In the Matter of:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF NARA LOCALS 260

Union

and

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency

_____/

David P. Clark, Arbitrator
(RD Time and Leave Policy)

August 2, 2017

Decision and Award

Statement of the Case

This arbitration involves the American Federation of Government Employees, Council of NARA Locals 260 (hereinafter "the Union") and the National Archives and Records Administration (hereinafter "the Agency"). The Agency's mission as an independent agency of the U.S. government is to preserve and provide access to the historical records of the federal government. The bargaining unit employees in this case work in one area of the Agency, called the Office of Research Services (also known as the office code abbreviation RD, hereinafter "RD"). The employees at RD assist the public with access to federal records. The grievance arose when the Agency issued a list of time and leave procedures for employees at RD, which the Union complained was inconsistent with sections of their National Agreement (hereinafter "the Agreement") and their rights under the Federal Service Labor-Management Relations Statute (hereinafter "the Statute"). When the grievance was not resolved, the matter was escalated to arbitration and heard by the undersigned on May 12, 2017, 2017, after which the Parties submitted briefs.

Issues

The Parties submitted the following joint statement of the issues:

(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, D.C. If so, what shall be the remedy?

Relevant Portions of the Parties' Collective Bargaining Agreement

Article 6 Hours of Work and Overtime
Section 1. Basic Work Schedule

A. The administrative workweek will be a period of 7 consecutive calendar days beginning on Sunday.
B. The 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. Management will consider employee requests for non-consecutive days off. . .

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Article 7 Alternative Work Schedules
Section 1. General

The Parties agree that all full-time and part-time employees will have the opportunity to work a flexible work schedule (flexitime or flexitour) or a compressed work schedule as described below.

Section 2. Definitions

A. Flexitime and flexitour are two forms of flexible schedules established by NARA under 5 U.S.C. § 6122.
    1. Flexitime: Allows employees to very their time of arrival and departure within designated flexible time bands that surround designated core hours. Employees are required to fulfill the basic work requirement. Employees on a flexitime schedule may earn credit time in accordance with Section 5 (Credit Hours) of this Article.
    2. Flexitour: Allows employees on an otherwise fixed schedule (excluding a compressed work schedule) to vary the time of arrival or departure within designated time bands for the sole purpose of earning credit time. Credit time earned on a flexitour schedule may be used to reduce the length of the workweek or another workday in accordance with Section 5 (Credit Hours) of this Article. Employees on a flexitour schedule may earn credit time in accordance with Section 5 (Credit Hours) of this Article. (For example, if an employee is required to open a facility at 6:00 a.m., the employee may opt to work past their basic work requirement with the approval of their supervisor in order to earn credit hours).
B. Core time. The Agency designated period during which all employees on a flexitime schedule must be present unless in a leave status or on lunch break. . . .
E. Credit hours. Any hours in a flexible schedule, established under 5 U.S.C. § 6122 which are in excess of an employee's basic work

requirement and which the employee elects to work so as to vary the length of the work week or a work day. . . .

Section 5. Credit Hours

A. Only employees working on a flexitime or flexitour schedule may earn credit hours. Employees who work on a 5/4-9 or 4/10 compressed work schedule are on a fixed tour of duty and are not eligible to earn credit hours.

B. Full-time employees may carry over up to 24 hours of credit time from one bi-weekly pay period to the next. Part-time employees who participate in the flexible work program may accumulate up to one quarter of the hours of the employee's basic work requirement (as defined in Section 2) for carryover from one bi-weekly pay period to the next. Employees are responsible for requesting prior approval to use credit hours and to give sufficient notice to supervisors. A full-time employee who has accumulated more than 24 credit hours (or a part-time employee who has accumulated more than the maximum allowed) is subject to forfeiture of the excess credit hours if they are not used prior to the end of the pay period. The Agency is not obligated to approve the use of credit hours solely to prevent the forfeiture of the excess credit hours. The Agency may disapprove an employee's request for approval to use credit hours if the employee did not provide sufficient notice of the request or if there are valid work-related reasons for disapproving the request.

C. ***With the supervisor's prior approval, based on limiting factors such as workload or appropriate Management control, an employee on flexitime or flexitour may elect to earn credit time. The minimum amount of credit time that may be earned at any one time is 6 minutes. After that, credit time may be earned in 6-minute increments up to two hours. Credit time can only be earned in the performance of official duties and work performed will be evaluated under the employee's performance standards.***

D. Employees may earn credit time on a voluntary basis.

E. Credit hours may not be used in advance of being earned. The use of earned credit hours is subject to the same regulations and contractual agreements governing the use of leave. Credit hours can be used in conjunction with other forms of approved leave.

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Article 9 Leave

Section 1. General

A. Leave will be administered in accordance with the provisions of this Article and NARA leave regulations, NARA 304. However, should any provisions of this Article conflict with the provisions of NARA 304, the provisions in this Agreement will prevail.

B. Employees have the right to use leave subject to supervisory approval.
C. Leave may be used in 6-minute increments. Recording of leave increments must be consistent with the Agency's payroll reporting system and changes will be made as appropriate.
D. For the use of credit time, see Article 7, Alternate Work Schedules.

Section 2. Annual Leave

A. Annual leave is a period of paid absence from duty for vacation or other personal purposes.
B. ***Employees should ordinarily request annual leave at least one day in advance. For leave requested in advance, employees will normally not be required to divulge how they intend to use their time off in order for approval of annual leave. The amount of advance notice depends on factors such as duration of the leave and problems involved in adjusting work schedules. Consistent with the needs of the Agency, annual leave requested in advance will be approved***. . . .

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Section 3. Sick Leave . . . .

D. Documentation:

1. An employee must state on the OPM 71 if her or his request for sick leave is for family care or bereavement purposes.
2. An employee who requests sick leave under the FMLA is required to provide acceptable medical documentation as provided by the law (5 CFR 630.1207).
3. ***If management possesses reason to support a belief that the employee's sick leave has been abused, Management can require medical certificates for the period. Employees will not be required to reveal the nature of the illness for leave up to three days, except for situations where management has reasonable cause to believe that the leave has been abused. Management may also require medical documentation for absences of four or more consecutive workdays***. . .

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Article 24 Grievance/Arbitration

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Section 7. Steps of the Grievance Procedure

A. Timeliness.

1. 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.

By mutual consent, the Parties may extend any time limits or waive any step of the grievance procedure. . . .

2. Failure to follow any step of the grievance procedure (i.e., not file a grievance with wit the proper official or not provide all information required by section 7D) will result in the grievance being remanded to the grievant or designated representative. Upon receipt of the remanded grievance, the grievant will have 5 days to properly file the grievance.

3. Grievances that are not submitted initially within the time limits specified in Section 7A(1) or after remand as specified in Section 7A(2) may be rejected as untimely.

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Article 32 Mid-term Negotiations

Section 1. Statutory Obligations

In promulgating NARA regulations relating to personnel policies and practices and matters affecting conditions of employment, the Parties will negotiate consistent with law.

Section 2. Notice

A. The Agency agrees to provide the Council President, unless otherwise specified by the Union, with written notifications of changes in working conditions. Management proposed changes will be referred to the Union for review in advance of implementation of any change. Upon request, the Union will be given a briefing on the proposed change. NARA acknowledges that managers will not implement changes in working conditions without complying with this article.

B. Union-initiated mid-term bargaining changes will be submitted in writing to the Senior Labor Relations Specialist through the Council President.

Section 3. Mid-term Ground Rule Procedures

A. Management-initiated bargaining.
    1. Within 5 workdays of receipt of notification of a proposed change(s), the Union may request to negotiate (and receive a briefing if desired). The Union will indicate a preference for traditional or Interest Based Negotiation (IBN) techniques when requesting negotiations. If a preference for IBN is indicated, the Union will also submit a list of issues at that time. If the agency agrees to IBN, the parties will begin

negotiations within 3 workdays, or other mutually agreed upon date, after receipt of the issues. If the agency declines to use IBN, the Union will have 5 workdays from receipt of the Agency's declination to submit written proposals. If the Union chooses traditional negotiation techniques, the Union will submit written proposals within 5 workdays after requesting negotiations. If traditional negotiations are used, the parties will meet to negotiate within 3 workdays, or a mutually agreed upon date, after the Union has submitted proposals. Reasonable extensions may be granted for just cause. A briefing will not affect the above-stated time limits.

2. Failure 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 change.

B. Union-initiated bargaining.
The Union will notify the Agency in writing of a desire to initiate mid-term bargaining. The Union will provide traditional bargaining proposals or a list of issues consistent with IBN techniques. Within 10 workdays of receipt of this notification, the Agency will respond to the Union indicating whether the Agency believes there is a legal obligation to bargain and, if so, a preference for traditional or IBN techniques. If a preference for IBN is indicated, the Agency will also submit a list of issues at that time. IBN negotiations will begin within 5 workdays, or other mutually agreed upon date, after the exchange of issues. If the Agency chooses traditional negotiating techniques, the Union will submit written proposals. If traditional negotiations are used, the parties will meet to negotiate within 10 workdays, or a mutually agreed upon date, after the Union has submitted proposals. Reasonable extensions may be granted for just cause.

C. General.
1. Changes that are negotiated or agreed to pursuant to this Section will be duly executed by the Parties and will become an integral part of this Agreement and subject to all of its terms and conditions. At the request of either Party a mid-term bargaining agreement will be documented.

2. If otherwise in a duty status, Union negotiators will be placed on official time when traveling to the negotiation site and during the negotiation sessions, including mediation and impasse proceedings. The Union will provide all expenses for its bargaining representatives.

3. The Union may have present on official time the same number of negotiators as the Agency has on official time. The Union will not be barred from having a National Officer, Council Officer, or legal representative at these proceedings. The Union agrees to inform the Agency in advance if a legal representative or National Officer will be attending.

4. Negotiations will take place in space provided by the Agency and will be held as needed.

5. Either Party may request assistance from the Federal Mediation and Conciliation Service after either Party has declared impasse.

6. The Agency agrees to provide the Union with requested information and data as required by 5 U.S.C. 7114.

7. The only ground rules governing midterm negotiations will be those contained within this article.

Article 33 Duration and Termination

Section 1. Length of the Agreement

This agreement will remain in full force and effect for a period of 5 years after its effective date. It 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. When either party gives notice, the parties will meet to discuss the procedures for renegotiation within a reasonable amount of time. If re-negotiation of an agreement is in progress but not completed upon the expiration date of this Agreement, this Agreement will be automatically extended until a new contract is effective.

Section 2. Amendments

All amendments to this Agreement will terminate upon expiration of the National Agreement

See J.Ex. 1 (areas of emphasis supplied by Arbitrator).

Relevant Sections of the Agency's Document, "RD Units Core Time and Leave Procedures"

Credit Time:

. . . .

- Supervisors will not approve the earning of credit time for days when leave is used

. . . .

Annual Leave:

. . . .

- Annual leave requests must be requested and approved at least 24 hours in advance of leave...

. . . .

Sick Leave:

. . . .

- 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).

. . . .

Medical Documentation:

- Consists of diagnosis, prognosis, treatment plan, identification of restrictions, and signature of health care provider.
- May be requested in the following circumstances:
  - When employee is on letter of Leave Restriction
  - FMLA requests
  - LWOP requests
  - Advanced leave
  - Sick leave for more than 3 days
  - If supervisor suspects sick leave abuse.

Relevant Facts and Testimony

The Parties stipulated that the Union President at the time of the grievance, Darryl Munsey, had retired from the Agency prior to August, 2016, but the Agency maintained a personal "nara.gov" email address for him.

On August 8, 2016, the Agency sent an email (captioned "Review of RD Core Time and Leave Procedures Document"), addressed to the Union's general institutional email address (afge.council260@nara.gov) as well as several non-Union recipients, stating as follows:

> During the second quarter of FY 16 all RD staff and managers received training from HTS. As a follow-up to that training, the RD managers have created a concise guide for employees on the procedures relating to work hours and leave which we would like to roll-out to staff at the beginning of FY 17. This document is an attempt to re-emphasize what was discussed in the training as well as provide a consistent approach to how the RD management intends to define work hours and the implementation of leave procedures moving forward. We do not believe that any of the guidance or procedures included in this document change anything related to the existing labor agreement but welcome your comments and feedback prior to communicating this to RD staff.
>
> Please respond back to Ann Cummings, RD, with any concerns or questions.

See J.Ex. 5 (containing an attachment titled, "RD Work Hours and Leave Procedures.docx").[1]

On August 18, 2016, Amy Amidon, Union Secretary, sent an email to the Ann Cummings, captioned "Review of RD Core Time and Leave Procedures Document," stating in relevant part:

> In reviewing the new RD Core Time and Leave Procedures document, we have a couple of concerns about the change in core hours for many offices that have long-established 9:30 cut off times. From what we can ascertain, some offices have had a 9:30 arrival time for at least a decade and this change may have significant impact on staff within those work units.
>
> Our questions, then are as follows:
>
> What is the rationale for the change? Is it consistent with other offices across NARA?
>
> Has management done an assessment to determine how many staff will be affected by the change? If not, is there a plan to assess this before the change takes effect? It is my understanding that offices such as RDE, for example, have nearly a quarter of their staff arriving between 9:00 and 9:30.
>
> Has management considered any negative impact the change might have on staff or what might be done to mitigate it?

[1] The attached document is part of the record as J.Ex. 3, and is titled, "RD Units Core Time and Leave Procedures." This document describes the Agency's procedures that are the subject of the Union's grievance. Hereafter, the Arbitrator will refer to the content of this document as the Agency's "T&L Procedures")

> Have the affected staff been briefed about the changes? If not, when will the staff be notified that their arrival time will be changed?

See A.Ex. 1.

On August 24, 2016, Kevin Dill, Human Resources Specialist, sent an email to Audrey Amidon and Ann Cummings (also copying others) captioned "Management Response: Review of RD Core Time and Leave Procedures Document," stating in part:

> [ ] Management provided notification to AFGE on August 8, 2016 regarding the Core Time and Leave Procedures in RD. As you know, the CBA states that the Union has 5 days to respond if they wish to engage in negotiations and/or request a briefing. Your response to Ann Cummings came in on August 18, 2016, which is past the deadline.
>
> However, in an effort to continue a good working relationship and partnership with AFGE, management is providing the following answers to your questions posed from your email:
>
> > What is the rationale for the change? Is it consistent with other offices across NARA? This change is the result of input from staff who were unhappy that units across RD are not consistent in their Core Time and Leave Procedures. When we looked at the practices of each unit within RD, we realized that many of the units are not in compliance with the Labor Agreement since we have a flexible time band that was three and half hours, rather than three hours. Since RD is an organization that is responsible for interacting with on-site researchers, we determined that the core hours of 6:00-9:00 were the best to consistently meet the requirements of our work. Other offices across NARA do not have the same responsibility to meet the needs of on-site researchers.
> >
> > Has management done an assessment to determine how many staff will be affected by the change? If not, is there a plan to assess this before the change takes effect? It is my understanding that offices such as RDE, for example, have nearly a quarter of their staff arriving between 9:00 and 9:30. While we are cognizant of staff who routinely arrive between 9:00 and 9:30, we determined that for the purposes of consistency and meeting the requirements of our work, this schedule is the best choice for the organization.
> >
> > Has management considered any negative impact the change might have on staff or what might be done to mitigate it? We believe that the negative impact can be mitigated by allowing staff who want to arrive between 9:00 and 9:30 the option of choosing a fixed flexi-tour as outlined in the Contract.

> Have the affected staff been briefed about the changes? If not, when will staff be notified that their arrival time will be changed? Affected staff could not be briefed yet since in accordance with the Labor Agreement, we needed to consult with the Union prior to putting the new core hours into effect. Staff will be notified at least 72 hours prior to implementation, as outlined in the Labor Agreement. However, it is our goal to implement the new core hours at the beginning of the new FY, so staff will likely have more than 30 days notice . . . .

See U.Ex. 3.

On September 1, 2016, Debora Lelansky issued an email (captioned "Core Hours and Leave Procedures Meetings") announcing as follows, in relevant part:

> As some of you may have heard, the RD management group has agreed to procedures for all RD staff and managers relating to the administration of work hours and leave procedures. These procedures have been reviewed by Labor Relations, the Union, and the COO and we are ready to distribute to staff. The new procedures are attached and will take effect on October 17. We will be holding a number of meetings over the next two weeks to provide Special Media staff the opportunity to discuss the procedures, voice their concerns, and ask questions. . . .

See U. Ex. 9 (containing an attachment titled, "RD Work Hours and Leave Procedures.docx"). That same day, the Agency's Labor Relations office forwarded Ms. Lelansky's message to the Union's general email box. *Id.*

On September 21, 2016, AFGE Council 260 filed a grievance on behalf of itself as an institution, and bargaining unit employees in RD, alleging that some of the Agency's new T&L Procedures were in violation of Articles 7, 9 and 33 of the Parties' Agreement that "covered" those same procedures; and that the announcement constituted a unilateral change in terms and conditions of employment in violation of 5 U.S.C. § 7116(a)(5). In terms of a remedy, the grievance requested, among other things, that "the RD Policy Document be immediately withdrawn and that its implementation be rescinded." *See* Grievance, J.Ex. 2.

On October 5, 2016, Ms. Cummings issued a letter stating, in part, that the grievance was not filed in an untimely manner because: "AFGE Council 260 was sent an email on August 8, 2016, which served as notification of the [T&L Procedures] document and stated the steps which were taken to ensure all RD employees are on the same page regarding the topic of time and leave procedures. The email clearly stated to respond back to me with any concerns or questions. AFGE did not respond to the notification in accordance with the National Agreement, Article 32. *See* J.Ex. 4.

Sharmila Bhatia works in the Agency's Policy and Standards Team as a Specialist. She also serves as the Union's Executive VP, since November 2016, and has 10 years of experience as a Union official. Ms. Bhatia testified that the Council President is expected to be the person who is contacted when there are proposed changes to conditions of employment. As an example, she referred to U.Ex. 1, which is an email (October 2, 2015) from the Agency's labor relations department to the personal email address of Union President Darryl Munsey, and the personal email address of Union Representative Ashby Crowder, containing "documents regarding…reorganization" and closing with "please let me know if you have any questions or concerns." *See* U.Ex. 1. In comparison, with respect to the Agency's August 8, 2016 email containing the "T&L Procedures" document, Ms. Bhatia said the email was sent by a mid-level manager and was not addressed to any person but rather was sent to the Union's regional address. She said such information should be sent to the Union President, while sending it to a regional office is not a practical way to give notice of changes that were the subject of the August 8 email.

With respect to the procedures contained in the August 8 email, Ms. Bhatia testified that one of the changes was a new procedure that was "an across the board change to core hours." She said there was an impact on employees if the core hours changed because their daily lives were affected as a result, especially if they have children, because employees were accustomed to the flexibility of late arrivals under the old procedures. Specifically, she said that 9:30 was an allowable start time under the old procedures, but under new procedures a 9:00 start time was required.

In addition, Ms. Bhatia testified that the Agency changed employees' ability to use leave (such as sick leave) to go to a Doctor's appointment, and then return to work and stay later to do additional work. In terms of impact, Ms. Bhatia testified that this change reduces employees' flexibility and denies them the ability to complete their work at the end of the day.

Ms. Bhatia testified that the Agency also changed the manner that employees are allowed to make leave requests. She said that the Agency changed the "24 hour rule" that had allowed employees to request next-day leave at any time during the work day. For example, she said that employees were allowed to request leave at 5 PM for the next day. Under the Agency's new procedure, Ms. Bhatia testified that employees are required to submit requests for leave prior to 9:00 AM, if they wish to take leave the following day. She said that under the new procedure, a request for next-day leave submitted at 11:00 AM could be considered untimely.

Princess Black is employed in RD as an Archives Technician and is also a union representative. Ms. Black testified that one of the changes implemented by the Agency's new policy was to credit hours. She said that at least 50 or 60 percent of employees earn credit time. She said the result of the new policy is that employees cannot earn credit time if they use leave on the same day. For example, she said that if an employee arrives one hour early to work in order to earn an hour of credit time, that hour is lost if they take sick leave on that same day. She said that a similar situation occurred to her personally,

when she arrived to work one hour early in order to earn credit time, but was made to forfeit the extra hour when she was 7 minutes late from lunch that same day.

In addition, Ms. Black testified that the Agency changed the way employees can request next-day leave. She said under the new policy, "if an employee asks for leave the day before requested, then management can say the request is out of compliance with the policy."

Audrey Amidon is employed in RD as a Motion Picture Resource Specialist, and also is the Secretary of AFGE Council 260. With respect to the Agency's August 8, 2016 email, she testified that September 1, 2016, was the first time that the Union President, Darryl Munsey, heard about it, when she called him and asked if Union representatives could be arranged to attend meetings being scheduled by the Agency. Ms. Amidon testified that she had access to the Union's email box and read the August 8 email from the Agency, but she did not know if she read it exactly on August 8. She acknowledged that she sent an email on August 18, 2016 (A.Ex. 1) to Ann Cummings, where she inquired about the changes. She said that once she looked into what the changes meant, she was concerned that the subjects of the changes would have a bigger impact than she initially understood, and she was concerned about mitigation of the impact on employees.

Ms. Amidon testified that Union President Darryl Munsey's personal email address was not on the address line of the August 8 email, and Mr. Munsey was concerned and upset about the content of the email when he learned about it on September 1. She testified that the Union never received notice that someone other than the Union President was the proper contact for notice of changes.

Ann Cummings is the Executive for RD. She testified that in August, 2016, she was the Access Coordinator for RD, as well as its Executive. With respect to the document titled, "RD Units Time and Leave Procedures," (J.Ex. 3), Ms. Cummings testified that its content was prepared by Debby Lelansky and other RD Managers. Ms. Cummings said that Management decided to create this document because the Agency had hired new staff and supervisors, and Management wanted training on the rules. She said the training of managers concerning time and leave procedures began in early 2016, after which it was suggested that RD staff receive the training as well. Therefore, Ms. Cummings said her Management set up a series of meetings for staff, and decided to provide a document as a guide for the procedures (this document is J.Ex. 3, T&L Procedures).

Ms. Cummings testified that Management provided notice to the Union on Aug 8, 2016, in the form of an email (J.Ex. 5) that Debby Lelansky sent to the Union's email box and also cc's Labor Relations. Ms. Cummings testified that she considers this email "to be notice of changes in accordance with Art 32 of the CBA." In that email, Ms. Cummings testified that Ms. Lelansky asked for discussion and comment, to which the Union did not initially respond. Ms. Cummings testified that the Union's Audrey Amidon responded around Aug. 18, with an email (A.Ex. 1) to her, which contained some questions. Ms. Cummings testified that the new procedures had not been sent to all staff at the time of Ms. Amidon's August 18 email, and she assumed Ms. Amidon got access to these

procedures from the August 8 email that Ms. Lelansky had sent to the Union's email box. Ms. Cummings testified that Kevin Dill from her office responded to Ms. Amidon's questions in an email dated August 24, 2016 (U.Ex. 3). Ms. Cummings testified that Mr. Dill in that email characterized the nature of the August 8 email as "consistent with Article 32" of the Parties' Agreement.

Ms. Cummings acknowledged that the Union President, Darryl Munsey, had retired from the Agency prior to August, 2016, but he remained the Union President and the Agency maintained a personal email address for him. She said that Mr. Munsey did not approach her office regarding the T&L Procedures, but rather the Union's Ashby Crowder contacted her in September, 2016 (prior to filing the Union's grievance), in order to discuss them.

Ms. Cummings testified that she denied the Union's grievance because she did not believe the T&L Procedures were in conflict with the Parties' Agreement, and she believed the grievance was untimely filed.

Ms. Cummings testified that Management issued its procedure on Credit Time, which stated that "earning of credit time will not accrue on days that leave is taken," because "people were using credit time to change the core hours of their day." In this regard, she said "at times we were having issues with providing coverage to the public during core hours, in the morning." She said what would generally happen is staff would come in at 9:30 and be eligible to go home at 6:00, but work after 6:00 and earn credit time which they would then use the next day and come in between 9:30 and 10:00. Ms. Cummings testified that, as a result, there "may not be staff ready at 9:00 to cover the work." She said that is also why Management changed the core hours to start at 9:00 in order to ensure there was coverage starting at 9:00.

With further regard to core hours, Ms. Cummings testified that Management had units or divisions with flexible bands from 6:00 to 9:30, so the Agency had 30 minutes where employees had the right to show up after 9:00 and that is why Management changed the core hours to start at 9:00, in order to ensure that there was coverage starting at 9:00.

Debby Lelansky is the Division Director for the Agency's Special Media and Records Division. In 2016, she was the Division's Acting Director. She has been a Supervisor for 17 years. Ms. Lelansky testified that she was the main compiler of the substance of the "RD Units Core Time and Leave Procedures" document. Prior to the creation of that document, Ms. Lelansky testified that she had a training session in February, 2016, during which she realized there were inconsistencies within the Agency on how time and leave were being implemented, so Management decided after the training to identify what the Parties' Agreement and the Agency rules say about time and leave. She said, "so we reviewed all existing documents and had a consensus approach to how time and leave will be implemented. We took the slides from the training and made sure that was included, then had the document reviewed by all the managers and had them buy-in to it, and then had the chief operating officer look at it."

Ms. Lelansky testified that she notified the Union of the procedures, via email on August 8, 2016 (J.Ex. 5). She said that she sent the email to the Agency's Labor Relations office and the Union email box at the same time. Ms. Lelansky testified that she knew someone from the Union received her email because Ms. Cummings received a response later. Ms. Lelansky said that she worked with Ms. Cummings on how to respond to the Union, and they talked to Labor Relations, which said they had "fulfilled our due diligence requirements and that we could start with training and implementation in October."

Ms. Lelansky testified that the procedures establish core hours as 9:00-2:30**,** and "this was a change for some units." She said that Management understood that some people would have had a difficult time under a flexitour schedule that started at 9:00, so Management offered some employees the option of having a fixed schedule with a 9:30 start time, and several employees took advantage of that.

Ms. Lelansky testified that prior to issuing the procedures, Management had a problem with some employees who would arrive at 10:30 AM, then work late hours, and then apply those credit hours to another late start time the next day. She said that this occurring made it difficult to staff adequately, and Management "just needed everyone to arrive at 9:00."

Regarding the procedures' requirement that employees submit requests for leave at least 24 hours ahead of the requested leave time, Ms. Lelansky testified that she knows of no one being disciplined for a late request for leave the next day. She said "the change was made because too many employees were leaving requests for leave late, after the supervisor had departed, for leave the next day." She said that Management "implemented the 24 hour request so that supervisors would be able to actually respond to leave requests." She said this policy does not restrict an employee's ability to request emergency leave.

Regarding the T&L Procedures' requirement that supervisors will not approve the earning of credit time for days when leave is used, Ms. Lelansky testified that in the past, some supervisors would approve credit time on days when leave was used.

With respect to the August 8 email that she sent to the Union, Ms. Lelansky testified that she was following the advice of her Labor Relations office by sending it to the Union's mailbox. She said she does not know how the Union mailbox is monitored, and acknowledged that she did not submit the T&L Procedure to the Union President or Officer.

Emma Lisa Hobbs is the Director of Employee Labor Relations, Performance and Benefits, which is the same position she held in August, 2016. Earlier, Ms. Hobbs was Chief of Employee Labor Relations. Ms. Hobbs testified that sending the August 8 email to the AFGE box was appropriate notice, "because that is the address that supervisors and managers normally send it [notice] to, and copy Labor Relations as well." She testified that the Union's response was after the normal 5 days response time required by Article 32 of the Parties' Agreement. Ms. Hobbs acknowledged that Article 32 concerns mid-

term negotiations. With respect to the effect of the T&L Procedures, Ms. Hobbs testified that the procedures do not change employees' working conditions; but were rather in nature clarifications. However, she testified that even if there was a change in working conditions, the Union waived its right because the Union did not respond within 5 days. She said that the Agency complied "with the spirit of Article 32," and "at the end of the day the Union did have notice of these procedures."

In response to the Union's question, Ms. Hobbs testified that if the Parties negotiate changes to the Parties' Agreement, such changes would normally be memorialized in a Memorandum of Understanding (such as an example provided by the Union by U.Ex. 6). In response to another question, Ms. Hobbs acknowledged that Union President Munsey did not designate someone else to act on his behalf for the purpose of receiving notice of changes under Article 32 of the Parties' Agreement.

Positions of the Parties

A. The Union's Arguments

As a preliminary matter, the Union claims the grievance was timely filed, consistent with Article 24, Section 7 (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."). The Union asserts "there are several dates on which the countdown clock could reasonably start ticking" but "the grievance filed on September 21, 2016 was timely filed under all of them." *See* U.Br. at 4-5. In this regard, the Union states, "the employer announced the change to employees in a series of meetings that started September 8, 2016"; "as Union witness Amidon testified, the Council President became generally aware of the event giving rise to the grievance on September 1, 20[16]; or, the Union argues that the T&L Procedures constitute a "continuing violation" of Articles 7 and 9 of the Parties' Agreement. *Id.* at 5. In addition, the Union argues that "no Article 32 notice occurred" because the Agency failed to comply with the language of Article 32, Section 2, which states, "the 'Agency agrees to provide the *Council President, unless otherwise specified by the Union* [ ] with written notifications of changes in working conditions.'" *Id.* at 5-6 (emphasis added). The Union points out that "[t]he 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." *Id.* at 6. Moreover, the Union points out that Union President Munsey never designated anyone else, other than himself, to receive Article 32 notice. As a result, the Union's positon is that the August 8 email was not adequate notice. In support, the Union cites *Federal Emergency Management Agency Headquarters, Washington, D.C. and AFGE, Local 4060*, 49 FLRA 1189 (1994) "(noting that an exclusive representative must make a clear delegation of authority for the agency to accord recognition to that person)"; *U.S. Penitentiary, Leavenworth, Kansas and American Federation of Government Employees, Local 919*, 55 FLRA 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.)." *Id*. at 10, 11.

The Union also argues that the content of the August 8 email "was not a sufficiently clear notice of changes" and "cannot be reasonably interpreted as a good faith notification of intent to initiate mid-term negotiations" because it "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.'" U.Br. at 12. In this regard, the Union asserts the Agency failed its obligation to explain to the exclusive representative 'the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change.'" *Id.*, *quoting U.S. Army Corps of Engineers, Memphis and NFFE, Local 259*, 53 FLRA 79 (1997). The Union's position is that the August 8 email should not be construed as adequate notice when the content of the email did not inform the recipient that the attached T&L document "ultimately did include changes." *Id.* Moreover, the Union argues that it cannot be true that the Union "waived" its right to bargain over the changes, as "[r]eceipt of adequate notice is itself a prerequisite for a waiver of bargaining" and it could only have waived bargaining rights if such waiver were "clear and unmistakable." *Id.* at 16, *citing Dep't of Labor, Employment Standards Administration, Wage and Hour Division and AFGE Local 2513*, 21 FLRA 484 (1986).

Next, the Union argues that the Agency violated the Parties' Agreement and the Statute by implementing four changes to time and leave procedures, one of which carried an obligation to bargain over impact and implementation, and three others that were already covered by the Parties' Agreement. First, with respect to impact and implementation, the Union acknowledges that Management has the right to establish core hours, but in this case, the Union says the Agency changed the core hours of bargaining unit employees without providing adequate notice. Therefore, the Union argues it should have the opportunity to bargain over the impact and implementation Management's decision. Second, the Union asserts that the Agency made changes to leave procedures, credit time, and medical documentation, all of which were covered by their Agreement. The Union lists the affected provisions of their Agreement as follows:

- Article 7, Section 5: Credit Time. The Union states that under this section, an employee may elect to earn credit time "with the supervisor's approval." In comparison, the Union points out that the T&L Procedures state that "Supervisors will not approve the earning of credit time for days when leave is used," but says that "[n]othing in the National Agreement disallows combination of leave use and earning of credit time on the same day." U.Br. at 20. The Union argues that this change "removed supervisory discretion that the union had bargained for." *Id.* at 21, *citing Social Security Administration and IFPTE, 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' not to use their discretion to approve additional telework.)." The Union raised the example of one employee who requested six minutes of unscheduled leave in the afternoon, and was thereby required under the new policy "to forfeit remuneration for the credit time she had already worked, because credit time and leave cannot be combined in the same day." *Id.*

- Article 9, Section 3(D): Medical Documentation. The Union states that under this section, management has the 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." In contrast, the Union points out that the Sick Leave section of the T&L Procedures states specifically 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)"; and the Medical Documentation section of the T&L Procedures states that medical documentation "consists of diagnosis, prognosis, treatment plan, identification of restrictions, and signature of health care provider" that "may be requested" for "sick leave for more than 3 days." *Id.* at 22 (quoting the T&L Procedures in parts). The Union argues that the Agency's list of acceptable medical documentation amounts to "confusing 'medical certificate' under 5 CFR § 630.201 with 'medical documentation' under 5 CFR §339.04" which has the effect of allowing an a "broad range of medical documentation" that is not included within the scope of the Parties' Agreement. *Id.* at 23.

- Article 9, Section 2: Requests for Annual Leave. The Union quotes the relevant language of this section as: employees "should ordinarily request annual leave at least one day in advance." In contrast, the Union points out that the T&L Procedures require requests for leave to be submitted at least 24 hours ahead of time. The Union argues that the word "must" contained in the T&L Procedure for leave creates "a necessary condition for non-emergency leave to even be considered" whereas "Union witness Bhatia testified that it is past practice for leave requests to be treated with more flexibility." U.Br. at 23-24. The Union submits that "[a] day did not necessarily meant 24 hours from the date for which leave is requested, and the inclusion of the term 'ordinarily' suggests there are times when an employer may not require an entire day – however the day is defined – for a regular request." *Id.* at 24. The Union argues that there is no 24-hour unit of measurement included in Article 9, Section 2, which means that the change contained in the T&L Procedures is a change to the Parties' Agreement itself. The Union also argues that the word "day" contained in Article 9, Section 2 of the Parties' Agreement does not necessarily mean "24 hours" as may be argued by the Agency, because for example Article 6, Section 1 of the Agreement defines a work "day" as 8 hours. *Id.*

The Union asserts that because these three subjects are "covered by" the Parties' Agreement, the Agency was not authorized to change them and they "are not subject to change until the term contact is expired, except by express agreement between the parties." *Id.* at 19. In support, the Union cites, for example, *U.S. Dep't of Health and Human Services, SSA, Baltimore, MD and AFGE, National Council of SSA Field Office Locals, Council 220*, 47 FLRA 1004 (1993). The Union asserts that those three subjects were out of reach of the scope of Article 32 of the Parties' Agreement, which is meant to address "mid-term changes" that "are not covered by the Agreement[.]" If the Agency

wished to change those subjects, the Union argues, "an express agreement between the parties to modify the agreement is required." *Id.* at 19. As an example of the Parties' prior practice on this, the Union directs the Arbitrator's attention to U.Ex. 6, which is "an MOU signed by the parties that modifies the terms of the contract." *Id.*

Finally, the Union argues that the T&L Procedures create a more than *de minimis* changes in employees' conditions of employment. On this point, the Union refers to the testimony of its witnesses that the changes have an adverse effect on their work lives. In terms of a remedy, the Union requests that the Arbitrator issue a *status quo ante* remedy; order the Agency to withdraw the T&L Procedures that violate the Parties' Agreement; order the Agency to post a remedial notice; order impact and implementation bargaining where appropriate; and make whole any employees who were adversely affected by the changes, to the extent allowed by law, including back pay for any employees who worked hours for which they were not compensated.

B. The Agency's Arguments

The Agency argues that the grievance should be denied "[b]ecause the grievance was not timely filed, because the Union waived its right to challenge the time and leave procedures, [and] because the grievance fails to demonstrate any violation of the National Agreement[.]" A.Br. at 2.

With respect to the issue of timeliness, the Agency points out that it notified the Union of the T&L Procedures by email dated August 8, 2016, and then "[t]he Union contacted the Agency with questions about the procedures on August 18, 2016", and then "the Agency responded on August 24, 2016, noting that the Union's communication on August 18 was beyond the five days for requesting to negotiate[,]" but also, "in the interest of maintaining a good working relationship, the Agency provided substantive answers" to the Union's questions. A.Br. at 4. In this connection, the Agency points out that, pursuant to Article 24, Section 7 of the Parties' Agreement, the Union was required to file a grievance within 20 calendar days "after the event giving rise to the grievance." *Id.* at 5. Under these facts, the Agency argues that "the Union did not file its grievance until September 21, 2016, after the 20 day period for filing a grievance had expired…[a]s such, the grievance was untimely and should be denied as not arbitrable." *Id.* In support, the Agency cites *U.S. Defense Mapping Agency Aerospace Center v. NFFE*, 35 FLRA 973 (1990) "(noting that where the 'contract was definite, precise, and strong requiring grievances to be filed within the 20 day time limit,' a grievance filed after the time period is untimely and should be dismissed.)"; *IFPTE Local 386 v. U.S. Dep't of the Navy*, 66 FLRA 26 (2011) "(finding that time for filing grievance began to run on date of notice of change, and if a grievance was not filed within the number of days required by the contract, it was untimely and not arbitrable.)" *Id.* at 5, 6.

On the issue of waiver, the Agency states, "[t]he National Agreement provides a process for the Union to seek to negotiate changes proposed by the Agency[,] pursuant to Article 32, Section 2, A, that "the Union must seek to negotiate within five workdays of receiving notice of any proposed changes." A.Br. at 6. In this connection, the Agency points out

that "the Union was notified on August 8 of the RD Units Core Time and Leave Procedures" and argues, "[t]o the extent the RD Units Core Time and Leave Procedures constitute a change, the Union had to notify the Agency within five workdays of its intent to negotiate the proposed changes." *Id.* Under these facts, the Agency argues that the Union "would have had to notify the Agency by August 15 of its intent to negotiate[,]" and because the Union did not do so, its opportunity to bargain was waived. Also, the Agency states that Darryl Munsey was the Council President on August 8, 2016, and that he "had retired from the Agency in the summer of 2014…Ms. Cummings testified that she had not received communications from Mr. Munsey since June 2016." *Id.* at 7.

Next, the Agency argues that the T&L Procedures do not violate the Parties' Agreement. In particular, first with respect to requests for leave under Article 9, Section 2(b) of the Parties' Agreement, the Agency argues that a "clarification of 24 hours was necessary because employees were submitting leave requests late in the day before taking leave without providing sufficient time for the leave to be approved prior to it being taken." A.Br. at 8 (citing testimony of Ms. Lelansky). Also, the Agency submits that the Union's witnesses did not testify that any employees experienced any harm "beyond the testimony that the 24 hours clarification was unfair and would affect employees in some unarticulated way." *Id.*

With respect to "the earning and use of credit time," the Agency argues that there is no conflict between the T&L Procedures and Article 7, Section 5(c) of the Parties' Agreement. In this regard, the Agency points out that while the Parties' Agreement allows for credit time "with the supervisor's prior approval," "Ms. Cummings as the manager over RD, has the authority to direct the supervisors within her management chain regarding the approval to earn and use credit time." *Id.* at 9. Therefore, the Agency says the new procedure stating "supervisors will not approve the earning of credit time for days when leave is used" is consistent with the language of the Parties' Agreement.

Analysis

This arbitration decision is based on the Arbitrator's interpretation and implementation of the terms of the Parties' Agreement.

A. The Union's grievance was not untimely filed and the Union did not waive its right to bargain

Article 32, Section 2 of the Parties' Agreement, concerning mid-term negotiations of changes in working conditions, requires the Agency to notify the Union President in advance of implementation of any proposed change: "The Agency agrees to provide the Council President…with written notification of changes in working conditions."

Under the facts of this case, the Agency did not provide written notice to the Union President, Darryl Munsey, that implementation of Management's T&L Procedures would

amount to changes in conditions of employment.[2] Instead, on August 8, 2016 (J.Ex. 5), the Agency sent an email to the Union's general email box ("afge.council260@nara.gov") of its intention to disseminate the content of its list of T&L Procedures to employees. If the Agency considered the T&L Procedures to consist of changes to conditions of employment, then it was required, under the plain language of Article 32, Section 2, to inform Mr. Munsey of that fact, personally and in writing.[3] In support for this finding, the Arbitrator notes that in past dealings, the Agency had engaged Mr. Munsey's personal email address, for matters concerning bargaining (See U.Ex. 1). Why the Agency did not do the same in this case was not explained. In any event, the Agency did not provide notice as required by Article 32 of the Parties' Agreement. As such, the Union was free to refrain from making a formal request to negotiate until such time as Mr. Munsey was provided with personal notice of the Agency's intentions. Moreover, contrary to the Agency's argument, the Union could not have waived its right to engage in mid-term bargaining, because the Agency never accomplished the prerequisite notice for triggering the 5-day period for requesting mid-term bargaining under Article 32, Section 3 of the Parties' Agreement: "Within 5 workdays of receipt of notification of a proposed change[s], the Union may request to negotiate…" Consequently, the Arbitrator finds that the Union's September 21, 2016, grievance was timely filed, at least with respect to subjects of mid-term bargaining. There was no waiver, as there was no notice as defined by the Parties' Agreement.

Alternatively, as explained further in this decision below, some of the areas listed within the T&L Procedures were not subject to mid-term bargaining, because they would have amounted to changes in areas covered by the Parties' Agreement that were already bargained. With respect to those areas, if the Union intended to file a grievance rather than a ULP, the Union was obligated to file within "20 days after the date the grievant becomes aware of the event giving rise to the grievance," as required by Article 24, Section 7 of the Parties' Agreement. Here, the Union's "awareness" was triggered when it understood that the Agency had decided to implement changes to the negotiated Agreement, without offering an opportunity to bargain. Such awareness could not have occurred as a result of the Agency's August 8, 2016 email, because as the Agency stated therein, "We do not believe that any of the guidance or procedures included in this document change anything related to the existing labor agreement but welcome your comments and feedback prior to communicating this to RD staff." *See* J.Ex. 5. The record of this case shows that the Agency has maintained that perspective throughout these proceedings. Therefore, at least initially, there was no "trigger" of awareness that

[2] The Arbitrator notes, of course, that if the Agency had a good faith belief that implementation of the T&L Procedures would not to amount to any changes in conditions of employment, then the question of compliance with procedures contained in Article 32, Mid-term Negotiations, would be irrelevant.

[3] The Arbitrator notes that in order for "notice" to be considered properly accomplished, the FLRA requires an agency to inform the union that there is in fact a proposed change to conditions of employment, of its scope, and of its nature and timing, in order to adequately provide the exclusive representative with a reasonable opportunity to request bargaining. *See, e.g., U.S. Dep't of Homeland Security, U.S. Customs Border Protection, El Paso, TX and AFGE, National Border Patrol* Council, *Local 1929*, 65 FLRA 422 (2011); *U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 692 (2006).

would hold the Union responsible for filing a grievance beyond the 20-day window contained in Article 24, Section 7. However, the Arbitrator credits the testimony of Executive Cummings that she informed Union Representative Ashby Crowder during their meeting (which occurred in September 2016, sometime before the Union filed the grievance on September 21, 2016), that she did not believe the T&L Procedures were in conflict with the Parties' Agreement: at that point, Mr. Crowder would have understood that the Agency's management was not receptive to the Union's position. Mr. Crowder filed the Union's grievance a short time after his meeting with Executive Cummings, well within the 20-day window set by Article 24, Section 7.

In sum, the grievance is timely filed and arbitrable.

B. T&L Procedures concerning Credit Time and requests for Annual Leave are covered by the Parties' Agreement. The Procedure concerning documentation for Sick Leave is not covered by the Parties' Agreement.

Under the Authority's "covered by" doctrine, a party is not required to bargain over terms and conditions of employment that have already been resolved by bargaining. *U.S. Dep't of Health and Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1017-18 (1993). To assess whether a particular proposal or provision is "covered by" the parties' agreement, the Authority applies a two-prong test. Under the first prong of the test, the Authority examines whether the subject matter in dispute is expressly contained in the agreement. *See, e.g, Dep't of the Treasury, IRS, Kansas City Serv. Ctr., Kansas City, Mo., 57 FLRA 126, 128-9 (2001).* If a provision of the agreement does not expressly contain the matter, then the Authority will determine, under the second prong of the test, whether the matter is inseparably bound up with, and thus plainly an aspect of, a subject "covered by" the agreement. *Id.* A determination of the parties' intent, including an examination of bargaining history, is an "integral component" of assessing the second prong. *United States Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000).

The Arbitrator will analyze the relevant sections of Agency's T&L Procedures, in comparison to the meaning of the relevant sections of the Parties' Agreement, below:

1. Credit Time

The relevant language from the T&L Procedures, under "Credit Time," states:

- Supervisors will not approve the earning of credit time for days when leave is used.

In comparison, the relevant section of the Parties' Agreement, Article 7, Section 5(C) ("Credit Hours"), states:

> ***With the supervisor's prior approval, based on limiting factors such as workload or appropriate Management control, an employee on flexitime or flexitour may elect to earn credit time. The minimum amount of credit time that may be earned***

at any one time is 6 minutes. After that, credit time may be earned in 6-minute increments up to two hours. Credit time can only be earned in the performance of official duties and work performed will be evaluated under the employee's performance standards.

The language of Article 7, Section 5(C) contains no restriction on an employees' access to credit time other than the supervisor's consideration of relevant (not fully enumerated) "limiting factors." Ordinarily, without bargaining, Management would be able to dictate exactly what those limiting factors are; but in this case, the Parties negotiated an arrangement where the supervisor decides how to apply those factors in particular circumstances. Put another way, the Parties entered into an arrangement that limits to some degree the scope of the Executive's control over individual supervisors' decisions with respect to credit time. However, the examples of limiting factors named by the Agreement are not exhaustive, which on its face, arguably, could allow Management to provide more guidance to supervisors on how they should exercise their discretion. The effect of the T&L Procedure listed above would be to insert a new limiting factor – i.e., an employee cannot earn credit time on the same day where he or she uses leave – that a supervisor must consider when evaluating an employee's request for credit time. Therefore, the relevant question, here, is whether the meaning of Article 7, Section 5(C) would allow Management to insert a new limiting factor with such mandatory effect. To answer that question, the first prong of the Authority's "covered by" test requires the Arbitrator to consider whether the subject matter in dispute is "expressly contained" in the agreement. Because the plain language of Article 7, Section 5(C) does not contain the word, "leave," the Arbitrator's conclusion is that the matter is not expressly contained in the provision. Under the second prong of the test -- whether the matter is inseparably bound up with Article 7, Section 5(C) -- the answer is "yes," for several reasons. The Arbitrator points out that the provision as written did not require that a supervisor's authority to approve credit time be restricted in any particular circumstance. Also, Article 7, Section 5(E) states in part, "Credit hours can be used in conjunction with other forms of approved leave." The language of that provision is in direct conflict with the T&L Procedure at issue: if, as Article 7, Section 5(E) says, employees can use credit hours in conjunction with other forms of leave, then an employee who is approved for (and earns) credit time in the morning of a particular day will be able to keep that credit time even if later in the afternoon the employee is forced to use emergency leave for some unforeseen reason; however, under the "Credit Time" section of the T&L Procedures, a supervisor arguably would be required to rescind approval of morning-earned credit hours, because the new rule says that credit time cannot be earned on days when leave is used. To be clear: under the Parties' Agreement, a credit hour that was approved for being earned in the morning may be retained, and in effect "used," in the unforeseen event that some form of leave must be used later in the day. The new rule, arguably, would prevent that from occurring. Indeed, a Union witness, Princess Black, testified that a similar outcome happened to her, as a result of the new rule: she believed she had earned a credit hour in the morning, but was made to forfeit that hour when she had to take 7 minutes of leave later in the day. Finally, and most importantly, the Arbitrator credits the testimony of Ms. Bhatia that it has been common for bargaining unit employees to combine use of sick leave (in order to, for example, go to a medical appointment) and earn credit hours on the

same day. The Agency does not disagree that this has been true. The Parties' behavior in this regard is evidence of the Agreement's intended effect. In sum, the Arbitrator concludes that bargaining unit employees' ability to earn credit time in conjunction with using leave on the same day was a matter "inseparably bound up with" Article 7, Section 5(C) of the Parties' Agreement. As such, the Agency had no authority to issue the contradictory rule contained in the T&L Procedures.

2. Annual Leave Requests.

The relevant language from the T&L Procedures, under "Annual Leave," states:

- Annual leave requests must be requested and approved at least 24 hours in advance of leave…

In comparison, the relevant section of the Parties' Agreement, Article 9 ("Leave"), Section 2 ("Annual Leave"), part B, states:

> ***Employees should ordinarily request annual leave at least one day in advance. For leave requested in advance, employees will normally not be required to divulge how they intend to use their time off in order for approval of annual leave. The amount of advance notice depends on factors such as duration of the leave and problems involved in adjusting work schedules. Consistent with the needs of the Agency, annual leave requested in advance will be approved****. . . .*

The first prong of the Authority's "covered by" test requires the Arbitrator to consider whether the subject matter in dispute is "expressly contained" in the agreement. In this connection, the subject of the Agency's new rule and Article 9, Section 2 (D) of the Parties' Agreement concern the exact same subject: viz., the amount of time in advance that employees are allowed to request annual leave. Significantly, the Parties' Agreement uses the permissive word, "ordinarily," while the Agency's procedure uses the restrictive word, "must." And again, the Parties' Agreement uses the generic term, "one day," while the Agency's procedure uses the precise term, "24 hours." The effect of the plain language of the Agency's procedure is to overwrite the plain language of the Parties' Agreement. Therefore, it is clear to this Arbitrator that the subject matter of the Agency's procedure is expressly contained in the Parties' Agreement, and therefore must be rejected because it is covered by the Parties' Agreement. In support, the Arbitrator points out that it was very common, pursuant to the language of Article 9, Section 2 (D), for supervisors to approve annual leave at some point the day before the annual leave is requested to occur. The Arbitrator credits the testimony of the Union's witness, Ms. Bhatia, that prior to the Agency's changes a 24-hour waiting period was not required for requests for annual leave to be approved. Although this evidence is not necessary for the Arbitrator's conclusion under the Authority's test, it is additional evidence of the meaning of the provision. Accordingly, the Agency must not impose a 24-hour waiting period on requests for annual leave, as governed by the language of Article 9, Section 2 (D) of the

Parties' Agreement.[4]

3. Medical Documentation.

The relevant language from the T&L Procedures, under "Sick Leave," and "Medical Documentation," state:

Sick Leave:

- 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).

Medical Documentation:

- Consists of diagnosis, prognosis, treatment plan, identification of restrictions, and signature of health care provider.
- May be requested in the following circumstances:
  - When employee is on letter of Leave Restriction
  - FMLA requests
  - LWOP requests
  - Advanced leave
  - Sick leave for more than 3 days
  - If supervisor suspects sick leave abuse.

In comparison, the relevant section of the Parties' Agreement, Article 9 ("Leave"), Section 3 ("Sick Leave"), part D ("Documentation"), No. 3, states:

> ***If management possesses reason to support a belief that the employee's sick leave has been abused, Management can require medical certificates for the period. Employees will not be required to reveal the nature of the illness for leave up to three days, except for situations where management has reasonable cause to believe that the leave has been abused. Management may also require medical documentation for absences of four or more consecutive workdays***

The Arbitrator's interpretation of the Union's position is that the phrase, "medical certificate" contained in Article 9, Section 3 (D)(3) of the Parties' Agreement, has a narrow definition in comparison to the more expansive description of medical "documentation" contained in the sections on Sick Leave and Medical Documentation in the Agency's T&L Procedures. On review, the Arbitrator is not convinced that these provisions conflict with one another in a substantial way. Also, the Arbitrator does not find that the Union submitted sufficient evidence to show that the Agency's procedures on this subject have more than a *de minimis* effect, in general, on working conditions.

[4] The Arbitrator notes that this Decision does not address the Agency's procedures for requesting non-annual leave, as that issue was not sufficiently addressed by the Union.

Consequently, the grievance with respect to Medical Documentation is denied.

C. The Agency's unilateral implementation changes to the Parties' Agreement was an Unfair Labor Practice. Also, the Agency's changes to Article 7, Section 5 (C), and Article 9, Section 2 (B), of the Parties' Agreement were a repudiation of those sections of the Agreement, and an Unfair Labor Practice.

The record shows that the Agency implemented the changes contained in its T&L Procedures on October 17, 2016. *See* U.Ex. 9. This was an Unfair Labor Practice, in violation of Section 7116(a)(1) and (5) of the Statute, as the Union was not given reasonable notice and an opportunity to bargain over parts that were negotiable. *See, e.g, U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn., and NFFE Local 259*, 53 FLRA 79, 81 (1997) (Before an agency changes bargaining unit employees' conditions of employment, it is obligated to give the exclusive representative notice and a chance to bargain over the parts of the change that are within the duty to bargain. Failure to do so violates Section 7116(a)(1) and (5) of the Statute) (*U.S Army, Memphis*). Moreover, for the reasons stated immediately below, the Union was due more than an opportunity to bargain; rather, the Agency was required to request bargaining over parts that were covered by their Agreement, if it wished to make a change.

The Arbitrator highlights that the Agency changed key provisions of the Parties' Agreement with respect to bargaining unit employees' ability to earn credit time and use annual leave. Because these matters were covered by the Parties' Agreement, the Agency should have known that it had no authority to change them, yet it chose not to even request bargaining. In the Arbitrator's experience, the two subjects that were changed are among the most important to the work lives of federal employees. Under FLRA case law, an agency's decision to unilaterally implement changes to key provisions of the parties' collective bargaining agreement, in a permanent way rather than as a one-time occurrence, is a repudiation of the parties' agreement and an unfair labor practice in violation of section 7116(a)(1) and (5) of the Statute. *See Dep't of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia and AFGE, Local 987* (1991) ("Where the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms, we will find that an unfair labor practice has occurred in violation of the Statute"). After review of the facts, the Arbitrator finds that repudiation occurred here.

D. The Agency's decision to implement a change in Core Hours changed the conditions of employment of bargaining unit employees, which carried with it an opportunity for the Union to bargain over impact and implementation (I&I) of those changes. Consequently, the Agency must rescind its decision and engage in I&I bargaining.

As stated above, the Agency implemented its changes, including a change to core hours, on October 17, 2016. The Union acknowledges that Management's decision to change core hours was within the Agency's management rights and therefore was subject only to impact and implementation bargaining. On this point, the Agency does not disagree that

core hours are a condition of employment, and it had a right to change them, other than to argue that the Union lost its opportunity to bargain over impact and implementation because of the Union's lack of response to the Agency's August 8, 2018 email. However, for reasons stated at the top of this Decision, the Agency's arguments on arbitrability are rejected. As a matter of right under the Statute, the Union remains entitled to engage in impact and implementation bargaining over the Agency's decision to change core hours. The Arbitrator submits that a change in core hours is, on its face, a more than *de minimis* change to conditions of employment. In support, the Arbitrator credits the testimony of Ms. Bhatia that the work lives of more than a few bargaining employees were significantly affected by the change. Also, the Agency's letter, dated August 24, 2016, addressed to the Union's Audrey Amidon, acknowledged that the change was more than *de mimimis*: "We believe that the negative impact can be mitigated by allowing staff who want to arrive between 9:00 and 9:30 the option of choosing a fixed flexi-tour…" Accordingly, the Arbitrator finds that the Agency committed an unfair labor practice by violating Section 7116(a)(1) and (5) of the Statute. *See U.S Army, Memphis,* 53 FLRA 79.

In order to protect the Union's right to bargain, a *status quo ante* remedy is appropriate in this situation. Even though the Arbitrator does not question the Agency's motivation for deciding to change the core hours – for example, Ms. Cummings testified that "at times we were having issues with providing coverage to the public during those core hours, in the morning" – the FLRA generally supports that a *status quo ante* remedy will effectuate the broad policies of the Statute when an agency does "'not establish[ ] how, and to what degree, disruption to the efficiency and effectiveness of its operations would be caused by a restoration of the former practices.'" *See U.S. Dep't of Justice, Immigration and Naturalization Service, Washington, D.C. and AFGE, National Border Patrol Council*, 56 FLRA 351, 360 (2000), *quoting Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 856 (1999). The Arbitrator does not find the Agency's testimony with respect to its motivation is sufficient to justify its failure to appropriately notify the Union of its intentions as required by the Statute, or its failure to explicitly offer the opportunity to bargain (see footnote no. 3, *supra*), in order to address bargaining unit employees' concerns resulting from the change.

E. Remedy.

The Agency is ordered to rescind its new rule with respect to credit time combined with leave; and rescind its new rule concerning 24-hour notice for annual leave; and return to the *status quo ante* with respect to the Parties' practices as carried out under the meaning of Article 7, Section 5 (C), and Article 9, Section 2 (B), of the Parties' Agreement. Because those matters are covered by the Parties' Agreement, the Agency cannot change them in the future unless the Union consents. Moreover, the Union demonstrated that at least one bargaining unit employee lost an hour of credit time that she would have retained, had the Agency not enacted the new procedure on credit time, in violation of the Parties' Agreement. This evidence is sufficient to justify back pay under the Back Pay Act. *See, e.g., Soc. Sec. Admin., Balt., Md. & Soc. Sec. Admin., Hartford Dist. Office, Hartford, Conn.*, 37 FLRA 278, 292 (1990) (If the ULP resulted in a loss of pay, allowances or differentials to employees, then the affected employees may receive back pay to compensate for such losses). As a result, the Agency is directed to conduct an

investigation, with the assistance of the Union, of employees who lost credit hours, and remunerate them accordingly.

Also, because the Agency failed to give the Union adequate notice and an opportunity to bargain over its decision to change core hours, the Agency is ordered to return to the *status quo ante*, until the conclusion of impact and implementation bargaining over its decision.

AWARD

For the foregoing reasons, the Grievance is SUSTAINED. The Agency is directed to return to the *status quo ante* with respect to the meaning of Article 7, Section 5(C), and Article 9, Section 2 (B), of the Parties' Agreement, as found by the Arbitrator. The Agency is also directed to return to the *status quo ante* and engage in impact and implementation bargaining with respect to the Agency's decision to change the core hours of bargaining unit employees. To the extent that any bargaining unit employees lost their right to credit hours as a result of the Agency's violation of Article 7, Section 5(C), the Agency is directed to investigate the numbers and make the employees whole.

So Ordered,

David Paul Clark

David Paul Clark
Arbitrator
August 2, 2017

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