusive representative has the right to designate its representatives when fulfilling its responsibilities under the Statute. An agency violates § 7116(a)(1) and (5) of the Statute when it refuses to honor a union's designation. An exclusive representative also has the right to designate representatives for specific, limited purposes, including the receipt of notifications of changes in conditions of employment. See *United States Dep't of the Air Force, 913TH Air Wing, Willow Grove Air Reserve Station, and National Association of Government Employees, Local R3-32, SEIU*, 57 F.L.R.A. 852 (2002) (noting that the employer violated the Statute when it sent a notification of changes to union stewards, but not to the union president, when the union requested that the union president be served with notice of changes in conditions of employment.) In the instant case, the plain language of Article 32 designates the Council President as the person to receive notice of changes.

At the time of the events that are the subject of this grievance, Darryl Munsey was President of AFGE Council 260. Munsey retired as an employee from the National Archives and Records Administration in the summer of 2014. Having been elected to a three year term as Council President in 2013, Munsey continued to hold this office as an annuitant, there being no

provision of the Union's constitution or bylaws barring an annuitant's continued service as a Union officer. The FLRA has recognized that a Union has a right to designate its own representative under §7114 of the Statute. See *Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C. and National Association of Government Employees, Local R5-150, SEIU,* 57 F.L.R.A. 495, 498 (2001). More specifically, an agency has a duty to recognize a union's duly authorized representatives, even when they are not employees. *See*, e.g., *United States Department of Veterans Affairs, Northern Arizona VA Health Care System, Prescott, Arizona* and *American Federation of Government Employees, Local 2401*, 66 F.L.R.A. 963 (2012) (noting that the Authority found the agency committed an unfair labor practice when it refused to recognize a longstanding union president who retired from her employment with the agency but remained union president).

In the instant case, there has been no controversy surrounding the Agency's duty to recognize Munsey as Council President. As the parties stipulated at hearing, the Agency continued furnishing Munsey with an agency email address, darryl.munsey@nara.gov, which the Agency used to contact him, and which he used to contact the Agency, in his role as Council President for years after his retirement. Union Exhibit 1, for example, which Union witness Bhatia identified at hearing as a typical notification of changes the council would receive, through the Council President, was sent by the Chief of Labor/Employee Relations to Darryl Munsey at darryl.munsey@nara.gov, and included a salutation to the Council President. In this example, the afge.council260@nara.gov email address was included in the list of recipients as a copy, but was not the means of contacting the Union's designated agent.

The Council President did not delegate or assign to another official the role or receiving notice of changes in conditions of employment. For the Agency to recognize another official, a delegation is required by the plain language of Article 32. Union witnesses Bhatia and Amidon, as well as Agency witness Hobbs, all testified at hearing that Munsey had made no such delegation. Bhatia and Amidon testified that it is not a normal practice for a program manager to notify the Union of changes directly, and that it is not normal practice for an Article 32 notice to be sent to the afge.council260@nara.gov email box only. NARA's own labor relations training for managers and supervisors, Union Exhibit 7, instructs officials to use the afge.council260@nara.gov email address only for sending the Union invitations to formal discussion -- a procedure to which the Union agreed -- but not for sending notification of changes to conditions of employment.

The employer attempts to elide the entire question of whether a duly authorized representative was notified of changes. Both at hearing and in its brief on arbitrability, NARA frames the question as to whether "the Union" was notified, not whether the Council President was notified. The employer argues that the Union received "effective notice" because the Council Secretary received the notice and responded as Council Secretary.

The Agency's argument must fail. The position of Council Secretary is not a position that the Union has imbued with authority to handle notifications of changes. Although the authority of positions of Council President and Executive Vice President are identified numerous times in the National Agreement, the position of Council Secretary is not referred to once in the entire document. Agency witness Hobbs acknowledged at hearing that the Union does not identify to the Agency who encumbers the position of Council Secretary, and that it is

not included in the routine Designation of Representatives letter the Council President periodically transmits to the Chief of Labor/Employee Relations, Union Exhibit 8. In addition to being secretary of the council, Ms. Amidon is also a designated Union representative. However, under Article 32, she would only have the authority to receive and respond to a notification of changes in her role as Union Representative if she were so designated by the Council President. Agency witness Hobbs acknowledged at hearing that the Agency received no such designation. At hearing, when asked for the source of Ms. Amidon's authority to respond to the change on behalf of the Union, Agency witness Cummings replied that she was to be recognized because she was "part of the Union." Asked whether she believed Ms. Amidon was speaking for the Council President, Cummings replied that she did not know. This testimony, as well as NARA's general approach to notice of changes, suggests an insufficient regard for the formalized delegation procedures that are a feature of the labor-management landscape both in the NARA/AFGE contract, and in labor management interactions under 5 U.S.C. §71 generally. *See*, e.g., *Federal Emergency Management Agency Headquarters, Washington, DC* and *American Federation of Government Employees, Local 4060*, 49 F.L.R.A 1189 (1994) (noting that an exclusive representative must make a clear delegation of authority for the agency to accord recognition to that person.)

The Agency essentially asks to arbitrator to waive a clear and unambiguous contract provision, yet does not establish that the parties had a past practice whereby someone other than the Council President was notified, or whereby the council president accepted notification through the afge.council260@nara.gov email address. Most importantly, Agency and Union witnesses both acknowledge that the Council President never specified that anyone other than he

should receive notice under the National Agreement.The Agency's attempt to substitute notification to "the Union" generally, for the contract's requirement for notice to the Council President specifically, must fail.

The FLRA has established an adequacy standard to evaluate an averred notice of changes by an employer to an exclusive representative. *See U.S. Penitentiary, Leavenworth, Kansas and American Federation of Government Employees, Local 919,* 55 F.L.R.A. 704 (1999) (noting that notice must be "adequate notice of a proposed change in conditions of employment" to trigger the exclusive representative's responsibility to request bargaining.) The Authority looks to the notification procedures established through collective bargaining to determine adequacy. The Authority has found that following the terms of the collective bargaining agreement in the area of notice is part and parcel of the duty to negotiate in good faith, and therefore failure to follow the notification procedures set forth in a collective bargaining agreement is grounds for finding implementation of a change to be an unfair labor practice. *See Department of the Air Force, Air Force Material Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214,* 51 F.L.R.A. 1532 (1996) (noting that the Administrative Law Judge examined the procedures established in the parties' mid-term bargaining article to determine whether the employer fulfilled its obligations under §7116(a)(5)). Finally, the Authority assigns significance to the addressee in determining whether an action counts as notice. *See U. S. Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia and American Federation of Government Employees, Local 2145*, 70 FLRA 119 (2016) (noting that the Administrative Law Judge took into account the party to whom a letter was addressed in determining whether it counted as notice of a change.)

Although the Agency's failure to send the purported change notice to the appropriate official is the most glaring deficiency, it is not the only one. The August 8 email is not a sufficiently clear notice of changes. The message cannot reasonably be interpreted as a good faith notification of intent to initiate mid-term negotiations. Rather, the email explicitly states that "We do not believe that any of the guidance or procedures included in this document change anything related to the existing labor agreement." Adequate notice must "apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change." *See U.S. Army Corps Of Engineers Memphis District Memphis, Tennessee* and *National Federation Of Federal Employees, Local 259,* 53 F.L.R.A. 79 (1997). Notice of a proposed change in conditions of employment must be "sufficiently specific and definitive" to adequately provide the exclusive representative with a reasonable opportunity to request bargaining. *See, e.g., Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio* and *American Federation of Government Employees Local 1592*, 41 F.L.R.A. 690 (1991)

Although the attachment ultimately did include changes, an adequate notice cannot force the Union to hunt through a multi-page attachment. An attachment containing a buried reference to a change is not adequate. Rather, adequate notice affording an opportunity to bargain must explicitly refer to a change. *See United States Dep't of the Air Force, 913TH Air Wing, Willow Grove Air Reserve Station,* and *National Association of Government Employees, Local R3-32, SEIU*, 57 F.L.R.A. 852 (2002). (noting that the Union president received a staffing memo that identified security personnel and rules for staffing posts, but no change was explicitly

communicated to the union.) In the instant case, the employer not only obscures but also misleads: the August 8, 2016 purported notice specifically states that the procedures do not constitute changes.

The intended recipient of the August 8, 2016 message is unclear. Lelansky's inclusion of the Labor Relations office as the primary recipient suggests that the message was a request from RD management to management's own agent in the labor-management relationship, not an attempt to initiate a formal process with the employees' exclusive representative. As Union witnesses Bhatia and Amidon testified at hearing, it is typical for Labor Relations to formally give an Article 32 notice. It would be reasonable, therefore, for any Union official who saw the message to consider it an internal management communication that the general AFGE email box was copied on by a well meaning but novice supervisor. Should anything actually be changing in the area of time and leave, it would be reasonable to assume, Labor Relations would be in touch.

The Union maintains that the August 8 email did not come from an official possessing the authority to notify the Union of a change. A notification under Article 32, Mid-Term Bargaining, is the first step in opening the contract. Per NARA Directive 101, Part 4, Union Exhibit 5, this step should be accomplished by NARA's Labor and Employee Relations Branch. According to the directive, this office "negotiates agreements with the union on behalf of NARA management." In Article 1, Section 1 of the National Agreement, "the agreement is entered into between the Union and the National Archives and Records Administration, hereafter referred to as 'NARA,' 'Agency' or 'Management'." This means that in bargaining interactions, Agency officials must have the standing and authority to represent Agency

management as a whole. The purported notification came from a Supervisory Archivist in Research Services, Deborah Lelansky. This official lacks the authority to reopen a master contract on behalf of the Agency. As Lelansky acknowledged at hearing, her management authority is limited to the Office of Research Services. Union witnesses Bhatia and Amidon testified at hearing that notifications of changes normally come from Human Resources, not from individual supervisors, because institutional interactions involving bargaining take place between Labor Relations and the Council President, Executive Vice President, and other Union representatives appropriately designated.

The Agency suggests that the contract's silence on who notifies the Union of changes in conditions of employment means that any NARA official is in a position to give administratively acceptable notice to the Union to initiate mid-term negotiations. Read in its entirety, and in the context of the labor-management relationship generally, this view cannot be supported. First, in context, Article 32 notice can only be given by an official with the authority to deal with the Union institutionally on a national contract. The bulk of Article 32 contains detailed procedures regarding bargaining techniques, which are the specialized area of practice of the Agency's Labor Relations operation, and not practices in which program managers and supervisors would be trained. NARA Directive 101, Section 4 supports the position that negotiations with an exclusive representative are to be carried out by Labor Relations, and Agency witness Lelansky herself testified that this is a task Human Capital, not each program office, handles.

Second, the essence of the contract leads to only one reasonable reading. Article 32 specifies that "Union-initiated mid-term bargaining changes will be submitted in writing to the Senior Labor Relations Specialist through the Council President." Although the reverse -- that

Agency-initiated mid-term bargaining changes will be submitted in writing to the Council President through the Senior Labor Relations Specialist -- is not explicitly contained in the agreement, the Union suggests that this was simply so obvious, in light of NARA 101 and past practice, that it was assumed. NARA's labor relations training for managers and supervisors, Union Exhibit 7, supports the Union's position. The training's "5 Day Notice" section specifies that "Changes like this should be coordinated through the Labor Relations Staff." It instructs managers and supervisors that they may be asked to participate in briefing or attend negotiations." The clear implication is that Labor Relations will be in the driver's seat.

On cross-examination, Agency witness Hobbs had to acknowledge that if the August 8 message could count as notice from an authorized official, any and every manager had Article 32 authority. The Union submits that this is an ex post facto justification, given bargaining history, past practice, and common sense questions of administrability. However, it is a necessary concession for the Agency to make the the square peg of Lelansky's August 8 message fit into the round hole of adequate notice. This reading of the contract, however, would strain credulity because it is so incongruous with Section 2(b). If NARA and AFGE Locals bargained local supplemental agreements, the agency's position may be a reasonable reading, but as a rule for administering a national master contract, it is not.

III. The Union did not waive its right to bargain over the changes.

Insofar as the employer's argument is premised on the assumption that the Union had the responsibility to request bargaining and chose to waive bargaining, this argument fails because the Union's responsibility to request bargaining was not triggered by adequate notice of a change

in working conditions. Receipt of adequate notice is itself a prerequisite for a waiver of bargaining. If the Union did not receive adequate notice of changes, it could have waived bargaining rights only if such waiver were "clear and unmistakable." *See Dep't of Labor, Employment Standards Administration, Wage and Hour Division* and *AFGE Local 2513*, 21 F.L.R.A. 484 (1986).

When an agency asserts waiver of bargaining rights as a defense to a charge that it failed to bargain over a change in conditions of employment, it bears the burden of establishing that the exclusive representative received adequate notice of the change. *See U. S. Army Corps of Engineers, Memphis District, Memphis, TN and National Federation of Federal Employees Local 259*, 53 F.L.R.A. 79 (1997). For the reasons discussed above, the Agency has failed to establish such receipt. By contrast, the Union has submitted substantial evidence and testimony that the Agency is playing fast and loose in asserting that the August 8 message is adequate notice. The National Agreement provides that "[f]ailure to follow the procedures outlined in paragraph A(1) above will be deemed to constitute acceptance of the changes by the Union and the Agency may proceed to implement the proposed changes." For this section to have its full force, however, it is presumed that the Agency will have fully complied with its own notification obligations under Article 32 -- namely, the obligation to give notice to the appropriate official and to clearly represent proposed changes as the changes they are.

The Agency acts at its peril when it attempts to notify the exclusive representative in a manner other than that specifically provided for in the parties' agreement. Union witness Amidon testified at hearing that the the Council President first heard of the change from her, on September 1st, and not on or around August 8, when Lelansky sent her message to the general

council email address. When the Agency fails to follow the established procedures for providing notice, and it turns out that notice was not effectively received by the Union's designated representative, the Agency cannot be held harmless. Union witness Amidon testified to the organizational challenges the Union was facing at the time of the events in question. In times of such challenges, it is more, not less, important that the Agency fulfill the procedural requirements for giving notice to the authorized representative, to ensure that no matters in the collective bargaining relationship go unattended.

As with the question of notice, the Agency again relies on communication with Council Secretary Amidon to build its case for waiver. The Agency mistakenly treats the questions in her August 18 email as the official reply on behalf of the Council President. As explained above, the Council Secretary was in no position to officially reply on the behalf of the Union, and the Agency was in no position to accord her the recognition to do so. Because Amidon was not the Council President and had not been designated by the Council President to handle the matter, she could not give a "clear and unmistakable" waiver. Moreover, since the Agency did not transmit adequate notice, it did not trigger the Union's contractual 5 days to request briefing or bargaining in the first place.

IV. The Agency violated the Collective Bargaining Agreement and the Statute by implementing changes to time and leave policy and procedures.

In standardizing core hours in RD without giving the Union adequate noticed, the Agency violated 5 U.S.C. § 7116(a)(1) and (5). Although NARA 333.24, Agency Exhibit 3, assigns the responsibility for establishing core hours to the Executive for Research Services,

management acknowledged at hearing, through Agency Witness Hobbs, that changes affecting working conditions are subject to bargaining obligations, even when delegated to an executive. As such, the impact and implementation of changes to core hours was bargainable. Because the Agency did not provide the Union adequate notice of changes to working conditions, the Union did not have the opportunity to bargain the impact and implementation of the adjustment of core hours.

Assuming, *arguendo*, that the August 8 email was procedurally adequate notice of a change, the substance of the change nevertheless addressed several matters on which the parties had already come to agreement. The "covered by" doctrine is based on the notion that a party should not have to bargain over matters contained in an existing agreement between the parties. *See American Federation of Government Employees, Local 225 and U.S. Department of the Army, Armament Research, Development, and Engineering Center, Picatinny Arsenal, New Jersey*, 56 F.L.R.A. 686 (2000). To determine whether a matter is covered by an existing contract, the Authority determines whether a matter is expressly contained in the collective bargaining agreement. *See, e.g., U.S. Department of Health and Human Services, Social Security Administration, Baltimore, MD and AFGE, National Council of SSA Field Office Locals, Council 220*, 47 F.L.R.A. 1004 (1993).

Under the Agency's view, the employer would be permitted to pepper the Union with notifications to change procedures and arrangements already established in the contract, and implement them five days after the Union didn't respond. This view is not supported by Article 33, Section 1, according to which the agreement "will remain in full force and effect for a period of 5 years after its effective date" and "will be automatically renewed for yearly

periods" unless "either party at the national level gives the other party notice of its intention to renegotiate the Agreement no more than 90 nor less than 30 days prior to its termination date." As Agency witness Hobbs acknowledged at hearing, the agreement was in full effect at the time of the events in question. The Union maintains that changes to leave procedures, credit time, and medical documentation required for sick leave are not subject to change until the term contract is expired, except by express agreement between the parties.

The only reasonable interpretation of Article 32 is that it covers matters not already covered by the National Agreement. In other words, mid-term changes speaks to changes that arise that are not covered by the agreement. The Agency treats the article, including the 5 day notice period, as covering changes to the agreement itself. This reading cannot be reconciled with Article 33. Parties may choose to bargain over matters contained in or covered by an existing agreement, but these are considered permissive subject of bargaining. *See National Association of Government Employees, Local R3-32* and *Dep't of the Air Force, 913TH Air Wing Willow Grove, Air Reserve Station, Willow Grove* 61 F.L.R.A. 127 (2005). In the instant case, the Agency should have treated its request as a permissive subject of bargaining, for which express agreement between the parties to modify the agreement is required. The parties have a history of treating permissive subjects in this manner. For example, Union Exhibit 6 is an MOU signed by the parties that modifies the terms the contract.

V. Conditions changed in the RD Core Time and Leave Procedures Document are already covered by the agreement and violative the agreement and regulation.

The Union has identified three specific changes in the RD Core Time and Leave Procedures Document that violate procedures already established in the National Agreement. They are in the areas of credit time, medical documentation, and requests for leave.

Credit Time

In Article 7, Section 5, the parties have bargained a five part contract section governing earning and use of credit hours. Under the agreement, an employee may elect to earn credit time "with the supervisor's prior approval." Agency witness Cummings acknowledged at hearing that "the supervisor" referred to in section C is the employee's front line supervisor. This language leaves supervisors the discretion to permit employees to work credit time subject to the supervisor's judgment and in the realms of workload and appropriate management controls. Nothing in the National Agreement disallows combination of leave use and earning of credit time on the same day. The RD Units Core Time and Leave Procedures document, meanwhile, states that "Supervisors will not approve the earning of credit time for days when leave is used." Although Agency Witness Lelansky testified at hearing that the decision to categorically disapprove all such requests was made collectively by RD supervisors, the Agency's own opening statement and Ms. Cummings herself at hearing make clear that this was the Research Services Executive's decision. The Agency maintains that it is management's right, at the level of the Executive, to categorically disapprove all such requests as a matter of policy.

The arbitrator should reject this position. The collective bargaining agreement includes provisions controlling the procedures by which management exercises its rights under §7106.

These procedures include the levels at which management decisions are made. The Union bargained a §7106(b)(2) procedure under which management decision making in the area of credit time would take place at the lowest possible level. When Cummings instructed supervisors regarding approval and earning of credit time, the Agency unilaterally changed and violated the terms of Section 5(c). The FLRA has upheld arbitral awards that the Agency violated the contract when it removed supervisory discretion that the union had bargained for. *See Social Security Administration* and *International Federation of Professional and Technical Engineers, Association of Administrative Law Judges,* 69 FLRA 208 (2016). (noting that the Agency "unilaterally change[d]," and violated the contract's provision that "[a]dditional days may be worked on telework with the approval of the [supervisor]" when it instructed supervisors to "use their discretion to not use their discretion" to approve additional telework.)

The Union presented at hearing testimony of the harm this unilateral change to credit time procedures has caused. As Union witness Black testified, unit employees in Research Services Operations typically earn credit time in the morning, before the unit opens for public business. When an employee requested six minutes of unscheduled leave for unexpected personal reasons in the afternoon, the new policy required her to forfeit remuneration for the credit time she had already worked, because credit time and leave cannot be combined in the same day. If the Agency wanted to forbid combination of credit time and leave, it should have presented this proposal to the Union in term negotiations, whereupon the Union could have at the very least negotiated procedures and appropriate arrangements that could have prevented the type of harm about which Ms. Black testified. More generally, the prohibition on combination of

earning of leave and credit time use significantly reduces work hour flexibility, even in units that are not public facing.

Medical Documentation

The RD Procedures document establishes invasive requirements for routine sick leave requests. These requirements go above and beyond what is established in the collective bargaining agreement as well as NARA and government-wide policy. Article 9, Section 3(D) establishes management's right to require "medical certification" or "medical certificates" for "absences of four or more consecutive workdays" or "situations where management has reasonable cause to believe that the leave has been abused." NARA 304.39 and 304.41 also refer to a "certificate from a physician or health care practitioner" or a "physician's certificate or other proof of sickness." The Sick Leave section of the RD Units Core Time and Leave Procedures Document, meanwhile, states that "Sick leave requests for more than three days may require additional documentation (consists of diagnosis, prognosis, treatment plan, identification of restrictions, and signature of health care provider)." Similarly, the Medical Documentation section of the document states that medical documentation "consists of diagnosis, prognosis, treatment plan, identification of restrictions, and signature of health care provider" and "may be requested" for "sick leave for more than 3 days."

This expansive definition of "physician's certificate" violates the contract and NARA policy.[2] Under 5 CFR § 630.201, a medical certificate is "a written statement signed by a

[2] Government-wide regulation is incorporated into the National Agreement by reference. Article 9, Section 1 of the National Agreement states that "Leave will be administered in accordance with the provisions of this Article and NARA leave regulations, NARA 304." NARA 304, in turn, includes 5 CFR, Part 630 as an authority.

registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, or to the period of disability while the patient was receiving professional treatment." This is the definition applicable under 5 CFR § 603.405. Under this definition, a certificate must address what in the job the employee cannot do, or state that the employee is incapacitated and unable to perform any work. Revelations of diagnosis are not required. The employer is confusing "medical certificate" under 5 CFR § 630.201 with "medical documentation" under 5 CFR § 339.104. This latter definition pertains to medical qualification determinations and is not the one applicable to routine sick leave requests. NARA 304 only mentions this lengthy list of items including diagnosis, prognosis, etc. in NARA 304.64, "What medical documentation must I submit when requesting sick leave to care for a family member with a serious health condition?" The employer violates the contract, the CFR, and its own policy by instructing employees that, in those instances where a medical certificate is required, this broad range of medical documentation is what that certification must consist of.

Requests for Leave: the 24 Hour Rule

The Collective Bargaining Agreement provides in Article 9, Section 2 that employees "should ordinarily request annual leave at least one day in advance." The RD Units Core Time and Leave Procedures document, meanwhile, states that "Requests for leave must be submitted at least 24 hours ahead of leave time and approved by certifying official." "Must" is a strong word, expressing requirement and obligation.[3] The plain text of the rule indicates that submission in at least 24 hours in advance is a necessary condition for non-emergency leave to

[3] To "be required by law, custom, or moral conscience"; "be obliged to." "Must."*Merriam-Webster.com*. 2017.https://www.merriam-webster.com (30 May 2017).

even be considered. Union witness Bhatia testified that it is past practice for leave requests to be treated with more flexibility. A day did not necessarily mean 24 hours from the date for which leave is requested, and inclusion of the term "ordinarily" suggests there are times when the employer may not require an entire day -- however day is defined -- for a regular request. A 24 hour rule carries a unit measurable precision that the parties did not write into their agreement. Agency witness Lelansky acknowledged at hearing that the rule in the RD document is "more precise" than that contained in the National Agreement. By including this rule in what management acknowledges in Union Exhibit 9 are "new procedures," the employer has unilaterally changed and violated the terms of Article 9, Section 2.

Turning to the question of what constitutes a day, the parties define in their agreement a day in two different ways. According to Article 6, Section 1 of the agreement, "[t]he basic required workweek schedule will be 5 consecutive days of 8 hours each, normally Monday through Friday. Within each pay period employees will be scheduled for 2 consecutive days off." This section defines a day as an 8 hour work day -- the most applicable definition for the circumstances of Article 9. According to Article 1, Section 3, Computing Time Limits, "[a]ll 'days' cited herein are 'calendar days' unless otherwise specified." The Union does not argue that this definition is controlling, because in context it appears applicable only to the specific situation of computing time limits for handling Union-Agency interactions such as grievance processing. However, the definition is applicable insofar as it is constitutes one of two specific definitions of a day contained in the agreement. A calendar day is defined as the time from

midnight to midnight.[4] No definition of a day contained in the agreement explicitly refers to a day as a 24 hour period with an event-driven countdown.

Agency witness Cummings testified at hearing that the 24 hour rule was designed to reduce instances of employees who are absent without leave (AWOL), who submit leave requests immediately before stopping work, or who attempt to request leave upon returning from an unapproved absence. This suggests that the 24 hour rule is an attempt to find a shortcut for resolving a concern management already has sufficient tools to deal with. The 24 hour rule is a blunt instrument that harms all employees. What is required are well trained managers, not arbitrary rules that violate procedures already established through collective bargaining.

VI. The changes established in the RD Core Lime and Leave Procedures document are more the *de minimis*.

An agency has a statutory duty to bargain over a change in bargaining-unit employees' conditions of employment when that change has a more than *de minimis* effect on unit employees' conditions of employment. In assessing whether the effect of a change 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." *See Dep't of Labor* and *American Federation of Government Employees, Local 12* 70 F.L.R.A. 27 (2016).

Union witnesses testified at hearing about the nature and scope of changes. Witness Bhatia testified that changes to core hours from beginning at 9:30 AM to 9:00 AM meant some

[4] "Calendar day." *Merriam-Webster.com*. 2017. https://www.merriam-webster.com (30 May 2017).

employees had to significantly adjust their daily schedules. Bhatia testified that the new prohibition of combining earning of credit time with use of leave significantly reduced flexibility. Union witness Black testified that the rollout of the changes in Research Services Operations (RDO) was swift and constituted a significant change in work life. The 24 hour leave rule ended the existing flexible understanding of what constituted a day for purposes of leave request. Most significantly, the prohibition on combination of earning credit time and using leave on the same day meant that forfeiture of remuneration for hours worked was a derivative feature of the new policy, in those cases where emergency leave was requested after credit hours had been worked. The effect of invasive requirements for medical documentation has the reasonably foreseeable effect of deterring legitimate leave use when an employee does not want, or is not able, to secure and submit to management such a laundry list of personal information.

The Agency introduces Agency Exhibit 4, a presentation entitled Leave Administration for Staff, to support its position that the RD procedures document is a simple extension of management efforts to educate employees on existing policies. The Agency suggests that the changes are therefore non-existent or *de minimis*, and that the Union's not having raised concerns about this document and the meetings at which it was presented supports its position that the Union waived bargaining. The Union stipulates that it was properly notified of, and was represented at, the formal discussions at which Human Resources officials gave this presentation to RD employees. This presentation, however, does not contain the violations the Union alleges are included in the RD procedures document. For example, the presentation correctly states that "Acceptable medical documentation for 3 days or more of sick leave must

state that the employee was incapacitated and unable to report for duty," while the RD procedures document states that "Sick leave requests for more than three days may require additional documentation (consists of diagnosis, prognosis, treatment plan, identification of restrictions, and signature of health care provider)." The presentation does not include the hard and fast 24 hour rule announced in the RD document, and instead correctly states that leave should ordinarily be requested "at least one day in advance." Finally, the Leave Administration for Staff presentation is silent on both core hours and approval to work credit time. The Union's knowledge of this HR presentation in no way supports the Agency's position that the RD procedures document is a mere reiteration of the content of the HR presentation. Nor does the Union's prior awareness of this HR document weaken its objections to the new RD time and leave policy.

The Agency seeks to draw a distinction without meaning between announcing its policy and implementing its policy. The Agency suggests, for example, that the Union's objections to the new policy are groundless because neither of the RD management officials who testified were aware of non-emergency annual leave requested under 24 hours having been denied as not timely requested. The arbitrator should reject the the very premise upon which this argument is based. Although it has done so in several instances, the Union need not point to individual instances in which the violative policy has been enforced. When the employer announces a policy that is in violation of the bargaining agreement, or that was subject to a bargaining obligation that the employer did not fulfill, promulgation of the policy is sufficient to establish the violation. Announcement of the new rule effectively sets terms and conditions of

employment. Once the policy is established, it is unknown how many employees may have been or may in the future be negatively affected by simply following the policy.

CONCLUSION

The facts of the case fully support the Union's position that the grievance was timely filed; that the Agency implemented changes without giving the Union adequate notice under the National Agreement and the Statute; that the Union did not waive bargaining; that the changes are more than *de minimis,* and that some of the changes violate or are covered by the National Agreement. As a result, for the foregoing reasons, the arbitrator should issue a *status quo ante* remedy; order the Agency to withdraw the rules that violate the National Agreement; order the Agency to post and electronically transmit an appropriate remedial notice; order the Agency to bargain impact and implementation of changes to the extent required by Statute; and order the Agency to make whole all employees negatively affected by the changes, to the extent allowed by law. To this end, the Union requests that the arbitrator order the Union and the Agency to jointly establish a list of employees who are owed back pay for having to work hours for which they were not remunerated, or for other reasons that result from violations that the arbitrator sustains. The Union requests that the arbitrator retain jurisdiction through final disposition of the back pay claims.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on the 12th day of January, 2017 on:

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