In the Matter of:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF NARA LOCALS 220

Union

and

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency

_____/

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

March 2, 2017

Decision on Agency's Motion to Dismiss

Procedural History

Pursuant to the Parties' National Agreement, the undersigned was selected from a panel of arbitrators to hear the Union's grievance. As a preliminary matter, the Agency submitted a Motion to Dismiss Based on Arbitrability, to which the Union submitted an Opposition.

Background

Based on the papers submitted by the Parties, the Arbitrator provides the following relevant background.

On August 8, 2016, the Agency sent an email to several recipients (including the Union's general email address) stating, in pertinent part, "…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…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…" *See* U.Ex. 3. On August 18, 2016, the Union sent an email to the Agency, captioned "Review of RD Core Time and Leave Procedures Document," wherein the Union asked several questions concerning "the change in core hours for many offices that have long-established 9:30 cut off times." *See* A.Ex. 5. The Agency asserts that it responded to the Union's questions on August 24, 2016. A.Motion at 2, 3. On September 1, 2016, the Agency notified management of formal discussions to take place with small groups of RD employees starting September 8, 2016, to "provide [staff] the opportunity to discuss the procedures, voice concerns, and ask questions." *See* U. Ex. 4.

On September 21, 2016, the Union filed a grievance alleging that some of the Agency's announced rules relating to time and leave were in violation of the Parties' Agreement.

See Grievance, U.Ex. 1. On October 5, 2016, the Agency responded, stating the Union's grievance was filed in an untimely manner. The Agency now argues before the Arbitrator that the grievance is non-arbitrable due to its untimeliness.

Relevant Portions of the Parties' Collective Bargaining Agreement

Article 24 Grievance/Arbitration

. . . .

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. 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.

. . . .

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

Positions of the Parties

A. Agency's Arguments

The Agency submits that on August 8, 2016, it notified the Union of its decision pertaining to RD Time and Leave procedures. The Agency also asserts that the Union "contacted the Agency with questions about the procedures on August 18, 2016[,]" and on August 24, 2016, "the Agency provided substantive answers" to the Union's questions." *See* A.Motion at 3. In this connection, the Agency argues that the Union violated the requirement set forth by Article 24, Section 7 of the Parties' Agreement that a grievance must be filed in writing within 20 days of the event giving rise to the grievance, or 20 days after the grievant becomes aware of the grievance: "the Union did not file its grievance until September 21, 2016, after the 20 day period for filing a grievance had expired." *See id.* Therefore, the Agency argues the grievance should be dismissed as untimely filed.

In addition, the Agency submits that, according to Article 32, Sections 2 and 3, the Agency will provide the Union with written notification of changes in working conditions, and within 5 workdays of receipt of the proposed change, the Union may request to negotiate the change; but failure to follow this procedure "'will be deemed to constitute acceptance of the changes by the Union and the Agency may proceed to implement the proposed change.'" A.Motion at 3 (quoting Article 32, Section (3)(A)(2) of the Parties' Agreement). In this connection, the Agency argues that the Union "waived its rights" to challenge the Agency's decision because the Union did not notify the Agency within five workdays after August 8 "of its intent to negotiate the proposed changes." *Id.* at 4. Moreover, even if "the email from the Union on August 18, 2016 was the Union's attempt at initiating negotiations, the Agency responded on August 24, 2016" and "[t]he Union did not engage further with the Agency[.]" The Agency concludes that the Union "accepted the Agency's terms." *Id.*

B. Union's Arguments

The Union acknowledges that Article 24, Section 7 provides a filing window of 20 calendar days from "'the date the grievance becomes aware of the event giving rise to the Grievance'"; however, the Union contests that it was provided adequate notice of a change in conditions of employment. *See* U.Opp. at 3 (quoting the Parties' Agreement). In particular, the Union asserts that its grievance is institutional in scope (as opposed to an individual grievance) and therefore required notice at an institutional level, which it says was not accomplished by the Agency's August 8, 2016 email message addressed (among other recipients) to "the AFGE Council general email address." *Id.* at 5. Instead, the Union argues that Article 32, Section 2(a) of the Parties' Agreement, as well as their bargaining history, required notice to be provided to the Council President. *See id* at 4, 5. On this basis, the Union argues that August 8 should not be recognized as the effective

date of notice to the Union of a change to working conditions; rather, the Union argues the Council president "became aware of the changes after RD management's meetings with employees beginning [on] September 8th [.]" *See id* at 6-7. If September 8 is recognized as the date of notice, then the Union argues, "a grievance filed on September 21st is timely." *Id.* The Union also refers to the text of the Agency's August 8, 2016 email to support its argument that the email should not be recognized as providing notice to the Union of a change to conditions of employment, as it states the Agency does "'not believe that any of the guidance or procedures included in this document change anything related to the existing labor agreement.'" *Id.* at 5 (quoting Agency's email dated August 8, 2016). According to the Union, this language failed to provide "specific, definitive" notice of a change to conditions of employment, as required by federal labor law. *Id.* at 7. In support, the Union cites *Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and AFGE Local 1592*, 41 F.L.R.A. 690 (1991). The Union argues that it should not be ruled to have waived its right to bargain because the Agency did not meet "the burden of establishing that the exclusive representative received adequate notice of the change." *Id.* at 8.

In addition, "assuming, *arguendo*, [the Agency's August 8, 2016 email] was procedurally adequate notice of a change, the substance of the change nevertheless addressed a matter on which the parties had already come to an 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." U.Opp. at 9. In support, the Union cites *AFGE, 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). In this connection, the Union argues the evidence will show that "the changes to leave and credit time procedures are covered by" the Parties' Agreement. U.Opp. at 9. On this basis, the Union argues that its grievance deserves a hearing on the merits.

Analysis

At this stage of the pre-hearing process, the Arbitrator cannot determine whether the Agency's position that effective notice was given to the Union is a matter of fact. In particular, the Union's position that the Parties' bargaining history, as well as the content of the Agency's August 8, 2016 email, shows that notice was not effective cannot be decided on the papers submitted. Rather, testimony is required to provide a foundation for the Parties' respective positions.

In addition, even if adequate notice was provided, the Union's position that the Agency's decision is covered by the Parties' Agreement was not addressed by the Agency. In the absence of clear evidence to the contrary, the Union's position requires further exploration and cannot be dismissed out of hand. Therefore, the Agency's Motion to Dismiss is denied, without prejudice. The Agency may raise its Motion again, with additional evidentiary support, at a hearing.

ORDER

The Agency's Motion to Dismiss is DENIED, without prejudice.

So Ordered,

David Paul Clark

David Paul Clark
Arbitrator
March 2, 2017

Copies to:

Stephani L. Abramson, Esq.
Agency Representative
Office of General Counsel
National Archives and Records Administration
Email: stephani.abramson@nara.gov

Ashby Crowder
Union Representative
AFGE, Council of NARA Locals 260
Email: ashby.crowder@nara.gov