UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: April 28, 1999

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. CUSTOMS SERVICE
CUSTOMS MANAGEMENT CENTER
MIAMI, FLORIDA

Respondent

and Case No. AT-CA-80566

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 137

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

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. CUSTOMS SERVICE CUSTOMS MANAGEMENT CENTER MIAMI, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 137 Charging Party	Case No. AT-CA-80566

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 1, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: April 28, 1999
Washington, DC

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[1] The complaint in this case was issued against "U.S. Department of the Treasury, U.S. Customs Service, Miami, Florida," as the Respondent. The complaint was amended at the hearing to reflect what the parties then agreed to be the correct name of the organizational component involved in this case. That name is now reflected in the case caption.

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. CUSTOMS SERVICE CUSTOMS MANAGEMENT CENTER MIAMI, FLORIDA1 Respondent	
and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 137 Charging Party	Case No. AT-CA-80566

David J. Mithen, Esq.
Gary J. Lieberman, Esq.
For the General Counsel

Deborah E. Rand, Esq.
For the Respondent

Steven P. Flig, Esq.
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint in this case alleges that the Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by discontinuing an "established practice" of permitting employees to be granted administrative leave to attend and participate in the "Florida Police Olympics," without providing the Charging Party ("Chapter 137" or "the Union") with an opportunity to negotiate to the extent

required by law. The Respondent's answer denies that there was such an "established practice," that there was a change in the "practice," that the Respondent implemented such a change without providing the Union with the required opportunity to negotiate, and that the Respondent committed the unfair labor practice alleged in the complaint.

A hearing on the complaint was held in Miami, Florida, on January 14, 1999.[2] Counsel for the General Counsel and for the Respondent filed posthearing briefs. The General Counsel's brief was particularly helpful in that its statement of facts was sufficiently complete, accurate, and balanced as to permit me to use it as a draft for my findings of fact.

Findings of Fact[3]

A. Background

The National Treasury Employees Union (NTEU) is the certified exclusive representative of a nationwide unit of U.S. Customs Service employees appropriate for collective bargaining, including employees at the Respondent. The parties' current collective bargaining agreement (contract) is dated October 3, 1996. Three of the contract's articles were implemented on October 1, 1996, the remainder becoming effective on February 1, 1997. Chapter 137, a component of NTEU, represents approximately one thousand bargaining unit employees. Most of the employees Chapter 137 represents are law enforcement officers, including Customs Inspectors and Canine Officers. Chapter 137 also represents Customs Service officers who serve in administrative functions.

U.S. Customs Service is organized into twenty Customs Management Centers, or CMC's. Florida is home to two of these CMC's, including the Respondent, which is based in Miami. The Respondent's highest level official is its Director, D. Lynn Gordon. Gordon, in turn, reports to the Assistant Commissioner for the Field Operations Division, who's office

[2] At several places in the transcript of the hearing, fragments of questions and answers are missing, the omissions usually identified by the symbol, "--." None of the parties have indicated that these omissions were prejudicial, and I conclude that no useful purpose would be served by refusing to accept the transcript as a true and accurate record.

[3] These findings are based on the entire record, the briefs, my observation of the witnesses, and my evaluation of the evidence. The facts are, to a great extent, and, in my view, in all essentials, undisputed.

is at Customs Service headquarters. Gordon's second in command at the Respondent is the Mission Support Officer, James Elzer. Elzer oversees the Respondent's administrative functions and labor relations and has served from time to time as Acting CMC Director.

Prior to adopting its current structure on October 1, 1995, the Customs Service was divided into seven Regions, each headed by a Regional Commissioner. These regions were sub-divided into district offices. Much of the geographical area now under the jurisdiction of the Respondent came under the Miami District office in the Southeast Region. Gordon became the District Director for the Miami District in March 1990. As a result of the reorganization, four stations were added to the Miami District and it was renamed the South Florida CMC. Following the reorganization, Gordon became the Director of the South Florida CMC. Chapter 137's representational coverage remained essentially the same.

The Respondent's mission is, primarily, the interdiction of drug smuggling. Subsidiary missions are the processing of passengers entering the United States and cargo both entering and exiting. A Customs Inspector's duties can involve each of these missions. In the course of such duties, Inspectors interact with law enforcement officers from other local, county, State, and Federal agencies. For example, they have served on joint task forces with agents from the Federal Bureau of Investigation, the Drug Enforcement Agency, the U.S. Coast Guard, the Bureau of Alcohol, Tobacco and Firearms, and the Internal Revenue Service. When Inspectors discover illegal aliens, foods, or narcotics they contact officials from the appropriate law enforcement agencies, and the involved individuals may be turned over to such other agencies.

B. Granting of Administrative Leave to Attend Florida Law Enforcement Games

A group of "retired officers" organized the Florida Law Enforcement Games ("Florida Games" or "Games"), also called the Florida Police Olympics. The Games consists of competitions in a broad spectrum of "sports," such as archery, bowling, billiards, darts, golf, softball, and tennis. The annual, week-long event is held in different cities in Florida, shifting from city to city every two years. The participants include employees from local, State, and Federal law enforcement agencies.

Since at least 1990, both management officials and bargaining unit employees of the Respondent participated in the Games. Neither the Respondent nor the Florida Games'

sponsors require that its participants pass a physical exam, satisfy a fitness requirement, or maintain a training log. Participants from the Respondent were responsible for covering their own entry fees and travel expenses. In addition to the competitive events, there are ceremonies and other functions at which the participants have an opportunity to socialize with fellow law enforcement officers among others.

The Respondent allowed bargaining unit employees to participate in the Florida Games on administrative leave. Employees submitted leave requests to their supervisors a few weeks before the Games and such requests were approved routinely. As District Director, Gordon knowingly permitted first line supervisors to approve these requests and used administrative leave to attend the Games herself, with the understanding that her superior, the Regional Commissioner, approved this policy (Tr. 6-7, 109).

Bargaining unit employees participated in the Games on administrative leave until 1998. Few restrictions were placed on the practice. Typically, employees were given 40 hours of administrative leave to participate (Tr. 76, 205). The Respondent did, some time before 1998, limit the use of administrative leave to the time that employees actually participated in the athletic events, plus travel time. When employee participation from the Respondent's Contraband Enforcement Team became so popular as to cause a concern about adequate staffing, the Respondent limited the number of employees who could attend, based on seniority.

In 1996 and 1997, after the Customs Service reorganization, Director Gordon was temporarily absent when employees requested administrative leave for the Games. In her absence, Mission Support Officer Elzer approved such leave. He believed he had the authority to do so based on the past procedure. (Tr. 203.)

C. The Respondent Changed its Leave Policy for the Games and So Informed the Union

In early 1998, the Respondent was part of a narcotics interdiction effort along the southern tier of the United States. Elzer was concerned that employee participation in the Florida Games would impact the Respondent's staffing of this project. In early 1998, he asked Deputy Assistant Commissioner Al Tennant whether the Respondent should release

its employees on administrative leave for the Games.[4] Tennant acknowledged this as a good question, but did not know the answer, and provided Elzer with no advice as to whether Director Gordon was authorized to approve administrative leave (Tr. 204, 231-32). At Tennant's suggestion, Elzer put the question in writing to him via e-mail or "cc mail" (Tr. 207-08).

On March 30, 1998, Elzer received an e-mail message from Carolyn Clark, the Coordinator for the "Customs Health Enhancement Program" (CHEP). Clark's message was not addressed to Elzer specifically. It began (Resp. Exh. A1):

> Hi everyone, In the past few years since we have overseen the World Police and Fire Games we have gotten many calls about all kinds of games. We decided that one such event would be sponsored at the HQ level for the field. So we chose the World Police and Fire Games for several reasons.

After explaining the reasons for selecting the "World" games, Clark's message continued:

> The CHEP program felt for a number of reasons that Customs shouldn't sponsor every event -- mostly the cost of admin. time and for perception wise (that the taxpayers are paying for the employees to go out and "play"). So based on this the CHEP program continues to sponsor the one event. This information has been told to the employees over the years.
>
> It would be my advi[c]e that we continue to sponsor this one event and any other events the employee wants to do they can put in for annual leave.
>
> Please let me know if you need any more information.
>
> Carolyn Clark

Elzer believed this message to be in response to his inquiry to Tennant. He did not check further with either Clark or Tennant, but took the message to be a statement of Clark's advice based on her understanding of national Customs policy (Tr. 209-10, 223-24).

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[4] Mr. Tennant's name is misspelled in the hearing transcript as "Tenick." I accept the correction as represented in Respondent's brief.

Elzer brought this matter to Director Gordon's attention. Gordon, doubting at this point that she had authority to grant administrative leave for the Games, asked Elzer to ascertain whether she had been delegated such authority.

U.S. Customs Service publishes delegation orders that describe certain authorities given to certain officials. These delegation orders are internal Customs Service documents, relating to Customs Service employees only. They are not Government-wide regulations. Elzer was unable to find a delegation order giving Gordon authority to grant administrative leave for the Games or, apparently, administrative leave for any other purpose in excess of 59 minutes (Tr. 202, 216, R Exh. C).

Elzer reported to Gordon that he believed she did not have the authority in question (Tr. 132). It was apparently then that Gordon decided to stop granting administrative leave for the Games. Elzer recognized this as a change in the Respondent's practice and advised Labor Relations Specialist Lenny Dorman to inform Chapter 137 of the new policy. Respondent also notified its employees, through its port directors "who usually have staff meetings where they'd tell their supervisors . . . ." (Tr. 210, 226-27.)

At some point around this time, presumably at Elzer's request, Labor Relations Specialist Dorman sought the advice of Labor Relations Specialist Robert Lewis about the Respondent's bargaining obligation with respect to this issue. Lewis had been the Custom Service's chief negotiator or lead spokesperson in the last three national contract negotiations with NTEU. Lewis advised Dorman that the Respondent had no obligation to negotiate "locally" (with Chapter 137) because this subject was covered by the national agreement.

Dorman notified Chapter 137 President Scott Bober of the change by telephone on April 8, 1998, followed up at Bober's request with a memorandum on April 9 explaining the new policy:

> [E]mployees will not be granted administrative leave for participation in the Florida Police Olympics. Any employee wishing to participate must request annual leave from his/her supervisor. However, there will be a liberal annual leave policy for such requests. Finally, this memorandum is merely a reflection of national policy on this subject.

D. The Union Requested, and the Respondent Refused, to Negotiate Over the Change; Follow-up Contacts

On April 14, 1998, Union President Bober wrote to Director Gordon, requesting to bargain over "this change in past practiced of the leave policy" and stating that "[t]he established past practice should continue until we have bargained over this change." This letter was met with a written response, the following day, from Labor Relations Specialist Dorman. Dorman stated that:

> Unfortunately, as stated in my memorandum, dated April 9, 1998, we cannot authorize administrative leave for participation in this event. Furthermore, this is in accordance with national policy and was not a local decision. Therefore, there is no local bargaining obligation on this subject.

Scott McWilliams is Chapter 137's Associate Chief Steward and Legislative Coordinator. McWilliams wrote to Dorman, in that capacity, on April 16. He stated that the Union was unaware of any national policy addressing the past practice in question and requested "a copy of same." Receiving no response, on April 24 McWilliams made a request to Director Gordon, pursuant to the Freedom of Information Act, for "a copy of the national policy cited in [Dorman's April 9] memo."

Gordon responded to McWilliams' request in a letter dated May 12, 1998. Gordon wrote that the Respondent did not have a copy of any headquarters policy concerning administrative leave in connection with law enforcement games at the local or state level. She testified that she had tried to find any such written policies, and, to the best of her knowledge, there were none (Tr. 101, 120).[5]

Gordon did, however, provide two letters written in 1996, which she described as the only written national policy she possessed on the subject of administrative leave for employees participating in law enforcement games. These letters approved the use of administrative leave for participation in the "1996 International Law Enforcement Games." These are bi-

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5 Apparently there were documents evidencing, in some years prior to 1998, authorization from the Commissioner of Customs or the Regional Commissioner for administrative leave for the Games (Tr. 109-11, 128-29).

annual recreational events in which law enforcement officers and fire fighters from around the world participate.[6]

In accordance with the policy announced in April 1998, the Respondent's bargaining unit employees were denied administra-tive leave to attend the Florida Games in 1998 and were required to use annual leave to participate.[7]

E. National Bargaining History on Administrative Leave

During the period in which administrative leave was granted to attend the Florida Games, the parties at the national level (U.S. Customs Service and NTEU) negotiated and implemented collective bargaining agreements dated May 19, 1991, and October 3, 1996, respectively. Both contracts include articles addressing the granting of administrative leave for specific purposes and, in some cases, under certain circumstances. Neither contract, however, specifies the use of administrative leave for law enforcement recreational events, or athletic competitions at any level (i.e., local, state, national, or international).

Negotiations concerning the current (October 1996) contract began in the latter part of February of 1995 and continued for a year, until the last bargaining session in February 1996. The parties used an "interest based" approach. They used their initial sessions to identify, jointly, the issues to be addressed. To facilitate this process, the lead spokesperson for NTEU's bargaining team, Larry Adkins, had prepared a list of issues in advance. Both parties used this list as a discussion paper during the issue-identification stage. Items were added as they went along.

One of the subjects identified was "Leave," the subject of Article 13 of the 1991 contract. The parties identified several issues involving leave, including the Family Medical Leave Act, "use or lose," maternity/paternity, leave sharing, and excused time for exercise programs.

A revised list of issues identified for negotiation was entitled "Quality of Work Life." The issue of providing excused time for exercise programs remained on this pared-down

[6] Presumably the International Law Enforcement Games are the same as what Carolyn Clark referred to in her March 30, 1998 "Hi everyone" e-mail message as the "World Police and Fire Games."

[7] "Annual leave" is the accrued vacation time that Federal employees earn according to their respective periods of service.

list. NTEU had presented the issue for the purpose of establishing a program allowing employees to have excused time for exercise in order to improve individual fitness and health. The parties agreed on a contract provision that would allow bargaining unit employees to participate voluntarily in an agency-approved fitness program for up to three hours a week on administrative leave, work load permitting, under locally negotiated procedures.

In its final version, the contract provision concerning excused time for exercise specifically incorporated CHEP, the agency-approved physical fitness program. CHEP is an agency-sponsored fitness program designed to improve employee health and fitness. The contractual provision, Article 13, Section 32.C, requires employees wishing to participate in the excused time program to complete three "phases" of the CHEP program: medical screening; individual fitness assessment; and development of an individualized fitness program. Once cleared to participate, an employees is required to keep a daily log containing details of the exercise performed. Recreational sports such as bowling and golf were not authorized, and competitive sports were not to "be a substitute for an individualized exercise program" (GC Exh. 15 para. 6c(5), Tr. 174, 264-65).

Article 13 of the contract, entitled "Leave," has ten parts. Part IV covers "Administrative Leave." It outlines various circumstances in which administrative leave is available. One such circumstance, described in Article 13, Section 32, is the obtaining of medical services (physical examinations, x-rays, etc.) required for official purposes or administered as part of the official health program. It was also within Section 32 that the parties had agreed to include the negotiated provision regarding leave for personal fitness.

Part IV, addressing "Administrative Leave," also includes Section 36:

> Occasional brief absences from duty of less than one (1) hour will be excused when the employee provides the supervisor with an acceptable explanation for the absence.

This provision, carried over from the previous contract, was intended to give supervisors discretion to excuse instances such as employees' unavoidable tardiness.

Article 2, Section 3 of the contract provides that:

> This Agreement supersedes all previous agreements and past practices in conflict with this Agreement.

> Local agreements and past practices not in conflict shall continue unless modified in accordance with law and the terms of this Agreement.

Local negotiations routinely take place throughout U.S. Customs Service. The lead negotiation-team spokespersons for both NTEU and U.S. Customs Service testified that there are so many local agreements that it would be impossible to codify all of them into the national contract. (Tr. 188, 272.)

Several appendices are attached to the October 1996 contract, as printed. Appendices "N" and "O" are listed in the contracts table of contents as "Periodic Reinvestigations Agreement" and "Periodic Reinvestigations Supplemental Agreement," respectively. These agreements, reached in 1990 and 1993 respectively, provide for up to 16 hours of "administrative time" to complete the forms required in a "periodic investigation," including time away from the work site if "reasonably necessary." Although not incorporated into the contract's Article 13 ("Leave"), these agreements are part of the contract and have continued in effect (Tr. 259-62, 277).

The subject of using administrative leave to attend statewide law enforcement games, such as the Florida Games, was not discussed during these negotiations. The parties negotiated changes in several provisions concerning various kinds of leave (Tr. 246), but apparently none involving administrative leave except for the individual fitness program (GC Exhs. 11, 12). U.S. Customs' lead spokesperson did not articulate the position, during the negotiations, that administrative time for any activities other than those listed in the contract was precluded (Tr. 267).

Upon agency head review the U.S. Department of the Treasury disapproved Article 13, Section 32.C, the section on excused time for participation in CHEP. NTEU filed a negotiability appeal with the Authority, which is currently pending.

Discussion and Conclusions

A. Positions of the Parties

While I do not usually find it necessary or even useful to set forth separately the positions the parties have taken with respect to the issues in the case, I do so here because their positions are not exactly what one might have expected and because they are not, in every instance, congruent in their opposition to each other. How each party views the

issues to be resolved here may affect the disposition to be recommended.

The General Counsel contends that the opportunity to obtain administrative leave to attend the Florida Games was a condition of employment, evidenced by an established past practice, and that the Respondent was obligated to bargain with the Union before implementing the change that removed that opportunity. The General Counsel contends that the defenses asserted by the Respondent here with respect to the bargaining obligation (to be discussed later) are meritless. Counsel for the General Counsel argue, in effect in the alternative, that the Respondent was obligated to bargain over the substance of the change or at least over its impact and implementation. Counsel do not, however, make a clear distinction between these obligations in their argument, and do not specify in their proposed remedial order about what the Respondent is to be directed to negotiate-- only that it negotiate "to the full extent required by law."[8]

The General Counsel characterizes the practice in question as one that did not require the Respondent to approve leave for so many employees that their absence would have a serious impact on the agency's operations (GC Br. at 7) and that did not prohibit the Respondent from denying an employee's request where his or her absence would affect work assignments (GC Br. at 23 n.8). Thus, the General Counsel would have the practice treated as one that reserves management's discretion to approve or disapprove of the leave and that is not in conflict with the right to assign work (GC Br. at 23).

Counsel for the Union, in his opening statement, presented his view of the case as one concerned primarily with what the Union considered to be an overly expansive application of the "covered by" doctrine in previous Authority decisions. He saw this case as an opportunity to set limits on the use of that doctrine. The Union did not otherwise present any different positions from those of the General Counsel although, as I explain next, Counsel for the Respondent attributes to the Union a different characterization of the practice at issue.

The Respondent takes aim here at an alleged practice (although it does not concede that the facts establish a "practice") pursuant to which, as the Union is said to insist, there was a "per se requirement" to grant administrative leave, so that the Respondent "must provide any employee who

[8] I reserve for later discussion other aspects of the General Counsel's requests for specific remedial provisions.

wants leave with the amount requested" (Resp. Br. at 5). On the other hand, the Respondent asserts that the General Counsel has not established "exactly what the alleged practice was" (Resp. Br. at 1) and has failed "to identify [its] parameters" (Resp. Br. at 20).

The Respondent's legal arguments are essentially that: (1) the General Counsel has failed to sustain his burden to establish the bargaining obligation; (2) that if there was a practice it was unlawful and could be discontinued without bargaining; and (3) that any such practice was in conflict with, and "covered by" the October 1996 collective bargaining agreement.

In arguing that any such practice was unlawful, the Respondent asserts, principally, the absence of a current and valid delegation from U.S. Customs Service to it to grant administrative leave for the Florida Games, and that, in the absence of such delegated authority, continuation of the "practice" would have been unlawful. The Respondent's brief also incorporates by reference its Motion for Summary Judgment, in which the Respondent noted that certain decisions of the Comptroller General found that the use of administrative leave to participate in competitive games was unauthorized.

Since the Respondent incorporated the Motion for Summary Judgment by reference, it is not clear that it has abandoned the point it intended to make with respect to the Comptroller General's decisions. Yet those decisions would appear to apply equally, if at all, to the Florida Games and to the "World" or "International" games to which U.S. Customs Service still provides administrative leave for some employees' participation. Moreover, immediately after stating that it incorporated the Motion for Summary Judgment by reference, the Respondent's brief (pp. 6-7) proceeds as follows: "The underpinning of the Respondent's ["unlawful practice"] defense is that the CMC only came into existence two years ago, and that the Director of the CMC has no authority to grant administrative leave of up to forty hours . . . ." In these circumstances, the Respondent's failure to renew the Comptroller General line of argument explicitly at the posthearing stage makes it difficult to ascertain its present position on that point.

Finally, the Respondent repeatedly asserts or assumes that if it has any bargaining obligation it would be only for "impact bargaining," but it does not explain why. Despite its charac-terization of the alleged practice as one that deprives it of discretion in granting or denying leave (a characterization that I find to be inaccurate), the Respondent

states no claim that the practice implicates any of the management rights set forth in section 7106(a) of the Statute.

B. Preliminary Analysis of the Underlying Issue

The evidence is far more consistent with the General Counsel's characterization of the "practice" in question than with the Respondent's characterization. Moreover, there does not appear to be much dispute about the opportunity of employees to be released from their duty assignments, under the new "liberal annual leave policy," to attend the Florida Games. Stripped of its legalistic trappings, the dispute here appears to be about whether the employees who attend the Games will receive pay for the time involved without using annual leave.

C. The General Counsel Established the Existence of a Practice That Became a Negotiable Condition of Employment

The opportunity to use administrative leave to participate in outside activities, even if such activities are non-work related, is a condition of employment. *American Federation of Government Employees, Local 2022 and U.S. Department of the Army, Headquarters, 101st Airborne Division, Fort Campbell, Kentucky*, 40 FLRA 371, 379-80 (1991). When an agency changes a condition of employment of bargaining unit employees, it is obligated to notify and negotiate with the collective bargaining representative before effectuating the change, provided that the changed practice was lawful. *Navajo Area Indian Health Service, Winslow Service Unit, Winslow, Arizona*, 55 FLRA 186, 188 (1999).

A negotiable condition of employment may be established through past practice. This occurs when the practice has been exercised consistently over a significant period and followed by both parties, or followed by one party and not challenged by the other. *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899, 908 (1990). For this purpose, employees may be considered as equivalent to a "party." Thus, it is sufficient that employees consistently had exercised a practice for an extended period with the employing agency's knowledge and consent. *Defense Distribution Region West, Tracy, California*, 43 FLRA 1539, 1559-60 (1992). The knowledge and consent of management officials at the local supervisory level is sufficient; knowledge and consent at the highest levels of the agency is not required. *See United States Immigration and Naturalization Service*, 43 FLRA 3, 8-9, 19 (1991).

That a practice of granting administrative leave to attend the Florida Games existed is all but formally acknowledged here. The facts speak eloquently for themselves.

The Respondent continues to question certain details of the practice's application. As noted above, the Respondent views the alleged practice as requiring it to grant administrative leave to any participating employee who requests it. I have found this description to be inaccurate. The practice demonstrated in the record permitted the Respondent to limit the number of employees released to accommodate the workload during the period for which leave was requested. The record also shows that while, typically, employees were granted up to 40 hours of administrative leave each time they participated in this annual event, in the latest application of the practice employees were allowed only the time in which they actually participated in athletic "events" plus travel time. This, then, defines the past practice and describes the condition of employment involved here.

D. The Respondent Was Obligated to Bargain Over the Substance of the Change

Having found that the practice, so defined, was a condition of employment, it is undisputed that the Respondent changed it and, further, that the Union, the agent of the employees' exclusive representative, requested negotiations over the change. The Respondent, taking the position that it had no bargaining obligation, refused. Therefore, unless the Respondent has established a legitimate basis for escaping a bargaining obligation, it has violated the Statute.

As noted, the Union requested bargaining over the change. Such a request ordinary is understood to encompass bargaining over the decision to make--or the substance of--the change. That is, the Union took the position, as the General Counsel does in this proceeding, at least in the alternative, that the decision to make the change was fully negotiable and not merely negotiable as to its impact and implementation (I&I). I find this to be the proper measure of the Respondent's obligation.

The Respondent having made no claim for the application of section 7106(a) of the Statute, it may be precluded from arguing that any bargaining obligation must be limited to I&I bargaining. *Cf. Department of Health and Human Services, Social Security Administration, Office of Program Operations and Field Operations, Sutter District Office, San Francisco, California*, 5 FLRA 504, 516 n.8 (1981) (noted that no contention was raised as to the applicability of section 7106; neither the judge nor the Authority found it necessary to discuss its applicability). In the event that the Authority would entertain such an argument in the circumstances of this case, I restate my finding that the practice described in the record preserves the Respondent's right to approve or

disapprove the use of administrative leave consistent with its operational needs. In effect, the Respondent's discretion with respect to administrative leave under the past practice was substantially equivalent to the discretion it now exercises with respect to the granting of annual leave to attend the Florida Games. A practice pursuant to which an agency retains such discretion does not directly interfere with the right to assign work and is fully negotiable. *See National Federation of Federal Employees, Local 2119 and U.S. Department of the Army, Rock Island Arsenal, Rock Island, Illinois*, 49 FLRA 151, 160-61 (1994); *American Federation of Government Employees, Local 2298 and U.S. Department of the Navy, Polaris Missile Facility, Atlantic, Charleston, South Carolina*, 35 FLRA 591, 593 (1990).

E. The Practice Was Not Unlawful for Purposes of the Bargaining Obligation

An agency may implement changes before bargaining when necessary to correct an unlawful practice. *United States Immigration and Naturalization Service, Washington,* D.C., 55 FLRA 69, 73 n.8 (1999). The Respondent asserts that it was privileged to discontinue the practice without bargaining because any authority that previously existed at its organizational level to grant the leave no longer existed after the Customs Service's reorganization.

I find this assertion to be unavailing. An agency's withholding or withdrawal of authority to take certain action is, typically, an exercise of discretion. In such case the withholding or withdrawal does not make such action unlawful except for the agency's own internal purposes. It does not affect the duty to bargain over any resulting changes in terms and conditions of employment.[9] The Respondent's assertion that there is no current delegation of authority to continue the practice is consistent with U.S. Customs Service's possessing the discretion to make such a delegation, as the Respondent concedes it did in the past.

The only assertion the Respondent has ever made to the effect that Customs Service could not lawfully grant administrative leave for the Florida Games or delegate the authority to grant such leave is the reference in its Motion for Summary Judgment, mentioned above, to decisions of the Comptroller General concerning an agency's authority to grant

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At the prehearing conference in this case, the Respondent represented that it would not raise as a defense the Union's opportunity to seek negotiations at the national level. The Respondent has raised no such defense, except for the distantly related "covered by" defense, discussed below.

administrative leave in certain circumstances. However, the Respondent gave no indication when it discontinued the practice, or in response to subsequent inquiries from the Union, that it believed Customs Service lacked the authority to permit such leave. Moreover, Customs Service continues to authorize administrative leave for the "World" Games, apparently under substantially the same conditions as had been applicable to the Florida Games. As noted above, the Respondent does not expressly renew at this posthearing stage any contention that Customs Service could not lawfully permit such leave. In view of all of this, I resolve the ambiguity in the Respondent's current position in favor of a *de facto* abandonment of any reliance on the Comptroller General's decisions or on any other *external* source of restriction on the authority to grant the leave at issue here.

I therefore conclude that the past practice has not been rendered unlawful for purposes of affecting the Respondent's bargaining obligation. As the Authority routinely adds when it finds a proposal to be negotiable, my finding that the practice was not unlawful in the sense that would defeat a bargaining obligation does not address the merits of the practice. Therefore I find irrelevant the parties' dispute about whether all the employees who participated in the Florida Games were *bona fide* "law enforcement" officers and whether their participation was beneficial with respect to the performance of their duties.

F. The Subject of the Practice Was Not "Covered By" the National Agreement

1. Framework for analysis

The Authority adopted its present "covered by" doctrine in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA*). In later decisions, the Authority has summarized the pertinent part of the doctrine originally set forth in *SSA*, describing it as a "three-pronged test" for determining whether a particular change in conditions of employment is "covered by" the existing collective bargaining agreement between the parties. In its most recent summary restatement, the test is:

> First, the Authority looks to the "express language" of the agreement to ascertain whether it reasonably encompasses the subject in dispute. *SSA*, 47 FLRA at 1018. Next, the Authority looks to whether the subject in dispute is "inseparably bound up with . . . a subject expressly covered by the contract." *Id.* (citing *C & S Industries, Inc.*, 158 NLRB 454, 459 (1966)). If neither of

> these steps leads to the conclusion that further negotiations on the subject are foreclosed, the Authority proceeds to the third step of the analysis, which is to examine the parties' intent. *Navy Resale Activity, Naval Station, Charleston, South Carolina*, 49 FLRA 994, 1002 (1994). In applying this three-pronged test, the Authority will examine all the record evidence, including the parties' bargaining history, to determine whether the parties knew or should have known that the agreement would preclude further negotiations regarding the disputed subject matter. *SSA*, 47 FLRA at 1019.

Department of the Treasury, United States Customs Service, El Paso, Texas, 55 FLRA 43, 46 (1998) (*Customs Service El Paso*). It must be noted, however, that in *SSA* and in the previous decisions applying its doctrine and cited by the Authority in *Customs Service El Paso*, the Authority referred to what is now called the third prong of the test as an inquiry that it would make only in those cases where it is "difficult to determine whether the matter sought to be bargained is, in fact, an aspect of matters already negotiated." *SSA*, 47 FLRA at 1018; *Navy*

Resale Activity, Naval Station, Charleston, South Carolina, 49 FLRA 994, 1002 (1994); *Department of Veterans Affairs Medical Center, Denver, Colorado*, 52 FLRA 16, 23 (1996) (citing *SSA* and *Naval Resale*). Although the above-quoted summary of the doctrine as restated in *Customs Service El Paso* suggests that (1) the Authority will proceed to the third step of the test even when it is clear after going through the first two steps that the disputed subject matter is **not** an aspect of matters already negotiated and (2) that the Authority will examine extrinsic evidence such as bargaining history in **every** case, the Authority was purporting in this summary to follow, not to modify, or even clarify its precedent. I therefore conclude that the weight of authority is on the side of proceeding to the third step only when, after the first two steps, it is difficult to determine *whether or not* the subject matter is an aspect of matters already negotiated or is otherwise foreclosed. I conclude further that it is only in such cases that it is appropriate to resort to an examination of bargaining history to determine the parties' intent.

The Authority views the "covered by" principle as one that provides an affirmative defense to an alleged refusal to bargain. *See, for example, Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico*, 53 FLRA 1161, 1162 n.3 (1998); *General Services Administration, Region 9, San Francisco, California*, 52 FLRA 1107, 1109 n.3 (1997). Accordingly, the party raising the "covered by" doctrine as a justification for refusing to bargain must bear the burden of persuasion as to the doctrine's applicability.

With respect to the first prong of the test, the Authority's summary restatement quoted above is only an approximation of the inquiry it formulated in *SSA*, where it stated that it first would determine whether the matter in dispute is expressly "contained in" the collective bargaining agreement. The Authority stated that, in making this determination, it would examine the contractual provision in question to ascertain whether there is either an "exact congruence of language" with the matter in dispute or "the requisite similarity" so that "a reasonable reader would conclude that the provision settles the matter in dispute." *SSA*, 47 FLRA at 1018.

I take this to mean that the very words of the contract must convey to the "reasonable reader" who is otherwise uninformed about the dispute and its background that the

parties have agreed on how to resolve the matter.[10] At the same time, the doctrine recognizes the richness and depth of the English language and that, therefore, different linguistic formulations might convey the same meaning.

In applying the "covered by" doctrine, no mechanical formula should be made to substitute for the attempt to achieve the result the Authority intended when it devised the doctrine. The Authority expressed that goal as follows:

> In sum, in examining whether a matter is contained in or covered by an agreement, we must be sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter. Thus, the stability and repose that we seek must provide a respite from unwanted change to both parties: upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining.

SSA, 47 FLRA at 1017-18.

2. Application to this case

The fact that Article 13, Part IV of the collective bargaining agreement addresses the granting of administrative leave for various other purposes does not persuade me that those provisions settle the matter of administrative leave for the Florida Games. While it might have been reasonable to expect that any provision concerning administrative leave for the Florida Games (or, for that matter, the "World" Games) would belong in Article 13, Part IV, the agreement contains no reference to the granting of leave for this purpose, one way or the other. Thus, the express language of the agreement cannot be said to encompass the matter in dispute.

Is then, the subject of administrative leave for the Florida Games "inseparably bound up with and . . . thus . . .

[10] The Respondent argues that the term, "matter," should be construed broadly--in this case to encompass the subject of administrative leave generally. However, the general subject of administrative leave is not the matter in dispute here.

plainly an aspect of . . . a subject expressly covered by the contract"? *Id.* at 1018. In further explanation of this second prong of the test, the Authority stated in *SSA* that it would determine "whether the subject matter . . . is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision." *Id.*

The Respondent argues that the subject of administrative leave for the Florida Games is inseparably bound up with the provisions of Article 13, Part IV and especially Section 32.C, the provision (now in dispute as to its negotiability) for excused time to participate in the CHEP fitness program. The Respondent contends that Part IV is part of an extensive article on leave and that it enumerates all of the situations in which administrative leave may be authorized.

While Article 13 is extensive, and while Part IV authorizes administrative leave in various circumstances, this alone does not indicate that it was intended to be comprehensive with respect to any past practices. *Cf. Air force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 53 FLRA 1092, 1105 (1998) ("[N]othing contained in Article 17 shows any intent that further bargaining was foreclosed if Respondent changed conditions of employment by reassigning duties to employees who had never performed them.")
Certainly U.S. Customs Service did not contemplate that Article 13, Part IV, would, for example, end the practice of granting administrative leave for the "World" Games.

Contrary to the Respondent's contention, the contract deals specifically with local practices of all kinds in Article 2, Section 3, which sanctions the continuation of "Local agreements and past practices not in conflict" with the contract. The past Florida Games practice is not in conflict with the contract. The Respondent contends that the practice conflicts with the contract because it does not allow for the Agency's right to assign work or for similar "staffing concerns." I have found that the past practice does allow for such concerns. In this respect the practice is as deferential to the Agency's operational needs as any of the contractual provisions for administrative leave.

The Respondent contends, similarly, that the practice is incompatible with the enumerated administrative leave provisions of Article 13, Part IV. Thus, the Respondent argues, each of the enumerated purposes for which such leave may be granted is specific (except for the non-specific authority in Section 36 to grant administrative leave for less

than an hour), thereby precluding local management from granting administrative leave for any other purpose. I find that this argument is also answered by Article 2, Section 3, which permits the continuation of local practices that are not in conflict with the contract. Practices that are not reflected in written contracts arise frequently, and are usually presumed to coexist with the rights and obligations contained in the contract, not to be in conflict with them. That presumption is not to be reversed merely because the parties, bargaining at the national level, agreed on a number of situations in which all employees in the nationwide bargaining unit would have an opportunity to be granted administrative leave.

The Respondent also argues that the Florida Games should be considered a "fitness activity" and therefore preempted, for *SSA* purposes, by Article 13, Part IV, Section 32.C, which makes the 3-hour leave for fitness exercise part of the Customs Health Enhancement Program (CHEP). While one might debate how well an annual event like the Florida Games qualifies as an activity to promote fitness or to enhance health, the devil we must deal with here is in the details. In virtually every aspect except the prospect of working up a sweat, the fitness program prescribed in Section 32.C is unlike participation in the Florida Games.[11] Nor is there any persuasive significance in the fact that the decision that only the "World" Games would be "sponsored at the HQ level for the field" was made under the auspices of CHEP. Whether or not that decision played a decisive part in the change of the Florida Games practice, U.S. Customs Service's administrative determination to assign the sponsorship decision to CHEP cannot convert the Florida Games into something that it is not--an activity inseparably bound up with the fitness program contemplated by Section 32.C.

In sum, I conclude with respect to the second prong of the *SSA* test that the local practice of granting administrative leave for the Florida Games is not inseparably bound up with the subject of administrative leave for the purposes specified in the contract. Rather, Article 2, Section 3, manifests an understanding that local practices can coexist with the contract's substantive provisions unless they are actually in conflict.

Given the weakness of the "covered by" case as analyzed through the first two steps of the *SSA* test, I am inclined to

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[11] Much of the Respondent's argument that the Games are a "fitness activity" is devoted to showing that they should not be considered to be law-enforcement related. Such a negative showing, however, does nothing to make the affirmative case.

conclude, for the reasons set forth above, that it is inappropriate to search outside the language of the contract as negotiated to determine the parties' intent concerning the "subject" or "matter" that, according to the defense, the contract "covers." However, since the Authority's most recent restatement of the test might be read to dictate otherwise, I will consider whatever other record evidence is arguably relevant.

The only outside evidence that I find arguably relevant here is that concerning the bargaining history of the national agreement. That evidence shows that the parties did not discuss the Florida Games and that they left it to Article 2, Section 3, to deal with such local practices. The only outside evidence that the Respondent was able to present in favor of a "covered by" interpretation of the contract was the opinion of its lead spokesperson at the national negotiations, Robert Lewis. Mr. Lewis testified that the parties' enumeration of the situations in which administrative leave was to be granted, in contrast to other provisions where the contract only gives non-limiting examples, signified that the enumerated situations were intended to be exclusive.

This, however, was only an opinion, and there is no evidence that it was discussed with the Union's negotiators. The Union's lead spokesperson testified credibly that his opinion was to the contrary of Lewis' on this point. Neither of their opinions, as such, can be dispositive. What remains is an absence of persuasive evidence that the parties had, or should have had based on their discussions, a mutual understanding that their negotiations over specific examples of the use of administrative leave left management free to discontinue any other existing practice of granting administrative leave.

In sum, the practice of granting administrative leave to participate in the Florida Games, subject to workload considerations, was not the subject of the parties' bargaining. Therefore, it was not covered by the resulting collective bargaining agreement, and the Respondent's unilateral change of that condition of employment violated sections 7116(a)(1) and (5) of the Statute.

The Remedy

Where management changes a condition of employment without fulfilling its obligation to bargain over the change, the Authority grants a *status quo ante* remedy in the absence of special circumstances. *Navajo Indian Health Service, Winslow Service Unit, Winslow, Arizona*, 55 FLRA 186, 189 (1999). The Respondent cites no special circumstances here

except to assert that a practice under which "any employee who wanted to attend the [Games] has to be granted any amount of leave they requested could clearly interfere with the Agency's operations" (Resp. Br. at 20). The Respondent also opposes a *status quo ante* remedy on the somewhat inconsistent ground that the General Counsel failed adequately to define the practice.

I have found in the record, as noted above, adequate evidence to define the past practice. I do not see much likelihood that its temporary restoration would unduly disrupt the Agency's operation. What apparently would be involved is merely that, while negotiations over the proposed change are proceeding, employees who participate in the Games and who would otherwise have been released on annual leave will be released on administrative leave. I therefore will recommend that remedy.

The General Counsel also requests make-whole relief for employees affected by the unfair labor practice in the form of restoration of any annual leave they have been required to use to attend the Games as a result of the change. Counsel for the General Counsel included in their prehearing disclosure statement that they would request such a remedy. The Respondent has not contested its appropriateness. I find that such restoration is an appropriate means for serving the objectives the Authority has identified in designing unfair labor practice remedies. Specifically, it will restore, so far as possible, the situation that would have obtained but for the wrongful act. *See Department of Defense Dependent Schools*, 54 FLRA 259, 269 (1998). Accordingly, I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, U.S. Customs Service, Customs Management Center, Miami, Florida shall:

1. Cease and desist from:

(a) Unilaterally implementing changes to the past practice of granting administrative leave to those bargaining unit employees participating in the Florida Law Enforcement Games (Florida Games) without providing the National Treasury Employees Union, Chapter 137 (Union), the agent for the exclusive representative of its employees, with notice and the opportunity to bargain over the changes.

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the changes to the practice of granting administrative leave to those bargaining unit employees participating in the Florida Games and reinstate the practice as it existed prior to April 1998.

(b) Notify and, upon request, bargain with the Union concerning any proposed change to the practice of granting administrative leave for the Florida Games.

(c) Restore annual leave to all employees who were required to take annual leave when they participated in the Florida Games, by changing their annual leave to administrative leave.

(d) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Director of the Customs Management Center, Miami, Florida, and they 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.

(e) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., April 28, 1999

_____
JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that U.S. Customs Service, Customs Management Center, Miami Florida, has violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT unilaterally implement changes to the past practice of granting administrative leave to those bargaining unit employees participating in the Florida Law Enforcement Games (Florida Games) without providing the National Treasury Employees Union, Chapter 137 (Union), the agent for the exclusive representative of its employees, with notice and the opportunity to bargain over the changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the changes to the practice of granting administrative leave to those bargaining unit employees participating in the Florida Games and reinstate the practice as it existed prior to April 1998.

WE WILL notify and, upon request, bargain with the Union concerning any proposed change to the practice of granting administrative leave for the Florida Games.

WE WILL restore annual leave to all employees who were required to take annual leave when they participated in the Florida Games, by changing their annual leave to administrative leave.

(Activity)

Date: 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 its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is 99 Summer Street, Suite 1500, Boston, MA 02110-1200, telephone number is (617) 424-5730. Case No. AT-CA-80566.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. AT-CA-80566, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

David J. Mithen, Esq.
Gary J. Lieberman, Esq.
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200
Certified Mail No. P 726 680 930

Deborah E. Rand, Esq.
Counsel for Respondent
Office of Associate Chief Counsel
U.S. Customs Service
909 S.E. 1st Avenue, Room 606
Miami, FL 33131
Certified Mail No. P 726 680 931

Steven P. Flig, Esq.
National Treasury Employees Union
2801 Buford Highway, Suite 430
Atlanta GA 30329
Certified Mail No. P 726 680 932

REGULAR MAIL:

National President
National Treasury Employees Union
901 E Street, NW, Suite 600

Washington, DC 20004-2037

Dated: April 28, 1999
        Washington, DC