FEDERAL LABOR RELATIONS AUTHORITY OALJ 11-15
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION EL PASO, TEXAS RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO CHARGING PARTY	Case No. DA-CA-09-0286 (65 FLRA 422)

Nora E. Hinojosa, Esq.
For the General Counsel

Mark W. Hannig, Esq.
For the Respondent

James Stack
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON REMAND

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et. seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On June 29, 2009, the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge (ULP) with the Dallas Region of the Authority against the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas (Respondent). (G.C. Ex. 1(a)). On March 31, 2010, the Regional Director of the Dallas Region of the

Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to respond to the Union's request to negotiate over the termination of the practice of allowing first-line supervisors the discretion of granting excused absence/administrative leave to bargaining unit employees and by implementing said change without providing the Union with an opportunity to negotiate over this change to the extent required by the Statute. (G.C. Ex. 1(c)). On April 16, 2010, the Respondent filed an Answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(g)). On April 21, 2010, the Dallas Regional Director issued an Amended Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by terminating the practice of allowing first-line supervisors the discretion of granting excused absence/administrative leave to bargaining unit employees, thereby discontinuing the practice of granting administrative leave on or near the birthdays of the Sector Enforcement Specialists at the El Paso Sector. (G.C. Ex. 1(h)). At the hearing, Counsel for the General Counsel amended the complaint to change the date of the alleged termination of the above practice to January 2, 2009. (Tr. 6).

A hearing was held in El Paso, Texas, on May 11, 2010, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely post-hearing briefs, which have been fully considered.

On September 14, 2010, I issued a recommended decision finding that the ULP charge was untimely filed under section 7118(a)(4)(A) of the Statute and recommended that the complaint be dismissed. In *U.S. Dep't of Homeland Sec., U.S. Customs & Border Protection, El Paso, Tex.*, 65 FLRA 422 (2011), the Authority reversed the decision and remanded the amended complaint to me for further consideration and resolution of the matter based upon the merits of the case.

Based upon the entire record[1], including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

STATEMENT OF THE FACTS

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(c), 1(g), 1(h)). Victor Manjarrez occupied the position of Chief Patrol Agent for the El Paso Sector from approximately 2008 through 2010. He has since transferred to the Tucson Sector of U.S. Customs and Border Protection; Randy Hill has been the interim Chief Patrol Agent since May 2010. (G.C. Exs. 1(c), 1(g), 1(h); Tr. 86-87). At all times material to this matter, Manjarrez has been a supervisor and/or management official within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c), 1(g), 1(h)).

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[1] For good cause shown, I grant the Respondent's unopposed motion to file its brief out of time.

The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. James Stack is a border patrol agent within the El Paso Sector and has served as President of AFGE Local 1929 since January 1999. (Tr. 19). Included within the bargaining unit are Sector Enforcement Specialists (SES), who work in communications and serve as support for border patrol agents in the field. There are approximately fifty (50) SES, with forty-three (43) located in El Paso and seven (7) located in Deming. SES work 24 hours a day, seven days a week. There are three shifts: 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to midnight and midnight to 8:00 a.m. (Tr. 19-21, 54, 63, 72, 110).

SES employees are considered essential personnel who must be present whenever border patrol agents are in the field. In general, this means when employees were granted administrative leave on Christmas Eve or New Year's Eve, SES employees remained at work, although they were apparently paid holiday pay for this time. (Tr. 32-33, 54-55). Prior to January 2009, a practice had developed that, in compensation for not being allowed to leave work on administrative leave like other employees, the SES employees were allowed administrative leave on or near their birthdays. The testimony indicated that this practice had been ongoing for several years, since about 1988. (Tr. 64). Employees were not required to request administrative leave for their birthdays and their birthdays were automatically included in the work schedules. If, somehow, a birthday was not on the schedule, the employee would ask about it and it would be placed on the schedule. Generally, employees took their specific birthday, but could also take the administrative leave at any time during that two week leave period. (Tr. 65-66, 76).[2]

In July 2008,[3] Stack heard rumors that the administrative leave for the SES was going to be eliminated and wrote to Alvon Williams, Supervisory Sector Enforcement Specialist, El Paso Sector. In his letter of July 3, Stack protested the termination of the practice and requested that the Respondent re-implement the practice immediately, while suggesting slight modifications to the manner in which the employees claim compensation for this date. (G.C. Ex. 2; Tr. 24).

On July 22, Chief Patrol Agent Manjarrez sent a letter informing Stack that he was rescinding the previous notice to the SESs, regarding the granting of a paid day-off for their birthdays. The letter also stated that "If management determines to revisit this issue, the union will be given official notification." (G.C. Ex. 3; Tr. 25-26).

On July 29, Manjarrez sent a letter to Stack, pursuant to provisions of Article 3A of the Negotiated Agreement between U.S. Immigration and Naturalization Service and National Border Patrol Council, stating, in part:

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[2] This practice only existed in the El Paso office; the SES in Deming did not receive administrative leave on or around their birthdays. (Tr. 110).

[3] All dates are in 2008 unless otherwise specified.

> This is to inform you that first line supervisors for the El Paso Sector do not have the authority or discretion to grant the El Paso Border Patrol Sector, Sector Enforcement Specialists (SESs), nor any other employee, excused absence to offset for time off-duty provided to other employees on Christmas Eve and New Year's Eve. Therefore, effective December 28, 2008, management will terminate the practice of allowing first line supervisors the discretion of granting excused absence/administrative leave related to holidays or birthdays. Terminating this practice on this date should provide affected employees, that is, those currently employed within El Paso Border Patrol Sector as of the date of this notice, with an adequate adjustment period. Management will continue to approve or disapprove "excused absences" in accordance with regulations and policy.

(G.C. Ex. 4).

Stack responded on August 8, stating that the Union was in need of additional information and clarification. The Union referred to its July 3 letter to Alvon Williams (G.C. Ex. 2) and requested certain information.[4]

Stack then stated:

> While we are not entirely sure if the agency's proposal is intended to impact, in any way, the affected bargaining unit employees' entitlement to excused absences/administrative leave, we will, in an exercise of caution, nonetheless make known our demand to bargain over the proposed change(s), to the fullest extent allowed by law. Moreover, the Union hereby proposes and insists that the agency hold any change(s) pertaining to the agency's proposal in abeyance until the completion of all phases of bargaining, including any attendant third-party resolution procedures, such as, but not limited to, assistance from the Federal Mediation and Conciliation Service or the Federal Service(s) Impasses Panel.

The Union then submitted five proposals, while it reserved the right to submit additional proposals. (G.C. Ex. 5 at 2; Tr. 27-29). The Union received no response to this letter and had no further communications with the Respondent on this issue until 2009.

Guillermo Acosta has been an SES since June 2006. He received administrative leave for his birthday, January 2, in 2007 and 2008. He did not receive administrative leave for his birthday in 2009. (Tr. 55). He expressed his concern to his supervisor (Tr. 59), as did other SESs. (Tr. 79). Another employee, Raymundo Montoya, has worked as an SES for twenty-two years and has received administrative leave for his birthday since about 1988 until 2009.

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[4] The complaint in this matter does not include any allegations regarding section 7114 (b)(4) and this request for information.

(Tr. 64). None of the other SESs have received administrative leave for their birthdays since January 2009. (Tr. 66, 76).

After learning that the SES were no longer receiving administrative leave for their birthdays, Stack contacted Bill Torres, a supervisory border patrol agent and the Respondent's liaison with the Union. Torres told him he would look into the situation, but Stack never heard from him. (Tr. 22, 42). Stack discussed this issue with Torres again, who suggested that Stack contact the Respondent's legal office. (Tr. 23). Stack spoke to attorneys in that office but eventually filed the unfair labor practice charge in this case on June 29, 2009. (G.C. Ex. 1(a); Tr. 23).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to provide the Union prior notice and an opportunity to negotiate the change in the practice of granting eight hours of excused absence/administrative leave to the Sector Enforcement Specialists on or near their birthdays to the extent required by the Statute, and by failing to respond to the Union's demand to bargain regarding the change in said practice.

The GC notes that even where the decision to change a condition of employment constitutes the exercise of a management right under section 7106 of the Statute, as in this matter, and the substance of the decision to make the change is not negotiable, the agency is nonetheless obligated to bargain over the appropriate arrangements and procedures of that decision if the resulting change will have more than a *de minimis* effect on bargaining unit employees' conditions of employment. *Dep't of Health & Human Serv., SSA*, 24 FLRA 403 (1986)(*HHS, SSA*). *Cf. Soc. Sec. Admin., Office of Hearings & Appeals, Charleston, S.C.,* 59 FLRA 646 (2004). In such circumstances, an agency which fails to provide adequate prior notice of the change to the affected employees' exclusive representative or rejects the union's timely request for negotiations pursuant to section 7106(b)(2) and (3) of the Statute will be found to have violated section 7116(a)(1) and (5) of the Statute. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848 (1999).

The evidence presented in this case demonstrates that the Respondent implemented a change with more than *de minimis* impact on bargaining unit employees' conditions of employment, without giving prior adequate notice to the Union and the opportunity to bargain. *United States Sec. & Exch. Comm'n*, 62 FLRA 432 (2008).

With regard to the remedy in this matter, the GC seeks a cease and desist order; an order that, upon request of the Union, the Respondent bargain concerning the impact and implementation of the discontinuation of the practice of granting SES employees

administrative leave for their birthdays, and apply retroactively the results of such bargaining; and the posting of a notice signed by the Chief Patrol Agent, El Paso Sector.

Respondent

The Respondent denies that it violated the Statute as alleged in the complaint. The Respondent argues that the change at issue in this matter had no more than a *de minimis* effect on the working conditions of bargaining unit employees, and therefore, there was no duty to bargain. The Respondent asserts that it changed the level of management that would approve administrative leave or excused absence to offset for time off-duty provided to other employees. Essentially, this was a change related to its first-line supervisor's delegated authority. Further, the Union did not see fit to bargain about excused absence when it bargained other aspects of leave in the SOP (Standard Operations Procedures) for the SES.

The Respondent argues that the Union provided no evidence of how management began to grant administrative leave for birthdays in lieu of holiday administrative leave; what management considered when exercising its discretion to grant administrative leave; or that management waived any ability to exercise discretion. The evidence does establish that seven out of the fifty SES did not receive and were denied excused absences related to their birthdays. (Tr. 110). Further, as soon as the El Paso Sector Chief found out about the practice, it was stopped. (Tr. 92).

The Respondent also asserts that this matter should be dismissed pursuant to section 7116(d), since the Union initiated grievances on this matter prior to the filing of the unfair labor practice charge.

ANALYSIS AND CONCLUSIONS

Procedural Issues

Section 7116(d)

Section 7116(d) of the Statute states:

> Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance, procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

The Respondent asserts that the complaint in this matter should be dismissed pursuant to section 7116(d) of the Statute since both the Union and individual bargaining unit employees filed grievances prior to filing the unfair labor practice charge in this matter.[5] The Respondent bases this position on the individual bargaining unit employees questioning their supervisors regarding the loss of the administrative leave for their birthdays and that the Union president brought the issue to the attention of the Respondent's liaison. There is no evidence that any actual grievance was filed or processed through the parties' negotiated grievance procedure.

Article 33, Grievance Procedure, in the parties' Collective Bargaining agreement, (Resp. Ex. A, pp. 51-56) states, in part:

> B. Definition – A grievance means a complaint either by a unit employee concerning his or her conditions of employment, or by the Union in its own behalf or concerning conditions of employment of any employee.
>
> D. The Agency and the Union agree that every effort will be made by management and the aggrieved party(s) to settle grievances at the lowest possible level.
>
> E. Step 1: Informal grievances must be filed within thirty (30) calendar days after the incident occurs. . . The grievance shall first be taken up orally by the concerned employee with the first level of supervision in an attempt to settle the matter.
>
> F. (1) Union initiated grievances may be submitted in writing (containing the same information required in Step II) within 30 calendar days of the incident by the appropriate Union representative or his or her designee to the appropriate management representative or his or her designee.

In support of this argument, the Respondent notes that the parties' collective bargaining agreement provides for both Union-initiated and employee-initiated grievances. The Respondent asserts that both the Union and various employees chose to deal with this issue through the negotiated grievance procedure. The evidence reflects that Stack began receiving alerts from the SES in January 2009 that they were not getting administrative leave for their birthdays. At that time Stack took the issue to Bill Torres, a supervisory Border Patrol Agent who is a Union liaison and had the capacity to resolve many issues himself or to obtain the authority to do so. Stack understood that Torres was serving as a management representative

[5] The Respondent did not raise the issue of a 7116(d) bar to the complaint in its prehearing disclosure or during the hearing, but did so for the first time in its brief. Counsel for the General Counsel did not discuss this issue in her brief. Since 7116(d) is a jurisdictional issue, it can be raised at any time during the proceedings. *See U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Coatesville, Pa.,* 57 FLRA 663, 666 (2002)(citations omitted).

to resolve labor relations issues. Stack also wrote a letter in July 2008 about the Union's desire to negotiate any change in granting administrative leave for birthdays. (G.C. Ex. 2). Further, several employees initiated a Step 1 employee-initiated grievances by expressing their concerns to their first-line supervisors. (Tr. 66, 58). The Respondent therefore argues that the complaint in this matter should be dismissed due to the earlier filed grievances.

The Authority's implementing Statute does not permit parties to litigate the same issue under both grievance/arbitration procedures and as an unfair labor practice. Thus, under section 7116(d) of the Statute, issues which can be raised under a grievance procedure may be raised under the grievance procedure or as an unfair labor practice (ULP), but not under both procedures. This policy was established to prevent needless duplicative and repetitive litigation. *U.S. Dep't of Labor, Wash*., *D.C.*, 59 FLRA 112 (2003). Whether a grievance is barred by an earlier-filed ULP, or vice-versa, requires examining whether the grievance involves the same "issues", that is, whether the grievance arose out of the same factual predicate as the ULP, and whether the legal theory advanced in support of the grievance and the ULP are substantially similar. When both tests are met, section 7116(d) bars the subsequent action. *See OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 801-02 (1996) and cases cited therein.

In this matter, however, there is no evidence that any grievance, either Union-initiated or employee-initiated, was ever filed. The fact that Stack received complaints from employees about the loss of administrative leave for their birthdays and brought the issue to Bill Torres, a supervisory Border Patrol agent and Union liaison, does not equate to a grievance filed pursuant to the parties' negotiated grievance procedure.[6] Employee complaints to their supervisors, without further evidence, are not sufficient to show that actual grievances were filed in this matter.

I find that there is no evidence that any grievance, either Union-initiated or employee-initiated, was filed on this issue. Therefore, there is no section 7116(d) bar to the ULP filed in this case. *See U.S. Dep't of Housing & Urban Dev., Denver, Colo.*, 53 FLRA 1301, 1317 (1998).

Even assuming a grievance was filed, the Respondent presented no evidence regarding the specific facts or theories underlying such a grievance. Without such support, it is impossible to assess whether the grievance concerns the same factual circumstances or legal theories as the ULP complaint. Therefore, the Respondent has provided no support for

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[6] Stack's July letter regarding the Union's desire to negotiate any change in the granting of administrative leave for SES employees (G.C. Ex. 2) cannot be considered a grievance filed under the parties' negotiated grievance procedure. Rather, it is the Union's first attempts to communicate and to inform the Respondent of its interest and desire to negotiate on this issue. The Respondent's failure to respond to the Union's request to bargain is at issue in this matter. The Respondent's attempt to turn the Union's communications regarding its desire to bargain into a grievance under the negotiated grievance procedure is rejected.

its claim that section 7116(d) bars the ULP in this matter and I am rejecting this defense. *See U.S. Dep't of Transp., FAA Houston,* 63 FLRA 34 (2008); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.,* 60 FLRA 490, 492 n.5 (2004).

ANALYSIS AND CONCLUSIONS

Prior to implementing a change in conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999). When, as here, an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency nonetheless has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a *de minimis* effect on conditions of employment. *See HHS, SSA,* 24 FLRA at 407-08; *Pension Benefit Guaranty Corp.*, 59 FLRA 48, 50 (2003)(*PBGC*)*; 92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995). In applying the de *minimis* doctrine, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000); *PBGC*, 59 FLRA at 51.[7]

The Authority has long held that "employees' use of duty time, without loss of pay, for certain activities" involves a condition of employment. *AFGE, Local 12*, 60 FLRA 533, 540 (2004) (Member Armendariz concurring)(proposal allowing employees to use administrative leave to attend union-sponsored labor recognition programs concerned a condition of employment). The Authority explained that "administrative leave allows employees to be absent from duty with pay" and, therefore, it affects conditions of employment. *Id*. The Authority has applied this precedent to conclude that granting administrative leave concerned conditions of employment even where the administrative leave at issue was "for participation in a non-work related activity[.]" *Id*. *See also U.S. Dep't of the Treasury, IRS*, 62 FLRA 411 (2008)(upholding Arbitrator's finding that the Agency violated the parties' agreement by unilaterally ending an established past practice of granting employees four hours of administrative leave to attend Employee Appreciation Day each year.).

[7] An agency may implement changes before bargaining when necessary to correct an unlawful practice. *U.S. Immigration & Naturalization Serv., Wash., D.C.*, 55 FLRA 69, 73 n.8 (1999). The Respondent did not make such an argument and I find no evidence that the practice was illegal.

In this matter, while not specifically arguing that the granting of administrative leave was not a condition of employment, the Respondent did argue that the termination of that practice had no more than a *de minimis* impact on the bargaining unit employees, and it therefore had no obligation to bargain with the Union. However, in *Dep't of Veterans Affairs Medical Ctr., Asheville, N.C.*, 51 FLRA 1572 (1996)(*VA Asheville)*, the Authority held that the Respondent violated section 7116(a)(1) and (5) of the Statute when it unilaterally discontinued the past practice of granting employees four hours of administrative leave for their birthdays without providing the Union notice and an opportunity to bargain on the impact and implementation of the change. There is no evidence that the granting of administrative leave in the circumstances of this case was less impactful on bargaining unit employees. Therefore I find that the change had a greater than *de minimis* impact and the Respondent was obligated to bargain prior to implementing the change.

The Respondent also argues that the change only related to the level of supervision that could grant or deny administrative leave. First-line supervisors were no longer allowed to approve such administrative leave and as a result, there was no change to bargaining unit employees' conditions of employment. The evidence clearly establishes that, as a result of this change, bargaining unit employees were no longer granted administrative leave for their birthdays. The Union was only interested in the results of the change and its impact on bargaining unit employees and never gave any indication that it was interested in bargaining over what level of management would grant or deny administrative leave. However the Respondent characterizes the change, it is clear that the discontinuance of granting employees administrative leave on or around their birthdays impacted bargaining unit employees.

The standard for determining the existence of a past practice is whether a practice was consistently exercised for an extended period of time with the other party's knowledge and express or implied consent. *U.S. Dep't of the Treasury, IRS, Louisville Dist., Louisville, Ky.*, 42 FLRA 137, 1142 (1991); *U.S. Dep't of Labor, OASAM, Dallas, Tex.*, 65 FLRA 677 (2011). The practice must be "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *Soc. Sec. Admin., Office of Hearings & Appeals, Montgomery, Ala.*, 60 FLRA 549, 554 (2005).

In this matter, the practice of allowing birthday leave had been in existence for a number of years. Both employees and the supervisory staff were well aware of the policy. Employees were not even required to request the day off, as it was generally included in the work schedule by the supervisors.[8] There is no evidence that either the supervisors or the

[8] The Respondent argued that there was testimony at the hearing that some SES employees were allowed administrative leave in conjunction with early release for Christmas and New Year's Eve, thus eliminating any justification to even consider providing compensatory birthday excused absence. However this practice was started, it is clear that after twenty years, it had developed into an automatic practice of allowing SES employees to have administrative leave on or around their birthdays without any real reference to the possible loss of other administrative leave.

employees attempted to conceal this practice. Although the Respondent argues that Chief Manjarrez had no knowledge of this practice prior to the summer of 2008, it presented no actual evidence in this regard. The Chief did not testify at the hearing, and while his successor did testify, he admitted that he had no direct knowledge of the practice or the policies at issue in the El Paso Sector. (Tr. 86-87). Therefore, I find that responsible management officials acquiesced to the practice. Evidence of knowing acquiescence by responsible management officials may be express or implied. *See Def. Distrib. Region West, Tracy, Cal.*, 43 FLRA 1539, 1559-60 (1992)("it is sufficient that employees consistently exercised a practice for an extended period of time, with the agency's knowledge and express or implied consent."). The Authority has described express acquiescence as occurring when management gives express consent to a practice. *Id*. Implied acquiescence is characterized as management's consent to a certain practice, given its knowledge of the practice, by failing to challenge it in a significant manner. *Id*. (finding implied acquiescence despite supervisors' occasional protests). *Internal Revenue Serv. & Brookhaven Serv. Ctr.*, 6 FLRA 713, 726-27 (1981)(finding implied acquiescence when, as a practice, management consistently met with more than one union representative without significant protest.)

Here, the continuation of this practice for more than twenty years (since 1988) without significant protest implies Respondent's acquiescence in the practice. This is not a practice that employees managed on their own – administrative leave for their birthdays was incorporated into the work schedules by the supervisors. Further, such practice was well known throughout this particular office of the organization. There is no evidence that any management officials objected to the practice until it was stopped in 2009.[9]

The Respondent argues that it was required to cease granting the administrative leave based on Department of Justice policy (Resp. Ex. J), Customs and Border Protection policy (R. Ex. C), or other regulations. The Authority has long recognized that agencies have broad discretion to grant administrative leave to employees for brief periods of time. *See U.S. Dep't of the Air Force, 439th Airlift Wing, Westover Air Reserve Base, Mass.*, 55 FLRA 945, 949 (1999). As agencies have discretion to grant administrative leave to their employees, management can negotiate the terms under which it will exercise that discretion. *See, e.g., Soc. Sec. Admin., Balt., Md.*, 58 FLRA 630 (2003); *VA Asheville*, 51 FLRA at 1578. Again, in this matter, the Respondent made a change without affording the Union notice or an opportunity to bargain and this defense must be rejected.

[9] Even if Manjarrez was unaware of this practice, and wanted to cease the practice as soon as he found out, the Respondent still had the obligation to provide notice to the Union and the opportunity to bargain on the appropriate arrangements and procedures of such a change.

The Respondent further argues that a SOP (Standard Operations Procedure) for the Communications Services Section (which includes SES employees) was negotiated with the Union in either 1999 or 2000 and does not cover the matter at issue in this case. Although the SOP discusses leave issues, it is silent on the issue of excused absence/administrative leave for birthdays. Therefore, the Respondent was under no obligation to continue granting excused absence/administrative leave for birthdays. The GC notes that the SOP was not entered into the record and there was no specific testimony regarding the practice of leave under the SOP; therefore, the Respondent has presented no evidence in support of its apparent "covered by" defense. Further, the practice was granted both before and after the creation of the SOP and, if the Respondent chose to change the practice, it was required to provide notice to the Union and an opportunity to bargain the appropriate arrangements and procedures of the change. *U.S. Army Corps of Engineers, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997). The Respondent also argues that the parties' National Collective Bargaining Agreement (CBA) covers the topic of Leave, but does not include administrative leave for birthdays. (Resp. Ex. A). The GC argues that the practice at issue existed before the national contract was negotiated and continued after the national contract was implemented. Article 5 provides that the CBA is not intended to abolish, solely be exclusion from the contract, any understanding or agreements which have been mutually acceptable to the parties, as long as the understanding or agreements are not in conflict with the master agreement. In agreement with the GC, I reject the Respondent's defenses regarding its right to change an established practice under the SOP and/or the CBA without fulfilling its Statutory obligations.

Under these circumstances, I find that the Respondent terminated the existing practice regarding granting administrative leave to SES bargaining unit employees without providing the Union proper notice and an opportunity to bargain regarding the impact and implementation of that decision. Further, the Respondent failed to respond to the Union's timely request to bargain. Respondent therefore violated section 7116(a)(1) and (5) as alleged in the amended complaint.

REMEDY

The General Counsel seeks a remedy requiring that the Respondent, upon request of the Union, bargain concerning the impact and implementation of the discontinuance of the practice of granting SES employees administrative leave for their birthdays. The results of such bargaining should be applied retroactively. *See VA Asheville.* Such a remedy appears appropriate in these circumstances and I will so recommend.

CONCLUSION

I find that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged when it unilaterally discontinued the practice of granting SES employees administrative leave for their birthdays without notifying the Union and affording it an opportunity to bargain on the appropriate arrangement and procedures of the change, and by failing to respond to the Union's timely request to bargain.

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

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, shall:

1. Cease and desist from:

(a) Unilaterally discontinuing the practice of granting Sector Enforcement Specialists employees administrative leave for their birthdays without notifying the American Federation of Government Employees, National Border Patrol Council Local 1929, AFL-CIO (the Union), the exclusive representative of bargaining unit employees, and affording it an opportunity to bargain on the appropriate arrangements and procedures for the change.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the Union, bargain concerning the impact and implementation of the discontinuation of the practice of granting SES employees administrative leave for their birthdays, and apply retroactively the results of such bargaining.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Agent, U.S. Customs and Border Protection, El Paso, Texas, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 30, 2011.

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SUSAN E. JELEN
ADMINISTRATIVE LAW JUDGE

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally discontinue the practice of granting the Sector Enforcement Specialists (SESs) administrative leave for their birthdays without notifying the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (the Union), the exclusive representative of bargaining unit employees, and affording it an opportunity to bargain on the appropriate arrangements and procedures for the change.

WE WILL NOT fail to respond, in a timely manner, to demands to bargain made by the Union in accordance with the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL, upon request of the Union, bargain concerning the appropriate arrangements and procedures of the discontinuation of the practice of granting the SESs administrative leave for their birthdays, and apply retroactively the results of such bargaining.

WE WILL, respond, in a timely manner, to demands to bargain made by the Union in accordance with the Statute.

____
(Agency/Activity)

Dated: ____________________ By:______________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, and whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214)767-6266.