UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: February 14, 2011

TO: The Federal Labor Relations Authority

FROM: CHARLES R. CENTER
Chief Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION

RESPONDENT

AND

Case No. CH-CA-04-0351

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3448, AFL-CIO

CHARGING PARTY

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
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SOCIAL SECURITY ADMINISTRATION RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3448, AFL-CIO CHARGING PARTY	Case No. CH-CA-04-0351

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been Remanded to the Chief Administrative Law Judge, pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 16, 2011**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

CHARLES R. CENTER
Chief Administrative Law Judge

Dated: February 14, 2011
Washington, D.C.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3448, AFL-CIO CHARGING PARTY	Case No. CH-CA-04-0351 (64 FLRA 199)

John F. Gallagher, Esq.
For the General Counsel

Wayne Schuerholz
For the Respondent

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON REMAND

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

The complaint, as amended, alleged that the Social Security Administration (Respondent) violated § 7116(a)(1) and (5) of the Statute by notifying bargaining unit employees assigned to its Painesville, Ohio, office they could no longer work past 5:45 p.m. each day, and by failing to provide the American Federation of Government Employees, Local 3448, AFL-CIO (Union/AFGE) with notice and an opportunity to bargain over the change. The effect of prohibiting employees from working past 5:45 p.m. was that it limited their ability to work overtime and credit hours. The case was initially heard by an Administrative Law Judge who is no longer with the Authority, and who issued a recommended decision finding that the Respondent's action constituted a violation of the Statute insofar as overtime was concerned, but not credit hours. In this latter regard, the

Judge found that although there was a practice of allowing employees to work credit hours until 7:00 p.m., the past practice was inconsistent with Article 10, Appendix A, Section 5 of

the collective bargaining agreement (CBA) that applied to bargaining unit employees in the Painesville office.

Subsequently, the Authority rejected exceptions to the Judge's finding that the Respondent violated the Statute by unilaterally changing the ability of bargaining unit employees to work available overtime until 7:00 p.m. on weekdays. *Social Security Administration*, 64 FLRA 199 (2009) (*SSA*) (Member Beck dissenting in part). Although the Authority adopted the Judge's factual finding that employees were no longer permitted to work credit hours until 7:00 p.m. on weekdays, it was unable to resolve the question of whether this particular change constituted a violation of the Statute. The Authority concluded that factual findings regarding two contractual provisions, Article 10, Appendix A, Section 5, and Article 10, Appendix A, Section 14(F), were needed in order to resolve that question. More specifically, the Authority found that in reaching the determination that the past practice of allowing employees to work credit hours as late as 7:00 p.m. on regular workdays was contrary to Article 10, Appendix A, Section 5, the prior judge failed to consider the General Counsel's argument that reliance upon this particular contractual provision ignored Section 14(F). The Authority remanded the issue of whether the CBA between the Respondent and the American Federation of Government Employees (AFGE) permitted the Respondent unilaterally to change the past practice whereby employees of the local office could earn credit hours up to 7:00 p.m. In its remand, the Authority stated:

> Absent factual findings interpreting the two contract provisions and construing their relationship, it is not possible to resolve the question whether the credit hours past practice is contrary to the CBA. These are factual findings that the Judge should make, in the first instance, during the remand proceedings. (footnote omitted).

SSA, 64 FLRA at 204.

FINDINGS OF FACT

The relevant CBA between the Respondent and AFGE became effective in April 2000. G.C. Ex. 2. Within that CBA, Article 10, titled "Hours of Work, Flextime, Alternative Work Arrangements and Credit Hours," addresses the subject matter central to the dispute underlying this case and this remand. G.C. Ex. 2.

There are three provisions in the CBA that bear on the issue remanded, two are contained in Article 10 and the other is in Article 1. The latter is Article 1, Section 2, which provides as follows:

> It is agreed and understood that any prior . . . practices . . . which were in effect on the effective date of this Agreement at any level (national, council, regional and local), and which are not specifically covered by this Agreement [and] do not detract from it shall not be changed except in accordance with [the Statute]."

G.C. Ex. 2 at 7.

Although the record does not pinpoint when the practice of allowing employees to work credit hours until 7:00 p.m. began, it is generally accepted and undisputed that it was in effect on the effective date of the CBA and in litigating this case both the General Counsel and Respondent asserted that Article 1, Section 2, is applicable. *See, e.g.*, *SSA*, 64 FLRA at 199-200. In applying this provision of the CBA in *SSA*, the Authority, noted it was "consistent with the parties' arguments and the record as a whole," and assumed for purposes of decision in the case that a "past practice 'detracts' from the CBA if the practice is inconsistent with a CBA provision." *Id.* at 203 note 9.

The second provision relevant to the disposition of the issue remanded is Article 10, Appendix A, Section 5, which prescribes the "Flexible Band" in small field offices, such as the Painesville office. Specifically, this provision states:

> The flexible band for small offices is a 1-hour and 45-minute period starting 45 minutes before the normal start time and ending one hour after the normal start time. It will also be 45 minutes prior to the normal end of the workday to one hour after the end of the normal workday.

G.C. Ex. 2 at 60.

Based on evidence in the record, the flexible bands at the Painesville office were from 7:15 a.m. to 9:00 a.m. and from 4:00 p.m. to 5:45 p.m. Tr. 22, 118. While discussing Article 10, Appendix A, Section 5, in its decision in *SSA*, the Authority noted, "This provision limits credit hours to a period ending one hour after the end of the normal workday." 64 FLRA at 204.

The third relevant provision is Article 10, Appendix A, Section 14(F), which provides:

> An employee may earn up to two and one-half (2 ½) credit hours per workday. Credit hours may be earned in one-quarter (1/4)-hour increments. An employee may accrue up to 28 hours during a pay period, however, only a maximum of 24 credit hours may be carried over from the prior pay period. Part-time employees may not carry over from the prior pay period more than one-half of their weekly part-time tour. Credit hours must be earned in advance of their use.

G.C. Ex. 2 at 65.

In the Painesville office, at the times relevant to the complaint in this case, the entire available work day ran from 7:15 a.m. to 5:45 p.m. and totaled 10 ½ hours. Within that total, employees would normally have been required to fulfill an 8-hour basic work requirement before they could earn credit hours. Evidence in the record also demonstrates that employees

in the Painesville office had a 45-minute lunch period. Tr. 18. There is, however, no indication in the record that employees could work credit hours during their lunch period. Thus, once employees were prohibited from working past 5:45 p.m., it was not possible for them to work 2 ½ credit hours on regular workdays. This was acknowledged at the hearing by two of the Respondent's witnesses. Tr. 65, 93. The record shows, however, that employees were allowed to, and did, work credit hours on those Saturdays when the office was open to accommodate overtime work. Tr. 30, 49. Since the 2 ½ hour limit on the number of credit hours that could be worked on an individual day applied to credit hours earned on Saturdays, the 2 ½ hour limit set forth in Article 10, Appendix A, Section 14(F) retained meaning even though section 5 of Appendix A precludes working past 5:45 p.m.

More importantly, that was the intent of AFGE and the Respondent in negotiating Article 10, Appendix A. The only evidence in the record regarding the intent of the parties is the unrebutted testimony of Lionel J. Hall who served on the Respondent's negotiation team during bargaining for the 2000 CBA and participated in the negotiation of Article 10. Tr. 79. Article 10 includes, among other things, seven appendices -- one for each of the seven major components within the Respondent's organization. Tr. 78, 81-82. Of the seven, Appendix A applied to field offices. Tr. 82. Hall testified that during the negotiations the 2 ½ hour limitation on the amount of credit hours that could be worked in any one day was included in all seven of the appendices to Article 10. Tr. 94. According to Hall, it was recognized by negotiators on both sides that it was not possible for employees in the field offices to work 2 ½ credit hours per day during the Monday through Friday workweek, but it was anticipated that during the life of the CBA, arrangements would be worked out so field office employees could work credit hours on weekends. Tr. 92-96. Hall testified that the 2 ½ hour cap was included in Appendix A to accommodate the likelihood that the ability to earn credit hours on the weekends would become a reality. Tr. 92-96. As noted, Hall's testimony was unrebutted and I find it credible.

DISCUSSION AND ANALYSIS

I do not interpret the first sentence of section 14(F) as establishing an amount of credit hours that employees are entitled to work on any given day assuming that other requirements, such as availability of work, were met. Rather, I interpret Section 14(F) as setting a cap upon the number of credit hours an employee can earn on any single day. Based on the provisions

of the CBA and the evidence regarding the parties' intent in negotiating those provisions, I find that although not a regular occurrence, it was possible for employees assigned to small field offices to work up to the 2 ½ hour limit on Saturdays when that particular office was open for overtime work. Additionally, I note that section 14(C) permits permanent, part-time employees to work up to 2 ½ credit hours on their non-tour day(s), thus affording other employees an opportunity to work up to the established limit.[1/] Since there are occasions when employees can work up to the 2 ½ credit hours allowed by section 14(F), I find the limitation that section 5 places upon the period during which full time employees can earn credit hours on a standard work day does not render section 14(F) without meaning and that the two sections can be reconciled. Section 5 establishes the hours during which credit hours can be earned by a full time employee on a regular workday, whereas, Section 14 establishes

[1] Section 14(C) provides in relevant part: "Permanent part-time employees may also earn up to 2 ½ credit hours on their non-tour day(s)." G.C. Ex. 2.

a ceiling upon the total number of credit hours any full or part-time employee can earn on any day, whether a regular work day or other. I further find the past practice of allowing employees to work credit hours until 7:00 p.m. was contrary to the CBA and that the terms of Article 10, combined with Article 1, permitted the Agency to limit the ability of employees to earn credit hours to the period ending one hour after the end of the normal workday. In the case of the Painesville office that period ended at 5:45 p.m. pursuant to section 5 of Appendix A.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

The complaint be and hereby is dismissed to the extent that it alleges the Respondent violated the Statute by changing the practice of allowing employees to work credit hours in the Painesville office until 7:00 p.m.

Issued, Washington, D.C., February 14, 2011.

CHARLES R. CENTER
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by **CHARLES R. CENTER**, Chief Administrative Law Judge, in Case No. CH-CA-04-0351, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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_____
Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: February 14, 2011
Washington, DC