BEFORE ARBITRATOR
DAVID CLARK

In the matter of arbitration

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American Federation of Government Employees (AFGE), Council of NARA Locals 260	)	
	)	
UNION,	)	
	)	
v.	)	January 12, 2017
	)	
National Archives and Records Administration	)	
	)	
AGENCY.	)	
	)	

UNION'S OPPOSITION TO AGENCY'S MOTION TO DISMISS

Representing the Union:
Ashby Crowder
Principal Representative

Representing the Agency:
Stephani Abramson
Counsel for Procurement and Employment Law

Pursuant to the parties' stipulation for the Union to submit its brief in support of arbitrability on January 12, 2017, the Union, by and through the undersigned representative, hereby submits the following brief in support of its position that the grievance is arbitrable and should be heard on the merits.

A. Background

On September 21, 2016 the Union filed a grievance concerning changes to time and leave policy in the Office of Research Services - Office of the Access Coordinator for Washington DC (RD). The Union charges that the Agency violated the collective bargaining agreement and the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7116[a]1 & 5) when it implemented new time and leave procedures. *See* Exhibit 1, attached hereto. On October 5, 2016, the Agency's deciding official, Acting Executive for Research Services Ann Cummings, denied the grievance, claiming that it was not timely filed and did not demonstrate a violation of the National Agreement. *See* Exhibit 2, attached hereto. The Agency did not respond to the charge that it violated 5 U.S.C. § 7116(a)(1) and (5). As the parties' grievance procedure has but one step, the Union invoked binding arbitration within 30 days of receipt of the final decision. Mr. David P. Clark, who serves on the panel of arbitrators the parties have established for the Washington DC area, was selected by the parties' representatives to arbitrate the dispute. The Agency challenges the procedural arbitrability of the grievance on the basis of timeliness and on the basis that the Union waived bargaining in the matter under dispute.

B. Statement of Facts

On August 8, 2016, a NARA management official in RD, Supervisory Archivist Deborah Lelansky, sent an email to multiple recipients requesting review of an "RD Core Time and Leave Procedures Document." The list of recipients included a general institutional email address for AFGE Council 260 that is used principally for formal discussion notifications. *See* email, August 8, 2016, attached hereto as Exhibit 3. Beginning on September 1, 2016, management official notified the Union of numerous formal discussions to take place with small groups of RD employees starting September 8, 2016. The Union was told that the purpose of the discussions was to announce that "the RD management group has agreed to procedures for all RD staff and managers relating to the administration of work hours and leave procedures," and to share these procedures with staff members. *See,* e.g., Lelansky email to employees, September 1, 2016, attached hereto as Exhibit 4.

On September 21, 2016, the Union filed a grievance alleging that some of the changes to leave and credit time procedures were violative. The Union held that adequate notice and the opportunity to bargain was not given to the Union, and that some of the changes affected matters specifically covered by a master agreement.

C. Argument

The National Agreement provides a filing window of "20 calendar days" from "the date the grievance becomes aware of the event giving rise to the Grievance." *See* Article 24, Section 7 of the National Agreement between NARA and AFGE, attached hereto as Exhibit 5. For the institutional aspects of the grievance, the Union is the grievant in a strictly institutional

sense, per Article 24, Section 8(a). For the group aspects of the grievance, the Union is the grievant on behalf of a defined group of unit employees, per Art 24, Section 8(b), in this case all unit employees in RD. According to Article 32, Section 2(a) of the National Agreement, "The Agency agrees to provide the Council President, unless otherwise specified by the Union, with written notifications of changes in working conditions."

C.1. The grievance is timely

The employer announced the change to employees in a series of meetings that started September 8, 2016. The grievance was filed September 21, 2016. The group components of the grievance were filed on behalf of affected unit employees, and so a grievance filed on September 21st for changes announced on September 8th is filed within the 20 day deadline. Since the Union alleges that the policy in question is a new policy in violation of the National Agreement, and that the matter is covered by the National Agreement, the 20 day period renews each and every day that the policy is in effect.

Turning to the institutional aspects, the Agency's position that the grievance is untimely is based on a presumption that the August 8, 2016 email, Exhibit 3, constituted a notice of a change in conditions of employment, and that the Union failed to request bargaining in response to the notice. Whether any notice as required by Article 32 was given is a material fact in genuine dispute. In Article 32, Section 2 of the parties' agreement, the "Agency agrees to provide *the Council President, unless otherwise specified by the Union,* (emphasis mine) with written notifications of changes in working conditions." The Union having not specified another official to whom notice should be given, and there being no past practice under which an

official other than the council president is notified to initiate mid-term negotiations, it is the Union's position that no Article 32 notice has occurred. The August 8 message was not sent to the email address of the council president, at the time Darryl Munsey, nor did the message include a salutation to the council president. Moreover, the message, which was sent simultaneously to NARA's Labor Relations office and to the AFGE Council general email address, cannot reasonably be interpreted as a good faith notification of intent to initiate mid-term negotiations. Rather, the email explicitly states that "We do not believe that any of the guidance or procedures included in this document change anything related to the existing labor agreement."

The August 8 email does not clearly carry the purpose that the Agency now wishes to assign it. Lelansky's inclusion of the Labor Relations office as the primary recipient suggests that the message was a request from RD management to management's own agent in the labor-management relationship, not an attempt to initiate a formal process with the employees' exclusive representative. Normally, a Labor Relations representative would formally give the Union notice under Article 32, Mid Term Negotiations. Moreover, the Union maintains that Lelansky, a mid-level manager in a regional program office, is not in a position to reopen labor-management negotiations on a nationwide master agreement on behalf of the employer. If she is, the Agency's position would require the Union to recognize a vague communication from any of several hundred NARA management officials as a possible mid-term bargaining request on a national contract. This is not a reasonable position in light of the parties' bargaining history, and it is not consistent with the Federal Service Labor-Management Relations Statute's hortatory requirements of an effective and efficient Government.

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

In the instant case, since the council president was not notified of the changes by management, and became aware of the changes after RD management's meetings with

employees beginning September 8th had taken place, a grievance filed on September 21st is timely.

It is long standing arbitral precedent in the federal sector that resolution of disputes should rest on the merits, and that reasonable doubts should be resolved in favor of arbitrability. *See, e.g., U. S. Department of the Navy, Naval Undersea Warfare Center Division, Newport, Rhode Island and National Association of Government Employees, Local R1-134, Federal Union of Scientists and Engineers, Local R1-144*, 64 F.L.R.A. 1136 (2010). The arbitrator need not adopt the Union's arguments on adequacy of notice at this preliminary stage; rather, he must only find that the Union's arguments deserve a full hearing on the merits because there is at least a reasonable doubt about the adequacy of notice. The Union has met this threshold. At a hearing on the merits, the Union is prepared to introduce further evidence and testimony regarding the inadequacy of the August 8, 2016 message as a change notice.

C.2. The union did not waive its right to challenge RD Time and Leave procedures

Receipt of adequate notice is itself a prerequisite for a waiver of bargaining. So long as doubt exists about the adequacy of notice, a determination of waiver would be premature. In addition to its failure to notify the council president, the Agency's purported notice of changes fails other Authority tests that have a direct bearing on the question of waiver. Notice of a proposed change in conditions of employment must be "sufficiently specific and definitive" to adequately provide the exclusive representative with a reasonable opportunity to request bargaining. *See, e.g., Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of*

Government Employees Local 1592, 41 F.L.R.A. 690 (1991). The notice in dispute here purports not to be a notice at all, as it includes a statement that management "do[es] not believe that any of the guidance or procedures included in this document change anything related to the existing labor agreement." This fact alone means the Agency's argument must fail the "sufficiently specific and definitive" test.

Waivers of bargaining rights can be established either by agreement or by bargaining history. NARA does not argue that it received express agreement, but relies on bargaining history to infer a waiver. To establish that the Union has waived its right to bargain, the Agency must demonstrate that the matter was "fully discussed and consciously explored during negotiations" and the Union "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." *See U.S. Department of the Interior, Washington, D.C. and U.S. Geological Survey, Reston, Virginia and National Federation of Federal Employees, Local 1309* 56 F.L.R.A. 45 (2000), and *U.S. Department of Treasury, Internal Revenue Service and National Treasury Employees Union*, 56 F.L.R.A. 906 (2000). Nothing the Agency points to can be considered express waiver, full discussion, or conscious exploration during negotiations.

When an Agency asserts waiver of bargaining rights as a defense to a charge that it failed to bargain over a change in conditions of employment, it bears the burden of establishing that the exclusive representative received adequate notice of the change. *See U. S. Army Corps of Engineers, Memphis District, Memphis, TN and National Federation of Federal Employees Local 259*, 53 F.L.R.A. 79 (1997). The National Agreement provides that "[f]ailure to follow the procedures outlined in paragraph A(1) above will be deemed to constitute acceptance of the changes by the Union and the Agency may proceed to implement the proposed changes." For

this section to have its full force, it is presumed that the Agency will have fully complied with its own notification obligations under Article 32 -- namely, the obligation to give notice to the appropriate official and to clearly represent proposed changes as the changes they are.

C.3. The changes are covered by an existing agreement

The Agency has not responded with any specificity to the charge that the changes to leave and credit time procedures are covered by an existing agreement, and therefore not subject to change until the term contract is expired, except by express agreement between the parties. Under the Agency's view, the employer would be permitted to pepper the Union with notifications to change procedures and arrangements already established in the contract, and implement them five days after the Union didn't respond. This view is not supported by Article 33, Section 1, according to which the agreement "will remain in full force and effect for a period of 5 years after its effective date" and "will be automatically renewed for yearly periods" unless "either party at the national level gives the other party notice of its intention to renegotiate the Agreement no more than 90 nor less than 30 days prior to its termination date." The agreement was in full effect at the time of the events in question.

Assuming, *arguendo*, that Lelansky'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 agreement. The "covered by" doctrine is based on the notion that a party should not have to bargain over matters contained in an existing agreement between the parties. *See American Federation of Government Employees, Local 225 and U.S. Department of the Army, Armament Research, Development, and Engineering Center, Picatinny Arsenal, New*

Jersey, 56 F.L.R.A. 686 (2000). To determine whether a matter is covered by an existing contract, the Authority determines whether a matter is expressly contained in the collective bargaining agreement. *See, e.g., U.S. Department of Health and Human Services, Social Security Administration, Baltimore, MD and AFGE, National Council of SSA Field Office Locals, Council 220*, 47 F.L.R.A. 1004 (1993). The Union should be afforded the opportunity to demonstrate that the changes to credit time and leave procedures violate the agreement, are more than *de minimis*, and that a reasonable reader would conclude they are already covered by the existing agreement. The Union's "covered by" argument is a substantive one that deserves a hearing on the merits.

CONCLUSION

The facts of the case fully support the Union's position that grievance is arbitrable. As a result, for the foregoing reasons, the arbitrator should schedule a hearing on the merits.

Respectfully submitted

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CERTIFICATE OF SERVICE

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

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