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

OALJ 15-55

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
SAN ANTONIO, TEXAS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1944, AFL-CIO

CHARGING PARTY

Case No. DA-CA-13-0410

Michael A. Quintanilla
For the General Counsel

Merci Castro
James Losasso
For the Respondent

Daniel Ramirez
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On June 26, 2013, the American Federation of Government Employees, AFL-CIO, Local 1944 (Union) filed an unfair labor practice (ULP) charge against the Department of Homeland Security, Immigration and Customs Enforcement, San Antonio, Texas (Respondent). (G.C. Ex. 1(a)). After an investigation of the ULP charge, the Dallas Regional Director of the FLRA issued a Complaint and Notice of Hearing on January 30, 2014, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by removing bargaining unit employees in the Harlingen and Port Isabel Detention Center from their compressed and alternate work schedules (CWS/AWS) without bargaining with the Union over the change to the extent required by the Statute. (G.C. Ex. 1(c)). The Respondent filed an Answer to the Complaint on February 20, 2014. (G.C. Ex. 1(d)). In its Answer, the Respondent admitted some of the factual allegations but denied that it violated the Statute as alleged in the Complaint. (G.C. Ex. 1(d)).

A hearing in this matter was held on April 9, 2014, in San Antonio, Texas. The parties were afforded an opportunity to be represented and heard, to examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel and Respondent filed timely post-hearing briefs which have been fully considered.

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

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. (G.C. Exs. 1(c) & (d)). At all times material to this matter, Enrique Lucero was the Field Office Director, Diana Perez was the Assistant Field Office Director, and Melissa DeLeon was the Supervisory Detention and Deportation Officer and these individuals were supervisors, management officials and / or agents of the Respondent under § 7103(a) (10) and (11) of the Statute. (G.C. Exs. 1(c) & (d)).

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Exs. 1(c) & (d)). AFGE, Local 1944 (Union) is an agent of AFGE for purposes of representing employees at the Respondent. (G.C. Exs. 1(c) & (d)). Daniel Ramirez is employed by the Respondent as

[1] Although the basic facts in this case are not disputed, Respondent devotes three pages of its post-hearing brief to attacking the credibility of the General Counsel's sole witness, Local Union President Daniel Ramirez, and in particular Mr. Ramirez's testimony regarding the implementation of CWS/AWS in 2009 and his communications with the Respondent's managers relating to the subsequent elimination or suspension of CWS/AWS in 2013 that is the subject of the Complaint in this matter. (Resp't Br. at 15-18). Mr. Ramirez did display some difficulty recalling pertinent details (*see e.g.*, Tr. 49-50). Consequently, to the extent that his testimony conflicts with the documentary evidence and the testimony of the Respondent's witness, Enrique Lucero, I have relied on the latter in making my findings of fact.

an Immigration Enforcement Agent in the San Antonio Field Office, and he has been the Local President of the Union since 2009 and held this position at all times material to this matter. (Tr. 22-24).

The alleged unlawful elimination of CWS/AWS that is the subject of the Complaint affected approximately 40 bargaining unit Enforcement Removal Assistants (ERAs) employed in the Respondent's Port Isabel Detention Center (PIDC) and Harlingen Resident Office (HRO) which fall under the jurisdiction of the Respondent's San Antonio Field Office. (Tr. 24, 26, 67-68). PIDC is responsible for the care and removal of immigrant detainees from the United States. (Tr. 68). It has a capacity for housing up to 1,200 detainees as well as oversight for approximately 2,500 external detainee beds. (Tr. 68). The HRO is responsible for a variety of immigrant detainee-related functions including the criminal alien and fugitive operations programs, processing and escorting unaccompanied children and family units, and "staging" of female detainees prior to their deportation. (Tr. 68-69). The detention and removal of aliens is subject to Congressionally-mandated procedures and time limits which include special procedures and time limits designed to ensure the protection of minors. (Resp't Ex. 4; Tr. 73; 101-02).

The ERAs assigned to the PIDC and HRO facilities are support personnel who assist the Respondent's law enforcement officers in carrying out detention and removal functions. (Resp't Ex. 2; Tr. 24-25; 69). The ERAs duties include managing dockets, review and evaluation of case documentation and collection and analysis of data from law enforcement sources. (Resp't Ex. 2; Tr. 106). With regard to juvenile detainees, the ERAs coordinate the assignment of escort officers and developing travel itineraries for the detained juveniles to be relocated to the Office of Refugees and Resettlement (ORR) and making necessary flight arrangements. (Tr. 103).

Beginning in October of 2009, all support employees in the San Antonio Field Office, including the ERAs assigned to PIDC and HRO, were eligible to participate in CWS/AWS pursuant to a memorandum dated August 27, 2009 issued by Michael J. Pitts who was then Field Office Director. (Resp't Ex. 3; Tr. 26-28). The August 27, 2009 memorandum stated CWS/AWS would be implemented as a "pilot program" on a 90-day trial basis and that the program would be re-evaluated by December 3, 2009. (Resp't Ex. 3 at 1, 3). The memorandum identifies factors to be evaluated at the conclusion of the 90-day pilot program including whether CWS/AWS schedules "are not detrimental to . . . business hours, ability to meet mission requirements, or work environmental climate." (Resp't Ex. 3 at 1). The memorandum further states that the implementation of CWS/AWS would not "remove responsibility of management to ensure departments are manned during business hours, 0600-1800" and that "[e]mployees will be required to adjust work schedules to meet mission requirements" such as attending meetings or providing coverage when other employees are on leave. (Resp't Ex. 3 at 1). The memorandum further stated that "Management reserves the right to make notice of requirement for change of schedule one workday in advance." (Resp't Ex. 3 at 2).

Prior to issuing the CWS/AWS memorandum, a labor relations official contacted Union President Ramirez and asked him to check with bargaining unit employees to determine whether there was interest in CWS/AWS. (Tr. 27). Mr. Ramirez then met with some of the ERAs and learned that a majority were interested in CWS/AWS. (Tr. 27). After Mr. Ramirez confirmed that there was interest among the ERAs, the August 27, 2009 memorandum was issued implementing the CWS/AWS pilot program. (Tr. 27). There were no negotiations with the Union prior to implementation of the CWS/AWS pilot program, and the Union did not file any ULP or otherwise protest the program's implementation because it was beneficial to employees. (Tr. 28, 46). It is undisputed that CWS/AWS continued to be available to support employees without interruption after the completion of the initial 90-day trial until April of 2013. (Tr. 28, 46). There were no further discussions of the subject between the Respondent and the Union which considered the continuation of CWS/AWS beyond the initial 90-day trial to have become a practice. (Tr. 47).

In or around January 2013, the Respondent began to experience a significant increase in immigrant detentions that negatively impacted on its ability to meet processing times. (Tr. 73-77; 101-102, 104-05). Faced with limited options for dealing with this influx which he described as precipitating a "logistical nightmare" (*i.e.*, the Respondent was under a budget sequester at the time which prevented it from filling vacant positions), Field Office Director Lucero decided around April 1, 2013, that it would be necessary to immediately suspend CWS/AWS for 90 days and then reevaluate the situation. (Tr. 74, 77-78, 80). Mr. Lucero felt that under the terms of the August 27, 2009, memorandum (Resp't Ex. 3) "we were well within our rights to suspend AWS based on the needs of the mission" as long as it provided notice of any change in work schedules one workday in advance of the change. (Tr. 82). Considering the need to immediately address the dramatic increase in workload, he believed that there was no time to delay implementation of his decision in order to allow for negotiation with the Union. (Tr. 86, 96). Mr. Lucero also thought that negotiations would not produce any agreement:

> I feel that we would not have been able to come to an agreement, that the employees would have wanted to keep some type of form of AWS when I needed the work done every day, all hands on deck.

(Tr. 87). Though he wanted to implement the suspension immediately, he decided to schedule implementation for April 21, 2013, allowing employees 19 days advance notice to make adjustments such as day care schedules and medical appointments. (Tr. 82-83).

On April 1, 2013, Julian Calderas, Jr., the Deputy Field Office Director instructed Labor Relations Specialist Jeffrey Sealey to inform Union President Ramirez of the decision to discontinue CWS/AWS for 90 days effective April 21, 2013 due to increased work load and then reevaluate after 90 days. (Tr. 112-13). Mr. Sealey met with Mr. Ramirez on April 2 and informed him of the decision. (G.C. Ex. 3; Tr. 49-50; 112-13). Also on April 2, 2013, Assistant Field Office Director Diana Perez sent an email to supervisors stating,

> Effective April 21, 2013, AWS for all HRO and PIDC employees will be discontinued; the Union is aware and AWS will be re-evaluated in 90 days. Please notify your affected subordinates and make the appropriate schedule changes.

(G.C. Ex. 2). Ms. Perez's email was then forwarded to the affected ERAs one of whom was a Union steward who, in turn, contacted Union President Ramirez. (G.C. Ex. 2; Tr. 32-33). At 3:43 p.m. on April 2, 2013, Mr. Ramirez sent an email to Ms. Perez and Jacob Castro, another Assistant Field Office Director, which reads as follows:

> Earlier today I was notified by LMR of SNA's [San Antonio's] intent to terminate AWS. The email broadcast on your behalf below gives HRO bargaining unit employees the false impression that HRO management has fulfilled its bargaining obligations with the Local Union, which HRO has not. Your email further implies that HRO management has received approval from the Local Union to proceed with this schedule change, but nothing could be further from the truth.
>
> Despite the Local Union's repeated plea, you and other HRO Managers continue to willfully ignore your obligations to the current collective bargaining agreement, federal law and [the] Presidential Executive Order to engage the Union in pre-decisional involvement, by continually refusing to formally serve the Union with a notice of all Agency proposed changes and by again denying the Union's right to negotiate on behalf of bargaining unit employees.
>
> In addition, it is also an Unfair Labor Practice (ULP) to solicit employees directly for input regarding changes in personnel policies and/or practices bypassing the exclusive representative which in this case is AFGE Local 1944.
>
> The Union is demanding that all of the changes listed in your email and any SDDO's email below cease and desist until after the Union has been notified in accordance with the current collective bargaining agreement (CBA), the Union has had an opportunity to submit a demand to bargain/information request(s) as provided for by federal law and the CBA, [and] negotiations have been completed and agreement has been reached or a decision is rendered by a third party.
>
> If I do not receive a response from you by 3 PM EST time tomorrow April 03, 2013 the Union will file formal charges accordingly and will send a copy of this letter along with a request [for] of assistance to ICE Director Morton.

(G.C. Ex. 3). Mr. Ramirez sent a copy of this email to several people including Mr. Lucero and Mr. Sealey. Within minutes at 3:55 p.m., Ms. Perez responded to Mr. Ramirez that the "AWS message and instruction . . . is coming from the Field office . . . [y]ou will need to deal with LER directly regarding your concerns." (G.C. Ex. 3).

On April 3, 2013, Mr. Calderas met with Mr. Ramirez regarding the decision to rescind CWS/AWS. (Tr. 112-13). There was some discussion of the parties engaging in "post-implementation" negotiations over the change at periodic labor-management meetings, and Mr. Ramirez indicated that he would not be opposed to addressing the matter at these meetings. (Tr. 112-13). In this time frame, Mr. Ramirez also spoke with Mr. Lucero who said that he was going to hold "town hall" meetings with the affected employees in PIDC and HRO. (Tr. 36-37, 84-85). Mr. Ramirez attended one of these meetings, and he spoke to some of the ERAs about the Respondent's decision to discontinue CWS/AWS. (Tr. 40-41, 48-49, 51).

After talking with the affected ERAs, Mr. Ramirez sent an email to Mr. Lucero on April 4, 2013, stating that that it is in the best interests of the bargaining unit employees to "ask for a 9A, in accordance with the collective bargaining agreement." (G.C. Ex. 4). In this regard, Article 9 – Impact Bargaining and Mid-Term Bargaining – of the parties' national collective bargaining agreement (Agreement 2000), section A (Notice of Proposed Change) in pertinent part encourages the parties to engage in "pre-decisional involvement" prior to formal presentation of proposals for changes in personnel policies, practices and / or working conditions not covered by the agreement and provides that "[i]f the parties are unable to reach an agreement through pre-decisional involvement or if pre-decisional involvement is not used, the Service shall present the changes and explanation of the changes . . . to the Union in writing." (Jt. Ex. 1 at 18). A little over an hour later, Mr. Lucero responded:

> The Agency has fully met its requirements per the contract (Article 29(A)(5)) regarding rescinding the AWS for employees in the RGV [Rio Grande Valley]. According to this Article, changes in the tour of duty of employees shall be posted no later than one (1) week prior to the beginning of the workday affected. We have more than met this requirement as you were notified of the pending change on April 1, 2013 and that the change would not take effect until April 21, 2013. You were allowed to go brief the employees about this change so this took care of the requirement to notify the employees of the reason, including the circumstances of the change. As such, it is our position that no 9A is required since the contract already has a provision for schedule changes.

(G.C. Ex. 4). Article 29 – Hours of Work, Section A(5) (Posted Schedules / Individual Changes) of Agreement 2000 in pertinent part states that "Individual changes in the tours of duty schedule or assigned shifts shall be posted in the work area no later than one (1) week prior to the beginning of the workday affected." (Jt. Ex. 1 at 54-55). CWS/AWS was rescinded for the ERAs assigned to PIDC and HRO effective April 21, 2013. (Tr. 39).

Subsequent to the rescission of CWS/AWS at PIDC and HRO, the Union submitted a written bargaining request on May 3, 2013. (Tr. 39, 41-42). The Responded answered this demand by letter dated June 12, 2013, in which it expressed a willingness to engage in post-implementation bargaining but maintained that the "current arrangement" (*i.e.*, no CWS/AWS) needed to be maintained pending resolution "due to law enforcement operation

and Agency mission critical needs." (G.C. Ex. 1(d) at 2). Prior to filing the unfair labor practice charge, the Union notified Mr. Lucero that it intended to file a ULP over the rescission of CWS/AWS without negotiations. (Tr. 42, 90). The Union did not "pre-file" the actual charge form with the Respondent before filing with the Authority on June 26, 2013. (Tr. 90).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) alleges that the Respondent violated § 7116(a)(1) and (5) of the Statute by terminating CWS/AWS schedules for bargaining unit employees before completing bargaining with the Union. In support of its position, the GC submits that the matter of alternate work schedules is fully negotiable under § 6131 of the Federal Employees Flexible and Compressed Work Schedules Act (the Work Schedules Act), 5 U.S.C. § 6131, and that Authority precedent clearly establishes that an agency cannot terminate an alternate work schedule without negotiations with the union representing the affected employees and, if an impasse is reached in such negotiations, submission of the impasse to the Federal Services Impasses Panel (FSIP) for resolution. In support of its complaint against the Respondent, the GC relies primarily on *Nat'l Fed. of Fed. Employees, Local 1998*, 60 FLRA 141 (2004) (*NFFE Local 1998*) where the Authority discussed the requirements of § 6131 and held that a union proposal to maintain the status quo and not eliminate compressed work schedules was within the agency's duty to bargain.

In arguing for a finding that the Respondent committed an unfair labor practice when it removed the PIDC and HRO employees from CWS/AWS without negotiating as required by the Work Schedules Act, the GC urges that the various defenses asserted by the Respondent be rejected. Specifically, the GC contends that the Respondent's claim at the hearing the CWS/AWS was not terminated or discontinued but merely "suspended" for a temporary period is a semantic ploy to shift focus from the undisputed fact that the ERAs had CWS/AWS schedules prior to April 21, 2013, and thereafter did not. The GC additionally contends that the Respondent's subsequent implementation of a different CWS/AWS program ten months later does not demonstrate compliance with its statutory bargaining obligations. The GC next argues against the Respondent's suggestion that the August 27, 2009 memorandum establishing CWS/AWS for support employees should be viewed as a negotiated agreement that permitted the decision in April 2013 to suspend CWS/AWS for PIDC and HRO employees. In this regard, the GC states that the 2009 memorandum was not negotiated with the Union and only established CWS/AWS as a "pilot" program that was to be reevaluated in December 2009. When CWS/AWS continued without change after the expiration of the original pilot program, the GC counters, it became a condition of employment established by past practice that could not be changed without negotiations. The GC also submits that the Work Schedules Act provides no exception to the bargaining obligations it established for CWS/AWS based on operational needs. Instead, the GC points out, the Work Schedules Act does not allow unilateral action when an agency asserts that CWS/AWS is adversely impacting agency operations but rather provides for such claims to be submitted to the FSIP for resolution. Finally, the GC takes the position that the Union

complied with the contractual requirement that it discuss an alleged unfair labor practice with the Respondent before filing a charge with the Authority, stating that nothing in the Agreement of 2000 requires the Union to "pre-file" a copy of the charge form as asserted by the Respondent.

As a remedy, the GC requests that the Respondent be ordered to post a Notice signed by the Deputy Assistant Director, Field Operations Division in all locations within the Respondent's San Antonio Field Office, and disseminate a copy of the notice electronically to all San Antonio Field Office employees.

Respondent

The Respondent initially argues that the Union's unfair labor practice allegations are not properly before the Authority because the Union failed to comply with the requirement of Article 7(A)(2) of the 2000 Agreement that it present the charge to management first in an attempt to resolve the issue before filing the charge with the Authority. The Respondent emphasizes that it offered a Declaration from its Acting Labor Relations Director, Michael Havrilesko, supporting its interpretation of Article 7(A)(2), which was rejected at the hearing, and the GC offered no credible evidence supporting a different interpretation. To remedy the Union's breach of the contractual pre-filing requirements, the Respondent requests that the matter be remanded to the Union with instructions that it comply with the contract. The Respondent notes, however, that the requested remand would not toll the time limits for filing an ULP with the Authority.

On the merits, the Respondent denies that it violated the Statute as alleged in the Complaint. In the absence of a "termination" of CWS/AWS or an "impasse," the Respondent states that the GC cannot show that § 6131 "trumps" the CWS/AWS policy implemented in 2009, which covers the change in CWS/AWS, or Article 9(F) of the 2000 Agreement which permits post-implementation bargaining. On these points, the Respondent contends that the 2009 memorandum implementing CWS/AWS, which had become a condition of employment by 2013, specifically provides that management reserved the right to give notice of a change of schedule one workday in advance while imposing no requirement for bargaining. The Respondent additionally argues that the Union effectively waived any right to bargain over future changes to CWS/AWS by not demanding to bargain over the August 27, 2009, memorandum. In the Respondent's view, § 6131 of the Work Schedules Act only applies to a "termination" of CWS/AWS and not a temporary "suspension" which is what was implemented in this case. Thus, the Respondent insists that the GC's case is baseless because it cannot show a "termination" of CWS/AWS which is a prerequisite invoking application of § 6131. Alternatively, the Respondent argues that even if the April 2009 suspension of CWS/AWS is viewed as a termination, § 6131 is still inapplicable to a situation where an agency, as in this case, is not in current negotiations over CWS/AWS and where there is no collective bargaining agreement but simply a local agency policy memorandum providing for CWS/AWS. That is, the Respondent reads § 6131 as only applying in circumstances where an agency and union are engaged in negotiations over CWS/AWS or where an agency seeks to change a collectively bargained

CWS/AWS arrangement. Moreover, even assuming that § 6131 is applicable to the suspension of CWS/AWS for PIDC and HRO employees, the Respondent states that the Authority held in *Def. Logistics Agency, Def. Indus. Plant Equip. Ctr., Memphis, Tenn.*, 44 FLRA 599 (1992) (*DLA*) that an agency may raise necessary functioning as a defense to pre-implementation bargaining in a matter involving CWS/AWS under § 6131. The Respondent points out that Article 9(F) of the parties' 2000 Agreement permits post-implementation bargaining where there is a need for expedited implementation of changes, and it cites *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 127 (2009) (*IRS*) for the proposition that an agency may implement necessary changes and offer post-implementation bargaining when consistent with the necessary functioning of the agency. The Respondent argues that it has shown that the suspension of CWS/AWS was consistent with its necessary functions to timely process immigrant detainees and that it offered the Union post-implementation bargaining consistent with IRS and Article 9(F) which the Union declined. Accordingly, the Respondent requests that the Complaint be dismissed.[2]

ANALYSIS AND CONCLUSION

Compliance with Contractual Pre-Charge Notification Requirements

The Respondent raises an initial procedural defense that the charge filed by the Union is subject to dismissal based on the Union's alleged failure to comply with the pre-filing provisions of Article 7(A)(2) of the 2000 Agreement. The GC concedes that a negotiated agreement containing a requirement for pre-charge filing notification or settlement efforts is enforceable, but it maintains that the facts show that the Union did comply with Article 7(A)(2) before it filed the charge with the Authority. (G.C. Br. at 6) (citing *Headquarters, Fort Sam Hous.*, 8 FLRA 394 (1982) (*Fort Sam Houston*)). In *Fort Sam Houston*, the Authority set aside an arbitrator's award that found a negotiated pre-charge notice provision to be an unenforceable infringement on employees' statutory right to file unfair labor practice charges. *Id.* at 395. Instead, the Authority reasoned that a negotiated pre-charge notification requirement is not inconsistent with the Statute and specifically encouraged by the Authority's regulations which adopt a policy of encouraging parties to informally and voluntarily resolve unfair labor practice allegations. *Id.* The Authority subsequently clarified this holding in *USDA, Food Safety & Inspection Serv.*, 22 FLRA 586, 590 (1986) (*Agriculture*) where it concluded that pre-charge notification procedures are permissive, rather than mandatory, bargaining subjects. Neither the *Fort Sam Houston* nor *Agriculture* addressed whether a union's failure to comply with a negotiated pre-charge

[2] It is noted that the Respondent also calls the GC's impartiality and adherence with its internal Case Handling Manual into question, accusing the GC of a "crudely veiled attempt" to raise issues outside the scope of the charge by stating at the hearing that the Respondent did not comply with the Work Schedules Act when it implemented the CWS/AWS pilot program in 2009. (Resp't Br. at 18-19). Since the Complaint under consideration contains no allegation concerning the events of 2009, and in the absence of any attempt by the GC to amend the Complaint or submit argument that the Respondent engaged in unfair labor practices when it implemented the pilot program, I find it unnecessary to address the Respondent's claims of prosecutorial bias.

notification provision would act as a bar to filing a charge, and the Respondent has cited no authority for its contention that the Union's alleged contractual breach in this case requires dismissal of the charge as premature.

Article 7 – Use of Official Time, Section A(2) in pertinent part states that "[p]rior to filing an unfair labor practice charge with the Federal Labor Relations Authority, Union [r]epresentatives will, in an effort to resolve the issue, discuss the complaint with local managers." (Jt. Ex. 1 at 9). In an effort to bolster its position that the term "discuss" means that the Union is required to "pre-file" the charge form with Agency management, the Respondent attempted to introduce the declaration from Mr. Havrilesko who states that he is the "responsible Agency representative to render interpretations of articles in the contract pursuant to Article 48(A) of Agreement 2000." (Resp't Ex. 1 at ¶1). Mr. Havrilesko further states that the "terms of the contract have been interpreted to consistently require that an actual copy of the proposed charge be filed with local management and reasonable opportunity to respond or discuss be available prior to filing it with the Federal Labor Relations Authority." (Resp't Ex. 1 at ¶2). The Havrilesko Declaration was excluded at the hearing as inadmissible hearsay. (Tr. 60-63). [3] I now affirm that evidentiary ruling.

The Statute provides that unfair labor practice hearings "shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title [the Administrative Procedure Act or APA], except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court." 5 U.S.C. § 7118(a)(6). The Authority's regulations similarly provide that unfair labor practice hearings before the Authority's administrative law judges (ALJs) "shall, to the extent practicable, be conducted in accordance with 5 U.S.C. 554-557, and other applicable provisions of the [APA]," and further that the "[r]ules of evidence shall not be strictly followed." 5 C.F.R. §§ 2423.30(b), 2423.31(b). Thus, the hearsay character of evidence does not bar its admission in an administrative hearing; *Richardson v. Perales*, 402 U.S. 389, 410 (1971); *U.S. Dep't of VA, Golden Gate Nat'l Cemetery, San Bruno, Cal.*, 59 FLRA 956, 959 n.7 (2004); and hearsay evidence may be considered in an APA proceeding as long as it "bear[s] satisfactory indicia of reliability." *Crawford v. USDA*, 50 F.3d 46, 49 (D.C. Cir. 1995). *See also EchoStar Commc'n Corp. v. FCC*, 292 F.3d 749, 753 n.8 (D.C. Cir. 2002) (hearsay may constitute substantial evidence if it is reliable and trustworthy). The decision on whether to admit hearsay evidence and the extent to which hearsay statements may be relied upon to support a finding or decision is committed to the discretion of the ALJ. *See, e.g., Indian Health Serv., Winslow Serv. Unit, Winslow, Ariz.*, 54 FLRA 126, 126-27 (1998). Applying these guidelines, I find that the Havrilesko Declaration lacks sufficient indicia of reliability to warrant its admission and consideration. First, Mr. Havrilesko is not a disinterested witness relating facts. Rather, he is an official of the Respondent offering an opinion on the proper interpretation of the collective bargaining agreement. Second, while Mr. Havrilesko asserts in his declaration that he is a responsible Agency representative to

[3] At the Respondent's request, the declaration has been retained in the record as a rejected exhibit. (Tr. 63).

render interpretations of the contract pursuant to Article 48(A), the language of that provision provides no support for apparent claim of authority to introduce opinions of what the contract means in an unfair labor practice case. To the contrary, Article 48 – Arbitration, Section A (Invoking Arbitration) simply states in pertinent part that "[i]ssues involving Service wide interpretation or application of this agreement will be filed with the Chief Labor Relations and Policy Section at Headquarters." (Jt. Ex. 1 at 97). That is, Article 48, Section merely identifies the appropriate management official with whom arbitration may be invoked. Finally, and most importantly, neither the declaration itself, the Respondent's post-hearing brief nor any evidence introduced by the Respondent corroborates the Mr. Havrilesko's statement that the contract has been consistently interpreted to require the Union to pre-file a charge form with management before filing a charge with the Authority. For these reasons, I conclude that the declaration was properly excluded as lacking adequate indicia of reliability.

As to whether the Union complied with the requirements of the collective bargaining agreement, there is ample evidence in the record that Union President Ramirez made several attempts to discuss the discontinuance of CWS/AWS before filing a charge with the Authority. On April 2, 2013, nearly three months prior to filing the charge with the Authority on June 26, 2013, Mr. Ramirez sent the Respondent's managers an email in which he demanded an opportunity to bargain over the announced decision to discontinue CWS/AWS and threatened to file a charge if he did not receive a satisfactory response. (G.C. Ex. 3). Thereafter, Mr. Ramirez communicated with both Mr. Calderas and Mr. Lucero in an unsuccessful effort to persuade them to bargain over the changes and maintain the status quo pending negotiations, and it was his uncontradicted testimony that he specifically notified Mr. Lucero that the Union intended to file a ULP over the rescission of CWS/AWS without negotiations. (Tr. 42, 90). Based on this evidence, I find that the Union satisfied its obligation under Agreement 2000 to "discuss the complaint with local managers" in an effort to resolve the issue prior to filing an unfair labor practice charge with the Authority. Alternatively, I find that even if it is assumed that Article 7(A)(2) does impose a requirement for "pre-filing" a charge with local managers as argued by the Respondent, I further find that the Union substantially complied by discussing its unilateral change complaint with local managers over an extended period before filing the charge. Moreover, given the absence of any claim or showing of prejudice to the Respondent, I find that the severe sanction of dismissal, for which the Respondent cites no authority, is not warranted.

Merits of the Complaint

The GC alleges that the Respondent violated § 7116(a)(1) and (5) of the Statute by removing bargaining unit employees in the PIDC and HRO facilities from CWS/AWS without bargaining with the Union over the change to the extent required by the Statute. (G.C. Ex. 1(c)). It is well settled that an agency may not change a condition of employment without fulfilling its bargaining obligations. *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1527 (1994). Prior to implementing a change in conditions of employment, an agency is obligated, by § 7116(a)(1) and (5) of the Statute, to 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. *SSA, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 649 (2004), *pet. for review denied sub nom. Assoc. of Admin. Law Judges v. FLRA*, 397 F.3d 957 (D.C. Cir. 2005).

Since the alleged change in conditions of employment in this case involves CWS/AWS, the starting point for determining what, if any, bargaining obligation the Respondent owed to the Union is the Work Schedules Act. In this regard, the Authority has consistently held that "alternative work schedules for bargaining unit employees are 'fully negotiable' subject only to the Work Schedules Act itself or other laws superseding it." *AFGE, AFL-CIO, Local 2361*, 57 FLRA 766, 767 (2002) (quoting *AFGE, Local 1934*, 23 FLRA 872, 873-74 (1986), *modified as to other matters, NTEU, Chapter 24*, 50 FLRA 330, 333 n.2 (1995)); *U.S. DOL, Wash., D.C.*, 59 FLRA 131, 134 (2003) *(DOL)* ("implementation and administration of alternative work schedules is fully negotiable, subject only to the . . .Work Schedules Act . . . or other laws superseding the Act, and without regard to management rights under the Statute"). An agency's duty to bargain under the Work Schedules Act encompasses "'the institution, implementation, administration and termination of alternative work schedules[.]'" *Nat'l Treasury Employees Union*, 52 FLRA 1265, 1293 (1997) (quoting S. Rep. No. 365, 97th Cong., 2d Sess. 14-15 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News at 565, 576-77); *see also Space Sys. Div., L.A. AFB, L.A., Cal.*, 45 FLRA 899, 903 (1992) ("the substance of the decision to terminate a CWS program is negotiable."). Consequently, when an agency eliminates CWS/AWS for bargaining unit employees without first negotiating over the substance of its decision, it will be found to have engaged in an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute unless it establishes that it was entitled under either the Work Schedules Act or the Statute to terminate CWS/AWS without bargaining. *DLA*, 44 FLRA at 600. With this statutory framework in mind, I turn now to the Respondent's arguments that it was not required to negotiate with the Union prior to implementing the decision to discontinue the CWS/AWS program for bargaining unit employees assigned to the PIDC and HRO facilities.

Termination or Suspension

The Respondent's primary defense is based on its contention that the bargaining obligations imposed by the Work Schedules Act apply only to "termination" of CWS/AWS and that its decision to "suspend" CWS/AWS at the PIDC and HRO facilities was implemented in full compliance with the local CWS/AWS policy (*i.e.*, the Field Office Director's August 27, 2009 memorandum) which allowed for the change without any requirement for bargaining. The first part of this argument, if accepted, would mean that an agency could sidestep statutory bargaining obligations by simply avoiding use of the word "termination" when making changes in CWS/AWS programs. While this novel interpretation might be convenient from an agency management perspective, it is completely at odds with the long line of legal precedent discussed above that CWS/AWS is "fully negotiable" under the Work Schedules Act and that an agency's duty to bargain extends to the "institution, implementation, administration and termination" of CWS/AWS. *See also*

DOL, 59 FLRA at 135 (nothing in the Work Schedules Act "limits bargaining to establishment and termination of the schedules"). Assuming that the decision to discontinue CWS/AWS for PIDC and HRO employees is most accurately described as a suspension rather than termination, it nonetheless falls within the "administration" of CWS/AWS. Consequently, I reject the Respondent's interpretation that a change in CWS/AWS that does not involve a "termination" is exempt from the scope of negotiations mandated by the Work Schedules Act.

"Covered By"

The second part of the Respondent's argument – that the "suspension" of CWS/AWS for PIDC and HRO employees was implemented in accordance with the local policy which allows for changes without bargaining – is similarly flawed. In effect, the Respondent is attempting to invoke the "covered by" doctrine as a bar to the negotiations that would normally be required by the Work Schedules Act. *See, e.g.*, *Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009) (*SSA*) (under the "covered by" doctrine, "a party properly may refuse to bargain over a matter that is expressly addressed in the parties' agreement . . . [or] if a matter is inseparably bound up with, and[,] thus[,] an aspect of," a subject "covered by" the agreement). Here, the Respondent relies on the August 27, 2009, memorandum from the Field Office Director implementing the CWS/AWS pilot program to obviate any bargaining obligations with respect to subsequent CWS/AWS changes. However, the August 27, 2009, memorandum is not a negotiated agreement, and there is no claim that the implementation of the CWS/AWS pilot program was collectively bargained. Thus, the "covered by" defense is not factually or legally available where the Respondent cannot show that it has already bargained over the matter. *See SSA*, 64 FLRA at 202 ("to be successful . . . [a "covered by" defense] require[s] a determination that a disputed matter is addressed in some matter in an agreement.").

Waiver

I conclude that the Union did not waive any right to bargain over future changes to CWS/AWS because it did not request to negotiate over implementation of the pilot program in 2009 or protest the implementation of the August 27, 2009 memorandum. Statutory rights, "such as the right to bargain prior to the implementation of a proposed change, may be waived as long as the waiver is clear and unmistakable." *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 527 (2009). However, a "[u]nion's failure to request bargaining on some other occasions of changes in duty hours d[oes] not constitute a clear and unmistakable waiver of its right to request bargaining in connection with [future] changes." *Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9, 22-23 (1981) (ALJ decision adopted by the Authority). Nor do I find that Article 9(F) of the 2000 Agreement permitted the Respondent to unilaterally discontinue CWS/AWS for PIDC and HRO employees as long as it offered the Union an opportunity for post-implementation bargaining. That section of the parties' agreement states in its entirety that,

> The parties agree that effective management of the Service and its resources is a mutual concern. The parties also agree that on certain occasions there is a
>
> need for expedited implementation of new policies or practices affecting conditions of employment. The provisions of this article apply to such situations. It is understood, however, that nothing in this Article precludes the Service and the Union from engaging in post implementation bargaining if mutually agreeable.

(Jt. Ex. 1 at 22). Given that Article 9(A) of Agreement 2000 mandates advance notice of mid-term changes and that Article 9(B) establishes procedures for pre-implementation bargaining over such changes if demanded by the Union, I cannot accept the construction advocated by the Respondent that Article 9(F) clearly and unmistakably waived the Union's rights under the Work Schedules Act and allowed the Respondent to discontinue CWS/AWS without first bargaining as demanded by the Union because it determined that the change was necessary for effective management and utilization of Agency resources.

Alternate Defenses

The Respondent's alternate arguments also fail to establish any basis for excusing its refusal to bargain over the substance of its decision to discontinue CWS/AWS at the PIDC and HRO facilities. As discussed above, the Respondent asserts that the bargaining requirements established by § 6131 of the Work Schedules Act only apply in circumstances where an agency and union are engaged in negotiations over CWS/AWS or where an agency seeks to change a collectively bargained CWS/AWS arrangement, neither of which occurred in the instant case. This argument is directly refuted by *DLA*, a case relied on by the Respondent, where the Authority held that an agency violated the Statute by refusing to bargain over the substance of its decision to terminate a CWS/AWS program that was implemented prior to the union's certification as exclusive representative. As ALJ Etelson explained in his decision which was adopted by the Authority in *DLA*, the pre-certification CWS/AWS program had been in effect for a sufficient period of time (eight months) to have become a condition of employment so that the agency's decision to terminate was "fully negotiable subject" pursuant to the Work Schedules Act. 44 FLRA 613.

The Respondent also invokes *DLA* as "FLRA precedent directly on point . . . that an Agency may assert 'necessary functioning' as an affirmative defense to pre[-] implementation bargaining in a matter falling under 5 U.S.C. 6131." (Resp't Br. at 10) (internal quotation marks in original). In making this claim, the Respondent mistakenly relies on Judge Etleson's discussion of the agency's defense that "necessary functioning" permitted it to terminate CWS/AWS prior to bargaining with the newly-certified exclusive representative. While Judge Etelson did consider (and ultimately reject) the agency's "necessary functioning" defense, he did so only for the purpose of providing the Authority with an alternative analysis in the event that the decision to terminate CWS/AWS was found to fall under the Statute rather than exclusively controlled by the Work Schedules Act:

> As (also) discussed above, however, those procedures [section 6131] call for bargaining before implementation of a decision not to continue such a schedule.
>
> Nothing in the Work Schedules Act, then, would appear to support a pre-bargaining termination of a CWS. That might be expected to end the matter. In the event, however, that it is determined that this aspect of the case is governed by the Federal Service Labor–Management Relations Statute, a different analysis is required.

44 FLRA at 615. In adopting Judge Etelson's decision that the agency had not shown that it was entitled under either the Work Schedules Act or the Statute to terminate the CWS program without first bargaining with the Union, the Authority noted,

> Because we agree that the Respondent was required to bargain with the Union over the substance of the Respondent's decision to terminate the CWS program, we do not rely on the cases cited by the Judge at page 13 of his decision that involved a duty to bargain only as to the impact and implementation of a change in conditions of employment.

44 FLRA at 600 n.1. Thus, there is no support for the Respondent's argument that an agency can assert that necessary functioning permitted implementation of a change in CWS/AWS prior to completion of negotiations to the extent required by the Work Schedules Act.[4] Rather, as the Authority explained in *NFFE Local 1998*, the Work Schedules Act specifically provides for an expedited FSIP proceeding to resolve claims that CWS/AWS is causing an adverse agency impact. 60 FLRA at 143-44.

Since the General Counsel has shown that the Respondent removed bargaining unit employees from the CWS/AWS program in the PIDC and HRO facilities without bargaining with the Union to the extent required by the Work Schedules Act, and since the Respondent has not shown that its unilateral actions were permitted by the Work Schedules Act, Statute or the parties' collective bargaining agreement, I conclude that the Respondent has violated § 7116(a)(1) and (5) of the Statute as alleged in the Complaint. *DLA*, 44 FLRA at 600.

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[4] In my view, *IRS*, 64 FLRA at 127, the other case cited by the Respondent in support of its "necessary functioning" argument, is inapposite as it did not deal with matters subject to the Work Schedules Act. I do note that the union in *IRS* argued that Authority precedent including *DLA* limits an agency's ability to raise a "necessary functioning" defense to cases where an impasse in negotiations has gone before the Federal Service Impasses Panel, and that the Authority rejected the union's argument, stating that the cited "precedent does not support a conclusion that the Agency is precluded from asserting the "necessary functioning" defense merely because the instant dispute was never taken to the FSIP." 64 FLRA at 129-30. However, I do not construe this general statement by the Authority in a case that did not involve CWS/AWS as constituting the ruling sought by the Respondent that "necessary functioning " is available as a defense to pre-implementation bargaining over a matter subject to the Work Schedules Act.

REMEDY

As requested by the General Counsel, I will order an appropriate cease and desist order to be signed by the Deputy Assistant Director, Field Operations Division in all locations within the Respondent's San Antonio Field Office, and disseminate a copy of the notice electronically to all San Antonio Field Office employees. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 226 (2014).

CONCLUSION

I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by removing CWS/AWS for bargaining unit employees assigned to its PIDC and HRO facilities without providing the Union with an opportunity to bargain over the change to the extent required by the Work Schedules Act.

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

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Homeland Security, Immigration and Customs Enforcement, San Antonio, Texas, shall:

1. Cease and desist from:

(a) Unilaterally removing bargaining unit employees from compressed or alternate work schedules or making other changes in conditions of employment without first notifying the American Federation of Government Employees, Local 1944, AFL-CIO (Union), the exclusive representative of bargaining unit employees, about any such proposed changes and providing the Union an opportunity to negotiate concerning the change.

(b) refusing to bargain with the Union over changes in working conditions of unit employees.

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

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

(a) Post at its facilities where bargaining unit employees represented by the Union are located in the San Antonio Field Office, 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 Deputy Assistant Director, Field Operations Division, San Antonio, Texas, and shall be posted and maintained for sixty (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.

(b) In addition to physical posting of the paper Notice, the Notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, customarily used to communicate with employees. This Notice will be sent on the same day that the paper Notice is physically posted.

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

Issued, Washington, D.C., September 28, 2015

Susan E. Jelen

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, Immigration and Customs Enforcement, San Antonio, Texas, 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 change working conditions of bargaining unit employees represented by the American Federation of Government Employees, Local 1944, AFL-CIO (Union), by removing employees from their compressed or alternate work schedules without first notifying the Union and providing it with an opportunity to bargain over the decision to change such conditions of employment.

WE WILL NOT refuse to bargain with the Union over changes in working conditions of unit employees.

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

_____

(Agency/Respondent)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for sixty (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, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX, 75202, and whose telephone number is: (214) 767-6266.