**65 FLRA No. 145**

UNITED STATES
DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
FOR ADMINISTRATION AND MANAGEMENT
DALLAS, TEXAS
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL
OF FIELD LABOR LOCALS
LOCAL 2139, AFL-CIO
(Charging Party/Union)

DA-CA-09-0273

DECISION AND ORDER

March 31, 2011

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

## I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to engage in mid-term bargaining over parking at the Respondent's Dallas, Texas office. The Judge found that the Respondent violated § 7116(a)(1) and (5) the Statute and recommended that the Authority issue a cease and desist order, require the Respondent to bargain in good faith with the Union, and require the Respondent to post a notice of the ULP finding.

For the reasons discussed below, we deny the Respondent's exceptions and adopt the Judge's findings, conclusions, and recommended order.

## II. Background and Judge's Decision

### A. Background

The Respondent has employees at two locations in downtown Dallas. Judge's Decision at 2. The building located at 525 S. Griffin has a parking lot that is managed by the General Services Administration (GSA). *Id.* at 2-3. The parking lot contains 169 spaces, of which 48 are assigned to the Respondent.[1] *Id.* at 3. When the parking lot behind the 525 S. Griffin building closed, the Charging Party proposed that the parties conduct negotiations over the 48 parking spaces assigned to the Respondent. *Id.* In response, the Respondent stated that its spaces were assigned in accordance with the Department of Labor Manual Series (DLMS) and that it could not negotiate changes to the policy.[2] *Id.* The Respondent did not respond to subsequent emails on the issue and assumed the matter was concluded. *Id.* at 4.

The Charging Party then filed a ULP charge against the Respondent. *Id.* at 1-2. The Regional Director of the Authority's Dallas Regional Office issued a complaint, which alleged that the Respondent had violated § 7116(a)(1) and (5) of the Statute by refusing to engage in mid-term bargaining. *Id.* at 2. The Respondent filed an answer, admitting certain allegations, but denying the substantive allegations of the complaint. *Id.* A hearing was held and the parties filed post-hearing briefs. The Judge issued her decision based on the entire record. *Id.*

### B. Judge's Decision

Before the Judge, the GC argued that the Respondent violated the Statute when it refused to engage in mid-term bargaining about parking. *Id.* at 5. The GC asserted that parking was not "covered

1. The remaining spaces are either: (1) assigned to other agencies located in the building or (2) unassigned and allocated to individuals through a process administered by the GSA. Judge's Decision at 3.

2. The DLMS contains the Respondent's internal regulations and policies regarding the administration and operation of the department, including parking at its facilities. DLMS Chapter 526 provides, in relevant part: "The following descending order of priority will govern allocation of [Department of Labor (DOL)] controlled parking spaces and will include the best interests of the DOL[.]" *Id.* at 4. The policy lists in order: "official needs, employees with disabilities, official necessity, van pools, and car pools." *Id.*

by" the parties' agreement, that the DLMS did not preclude bargaining over parking, and that the Respondent had not established a past practice regarding the DLMS. *Id.* In response, the Respondent argued that resolving parking issues using the DLMS constituted a past practice; as a result, under Authority precedent, the practice had been incorporated into the parties' agreement and was "covered by" the parties' agreement. *Id.* at 5-6. The Respondent further argued that, even if using the DLMS to resolve parking issues did not constitute a past practice, the DLMS had been incorporated into the parties' agreement through Article 2, Section 1 of the parties' agreement.[3] Respondent's Post-Hearing Brief at 8.

The Judge first rejected the Respondent's defense that using the DLMS to resolve parking issues constituted a past practice. Judge's Decision at 7. The Judge found that, although the Respondent had followed the practice of using the DLMS with regard to employee parking issues, there was "no evidence that the [Charging Party] ha[d] acquiesced to th[at] practice." *Id.* The Judge rejected the Respondent's argument that the Charging Party had agreed to be bound by the DLMS or had waived its right to bargain in *AFGE, Local 2139, National Council of Field Labor Locals*, 61 FLRA 654 (2006) (*AFGE, Local 2139*). Judge's Decision at 6-7.

The Judge also rejected the Respondent's second argument, finding that Article 2, Section 1 of the parties' agreement was insufficient to support the Respondent's "covered by" defense. *Id.* at 7. According to the Judge, the generalized reference to "policies and regulations" in that provision of the parties' agreement was not sufficient to incorporate the DLMS into the parties' agreement. *Id.*

Because the subject of parking was not "covered by" the parties' agreement, the Judge found that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Charging Party. *Id.* Accordingly, the Judge recommended that the Authority adopt an order requiring the Respondent to cease and desist from refusing to bargain and post a notice at its facilities. *Id.* at 8.

3. Article 2, Section 1 provides, in relevant part: "In the administration of all matters covered by this Agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities; [and] by published Department and/or Agency policies and regulations in existence at the time this Agreement was approved[.]" *Id.* at 4.

## III. Positions of the Parties

### A. Respondent's Exceptions

The Respondent argues that the Judge erred in finding that using the DLMS to resolve parking issues did not constitute a past practice. Exceptions at 7. According to the Respondent, the parties have used the DLMS as guidance in resolving parking issues since 2004, and both parties have "recognized and consented to the supremacy" of the DLMS regarding parking issues. *Id.* The Respondent contends that the Charging Party has acquiesced in this practice by following the DLMS and by failing to file a grievance over the use of the DLMS. *Id.* at 8. The Respondent also asserts that the Charging Party has argued previously that the Respondent must abide by the terms of the DLMS as applied to parking arrangements within the Dallas Region. *Id.* at 8-9 (citing *AFGE, Local 2139*, 61 FLRA 654). Therefore, the Respondent argues, resolving parking issues by reference to the DLMS constitutes a past practice and, in effect, has been incorporated into the parties' agreement. *Id.* at 10.

The Respondent also argues that the Judge was collaterally estopped from finding that using the DLMS to resolve parking issues did not constitute a past practice. *Id.* at 11. According to the Respondent, in *United States Department of Labor, Mine Safety & Health Administration, Rocky Mountain District, Denver, Co.*, FLRA ALJ Dec. Rep. No. 111, 1993 WL 545336 (1993) (*DOL, MSHA*), a case involving the same parties, another judge found that "those regulations establish 'a past practice.'" Exceptions at 11 (quoting *DOL, MSHA*, 1993 WL 545336, at *3). The Respondent asserts that the five elements of collateral estoppel are met and that, as such, the Judge was precluded from finding that using the DLMS to resolve parking issues does not constitute a past practice. *Id.* at 11-12.

The Respondent also argues that, contrary to the Judge's opinion, it did not assert below that the DLMS was "covered by" the parties' agreement; rather, it contended that, "[b]ecause resolution of parking issues by reference to the DLMS has been established by past practice, that condition of employment [wa]s incorporated into and covered by the parties' . . . agreement." *Id.* at 13. Moreover, the Respondent asserts that Article 2, Section 1 expressly incorporates into the parties' agreement policies and regulations that were in existence at the time the parties' agreement was executed -- such as the

DLMS. *Id.* Therefore, the Respondent asserts that the Judge erred in finding that the DLMS had not been incorporated into the parties' agreement. *Id.* at 13-14.

B. GC's Opposition

The GC argues that the Judge reasonably found that using the DLMS to resolve parking issues did not constitute a past practice. Opp'n at 3. Specifically, the GC asserts that the Charging Party did not agree to be bound by the terms of the DLMS, did not participate in negotiations over the DLMS, and did not waive its right to object to the DLMS. *Id.* at 3-4. The GC argues that the way in which GSA deals with the remaining individual parking lot spaces is irrelevant to the 48 spaces that are controlled by the Respondent. *Id.* at 4-5. The GC also contends that, contrary to the Respondent's argument, the Charging Party's argument in *AFGE, Local 2139* that the proposal in that case was consistent with the DLMS does not mean that the Charging Party agreed that the DLMS controls all parking issues. *Id.* at 5.

The GC also argues that the elements of collateral estoppel are not met. *Id.* at 6-7. The GC asserts that, in *DOL, MSHA*, the judge did not find that the DLMS controlled all parking issues with the Respondent, but only that allowing inspectors to park their privately owned vehicles (POVs) at the Denver Federal Center constituted a past practice. *Id.*

Finally, the GC argues that the Judge was correct to find that, even if using the DLMS to resolve parking issues did constitute a past practice, Article 2, Section 1 was insufficient to establish that the issue of parking is "covered by" the parties' agreement. *Id.* at 7. According to the GC, the Respondent simply disagrees with the Judge's conclusion. *Id.*

## IV. Analysis and Conclusions

A. The Judge did not err in concluding that the evidence did not demonstrate that the parties had a past practice that matters regarding parking at the Respondent's facilities were governed by the DLMS.

The standard for determining the existence of a past practice is whether a practice was consistently exercised for an extended period of time with the other party's knowledge and express or implied consent. *U.S. Dep't of the Treasury, Internal Revenue Serv., Louisville Dist., Louisville, Ky.*, 42 FLRA 137, 142 (1991). The practice must be "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *Soc. Sec. Admin., Office of Hearing & Appeals, Montgomery, Ala.*, 60 FLRA 549, 554 (2005).

In determining whether a judge's factual findings are supported, the Authority looks to the preponderance of the record evidence. *U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 365, 368 (2009) (Member Beck concurring).[4] Applying these standards, we find that the Judge's conclusion that there was no established past practice of using the DLMS to resolve parking issues is supported by the record. The Judge found that, although the Respondent followed the practice of using the DLMS with regard to employee parking, there was no evidence that the Charging Party acquiesced in the practice. Judge's Decision at 7.

The Respondent argues that, because the Charging Party has been aware of the DLMS and has been applying to GSA for individual parking spaces as directed by the DLMS, the Judge erred in not finding that the Charging Party had acquiesced in the practice. Exceptions at 8. Further, relying on *AFGE, Local 2139* and *DOL, MSHA*, the Respondent argues that the Judge was precluded from finding that a past practice did not exist.

We reject the Respondent's arguments. The mere existence of the DLMS is not evidence of acquiescence by the Charging Party. Also, that a party has not objected to a practice does not, by itself, establish acquiescence. *See Marine Corps Logistic Base, Barstow, Cal.*, 46 FLRA 782, 799 (1992) (finding no acquiescence even though the union did not object to the practice because prior changes to the practice could have met with the union's approval) (*Marine Corps*). Moreover, the Respondent has not established that there were frequent disputes where consultation with the DLMS was necessary. *See U.S. Dep't of Homeland Sec., Border & Transp. Directorate, Bureau of Customs & Border Prot.*,

4. Member Beck notes that, for the reasons stated in his separate opinions in *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256, 262-63 (2009) and *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 179-80 (2009), he reviews the Judge's factual findings using a "substantial evidence in the record" standard rather than a "preponderance" standard.

59 FLRA 910, 914-15 (2004) (finding that, because the practice at issue was limited to isolated incidents, the evidence failed to demonstrate acquiescence).

*AFGE, Local 2139* does not provide support for the Respondent's contention that the Judge erred in finding a past practice did not exist. In *AFGE, Local 2139*, a negotiability case, the Charging Party argued that its proposal concerning parking was "intended to require the Agency to comply with Agency regulations[,]" referring to the DLMS. *AFGE, Local 2139*, 61 FLRA at 654. However, the Charging Party did not assert that the DLMS always controlled or acquiesce in being bound by the DLMS simply because it argued in *AFGE, Local 2139* that its proposal was consistent with the DLMS.

The Respondent's reliance on *DOL, MSHA* to establish that the Judge was precluded by collateral estoppel is misplaced. As an initial matter, it is unclear whether the Respondent raised the precise issue of collateral estoppel before the Judge. However, even assuming the Respondent properly raised this issue, its claim is without merit. In *DOL, MSHA*, the judge found that permitting inspectors to park their POVs at a specific location while picking up their government owned vehicles was a past practice. *DOL, MSHA*, FLRA ALJ Dec. Rep. No. 111 at 3, 1993 WL 545336, at *3. Contrary to the Respondent's suggestion, the judge did not find that using the DLMS to resolve all parking issues constituted a past practice, nor was that issue litigated in that case. Because one element of collateral estoppel is that the issue must have been litigated in the previous case, the elements of collateral estoppel have not been met. *See U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 11-12 (2000) (finding no collateral estoppel where the same issue was not litigated in both proceedings).

Accordingly, we find that the Judge did not err in finding that a past practice did not exist, reject the Respondent's argument that collateral estoppel applies, and deny this exception.[5]

5. The Respondent also argues that the Charging Party did not file a grievance protesting the application of the DLMS and for that reason should be said to have acquiesced in the practice. Exceptions at 8. The GC argues that the Respondent did not properly raise this issue before the Judge. Opp'n at 4 n.1. However, even assuming the Respondent did properly raise the issue, as noted above, failure to object does not establish acquiescence and, thus, would not be sufficient to overcome the Judge's finding. *See Marine Corps*, 46 FLRA at 799.

B. The Judge did not err in concluding that, even assuming a past practice existed, parking was not "covered by" the parties' agreement.

The Authority has held that, absent a reopener clause, parties are not permitted to demand mid-term bargaining over matters that are covered by an agreement. *See, e.g., U.S. Dep't of Labor, Wash., D.C.*, 60 FLRA 68, 72 (2004) (citing *U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1013 (1993) (*SSA I*).

A subject for negotiation is covered by a collective bargaining agreement if the matter is expressly contained in the agreement. *See SSA I*, 47 FLRA at 1018. If the agreement does not expressly contain the matter, then the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *Id.* Consideration of the parties' bargaining history is an "integral component" of determining whether the matter is inseparably bound up with, and thus plainly an aspect of, the subject covered by the agreement. *U.S. Customs Serv., Customs Mgt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). Moreover, in ULP cases that turn on the meaning of the parties' collective bargaining agreement, the Authority has held that, where a judge's interpretation of the meaning of the parties' agreement is challenged, it will determine whether the judge's interpretation is supported by the record and by the standards and principles applied by arbitrators and the federal courts. *IRS, Wash., D.C.*, 47 FLRA 1091, 1110-11 (1993).

Even assuming that the Respondent is correct that a past practice is incorporated into the parties' agreement, Exceptions at 13 (citing *AFGE, Local 2128*, 58 FLRA 519, 523 (2003)), because we find that the Judge correctly determined that using the DLMS to resolve parking issues does not constitute a past practice, the Respondent's argument does not support its "covered by" defense.

The Respondent also argues that the DLMS has been incorporated into the parties' agreement through Article 2, Section 1, which incorporates existing policies and regulations into the parties' agreement. Exceptions at 13. The Judge found that the generalized language of Article 2, Section 1 is insufficient to incorporate the DLMS into the parties' agreement. Judge's Decision at 7. We find that the Judge's decision is supported by the record. Article 2, Section 1 clearly refers to "the

administration of *all matters covered by this Agreement* . . . ." GC's Post-Hearing Brief at 8-9. Because, as discussed above, we reject the Respondent's argument that use of the DLMS to resolve parking issues constituted a past practice and no other provision in the parties' agreement covers this issue, Article 2, Section 1 does not apply to the instant matter.

Accordingly, we reject the Respondent's argument that the DLMS has been incorporated into the parties' agreement such that the matter was "covered by" the parties' agreement and deny this exception.

## V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, it is hereby ordered that the Respondent shall:

1. Cease and desist from:

(a) Refusing to bargain mid-term with the Union, the exclusive representative of certain bargaining unit employees, regarding employee parking at 525 S. Griffin, Dallas, Texas.

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

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

(a) Upon request, bargain in good faith with the Union, to the extent required by law, regarding employee parking at 525 S. Griffin Street, Dallas, Texas.

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

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

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Labor, Office of the Assistant Secretary for Administration and Management, Dallas, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with the American Federation of Government Employees, National Council of Field Labor Locals, Local 2139, AFL-CIO (the Union), the exclusive representative of certain bargaining unit employees, regarding employee parking at 525 S. Griffin, Dallas, Texas.

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

WE WILL, upon request, bargain in good faith with the Union to the extent required by law, regarding employee parking at 525 S. Griffin, Dallas, Texas.

______________________________
(Respondent/Agency)

Dated: ___________ By: ______________________
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, and whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-6266.

Office of Administrative Law Judges

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
FOR ADMINISTRATION AND MANAGEMENT
DALLAS, TEXAS
Respondent

AND

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL
OF FIELD LABOR LOCALS
LOCAL 2139, AFL-CIO
Charging Party

Case No. DA-CA-09-0273

Michael A. Quintanilla, Esq.
For the General Counsel

David L. Peña, Esq.
For the Respondent

Jeffrey P. Darby
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

**DECISION**

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

On June 18, 2009, the American Federation of Government Employees, National Council of Field Labor Locals, Local 2139, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge with the Dallas Region of the Authority against the U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Dallas, Texas (Respondent/OASAM). (G.C. Ex. 1(a)) On December 22, 2009, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to engage in mid-term bargaining over parking at the Respondent's Dallas, Texas offices. (G.C. Ex. 1(c)) On January 19, 2010, the Respondent filed an Answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(e)) At the hearing, the Respondent amended its answer to admit all but the final paragraph of the complaint. (Tr. 7).

A hearing was held in Dallas, Texas on March 10, 2010, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely Post-Hearing Briefs, which have been fully considered.

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

**STATEMENT OF THE FACTS**

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(d), (h)) At all times material to this matter, Kelley Pettit served as Regional Administrator and Earsie Johnson served as the Labor Relations Officer and both have been supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c), (e); Tr. 16, 49).

The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. (G.C. Ex. 1(c), (e)) Jeffrey Darby is the President of AFGE, Local 2139 and is Vice President of the National Council of Field Labor Locals. (Tr. 13).

OASAM is the consolidated agency for the Department of Labor (DOL), responsible for all administrative and management programs that serve all agencies within DOL, such as Human Resources, Financial Management, Administrative Services, Space, Telecommunications and Information Technology. (Tr. 50) The Dallas Region covers eleven states, including Texas. (Tr. 14, 50).

DOL has employees in at least two locations in downtown Dallas: 525 S. Griffin (also referred to as the A. Maceo Smith Building) and 1100 Commerce Street (also the Earle Cabell Building).[1]

1. Although Darby referenced the Earle Cabell Building during his testimony, the evidence reflects that the request

525 S. Griffin has a parking lot which is managed by the General Services Administration (GSA). (Tr. 51) There are 169 spaces in the parking lot; DOL has 48 agency-paid parking spaces as part of its lease agreement. (Tr. 52) There are nine different agencies, including DOL, which occupy space at 525 S. Griffin. (Tr. 52) DOL is the largest agency in the building. Not all parking spaces are assigned to a specific agency through its lease agreement, and the remaining spaces are available to individuals. The individuals pay GSA directly to park in a space and GSA administers the entire parking process. (Tr. 52-53) There is a waiting list for the next available parking spaces. (Tr. 50).

On March 17, 2009,[2] Darby sent an email to Pettit, stating the following:

> We understand the parking lot behind 525 S. Griffin will soon close. The NCFLL recognizes that the Department has absolutely no control over this situation.
>
> We propose negotiations on the parking lot located at 525 S. Griffin, specifically the spaces controlled by DOL. The NCFLL is interested in making a number of these available to BUEs in direct proportion with the size of the NCFLL BU vs. non-BUEs. It is patently unfair that non-BUEs have the lion's share of these spaces.
>
> Please let me know OASAM's position in this matter. Thank you.

(G.C. Ex. 2 at 3; Tr. 14-15).

Earsie Johnson responded on March 20, stating:

> We certainly empathize with the employees over the loss of the public parking across from the A. Maceo Smith building. As you indicated, we do not have any control over the parking availability in downtown Dallas, but have tried to be proactive in providing helpful information to our employees to assist them with locating alternative parking spots. (see attached).
>
> The parking lot behind the A. Maceo Smith building belongs to and is controlled by GSA. GSA maintains the access list and manages the process by which employees receive parking spots should one become available. Parking places that are allocated to a specific agency are determined between that agency and GSA, and are in strict accordance with DOL policy and we do not have the latitude to negotiate or break a Departmental policy.
>
> I hope this clarifies our position on this issue. Please let me know if you have any questions.

(G.C. Ex. 2 at 2; Tr. 16-17).

Darby reiterated the Union's request to bargain by emails dated March 23, April 13 and June 4. (G.C. Ex. 2; Tr. 17) The Respondent did not reply to these emails. (Tr. 17-18) Sometime in June, during a regularly scheduled labor-management meeting in Dallas, Pettit and Darby discussed the issue of parking and the Respondent assumed that the matter was concluded. (Tr. 61, 79) On June 18, however, the Union filed the unfair labor practice charge in this matter. (G.C. Ex. 1(a)).

The parties have a current National Agreement (NA)(G.C. Ex. 3) Article 2, Section 1 (Governing Laws and Regulations, Precedence of Laws and Regulations) states:

> In the administration of all matters covered by this Agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities; by published Department and/or Agency policies and regulations in existence at the time this Agreement was approved; and by subsequently published Department and/or Agency policies and regulations required by law or by the regulations of appropriate authorities.

Section 6 – Past Practices states:

> It is agreed and understood that any prior working conditions and practices and understandings which are not specifically covered by the Agreement or in conflict with it shall not be changed unless mutually agreed to by the parties.

(G.C. Ex. 3, p. 4-6).

The NA does not contain an article on employee parking, although Article 17 does deal with GSA Vehicles or Lease Vehicles. Section 2 contains a reference to employee POVs, and specifically states "…Where parking is provided for GOVs, employees

to bargain at issue in this matter only related to the building located at 525 S. Griffin.

[2] All dates are in 2009, unless specifically noted.

may park their POVs in vacant Agency spaces, provided that such use is not prohibited by law, regulation, or lease." (G.C. Ex. 3, p. 52).

The Department of Labor Manual Series (DLMS 2) contains the Respondent's internal regulations and policies regarding the administration and operation of the Department, including among other things, parking at DOL facilities. Chapter 520 contains the Parking Policy and was last updated on May 7, 2004. (Agency Ex. 1) Chapter 526 sets forth the parking priorities and states "The following descending order of priority will govern allocation of DOL controlled parking spaces and will include the best interests of the DOL as judged by the Director, BOC, or by delegation to the Regional Administrator, OASAM in regional offices, or other responsible administrative authorities in other facilities…." *Id.* at 4. The policy lists in order: official needs; employees with disabilities; official necessity; van pools, and carpools. *Id.*

## POSITIONS OF THE PARTIES

### General Counsel

The General Counsel (GC) asserts that the Respondent violated section 7116(a)(1) and (5) when it refused to engage in mid-bargaining over parking with the Union. The GC asserts that the Respondent offered no legitimate defense for this failure.

Specifically, the GC asserts that the Respondent's "covered by" defense should be rejected, citing *U.S. Dep't of HHS*, *Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004 (1993)(*SSA Baltimore*) and *Soc. Sec. Admin.*, 64 FLRA 199 (2009)(*SSA*). The GC notes that the parties' current NA (G.C. Ex. 3) does not contain an article concerning employee parking, and the matter therefore, is not expressly addressed in the parties' NA. The GC also argues that Article 2 of the parties' NA in conjunction with DLMS 2 must also be rejected as a defense to the refusal to bargain mid-term regarding employee parking.

The GC further argues that the DLMS 2, Chapter 520, et seq., does not preclude bargaining with the Union over employee parking. Under section 7117(b) of the Statute, an agency regulation does not bar negotiation over an otherwise negotiable proposal unless the agency has demonstrated a compelling need for the regulation under Subpart F, 2424.50 of the Authority's Regulations. *See AFGE, Local 2139, Nat'l Council of Field Labor Locals*, 61 FLRA 654, 656 (2006). The Respondent has made no such assertion nor has it presented evidence to demonstrate a compelling need to issue DLMS 2, Chapter 520. Thus, the existence of DLMS 2, Chapter 520 does not bar negotiation over employee parking.

Further, the GC argues that the policy does not preclude bargaining with the Union over parking. While the parking lot is controlled by GSA, there are forty-eight parking spaces allocated to various DOL agencies that were included within the normal leasing arrangements for space and are under the control of DOL agencies. The Respondent could bargain about these particular parking spaces, even under its own policy.

Finally, the GC argues that the Respondent has not established a practice where the Union has agreed to be bound by the terms of the DLMS 2 as part of the NA. The GC therefore asserts that the Respondent has failed to offer any legitimate defense to its refusal to bargain with the Union regarding parking and a violation of the Statute as alleged in the complaint, must be found.

### Respondent

The Respondent denies that it violated the Statute as alleged in the complaint, asserting that it and the Union have a long-standing past practice that matters regarding parking at DOL facilities were governed by DLMS 2. Under Authority precedent, a past practice regarding working conditions constitutes an amendment to the parties' collective bargaining agreement (CBA), and, as such, the practice is "covered by" the CBA and not subject to mid-term bargaining. Under these circumstances, the Respondent's refusal to bargain was justified and the complaint should be dismissed.

## ANALYSIS AND CONCLUSIONS

This case involves the Union's request to engage in mid-term bargaining over the parking spaces under the Respondent's control at the federal building located at 525 S. Griffin Street. The parties are in agreement that employee parking can be a proper subject of bargaining. The Respondent however, asserts that in this instance, it has no obligation to bargain mid-term over parking. Specifically, as noted above, the Respondent asserts that the subject of parking has been controlled by its regulations set forth in the DLMS 2 for a considerable period of time and such practice has become a part of the NA. Therefore, the Respondent is not obligated to bargain over the Union's mid-term bargaining request

because the matter is "covered by" the parties' agreement.

The "covered by" doctrine is set forth in *SSA Baltimore* and applies only in cases alleging an unlawful refusal to bargain. *SSA,* 64 FLRA at 202. In particular, the doctrine is "available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue." *U.S. Dep't of Energy, Western Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000). The doctrine has two prongs. *U.S. Customs Serv., Customs Mgmt Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). Under the first prong, a party properly may refuse to bargain over a matter that is expressly addressed in the parties' agreement. *Id.* Under the second prong, a party properly may refuse to bargain if a matter is inseparably bound up with, and thus, an aspect of a subject covered by the parties' agreement. *Id.* Although not expressly limited to situations like the instant case where an agency refuses to engage in union-initiated, mid-term bargaining, the covered by doctrine derives from, and is most naturally applied in, this type of scenario. *SSA, 64 FLRA* at 202.

The parties have engaged in little negotiation regarding parking. There is no evidence that there have been any previous requests by the Union for mid-term bargaining regarding parking. The one case cited by both parties, *AFGE, Local 2139*, 64 FLRA at 654, concerned the negotiability of a proposal to continue to pay for employee parking at the El Paso location. The Respondent relies on this case to assert that the Union was in agreement that the DLMS 2 was the proper source for dealing with parking issues, while the Union denies that its request that DOL follow the DLMS 2 was any sort of waiver of its right to bargain. In that case, the Union proposed that "The Agency will provide parking at the El Paso Field Office for bargaining unit employees who use their privately owned vehicles (POV) a majority of the time on Government business." The Union argued before the Authority that the proposal conformed to DLMS 2, Chapter 525.

As stated by both parties, in order to find the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001). While the evidence indicates that the Respondent has followed the practice of using the DLMS 2 with regard to employee parking at its various locations, there is no evidence that the Union has acquiesced to this practice. A review of DLMS 2 does not reveal any prohibition against bargaining with the exclusive representative on the issue of parking. I do not find, that the single proposal noted above, although consistent with the DLMS 2, is sufficient to show that the Union has agreed to follow the DLMS 2 in all aspects of employee parking at various DOL facilities or that the Union has waived its right to bargain mid-term about parking.

Therefore, the Respondent's defense that resolution of parking issues by reference to the DLMS 2 has been established by past practice and has been incorporated into and covered by the parties' current NA, is rejected. *See AFGE, Local 2128 and U.S., Dept of Defense, Def. Cont. Mgmt. Agency, Dist. West, Hurst, Tex.,* 58 FLRA 519, 523 (2003). The issue of parking is not expressly addressed in the parties' agreement. The Respondent does not point to any specific article in the NA that deals with parking, rather it looks to Article 2, Section 1 as incorporating the DLMS 2 into the NA. I do not find, however, that Article 2, Section 1 of the agreement is sufficient to incorporate the DLMS 2, Chapter 525 into the agreement and therefore, it is not inseparably bound up with, and thus, an aspect of, a subject covered by the parties' agreement. *SSA,* 64 FLRA at 202.

Even assuming the evidence was sufficient to establish a past practice, I would reject the Respondent's covered by defense. In that regard, Article 2, Section 1 is inadequate to establish that the issue of parking is covered by the parties' agreement. The language has been carried over intact from contract to contract, except for elimination of the reference to Federal Personnel Manual. (*See* G.C. Ex. 4 at 4; G.C. Ex. 5 at 4; G.C. Ex. 6 at 4; G.C. Ex. 8 at 3) The language of the article itself, with its generalized references to policies and regulations, is not sufficient to incorporate the parking regulations into the NA. Therefore, the Respondent has failed to meet either prong of the covered by doctrine, since there is no specific article in the agreement related to parking, and the evidence fails to show that parking is inseparably bound up with and thus, a part of the agreement.

In this case, the Union has requested mid-term bargaining over the apportionment of parking spaces controlled by the Respondent. Since the subject of parking is not covered by the parties' agreement, the Respondent was obligated to bargain. The Respondent's refusal to bargain mid-term over parking arrangements at 525 S. Griffin was therefore

in violation of section 7116(a)(1) and (5) of the Statute.

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

**ORDER**

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Dallas, Texas (Respondent), shall:

1. Cease and desist from:

(a) Refusing to bargain mid-term with the American Federation of Government Employees, National Council of Field Labor Locals, Local 2139, AFL-CIO (the Union), the exclusive representative of certain of our employees, regarding employee parking at 525 S. Griffin, Dallas, Texas.

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

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

(a) Upon request, bargain in good faith with the Union, to the extent required by law, regarding employee parking at 525 S. Griffin Street, Dallas, Texas.

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

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

Issued, Washington, D.C. August 4, 2010

SUSAN E. JELEN
Administrative Law Judge