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

MEMORANDUM DATE: May 11, 2005

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF ENERGY
ROCKY FLATS FIELD OFFICE
GOLDEN, COLORADO

Respondent

and Case No. DE-CA-03-0231

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1103, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the stipulation, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

DEPARTMENT OF ENERGY ROCKY FLATS FIELD OFFICE GOLDEN, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1103, AFL-CIO Charging Party	Case No. DE-CA-03-0231

NOTICE OF TRANSMITTAL OF DECISION

Pursuant to §2423.26 of the Authority's Rules and Regulations, the above-entitled case was stipulated to the undersigned Administrative Law Judge. The undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 13, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: May 11, 2005
Washington, DC

OALJ 05-29

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF ENERGY ROCKY FLATS FIELD OFFICE GOLDEN, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1103, AFL-CIO Charging Party	Case No. DE-CA-03-0231

Nadia Sullivan, Esquire
Timothy Sullivan, Esquire
For the General Counsel

Mell Roy, Esquire
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

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 (FLRA or Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 1103, AFL-CIO (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Denver Regional Office of the Authority. The complaint alleges that the Department of Energy, Rocky Flats Field Office, Golden, Colorado (Respondent) violated section 7116(a)(1) and (5) of the Statute by unilaterally changing the terms of the Employee Annual Leave Agreements without providing the Union with notice and an opportunity to negotiate to the

extent required by the Statute. Respondent timely filed an answer to the complaint, in which it admitted and denied certain allegations. (G.C. Exs. 1(b) and 1(h))

A hearing was held in Denver, Colorado on April 6, 2004, 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. Both 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.

Findings of Fact

The Department of Energy, Rocky Flats Field Office (RFFO), Golden, Colorado (Respondent) is an agency as defined in 5 U.S.C. § 7103(a)(3).[1] The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization as defined in 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent. AFGE Local 1103 (Local 1103) is an agent of AFGE for the purpose of representing employees at the Respondent's Rocky Flats Field Office, Golden, Colorado. (G.C. Exs. 1(b) and 1(h)) The number of bargaining unit employees represented by Local 1103 has decreased from approximately 120 employees in December 2002 to approximately 30 employees at the time of the hearing. (Tr. 24)

Organizationally, the RFFO reports to the Assistant Secretary of Environmental Management Program (ASEM). The ASEM, in turn, reports to the Director of Management, Budget and Evaluation (MBE) from whom the RFFO receives its funding. Lastly, the Director reports to the Secretary of Energy. (Tr. 64-65)

The mission of the RFFO was changed in 1995 from weapons production to an accelerated closure site. (Tr. 24) The site was initially projected to close on December 15,

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[1] Effective February 8, 2004, Respondent's name was officially changed to the U.S. Department of Energy, Rocky Flats Project Office (RFPO).

2006. (Tr. 61) However, it was not until November/December 2002 that management gained confidence that it could meet the deadline. By January 2004, the new projected date of closure was estimated as April/May 2006. (Tr. 144, 146-147, 155)

In October 2000, Congress enacted the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Authorization Act) (later codified at 50 U.S.C. 2703). Section 3136 of the Authorization Act authorized the Secretary of Energy to provide employees with enhanced incentives to remain at the DOE closure projects until their skills were no longer needed. The Authorization Act also assigned benefits to employees to ease the transition from their jobs when their work was completed. One of the incentives provided by the Act granted employees at closure sites the right to accumulate annual leave. Specifically, § 3136(d)(1) provides the right to accumulate annual leave provided by § 6303 of Title 5, U.S.C., for use in succeeding years until it totals not more than 90 days, or not more than 720 hours based on a standard work week. (G.C. Ex. 2; Jt. Ex. 7) Section 3136(e) of the Authorization Act also requires that eligible employees provided with an incentive under the Act enter into an agreement with the Secretary to remain employed at the closure facility as of the date of the agreement until a specific date or for a specified period of time. (G.C. Ex. 2)

Following the passage of the Authorization Act, the Secretary of Energy delegated the authority to the Director, MBE, to determine and approve appropriate incentives. On December 3, 2001, the Director redelegated to the Manager of the RFFO the authority, pursuant to § 3136(d)(1), to determine and approve annual leave incentive agreements, consistent with the RFFO approved Annual Transition Incentive Plan. According to the delegation, in exercising the authority delegated, the Manager shall be governed by the rules and regulations of the DOE and the policies and procedures prescribed by the Secretary. Both Dotti Whitt, Labor Management Relations Manager and Program Management Analyst, and Michael Hargreaves, former Human Resources Director (now retired), testified that the delegation of authority did not contain a termination date or a requirement that the authority be redelegated every year. According to Whitt, typically a delegation remains in effect until rescinded. Furthermore, Whitt testified that she

sought clarification from Headquarters who advised her that the delegation remained standing. (Jt. Ex. 7, Section 4 and Attachment A; R. Ex. 3; Tr. 60, 64, 84, 165-167, 176, 194-196)

On August 7, 2003, the Acting Director, MBE, redelegated authority to the Manager of RFFO to use all § 3136 incentives, including the enhanced annual leave incentives. Whitt testified that management continued to have the authority to offer annual leave incentive agreements under the original 2001 delegation. However, Headquarters decided to restate the authority so as to avoid any misunderstanding regarding the scope of the delegated authority. (R. Ex. 4; Tr. 201-202)

Barbara Mazurowski, who became Manager of RFFO after the Authorization Act was passed, was actively involved in implementing the legislation. According to Whitt, Mazurowski viewed the enhanced annual leave incentive as a benefit to management and employees. Thus, she made the decision to use the incentives throughout the duration of the closure project as long as there were federal employees at the site. As required by the ASEM's procedures, Mazurowski submitted an Annual Transition Plan 2001-2002, dated August 30, 2001, which proposed to offer all federal employees who met the eligibility criteria the annual leave incentive. On October 29, 2001, Jessie Roberson, then ASEM, approved the plan subject to the conditions that, among other things, funding to implement the plan must be within the program direction allocations provided for RFFO for FY 2002. The ASEM progress report to Congress for the period of October 1, 2000 through June 30, 2002, also stated that approval was conditioned on the enhanced annual leave accrual being the only incentive currently authorized and

delegated to the Field Managers for FY 2001/2002.[2] (Jt. Ex. 7, Section 5; Jt. Ex. 8; R. Ex. 2; Tr. 63, 71, 93-95)

In approximately September 2001, the Union, through Marcy Nicks, President, learned that management intended to offer EAL agreements to bargaining unit employees. The Union was not given a copy of the EAL agreement, but was told by Whitt and Laura Kilpatrick, Attorney, that the agreements would benefit the employees by providing them with a cushion of money upon their departure from RFFO and that the agreements were intended to continue in effect through closure. The Union did not request to bargain. (Tr. 29-30)

Bruce Wallin, Physical Scientist, Joseph Rau, retired General Engineer and Project Managers, Nicks, and Whitt all testified that during her monthly all-hands meetings, Mazurowski informed employees that management would be offering employee annual leave incentives that would allow them to accrue up to 720 hours of annual leave and that the incentives would continue through closure as a means of recognizing their worth and contribution to the RFFO and to provide a financial safety net to help with the transition to other employment or retirement. Whitt further testified that both she and Mazurowski also informed employees that the EAL agreements would either continue in effect or new agreements would be executed to cover additional years. (Tr. 36, 44-46, 78-79, 108-109, 123-124, 128, 153-154, 162, 170, 187) Mazurowski did not testify at the hearing.

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[2] The evidence was disputed as to whether the ASEM's approval of the Annual Transition Incentives Plan for 2001-2002 authorized the use of multiple-year employee annual leave (EAL) agreements. Whitt, who was the primary author of the 2001-2002 plan, testified that the references to FY 2001 and FY 2002, were to cover the period of time addressed by the plan and the congressional report rather than an imposition of a limitation on the Manager's authority. Thus, Whitt testified that based on the delegation of authority from the Director, MBE, the Manager had the authority to offer multiple year agreements. On the other hand, based on a review of ASEM's authorization/approval letter and the congressional progress report referenced above, Hargreaves testified that Mazurowski did not have the authority to enter into agreements that exceeded the year 2002. Crediting the testimony of Whitt, who was actively involved in the process, I find that the plan authorized the use of multiple-year employee annual leave agreements.

All federal employees (bargaining unit and non-bargaining unit) at the RFFO were offered the EAL agreement by Mazurowski. The parties stipulated that eighty-one (81) bargaining unit employees signed the EAL agreements with an effective date of October 1, 2001. (Stip. at Tr. 9) The relevant provisions of the agreement (2001 Agreement) are as follows:

EMPLOYEE ANNUAL LEAVE AGREEMENT

> This Employee Retention Agreement (Agreement) is entered into between the U.S. Department of Energy (DOE), Rocky Flats Field Office (RFFO) and _____ (Employee) (jointly referred to as Parties), pursuant to the authority granted in § 3136 of the Floyd D. Spence National Defense Authorization Act for FY 2001, P.L. 106-398 (October 30, 2000) (§ 3136), hereby incorporated into this Agreement. The Parties acknowledge that, due to the nature of the RFFO's closure mission, it may become necessary for RFFO to determine that workload requirements prevent use of annual leave and to request that the Employee not take annual leave at particular times. As a result, in the event that the Employee agrees to modify their leave usage to the extent necessary, RFFO will allow the Employee to accumulate annual leave for a total of seven hundred twenty (720) hours for the term of this Agreement. It is not the intent of this Agreement for annual leave to be denied unless an exigency is declared by the Manager of RFFO.
>
> **Eligibility**
>
> In order to be eligible to receive the Incentives set out in this Agreement, the Employee must:
>
> 1. have worked continuously at the Closure Site for at least two (2) years total prior to the date of execution of this Agreement. . . .;
>
> 2. be a Federal employee, as defined at 5 U.S.C. 2105(a), required for mission accomplishment;

3. have a passing (fully satisfactory or equivalent) performance rating during the most recent performance period and not be subject to a pending conduct or performance action, . . .; and

4. remain employed at RFFO for the duration of this Agreement.

Nothing contained herein is intended to grant greater employment rights or benefits to the Employee than are authorized by § 3136.

Effective Date and Term of Agreement

This Agreement is for a one (1) year period effective October 1, 2001, with options to renew for successive one (1) year periods as offered by and solely at the discretion of RFFO. The Employee's eligibility to accumulate additional annual leave (under this Agreement) will be terminated in the event that the Employee breaches this Agreement or either voluntarily or involuntarily terminates his/her employment at RFFO, unless the Employee transfers to another Closure Facility.

Annual Leave Accumulation

> An eligible RFFO Employee may begin to accumulate, for use in succeeding years, up to seven hundred twenty (720) hours of annual leave beginning in the Leave Year in which this Agreement is signed. Any amount of leave in excess of two hundred forty (240) hours that remains unused when the Employee is reassigned to a non-closure DOE organization or transfers to another Federal agency will be paid to the Employee as a lump sum payment at the time the Employee separates from RFFO (unless he/she transfers to another Closure Facility). . . . In the event that the Employee either retires, or voluntarily or involuntarily terminates his/her employment, the annual leave will be treated as any other accumulated annual leave and will be paid to the Employee in one lump sum. In the event that the Employee chooses not to execute future Employee Annual Leave Agreements, the amount of annual leave which is accumulated during the term of this Agreement will become the new ceiling for the Employee's annual leave balance.

(Jt. Exs. 2, 4, 6; Tr. 70)

Sometime in November or December 2001, Nicks learned that management intended to offer employees a revised EAL agreement. Whitt and Kilpatrick informed the Union that management was changing the agreement to a calendar/leave year basis instead of a fiscal year basis. They also told Nicks that employees would continue to accumulate annual leave up to 720 hours through closure or the date they departed the RFFO. Based on management's assurances regarding the changes to the agreement, the Union did not request to bargain. (Tr. 31)

The parties stipulated that seventy-nine (79) bargaining unit employees signed EAL agreements with an effective date of January 1, 2002. (Stip. at Tr. 9) The introductory paragraph remained substantially similar to the initial agreement. Additionally, the eligibility criteria remained the same. The new agreement (2002 Agreement) contained, in part, the following language:

Termination of Previous Agreement

RFFO previously issued Employee Annual Leave Agreements to employees effective October 1, 2001. Both RFFO and Employee agree that the current Agreement terminates and replaces any previous Employee Annual Leave Agreement.

Effective Date and Term of Agreement

The effective date of this Agreement is January 1, 2002. The Employee agrees to remain employed by RFFO through the end of the 2002 Leave Year.

Annual Leave Accumulation

An eligible RFFO may begin to accumulate, for use in succeeding years, up to seven hundred twenty (720) hours of annual leave beginning in the Leave Year in which this Agreement is signed. In the event that the Employee chooses not to execute future Employee Leave Agreements, the amount of annual leave which is accumulated during the term of this Agreement will become the new ceiling for the Employee's annual leave balance.

(Jt. Ex. 1, 3, 5)

The decision to revise the agreement was due to complications in using a fiscal year basis rather than a leave year basis. Therefore, management decided to revise the agreement to operate on a leave or calendar year basis. Also, due to a change in personnel, there was no longer a concern that the additional types of incentives would not be allowed in the future. (Tr. 79-80)

The durations clauses in the two agreements differ. The 2001 EAL Agreement reads: This Agreement is for a one (1) year period effective October 1, 2001, with options to renew for successive one (1) year periods as offered by and solely at the discretion of RFFO. (Jt. Exs. 2, 4, 6) The 2002 EAL Agreement reads: The effective date of this Agreement is January 1, 2002. The Employee agrees to remain employed by RFFO through the end of the 2002 Leave Year. (Jt. Exs. 1, 3, 5)

Whitt testified that the revision of the duration clause was directed by Mazurowski so that the agreement would no longer be for one year and instead would be effective for as long as employees were employed at the site. The agreement also provided that the employee agreed to remain employed by RFFO through the end of the 2002 Leave Year. Whitt testified that the latter provision was intended to be a commitment by the employee to remain for one year at RFFO. However, if the employee decided to leave early, the employee suffered no harm because he/she would be entitled to a payment of their annual leave earned up to that point. (Tr. 80-82)

Eugene Schmitt became the Manager of the RFFO in approximately August 2002. On December 20, 2002, Schmitt issued a memorandum to all parties, which stated:

> Transition and Closure of the Rocky Flats Environmental Technology Site (Site) drives the employee levels necessary to accomplish the Site mission. Steadfast movement toward Site closure also dictates the need to reassess the Rocky Flats Field Office (RFFO) resource needs. Our increased progress toward closure is reducing the need to maintain higher staffing levels. It is no longer necessary to request that all employees put their annual leave usage on hold to achieve mission related objectives. The RFFO resource requirements have changed and the employee incentives provided in Section 3136 of the Floyd D. Spence National Defense Authorization Act for FY 2001, P.L. 106-398 (October 30, 2002) (Section 3136) will be offered prospectively on a limited basis at the discretion of the Department of Energy.
>
> The RFFO employees were offered the opportunity to accrue annual leave not to exceed 720 hours during a leave year. Eligible employees, needed to meet the RFFO Closure Mission, and the RFFO Manager entered into annual leave agreements for the 2002 leave year, pursuant to the authority in Section 3136. On January 11, 2003, annual leave accumulation ceilings will be set for those eligible employees with executed agreements and accrued leave exceeding 240 hours for the 2002 leave year. On January 12, 2003, new personal

> leave ceilings for those employees will become effective for the 2003 leave year based on the end of leave year balance. Exceptions for higher leave carry over will be made only if a new agreement is executed for the 2003 leave period. However, annual leave agreements for the 2003 leave year will be offered to a significantly smaller number of employees, if any.
>
> The personal leave ceilings will be reduced by the amount of annual leave the employee used during the preceding year in excess of the amount accrued during that year, until the employee's accumulated leave does not exceed 240 hours. Commencing at the end of the 2002 leave period, the end of leave year balance will become the employee's new maximum carry over. If the subsequent end of leave year balance is less than that of the previous year, the personal leave ceiling will be lowered to reflect the new maximum carry over. If an employee's personal ceiling falls to 240 hours or below, the ceiling level is reestablished at 240 hours of accrued leave. Amounts of annual leave that are restored are not included in personal leave ceilings. Any restored annual leave is accounted separately and must be used within the two-year period of restoration.
>
> Employees should schedule leave with their supervisors in advance. Unused leave accrued in excess of the ceilings established for employees will be subject to forfeiture and the use or lose leave requirements.

(G.C. Ex. 3; Tr. 33)

The Union was not given advanced notice of Schmitt's memorandum. Nicks returned from annual leave on January 7, 2003, and first learned of the memorandum. On January 9, 2003, Nicks submitted a letter to Schmitt, expressing concern over the lack of notification to the Union prior to the issuance of the December 20, 2002, memorandum to bargaining unit employees. The Union requested that the memorandum be rescinded and the status quo maintained until the RFFO met its statutory obligations. (G.C. Ex. 4;

Tr. 34)[3] The same day, the Union also filed the instant unfair labor practice charge. (G.C. Ex. 1(a); Tr. 35) Subsequently, the Union received a response from management indicating that it would take no action in response to the Union's demand to bargain since there was a pending ULP charge on the matter. (Tr. 35) The December 20, 2002 memorandum was not rescinded.

As a result of the memorandum, employees who had signed the previous EAL Agreements were no longer able to accumulate additional annual leave. Employees who were in a use-or-lose category, i.e. those who had a ceiling over 240 hours, were forced to use whatever annual leave they accrued starting in January 2003. Other employees, with less than 240 hours, were not allowed to accumulate more than 240 hours of leave. (Tr. 36)

In August 2003, approximately 10 to 25 employees at RFFO received Reduction in Force (RIF) notices. These employees were terminated by January 10, 2004. (Tr. 37)

Approximately ten (10) employees were offered new EAL agreements, effective October 1, 2003. The 2003 agreement specifically provides that the employee "may begin to accumulate . . . up to seven hundred twenty (720) hours of annual leave beginning in the Leave Year in which this Agreement is signed through the end of the 2004 Leave Year."[4] (G.C. Ex. 5, p. 3; Tr. 37-39)

Issue

Whether or not the Respondent violated section 7116(a) (1) and (5) of the Federal Service Labor-Management

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[3] Although the Union's letter to Respondent references Article 47 of the Collective Bargaining Agreement, neither party put on any evidence regarding the Collective Bargaining Agreement and its relation to this unfair labor practice charge. Therefore the effect of the CBA is not at issue in this matter.

[4] While the General Counsel found this language significant, it appears to me that the Respondent was clarifying that this specific agreement covered the last quarter of the 2003 leave year as well as the entire 2004 leave year. There is no evidence that this multi-year agreement extended beyond the 2004 leave year.

Relations Statute by unilaterally changing the terms of the Employee Annual Leave Agreements without providing the Union with notice and an opportunity to negotiate to the extent required by the Statute.

Positions of the Parties

General Counsel

The General Counsel maintains that the Respondent's decision to terminate the rights of bargaining unit employees who had signed the EAL Agreements to accrue annual leave beyond their leave balances as of January 11, 2003, was a change in their conditions of employment which triggered Respondent's statutory obligation to negotiate over the actual decision and/or the impact and implementation of that decision, prior to implementing the change. *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646, 649-650 (2004) (*OHA*) aff'd. *Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO v. FLRA*, 397 F.3d 957 (January 2005); *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999) (BOP), and *Air Force Logistics Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 53 FLRA 1664 (1998).

The General Counsel first argues that granting employees the right to accrue annual leave up to 720 hours involves a condition of employment. In determining whether a matter about which a union seeks to bargain concerns a "condition of employment", the Authority applies the test set out in *Antilles Consolidated Education Association*, 22 FLRA 235, 236-237 (1986) (Antilles), which considers: (1) whether the matter pertains to bargaining unit employees, and (2) the nature and extent of the effect of the matter proposed to be bargaining on working conditions of those employees. *See also, American Federation of Government Employees, Council 214 and U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 38 FLRA 309, 312 (1990), *aff'd sub nom. U.S. Department of the Air Force v. FLRA*, 949 F. 2d 475 (D.C. Cir. 1991). Applying the *Antilles* test, the General Counsel argues that the right to accrue up to 720 hours of annual leave offered to bargaining unit employees constitutes a condition of employment, since it pertains to

bargaining unit employees and was directly connected with their work situation or employment relationship. *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809 (2000) (*Customs Service*) (practice of granting employees administrative leave to attend Florida Games was a condition of employment).

The General Counsel also asserts that the Respondent's argument that the right to accrue annual leave up to 720 hours is excluded from the definition of conditions of employment because the matter is "specifically provided by Federal Statute", *i.e.*, the Authorization Act, should be rejected. A mere reference to a matter in a statute is not sufficient to exclude it from the definition of conditions of employment. *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 987 (1999). Further, when a statute provides an agency with discretion over a matter, it is not excepted from the definition of conditions of employment. *International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135, et.al.*, 50 FLRA 677, 682 (1995) *aff'd sub nom, Bureau of Engraving and Printing v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996). In this matter, the Authorization Act authorized the Secretary of Energy to provide employees with enhanced incentives, including the right to accumulate up to 720 hours of annual leave. There is nothing in the legislation that specifies the actual policy to be established or otherwise removes the discretion of the Respondent to implement any particular policy. Thus, there is no basis for finding that the right to accumulate annual leave up to 720 hours is "specifically provided for" by the Authorization Act and, therefore, excluded from the definition of "conditions of employment".

The General Counsel asserts that the right to accrue 720 hours of annual leave was established through written agreements between bargaining unit employees and the Respondent. See *AFLC*, 38 FLRA 309 (proposals relating to last chance agreements negotiable); *Social Security Administration*, 55 FLRA 978 (1999) (agency violated the Statute by failing to notify and bargain with the union prior to negotiating a last chance agreement with an employee); and *National Education Association, Fort Bragg Schools*, 34 FLRA 18, 19-20 (1989) (proposal barring the use of personal service contracts found to be negotiable because it concerns the agency's method of recording the terms and conditions of employment applicable to the employee it

decides to hire). The General Counsel argues that the conditions of employment concerning the carry-over of up to 720 hours of annual leave for those employees who entered into EAL agreements with the Respondent was established by the terms of the EAL agreements.

The evidence shows that the Respondent initially offered bargaining unit employees EAL agreements, effective October 1, 2001, which states that "This Agreement is for a one (1) year period effective October 1, 2001, with options to renew for successive one (1) year periods as offered by and solely at the discretion of RFFO". The Respondent then offered employees a revised EAL agreement, with language stating "The effective date of this Agreement is January 1, 2002. The Employee agrees to remain employed by RFFO through the end of the 2002 Leave Year." Whitt testified that the purpose of the revision was to make the agreement effective for as long as employees were employed at the RFFO. The General Counsel argues that the Respondent intended for the EAL agreements to continue in effect through closure, referencing testimony regarding Mazurowski's decision and communications with employees as well as the change in the duration clause of the original agreement to remove the one-year limitation.

The General Counsel rejects the Respondent's argument that the second sentence of the duration clause provides a termination date for the agreement, since it only obligates employees to remain employed by the RFFO through the end of the 2002 Leave Year. The General Counsel asserts that this language only relates to the consideration or promises exchanged by the parties and does not mean that the agreement expired at the end of the 2002 Leave Year. The General Counsel further argues that the Respondent was capable of crafting more specific language regarding termination language in the EAL agreement, citing to the 2003 EAL agreement, if it had desired to do so.

The evidence establishes that the Respondent, through its new Manager, Eugene Schmitt, terminated the EAL agreements by memorandum dated December 20, 2002. The effect of the memorandum was to rescind the EAL agreements, effective January 1, 2002, and to lower the annual leave ceiling from 720 hours to the greater of 240 hours or the employees' leave balance at the end of the 2002 Leave Year.

Thus, Respondent's December 20, 2002 memorandum changed the conditions of employment of bargaining unit employees.

The termination of the EAL agreements, effective January 1, 2002, was a change in conditions of employment of bargaining unit employees that was greater than *de minimis*. The General Counsel notes that the timing of the memorandum, which was issued on the Friday before Christmas, found many employees on scheduled leave and thus unable to cancel their leave in order to maintain a higher leave ceiling. Further, employees who had over 240 hours of annual leave as of January 11, 2003, were forced to use their annual leave as earned following the termination of the agreements, rather than being able to bank their annual leave to be used as a financial cushion upon retirement or as a way to supplement their years of service for retirement or separation. The General Counsel therefore argues that the evidence establishes that the Respondent's decision to terminate the EAL agreement, effective January 1, 2002, was a change in conditions of employment that was greater than *de minimis*. Further there is no dispute that the Respondent failed to provide the Charging Party with prior notice and an opportunity to negotiate over the decision to terminate the EAL agreements.

The General Counsel argues that the Respondent was obligated to negotiate over the actual decision to terminate the EAL agreements since it did not involve the exercise of a reserved management right. *OHA*, 59 FLRA at 650-654. The General Counsel asserts that the decision did not involve the exercise of the Respondent's right to assign work pursuant to section 7106(a)(2)(B) of the Statute. Management's right to assign work encompasses the authority to determine when work will be performed. *American Federation of Government Employees, Local 1900*, 51 FLRA 133 (1995); *Service and Hospital Employees International Union, Local 150 and Veterans Administration Medical Center, Milwaukee, Wisconsin*, 35 FLRA 521, 524 (1990). Included within that authority is the right to determine when an employee may use annual leave he or she has accrued. Moreover, Authority precedent holds that proposals restricting an agency's right to determine when annual leave may be used directly interfere with management's right to assign work under section 7106(a)(2)(B). *American Federation of Government Employees, Council of Marine Corps Locals, Council 240 and U.S. Department of the Navy, U.S.*

Marine Corps, Washington, D.C., 50 FLRA 637, 640 (1995). In this case, however, the agreements at issue relate only to the right to accrue leave, as authorized by the Authorization Act, and do not impinge on the Respondent's right to approve or disapprove the use of annual leave. Thus, since the agreements deal only with the right of employees to accrue leave, it does not interfere with the Respondent's right to assign work and is fully negotiable. *Customs Service*, 56 FLRA 809 (finding that the agency decision to discontinue the practice of granting administrative leave for the Florida Games when consistent with its operational needs was substantively negotiable because the agency retained discretion to approve or disapprove the leave.)

The General Counsel further argues that, even if the decision to terminate the EAL agreements was not substantively negotiable, the evidence establishes that the impact of the Respondent's decision was greater than *de minimis*. Thus, the Respondent was obligated to bargain over the procedures and appropriate arrangements for employees adversely affected by the resulting changes. *BOP*, 55 FLRA 848, and its failure to notify and bargain with the Union violated section 7116(a)(1) and (5) of the Statute.

With regard to the Respondent's asserted defenses in this matter, the General Counsel argues that they are without merit. The General Counsel argues that Respondent's defense that interpreting the EAL Agreements to allow them to continue through closure is inconsistent with section 3136 of the Authorization Act, since the closure mission is on target and there is no need to continue the retention incentives. The General Counsel asserts that the Respondent has failed to support its argument with record evidence. *U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 899 (1990). The plain language of the legislation provides no basis for concluding that the agreements were to be offered only to employees with "critical skills" or who were needed to complete a particular function. The eligibility criteria provided in section 3136(b) requires only that the employee must have worked at the closure site for at least two years, be a federal employees, have a passing rating and meet any other requirement or condition under subsection (d). Further, the ASEM Progress Report on the Use of Enhanced Retention Incentives at Environmental Closure Sites,

indicates that the retention incentives will be used for "staff in critical positions and transition support for those in surplus jobs." Further the undisputed testimony of Whitt indicated that the agreements were to provide both a retention incentive and a separation incentive, essentially as a financial cushion for employees in surplus positions.

The General Counsel also argues that the Respondent has failed to establish that its Manager Barbara Mazurowski did not have the authority to offer EAL agreements that extended beyond 2002. The General Counsel argues that the testimony of Hargreaves, who had little direct involvement in the development of the authorizing legislation or in drafting and implementing the EAL agreements, should not be credited over that of Whitt, who did have such involvement. Rather, the General Counsel argues that the Manager had the authority to enter in multiple year agreements and the Respondent's defense in this area should fail.

As a remedy, the General Counsel is not seeking a *status quo ante* remedy since many of the affected employees have since left the RFFO and some of those that remained were given the opportunity to sign a new EAL agreement, effective October 1, 2003. The General Counsel, however, is seeking a full make-whole remedy in order to restore to employees the annual leave the employees would have accrued and banked had the Respondent not terminated the EAL agreements. *Department of Defense Dependents Schools*, 54 FLRA 259, 269 (1998).

Respondent

The Respondent argues that use of the section 3136 incentives for Employee Annual Leave Agreements does not constitute a condition of employment and the Respondent had no duty to bargain with the Union, and, therefore, its conduct did not violate the Statute as alleged in the complaint.

The Respondent first argues that Congress intended to confer on the Secretary of Energy the sole and exclusive discretion to determine the use of incentives authorized under section 3136 and thus the Respondent is exempt from the obligation to bargain collectively with a labor organization under Chapter 71 of Title 5 of the U.S. Code. The Congressional intent is expressly demonstrated, by

restrictive and prescriptive statutory language, to establish the use of section 3136 within the sole purview of the Secretary of Energy. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993). Section 3136(a) sets forth:

> AUTHORITY TO PROVIDE INCENTIVES. -- *Notwithstanding any other provision of law*, the Secretary of Energy *may provide* to any eligible employee of the Department of Energy one or more of the incentives described in subsection (d). (G.C. Ex. 2) (emphasis added).

Citing to *U.S. Department of Homeland Security, Border and Transportation Security Directorate Transportation Security Administration and American Federation of Government Employees, AFL-CIO*, 59 FLRA 423 (2003), the Respondent argues that the sole and exclusive discretion of section 3136 results in effecting limitations and rights afforded by other statutes or legal authorities, including the FSLRS. Respondent therefore argues that since it has the sole and exclusive discretion to determine how and when the section 3136 incentives will be used, it is not required to notify or negotiate with the AFGE on the offer or discontinuation of Employee Annual Leave Agreements.

Respondent further asserts that the 2002 Agreements expired on their own terms. However, even if the 2002 Agreements were terminated, there was no duty to bargain and the action could not constitute a change in working conditions.

Respondent argues that pursuant to section 7117(a)(1), it had no duty to bargain Employee Annual Leave Agreements since such bargaining would thwart the Congressional intent that the Secretary use incentives to further the accelerated closure mission, notwithstanding any other provision of law. The Agreements were effected to allow employees to accumulate up to 720 hours of annual leave due to the necessity that the closure mission workload requirements prevented leave usage. Section 3136 exclusively authorized the Secretary to provide the incentives to address mission need without requiring consideration for the *quid pro quo* from bargaining or negotiating with bargaining unit members. As such, notwithstanding the mission needs of closure project, bargaining may result in employees foregoing leave usage when the workload no longer required or justified such forbearance.

In a footnote, Respondent also argued that bargaining a requirement to provide the Annual Leave Agreements to employees interferes with management's rights to assign work under section 7106(a)(2)(B) of the Statute and the right to determine when work will be performed. *National Treasury Employees Union and U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 30 (1992).

The Employee Annual Leave Agreements do not create an employee right to determine the time when leave may be taken and they do not create an employee right to continued increases in annual leave accumulation limits. Increased accumulation of annual leave as offered under section 3136 is unwarranted when the closure-acceleration project workload requirements no longer need employees to modify their leave usage. *See National Treasury Employees Union and the U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 46 FLRA 696.

Respondent therefore argues that the General Counsel's position that the Respondent's discretion affects a condition of employment that requires bargaining is inconsistent with federal law.

Finally, in the alternative, the Respondent argues that if it is found that expiration of the 2002 Agreements created a change in working conditions, then the effect on employees was *de minimis*, and therefore, there was no duty to bargain. In that regard, the Respondent notes that employees were compensated if leave was taken or if they were voluntarily or involuntarily separated from the Rocky Flats Field Office. Further employees who remained employed were offered new Employee Annual Leave Agreements in October 2003. (G.C. Ex. 5) No employee lost leave or was uncompensated for accrued leave as a result of the purported change in working conditions. Thus, the Respondent had no obligation to afford the Union notice and opportunity to bargain. *See U.S. Department of Homeland Security Border and Transportation Security Directorate Transportation Security Bureau of Customs and Border Protection, Washington, D.C. and National Treasury Employees Union*, 59 FLRA No. 131 (2004).

Respondent argues that under the express terms of the 2002 Agreements, each employee's obligation expressly ended

at the conclusion of the 2002 Annual Leave Year and the Respondent's obligations did not expressly continue beyond that period of time. Therefore, the RFFO Manager did not specifically terminate the 2002 Agreements.

Analysis and Conclusion

It is well established that if a law indicates that an agency's discretion is intended to be exercised only by the agency – referred to by the Authority as "sole and exclusive" discretion – then the agency is not obligated under the Statute to exercise that discretion through collective bargaining. *See NAGE, Local R5-136*, 56 FLRA 346, 348 (2000); *POPA*, 53 FLRA 625, 648 (1997). In determining whether an agency's discretion is sole and exclusive, the Authority examines the plain wording and the legislative history of the relevant statute. *See Int'l Assoc. of Machinists and Aerospace Workers, Franklin Lodge No. 2135*, 50 FLRA 677, 691-92 (1995), petition for review denied as to other matters, 88 F.3d 1279 (D.C. Cir 1996). A law need not use any specific phrase or words in order to confer sole and exclusive discretion. *See ACT, TEX. Lone Star Chapter 100*, 55 FLRA 1226, 1229 n.7 (2000), petition for review denied as to other matters, 250 F.3d 778 (D.C. Cir 2001). *See also, United States Department of the Interior, Bureau of Indian Affairs, Southwestern Indian Polytechnic Institute, Albuquerque, New Mexico*, 58 FLRA 246 (2002).

As stated above, section 3136(a) of the Authorization Act states "Notwithstanding any other provision of law, the Secretary of Energy may provide to any eligible employee of the Department of Energy one or more of the incentives described in subsection (d)." Section 3136 then specifically defines eligible employees (subsection (b)) and the closure facilities (subsection (c)). Subsection (d) lists the specific incentives that the Secretary may provide, including, the right to accumulate annual leave. An examination of the precise language of the authority found in the Authorization Act clearly shows that the Secretary is granted unfettered discretion in determining the granting of employee incentives. This language is similar to language determined by the Authority to show sole and unfettered discretion. *See, for example, Illinois National Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) (National Guard Technician Act, which allows the agency head to prescribe the hours of duty for technicians notwith-

standing any other provision of law, commits decisions regarding technicians' work schedules to the agency head's unfettered discretion); *Colorado Nurses Association v. FLRA*, 851 F.2d 1486 (D.C. Cir. 1988) (*Colorado Nurses*) (because 38 U.S.C. § 4108 grants the Veterans Administration unfettered discretion to prescribe the working conditions of the employees in the Department of Medicine and Surgery, the agency was not obligated to bargain over the union's proposals); *Police Association of the District of Columbia, National Park Service, U.S. Park Police*, 18 FLRA 348 (1985) (Park Police) (statute provided exclusive procedure for minor disciplinary actions for bargaining unit members and, therefore, proposal that permitted appeals of disciplinary actions through the negotiated grievance procedure were nonnegotiable). *See also American Federation of Government Employees, Local 3295 and Department of the Treasury, Office of Thrift Supervision*, 47 FLRA 884 (1993), aff'd 46 F.3d 73 (1995).

Therefore, since the language of the Authorization Act allows sole and unfettered discretion on the part of the Secretary, and through delegation to the Manager of RFFO, the issue of employee incentives is not negotiable and the Respondent's actions in this matter were not in violation of the Statute.

Even assuming that it was found that the Secretary's discretion in this matter did, in fact, allow negotiations, the record evidence establishes that the 2001 EAL Agreements terminated at the end of the annual leave year in January 2002. An examination of the Agreements reveals that they were for the annual leave year of 2001 and not for an indefinite period of time. Thus, when the Manager notified employees of the process that would be followed with the new leave year and how their leave balances would be maintained, he was merely giving them information regarding the leave process, consistent with the Authorization Act. The Manager did not, in fact, terminate the 2001 EAL Agreements, but merely informed his employees of the consequences of the end of the agreements.

While the General Counsel argues that the previous Manager, Barbara Mazurowski, had promised employees that the annual leave agreements would remain in effect until the end of the closure facility, the evidence reflects that she communicated to employees her position that they should

remain in effect.[5] These comments, however, were general in nature and did not specifically reference that the 2001 EAL Agreements would remain in effect until closure. Rather her comments were more to assure employees that she would continue to offer such agreements throughout the closure process. Further when she was replaced at the facility by the new Manager, there is no evidence that he was not free to offer or not to offer the new EAL Agreements, in his position as Manager, and with the discretion granted him by the Secretary.

Therefore, I find that the Respondent did not violate the Statute by changing the terms of the Employee Annual Leave Agreements without providing the Union with notice and an opportunity to negotiate to the extent required by the Statute.

Having found that the evidence does not support the allegation that the Respondent violated the Statute, it is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, May 11, 2005.

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SUSAN E. JELEN
Administrative Law Judge

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[5] In that regard, I credit the testimony of the General Counsel witnesses and not the testimony of the Respondent's witnesses. Further I note that Mazurowski was not called to testify.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-03-0231, were sent to the following parties:

_____

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DATED: May 11, 2005
Washington, DC