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

MEMORANDUM

DATE: September 16, 2010

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
RESPONDENT

AND

Case No. DA-CA-09-0286

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, 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

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DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO
CHARGING PARTY

Case No. DA-CA-09-0286

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her 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 **OCTOBER 18, 2010**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: September 16, 2010
Washington, D.C.

OALJ 10-17

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

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

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

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 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.[1]

Based upon the entire record, 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)).

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; midnight to 8:00 a.m. (Tr. 19-21, 54, 63, 72, 110).

SES employees are considered essential personnel who must be present whenever

[1] The GC's unopposed Motion to Correct the Transcript is granted.

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 around 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:

> 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.

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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.

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

After learning that the SES were not 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).

TIMELINESS

In its prehearing disclosure,[5] the Respondent raised the issue of timeliness, arguing that the unfair labor practice charge in this matter was not filed in a timely manner and thus, the complaint should be dismissed based on section 7118(a)(4)(A) of the Statute. The

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

[5] Section 2423.23 of the Authority's Rules and Regulations requires that the parties shall exchange information which includes "[a] brief statement of the theory of the case, including relief sought, and any and all defenses to the allegations in the complaint."

Respondent made no mention of this defense in its brief; however, the General Counsel (GC) did argue that the charge had been timely filed. Specifically, the GC asserted that the change in the established practice of granting eight hours of excused absence/administrative leave to the SES on or near their birthdays was implemented on January 2, 2009. The parties' collective bargaining agreement provides that the Union is to receive notifications from Respondent of intended changes and provide the appropriate level of bargaining when the Respondent proposes changes in the working conditions of bargaining unit employees. The GC asserts that the record evidence shows that adequate notice was not provided to the Union President of the change and that the Union was not provided an opportunity to bargain over the change prior to its implementation. Since the change was implemented on January 2, 2009, and the unfair labor practice charge in this matter was filed on June 29, 2009, the charge was timely filed and the Respondent's argument should be rejected.

Section 7118(a)(4) states:

> (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.
>
> (B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of –
>
> (i) Any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person; or
>
> (ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period.

The General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

In *U.S. Army Armament Research, Development and Engineering Ctr., Picatinny Arsenal, N.J.*, 52 FLRA 527, 532 (1996), the Authority states that "[s]tatutes of limitation[s] are affirmative defenses and, as such, are waived unless raised in the pleadings or at trial." *Id.* at 532. The Authority further found that section 7118(a)(4) of the Statute "is an affirmative defense[.]" *Id.* at 534. Although the Respondent did not argue this defense in its brief, since the issue of timeliness was raised in the pleadings, I find this issue is properly before me.

The record evidence shows that the Respondent sent a letter to the Union on July 29, 2008, giving the Union notice that "… 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…." (G.C. Ex. 4) The Union responded on August 8, requesting clarification and also requesting to bargain over the proposed change(s) to the fullest extent allowed by law. (G.C. Ex. 5) The Union received no further correspondence from the Respondent on this issue. The Union was not aware that the change had been implemented, specifically that SES employees were no longer receiving administrative leave/excused absence on or around their birthdays until employees began to complain in early 2009. The first known instance in which an employee was not given administrative leave for his birthday was on January 2, 2009. January 2 occurred on a Friday in 2009, which would be in the middle of a pay period. Apparently, the beginning of the pay period for the Respondent's employees was December 28, 2008, the date referenced in the Respondent's July 29, 2008, letter to the Union. (G.C. Ex. 4).

Although Respondent's July 29 notice to the Union is framed in terms of first line supervisors no longer having certain authority, it is also apparent that the asserted change will impact on bargaining unit employees, *i.e.* by essentially eliminating administrative leave on or around the SES birthdays. The evidence is clear that the Respondent's July 29 letter gave an implementation date of December 28, 2008, and, although the Respondent did not afford the Union the opportunity to bargain prior to implementation, it also never indicated to the Union that it had rescinded the implementation date. The Union was aware of the impact of the change on bargaining unit employees in early January 2009 and, therefore, should have been aware that the implementation date for the change was December 28, 2008. *See U.S. Dep't of the Treas., IRS and U.S. Dep't of the Treas., IRS, Houston District,* 20 FLRA 51 (1985) (Respondent's conduct did not prevent the Union from filing the charge within six months of the meetings where the dress code was announced.) *See also U.S. Dep't of Labor,* 20 FLRA 296 (1985).

Even though the GC amended the complaint to allege that the change was implemented on or about January 2, 2009, I find the record evidence establishes that the change was implemented, as announced, on December 28, 2008, rather than the date of the first affected employee's birthday. With the implementation date of December 28, 2008, the Union had six months from that date to file the charge in this matter. I find that the Respondent's conduct did not preclude the Union from filing the charge within six months. *Cf. Air Force Accounting and Finance Ctr., Lowry AFB, Denver, Colo.,* 42 FLRA 1226 (1991). Since the charge was filed on June 29, 2009, it was untimely filed under section 7118(4)(A) and thus no violation may be found.

Since I have found that the charge in this matter was untimely filed under section 7118(4)(A) of the Statute, no other discussion is necessary.

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

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., September 16, 2010

SUSAN E. JELEN
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-09-0286, 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: September 16, 2010
Washington, DC