



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 16-13

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
HARLINGEN, TEXAS

RESPONDENT

Case No. DA-CA-14-0229

AND

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

CHARGING PARTY

Charlotte A. Dye
Michael A. Quintanilla (on brief)
For the General Counsel

John H. Denton
For the Respondent

Daniel Ramirez
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On March 21, 2014, the American Federation of Government Employees, Local 1944, AFL-CIO (Union) filed an unfair labor practice (ULP) charge against the Department of Homeland Security, Immigration and Customs Enforcement, Harlingen, Texas (Respondent). (G.C. Ex. 1(a)). After an investigation, the Dallas Regional Director of the FLRA issued a

Complaint and Notice of Hearing on February 27, 2015, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by unilaterally implementing an Alternate Work Schedule (AWS) without completing negotiations with the Union and bypassing the Union. (G.C. Ex. 1(c)). The Respondent filed an Answer to the Complaint on March 17, 2015, admitting some of the factual allegations, but denying that it violated the Statute. (G.C. Ex. 1(f)).¹

A hearing in this matter was held on July 14, 2015, in Harlingen, Texas. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel (GC) and Respondent filed timely post-hearing briefs which have been fully considered. The GC also filed an unopposed motion to correct the hearing transcript, which is hereby granted.

Based on the entire record, including my observation of the witnesses and their demeanor, I conclude that the Respondent failed to negotiate with the Union to the extent required by the Statute regarding its decision to establish a compressed and alternate work schedule and that it bypassed the Union and dealt directly with bargaining unit employees over implementation of the schedule. Accordingly, I conclude that the General Counsel has established that the Respondent violated § 7116(a)(1) and (5) of the Statute as alleged in the Complaint.

I make the following findings of fact, conclusions, and recommendations in support of that determination.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. (G.C. Exs. 1(c), (f)). At all times material to this matter, Jacob Castro and Diana Perez were Assistant Field Office Directors, Juan Gonzalez and Jorge Jimenez were Supervisory Detention and Deportation Officers and these individuals were supervisors, management officials and/or agents of the Respondent under § 7103(a) (10) and (11) of the Statute. (G.C. Exs. 1(c), (f)). The Harlingen Resident Office is part of the Respondent's San Antonio Field Office.

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

¹ The complaint in this case represents the second phase of litigation over compressed and alternate work schedules in the Respondent's Harlingen Resident Office. In Case No. DA-CA-13-0410, which was heard on April 9, 2014, the complaint alleged that the Respondent violated § 7116(a)(1) and (5) of the Statute by removing bargaining unit employees in the Harlingen Resident Office and Port Isabel Detention Center from their compressed and alternate work schedules without bargaining with the Union over the change to the extent required by the Statute. On September 28, 2015, I issued a decision in Case No. DA-CA-13-0410, concluding that the Respondent had violated the Statute as alleged in the complaint.

Respondent. (G.C. Exs. 1(c), (f)). At all times material to this matter, Daniel Ramirez was the Local President of the Union beginning in October of 2009, Lorenzo Garza was the Local Vice President, and Monica Romo was the Local Treasurer and a steward. (G.C. Exs. 1(c), (f); Tr. 18-19, 29).

During the summer of 2009, then San Antonio Field Office Director (FOD) Michael J. Pitts learned during a "Town Hall" meeting that employees were interested in participating in a compressed work schedule. (G.C. Ex. 2 at 1). On August 27, 2009, FOD Pitts issued a memorandum entitled "Compressed Work Schedule and Alternate Work Schedule" to all support employees in the San Antonio Field Office. (*Id.*). The August 27, 2009 memorandum stated that a "compressed/alternate work schedule (CWS/AWS) would be implemented as a "pilot program" for "support positions" on a 90-day trial basis and that the program would be re-evaluated by December 3, 2009. (*Id.* at 1, 3). The memorandum identifies factors to be evaluated at the conclusion of the 90-day pilot program including whether CWS/AWS schedules "are not detrimental to . . . business hours, ability to meet mission requirements, or work environmental climate." (*Id.* at 1). The memorandum further states that that the implementation of CWS/AWS would not "remove responsibility of management to ensure departments are manned during business hours, 0600-1800." And that "[e]mployees will be required to adjust work schedules to meet mission requirements" such as attending meetings or providing coverage when other employees are on leave. (*Id.* at 1). The memorandum further stated that "Management reserves the right to make notice of requirement for change of schedule one workday in advance." (*Id.* at 2).

On August 28, 2009, the day after the August 27, 2009, CWS/AWS memorandum was issued, Mr. Pitts sent an "Article 9A – Notice of Proposed Change" letter to then Local Union President Kevin Tinker who informed Mr. Pitts that a new Local President, Robert Sanchez, had been appointed. (R. Ex. 14(a) at 1).² Mr. Pitts then reissued the notice of proposed change in a letter to Mr. Sanchez dated September 3, 2009. (*Id.*). The letter stated that "[i]n accordance with Article 9A of the Negotiated Agreement," it served as "an official notice of a change in working conditions of . . . support staff currently assigned to the San Antonio Field Office, . . . San Antonio, Texas." (*Id.*).³ More specifically, Mr. Pitts explained that effective October 1, 2009, support staff employees would have the opportunity to participate in a CWS/AWS schedule, in accordance with Article 29C of the parties' negotiated agreement,⁴ "on a 90 day pilot trial basis." (*Id.*). There is no evidence that the

² Exhibits introduced by the Respondent at hearing are referred to herein as "R. Ex."

³ In this regard, Article 9 (Impact Bargaining and Mid-Term Bargaining) of the parties' national collective bargaining agreement (2000 Agreement), Section A (Notice of Proposed Change) in pertinent part encourages the parties to engage in "pre-decisional involvement" prior to formal presentation of proposals for changes in personnel policies, practices and/or working conditions not covered by the agreement and provides that "[i]f the parties are unable to reach an agreement through pre-decisional involvement or if pre-decisional involvement is not used, the Service shall present the changes and explanation of the changes . . . to the Union in writing." (Jt. Ex. 1 at 18).

⁴ Article 29 (Hours of Work), Section C (Alternate Work Schedules) of the 2000 Agreement states that Directors may establish alternate work schedules and are responsible for obtaining higher agency approval and provides for consultation and negotiation over AWS with local unions. Article 29, Section C(4) (Consultations) provides for local consultation on AWS after written notice and states

Union ever responded to the Article 9A notice or requested consultations or negotiations over the proposed CWS/AWS arrangements prior to implementation of the 90-day pilot program on October 1, 2009. Daniel Ramirez, who was a steward at the time and who succeeded Mr. Sanchez as Local President in October of 2009, testified that he was asked by Richard Arredondo, a labor relations specialist in the San Antonio Field Office, to find out if employees were interested in CWS/AWS and that the Union had no problem with the CWS/AWS arrangements established by the August 27, 2009, memorandum. (Tr. 20, 31).

Pursuant to the August 27, 2009 memorandum, CWS/AWS was implemented for San Antonio Field Office support employees on October 1, 2009, and it is undisputed that it continued without change or interruption until April of 2013 when it was suspended or cancelled for employees in the Port Isabel Detention Center (PIDC) and the Harlingen Resident Office (HRO), precipitating the ULP proceeding in Case No. DA-CA-13-0410 (Tr. 20-21, 33-34; 162-64). Under the CWS/AWS arrangements implemented on October 1, 2009, employees could complete their biweekly, 80-hour work requirement in nine workdays through what is known as a "5/4/9" schedule consisting of eight nine-hour workdays and one eight-hour workday. (G.C. Ex. 2 at 2; Tr. 20, 50, 133, 178). Participating employees could select any weekday, including Mondays and Fridays, as off-days under this schedule. (*Id.*)

Upon completion of the initial 90-day pilot program, Mr. Arredondo forwarded the generally favorable comments received from field office supervisors to Assistant Field Office Director Marcos Reyna in an e-mail dated January 13, 2010. (R. Ex. 13 at 1). On January 15, 2010, Mr. Reyna forwarded Mr. Arredondo's e-mail to Mr. Pitts and other managers, adding that he had instructed Mr. Arredondo "to draft a memo to make this a permanent program and make any necessary updates to the policy." (*Id.*) Mr. Pitts noted his concurrence in an email dated January 15, 2010: "This is the correct approach in providing an alternate work schedule while looking out for our personnel supporting our mission. Great job in conducting the pilot program – overall good feedback from our SNA leadership." (*Id.*)

The foundation for the Respondent's defense to the Complaint, as will be discussed in greater detail below, is a contention that the CWS/AWS policy implemented by the August 27, 2009, memorandum was negotiated with the Union. (Tr. 35-37, 11-14; R. Br. at 18-25).⁵ As evidence, the Respondent relies on intra-management email

that where the parties "find the arrangements acceptable, such a schedule may be established without the necessity of negotiating an agreement." Article 29, Section C(5) (Negotiations) provides that if the local union objects to the "establishment or termination of an alternate work schedule" after consultations, management may propose the establishment or termination of AWS "in accordance with Article 9A" and that if management objects to an AWS proposal, the local union "may propose negotiations . . . in accordance with Article 50 Supplemental Negotiations."

⁵ In support of this contention, the Respondent attempted to introduce a September 24, 2009, e-mail from Norma Lacey, an administrative assistant to Mr. Pitts, to San Antonio Field Office managers regarding implementation of the August 27, 2009 CWS/AWS (R. Ex. 7; Tr. 156, 159-60). I sustained the GC's objection on relevancy grounds at the hearing, but allowed the Respondent to renew its arguments for admission in its post-hearing brief. (Tr. 161-62). Upon reconsideration, and noting particularly that the e-mail is relevant to the Respondent's theory of the case and defense to the

correspondence and the testimony of a labor relations specialist in its Washington, DC headquarters, Meir Braunstein. The first e-mail is dated September 24, 2009 from Norma Lacey, an administrative assistant to FDO Pitts, to field office managers. (R. Ex. 7 at 1). In this e-mail, which forwarded the August 27, 2009 CWS/AWS memorandum, Ms. Lacey states that “[t]he union has received the 9A and concurs with the Alternate Work Schedule.” (*Id.*). The second and final e-mail sequence begins at 9:36 a.m. on March 10, 2010, when Mr. Arredondo forwarded a copy of the “9A Notice of Proposed Change for the pilot Compressed Work Schedule and Alternate Work Schedule that was sent out to Local 1944” and requested Mr. Braunstein’s assistance “in putting together a 9A Notice changing it from a pilot to permanent.” (R. Ex. 14(a) at 1).⁶ Three minutes later, Mr. Braunstein responded,

Please send the request to Michael and he’ll assign it. Do you have the word version of what you sent out so that one of us can use it as a skeleton? Does the Union have any issues with extending it from Pilot to Permanent?

(*Id.*). Mr. Arredondo responded four minutes later that he “spoke to the Local President and he does not anticipate any problems.” (*Id.*).⁷ At 10:28 a.m. on March 10, Mr. Arredondo sent an e-mail to Michael Havrilesko, the Acting Director of Employee and Labor Relations, which forwarded his earlier e-mail to Mr. Braunstein and asked for the matter to be assigned. (R. Ex. 14(a) at 6). In an e-mail sent at 11:40 a.m., Mr. Havrilesko assigned Mr. Arredondo’s request for assistance to Mr. Braunstein with the admonition to “[k]eep in mind that this is in play in national contract negotiations so we need the std. disclaimer language.” (*Id.*). At 1:44 p.m., Mr. Braunstein scheduled a meeting with Mr. Arredondo for 10:00 a.m. on March 11, 2011, to discuss the “9A for AWS.” (R. Ex. 15). Mr. Braunstein testified that he spoke to Mr. Arredondo on March 10 and again on March 11, 2010. (Tr. 119). Mr. Braunstein explained that because the parties were negotiating over hours of work at the national level, “you don’t necessarily want an AWS or hours of work article being negotiated, or a policy being negotiated, at a local level.” (*Id.* at 120). Consequently, he suggested to Mr. Arredondo that it might be better if the local parties handled the matter “informally” instead of “doing things formally” which would require headquarters review and might result in the addition of disclaimer language that the Union might not like.” (*Id.* at 120). Mr. Braunstein further testified that his advice was apparently followed because he received a telephone call from Mr. Arredondo who said:

Complaint, I vacate my earlier ruling and admit Respondent’s Exhibit 7 into the record. However, Respondent’s Exhibits 17 and 18 remain rejected as the Respondent has not demonstrated relevance. (Tr. 126-28, 131-32).

⁶ This is the first indication in the record of Mr. Arredondo moving forward in accordance with the instruction in Mr. Reyna’s January 15, 2010, e-mail that he draft a memo to make CWS/AWS a permanent program. (R. Ex. 13).

⁷ The initial email from Mr. Arredondo was sent at 9:36 a.m., Mr. Braunstein’s response was sent at 8:39 a.m., and Mr. Arredondo’s response to Mr. Braunstein was sent at 9:43 a.m. (R. Ex. 14(a) at 1). Thus, it appears that the e-mails show the local times at the location of the sender – *i.e.*, Central Time for Mr. Arredondo in San Antonio, and Eastern Time, which is one hour earlier, for Mr. Braunstein in Washington, D.C.

Hey, we decided that we don't need you to work on this 9A because we've decided locally to talk to the Union, and they're just happy that we're going forward with the pilot permanent, and that was the understanding that they had reached; and so congratulations, Meir, you're off the hook on this one.

(*Id.* at 122). Mr. Arredondo was not called as a witness and thus did not testify regarding what if any discussions he had with the Union about extending the CWS/AWS pilot program into a permanent arrangement. For his part, Mr. Ramirez, who was the Local President beginning in October of 2009, did not remember the Respondent ever contacting him to make the CWS/AWS policy permanent (*id.* at 34), and no other evidence was introduced to show that the Respondent had any discussions, consultations or negotiations with the Union over extending the CWS/AWS policy beyond the initial 90-day pilot program.

On this record, I find that the evidence falls well short of demonstrating that the CWS/AWS policy established by the August 27, 2009, memorandum for support employees in the San Antonio Field Office was negotiated with the Union or otherwise jointly developed through informal consultations as contended by the Respondent. There is no dispute that the Union, after receiving written notice in accordance with Article 9, Section A of the 2000 Agreement, did not request either consultations or negotiations when the CWS/AWS policy was implemented as a 90-day pilot program in 2009. As for the Respondent's decision to continue CWS/AWS after initial 90-day pilot period ended on December 31, 2009, the evidence shows that the Respondent briefly considered providing written "9A Notice" to the Union in March of 2010 but quickly opted not to provide such notice because it believed the Union had no objection to the continuation of the CWS/AWS arrangements that were implemented by the August 27, 2009, memorandum. At most, I find that the Union acquiesced in the continuation of CWS/AWS after expiration of the 90-day pilot program and that it did not request either consultations or negotiations as provided for in the 2000 Agreement because it was satisfied with the schedules established by the August 27, 2009, memorandum.

Subsequent to the termination of CWS/AWS for the employees in the PIDC and HRO facilities in April of 2013, Local President Ramirez sent an e-mail on September 10, 2013, to the Assistant Field Office Directors (AFODs) requesting a meeting to discuss CWS/AWS for those facilities and noting that CWS/AWS has a "positive impact" on bargaining unit employees' morale. Thereafter, at a meeting on November 5, 2013 in the HRO, Local Vice President Lorenzo Garza and Local Treasurer and Steward Monica Romo discussed several issues including the Union's interest in establishing CWS/AWS for HRO employees, with AFODs Jacob Castro and Diana Perez. (Tr. 51, 60-61, 146-48, 178-79; R. Ex. 2). The witnesses at hearing provided somewhat differing accounts of precisely what was discussed with respect to re-implementation of AWS at this meeting. Ms. Romo testified that the Union did not submit any proposals at this meeting, that the management representatives made it clear that they could not consider Mondays and Fridays as non-workdays if CWS/AWS were to be re-implemented, and that Mr. Castro asked the Union to canvass HRO employees to see how many were interested. (Tr. 51-52, 61, 64). Ms. Perez recalled that Mr. Castro responded to the Union that management would be interested in re-implementing CWS/AWS minus Mondays and Fridays as off-days, but it would be a "moot

issue” if the employees were not interested in Tuesdays, Wednesdays or Thursdays as their days off. (*Id.* at 148-49).⁸ Ms. Perez also testified that she and Mr. Castro wanted to check with their subordinate supervisors as to “what would work for them and their units, given the Tuesday, Wednesday, Thursday as options.” (*Id.* at 149). Finally, Mr. Castro testified that the Union proposed re-implementation of CWS/AWS “without a Friday or Monday being the day off” and that “we were good with that” although management wanted some “clarification” and additional information. (*Id.* at 179-80). Thus, it was Mr. Castro’s perspective at the conclusion of the November 5, 2013, meeting that “the Union and management were both in agreement that we wanted to move forward and re-implement the AWS” but that “there were conditions to moving forward and re-implementing” the schedules at HRO. (*Id.* at 180). Considering that all of the witnesses agree that the Respondent wanted additional information before agreeing to re-implement CWS/AWS for HRO employees, I find that no agreement on reimplementation of CWS/AWS at HRO was concluded during the November 5, 2013, meeting.

On December 30, 2013, Ms. Romo sent an email to Mr. Castro stating,

There are 13 employees interested in AWS. Most would prefer Monday or Friday but that doesn’t mean that they will not consider other options. I believe the number of ERAs interested in AW[S] is more than we anticipated.

(G.C. Ex. 4 at 2). Mr. Castro responded by email later that same day, thanking Ms. Romo for the information but adding,

[I]n our November 5th meeting we discussed that you were going to provide the number of ERAs [Enforcement Removal Assistants] that would accept Tuesday, Wednesday or Thursday as their AWS days off rather than just those ERAs that would be interested in AWS. Please provide the information requested so that we may appropriately consider and move forward,

(*Id.* at 1). Ms. Romo responded that afternoon that she remembered the November 5, 2013, discussions differently:

[W]hat I do recall is that the units could not afford to have all ERA[s] off on Mondays and/or Fridays. The idea that was thrown around was that if every supervisor could let us know how many ERA[s] they could afford to have off on a given day then the ERAs would at least know which day[s] were available and decide if they wanted to participate in AWS.

I don’t think that it’s important to know how many ERAs will accept Tuesday, Wednesday, Thursday or for that matter Monday and Friday as their AWS.

⁸ Ms. Perez’s notes of the November 5, 2013 meeting stated that “Union wants to know if AFODs are open to the possibility of AWS if the AWS is not a Fri or Mon.” (R. Ex. 2).

Once the Agency informs us which days the unit can afford to have ERAs off the ERAs will have to select from those days available or elect not to participate in AWS.

(*Id.*). Ms. Romo concluded her email by asking, "Can the agency let us (union) know the available days off for AWS by units for this office?" (*Id.*).

The parties met again on January 10, 2014 with Ms. Romo and AFODs Castro and Perez in attendance. (Tr. 57, 152-53, 188; R. Ex. 4). Ms. Perez advised that after reviewing workloads, management could make Tuesdays and Wednesdays available as days off for HRO employees who wished to participate in CWS/AWS. (*Id.*). Ms. Perez also indicated that the Respondent was prepared to implement CWS/AWS as early as Pay Period Two in late January. (Tr. 189; R. Ex. 4). Ms. Romo responded that if those days were all that the Respondent had to offer, she wanted to hold off on implementation so that she could discuss the matter with Mr. Ramirez and Mr. Garza. (Tr. 58, 54, 192; R. Ex. 4). Thus, there was no agreement reached at this meeting on re-implementation of CWS/AWS for HRO employees.⁹ The Respondent felt that having provided the Union with the information of the days off that it was willing to make available to HRO employees, it had no further obligations to the Union and that it was under no duty to negotiate regarding re-implementation of CWS/AWS. As Mr. Garza explained, the August 27, 2009, CWS/AWS policy provided full authority to re-implement CWS/AWS and that the Respondent did not need the Union's "blessing" before proceeding with re-implementation: "No sir, just wanted to be cordial and make sure

⁹ I have credited Ms. Romo's specific and direct testimony that she did not agree to the Respondent's plan to implement CWS/AWS for HRO employees with only Tuesdays and Wednesdays available as off days over the more vague accounts on the January 10, 2014, meeting offered by Ms. Perez and Mr. Castro. In this regard, Ms. Perez testified that while she believed after the first meeting in November that the Union was "receptive to reimplementing CWS/AWS with off days limited to Tuesdays and Wednesdays, "it would be speculation" on her part to say whether the Union was in agreement with the Respondent's proposal at the January 10, 2014, meeting, though she did add that Ms. Romo "did not verbalize to me that Tuesdays and Wednesdays were not good." (Tr. 154-55). Mr. Castro also stopped short of testifying that the parties reached any agreement on January 10, 2014, although he believed that the Respondent had fulfilled any obligations it owed to the Union:

Q. Now, as far as – what – was there any agreement made during that meeting? Was there any – what belief did you have as far as reimplementing AWS, when the three of you met?

A. That was the final piece of information that Ms. Romo had requested back on December 30th, which was just to provide the Union with the days off that we were going to have for the AWS, and as I said, close that loop and then move forward to reimplementing the AWS.

(Tr. 188). Thus, neither of the Respondent's witnesses directly contradicted Ms. Romo's testimony that she did not agree during the January 10, 2014, meeting to proceed with implementation of CWS/AWS with off-days limited to Tuesday and Wednesday but, rather, that she wanted to discuss the matter further with Mr. Ramirez and Mr. Garza which is consistent with Ms. Perez's contemporaneous note of the meeting. (R. Ex. 4).

that we all had buy-in to move forward.” (Tr. 189). Ms. Perez similarly testified that no negotiations occurred, that she met with the Union to discuss their concerns about CWS/AWS because she “felt that it was the right thing to do” and that she never intended “to renegotiate this policy.” (*Id.* at 165-66).

Following the January 10, 2014 meeting, there were no further communications between the Union and the Respondent before the Respondent implemented CWS/AWS at the HRO with days off limited to Tuesdays and Wednesdays on or about January 26, 2014. Prior to January 26, 2014, the Respondent directed supervisors at the HRO to “canvass” bargaining unit ERAs to determine who wanted to participate in CWS/AWS and their desired days off. (Tr. 197, 203; R. Ex. 11). Two HRO supervisors, Jorge Jimenez and Juan Gonzalez went to the bargaining unit Enforcement Removal Assistants (ERAs) under their supervision and asked them if they wanted to participate in CWS/AWS and, if so, whether they wanted either Tuesday or Wednesday as their off-day. (Tr. 75-76, 81-82, 197-98, 203-04; R. Ex. 11). When ERA Juan Medina responded that he wanted to go back to his old schedule with Friday as his day off, Mr. Jimenez told him that his only options available were Tuesday or Wednesday. (*Id.* at 75). Another ERA, Marcos Garza, stated that he was interested on working under a CWS/AWS, and Mr. Jimenez gave him the option of taking either Tuesday or Wednesday as his scheduled off day. (*Id.* at 81). Mr. Garza asked to have Tuesday as his day off, but his choice was later rejected by Mr. Jimenez with the explanation that another employee with more seniority had already taken Tuesday. (*Id.*). Mr. Garza then contacted Ms. Romo, and he eventually was allowed to select Tuesday as his off day. (*Id.* at 81-82).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel’s position in this matter is based on Authority precedent that the institution, implementation, administration and termination of alternative work schedules are fully negotiable matters. (G.C. Br. at 3-4). The GC contends that the evidence shows that the Respondent began the bargaining process over the possible restitution of AWS at the HRO after the Union raised the subject and then acted to implement its proposal in late January 2014 when the Union did not agree to the Respondent’s proposed limitation on available off-days. (*Id.* at 4). By implementing the AWS schedule, without negotiating an agreement with the Union as to the plans details, the GC alleges that the Respondent once again failed to comply with its statutory obligation to bargain completely concerning the AWS program and, thereby violated § 7116(a)(1) and (5) of the Statute. (*Id.* at 5).

The GC further alleges that the Respondent’s supervisors dealt directly with unit employees concerning a change in their conditions of employment, the re-implementation of CWS/AWS at the HRO, thereby bypassed the Union in violation of § 7116(a)(1) and (5) of the Statute. (*Id.* at 5-6). Although the GC appears to acknowledge that its evidence does not establish that the Respondent engaged in direct “negotiations” with employees regarding the re-implementation of CWS/AWS at the HRO, it argues that its conduct “was actually more onerous than attempting to persuade bargaining unit employees to one position over another

... [because] Respondent acted as if the Union's position did not exist and used the employee's desire to participate in an AWS in the general sense to obtain the version of AWS Respondent wanted." (*Id.* at 6-7). The GC thus contends that since the Respondent dealt directly with the bargaining unit employees to establish conditions of employment on a substantively negotiable topic, it unlawfully bypassed the Union. (*Id.*)

To remedy the Respondent's alleged unfair labor practices, the GC requests an order requiring Respondent to cease and desist refusing to negotiate over the substance of CWS/AWS, including days off, unless Respondent first seeks a determination from the Federal Service Impasses Panel (FSIP) that the proposed schedule and days off would cause an adverse agency impact, and to cease and desist interfering with bargaining unit employees' protected rights under the Statute by bypassing the Union and dealing directly with bargaining unit employees. The GC additionally requests that the Respondent be ordered to return affected employees to the CWS/AWS schedule which existed in April of 2013 prior to the termination or suspension that was the subject of Case No. DA-CA-13-0410, and they be permitted to stay on the schedule until the parties have completed bargaining.¹⁰ Lastly, the GC seeks an order that the Respondent post a notice to employees, signed by Enrique Lucero, Field Office Director, in conspicuous places, including all bulletin boards and other places where notices to employees represented by the Union are customarily posted, including electronic distribution of the notice to all unit employees.

Respondent

The Respondent avers that a full understanding of the case requires the ALJ to "look beyond" the GC's allegations which are based on assertions that "negotiations" were conducted on the re-implementation of CWS/AWS schedule and, once they fell through, that the Respondent took steps to implement unilaterally, and in doing so, negotiated with bargaining unit employees, thereby "bypassing" the Union. (R. Br. at 14). Contrary to the GC's allegations, the Respondent states that it entered into an "informal agreement" in March of 2010 under the provisions of Article 29, Section C(4) of the 2000 Agreement to extend the pilot CWS/AWS program into a permanent policy that was "reviewed, supported, and agreed to by the Local 1944 President" and is "binding on the local parties until such time a new collective bargaining agreement is ratified, or the Agency seeks bargaining negotiations to have it changed." (*Id.* at 15). The Respondent notes that the August 27, 2009, CWS/AWS policy reserves to management the right to "make notice of requirement for change of schedule one workday in advance," and it maintains that it exercised this right when it "temporarily suspended the schedule (not policy) on April 22, 2013." (*Id.* at 15). While recognizing that its actions in 2013 to suspend CWS/AWS for PIDC and HRO employees is beyond the scope of the Complaint in this case, the Respondent asserts that the provision in the August 27, 2009, memorandum allowing for schedule changes "is at the heart of this current dispute." (*Id.*) That is, when the Union initiated discussions in September of 2013 about the possibility of reinstating CWS/AWS, the Respondent states that

¹⁰ The GC did not seek a status quo ante remedy in Case No. DA-CA-13-0410.

it was “open to the idea of finding a solution under the current workload challenges” but that “there never was any intent . . . to formally negotiate a new policy []or relinquish its rights under the contract.” (*Id.*). The Respondent states that it consented to meeting with the Union “in an effort to discuss their proposal to have the temporary suspension of AWS lifted” and the “Union’s idea was to eliminate consideration of Monday/Friday as non-work days.” (*Id.*).

Under the Respondent’s interpretation of the parties’ rights and obligations pertaining to CWS/AWS, “the Agency could compel the bargaining of a new AWS policy under the provisions of Article 9.A if desired, [but] the Union has no avenue from which to propose negotiations based upon the language contained in Article 29.C(5), which limits the Union’s right to bargain an AWS policy specifically to the provisions of Article 50 and only if there’s a Local Supplemental Agreement (LSA) which provides for such.” (R. Br. at 16). Since there is no LSA, the Respondent submits that “the Union has no contractual authority to demand bargaining on a new AWS policy. . . . [and] there can be no doubt the parties were simply discussing a way to lift the temporary suspension ‘informally’.” (*Id.*). As a result of these informal discussions with the Union, the Respondent states that it “decided to un-suspend the AWS schedule while limiting the non-work days to Tuesday/Wednesday.” (*Id.*). The Respondent further contends that “[b]ecause the parties have an AWS policy which gives full authority to Management to define the particular work schedules within the regular tours of duty, and allows for the changing of schedules with one day’s notice, the issue in dispute is ‘covered by’ article 29.C(4) and only negotiable at the Agency’s discretion.” (*Id.*; footnotes omitted). Thus, the Respondent submits that when it decided to re-implement CWS/AWS for HRO employees, “it did so within the confines delineated in the policy, ‘covered by’ Article 29.C(4)” and “[a]lthough the non-work days were limited to Tuesday/Wednesday upon re-implementation, the covered by agreement under Article 9.G does not require bargaining so long as the schedule had been used within the past twelve (12) months.” (*Id.* at 17). In this regard, the Respondent states that “[t]estimony provided at the hearing confirmed the use of other than Monday/Friday as non-work days within the timeframe allotted” (*Id.*).¹¹ Since there was no requirement for it to engage in bargaining over “an existing AWS policy which gave full latitude to Management to schedule the employees, with the option of changing/altering their work schedules” with one day’s notice, the Respondent concludes that the GC’s allegation that it unilaterally re-implemented the AWS schedule without bargaining is devoid of merit. (*Id.*).

The Respondent also argues that the assignment of employees to CWS/AWS shifts and tours of duty “is covered by Article 29, generally, and not excluded from the covered by doctrine in Article 9.G, because the shifts and tours at issue were used within 12 months of the “reassignment”, and thus had not lapsed.” (R. Br. at 33-35). Alternatively, the Respondents states that even if the CWS/AWS policy or the “existing, non-lapsed”

¹¹ The Respondent introduced a copy of an employee’s work schedule from January of 2013 which reflects that the employee was on a compressed work schedule with Wednesday as his day off. (R. Ex. 5; Tr. 185-86). Since it is undisputed that there was no restriction on available days off under the CWS/AWS program that was in use at the HRO prior to April of 2013, the fact that one employee selected a Wednesday as his day off does not establish that a compressed schedule with days off limited to Tuesdays and Wednesdays was in use at the HRO prior to January of 2014.

CWS/AWS schedules and tours did not “cover” its actions in “assigning” ERAs to CWS/AWS schedules, the Agency’s actions preceding the reassignment of ERAs to AWS schedules satisfied the informal consultation requirements of the 2000 Agreement. (*Id.* at 37). In this regard, the Respondent submits that e-mails show that Ms. Romo reached agreement on again assigning AWS schedules per the CWS/AWS policy, that a local Union designee came to a “parallel informal agreement” at another office, that Ms. Romo never indicated she lacked authority to reach an informal agreement prior to her “attempt to renege” and that there was no good cause that would justify and validate the Union’s subsequent attempt to renege on the informal agreement on CWS/AWS reached with Ms. Romo. (*Id.* at 37-43).

With regard to the allegation that it unlawfully bypassed the Union and dealt directly with unit employees regarding the re-implementation of CWS/AWS at the HRO, the Respondent reiterates that it was the Union’s idea in the first place to eliminate Mondays and Fridays as available off-days. (R. Br. at 17). The Respondent states that in accordance with its initial discussions with the Union, it proceeded to gather information from supervisors as to whether elimination of Mondays and Fridays as non-workdays would alleviate their concerns, while the Union was expected to find out from employees whether they wanted to participate in CWS/AWS if Mondays and Fridays were eliminated as available workdays. (*Id.* at 17-18). The Respondent emphasizes that Ms. Romo did not gather the requested information and instead stated that “[o]nce the Agency informs us which days the unit can afford to have ERAs off the ERAs will have to select from those days available or elect not to participate in AWS.” (*Id.* at 18 quoting R. Ex. 3). In response to the Union’s position, the Respondent then determined that Tuesdays and Wednesdays would be appropriate non-work days which provided the parties with “common ground on a means to re-implement the AWS schedule.” (*Id.*). At this point, the Respondent contends, there was nothing further to be discussed between the parties, and the HRO supervisors simply canvassed their employees to determine who would be participating in CWS/AWS and which one of the two days available would be selected. (*Id.*). The Respondent states that the supervisors only sought information to complete their work schedules and denied any “negotiations” with employees. (*Id.*). Moreover, the Respondent argues, an unlawful bypass can occur only when an agency deals directly with unit employees on matters that are subject to a bargaining obligation and, in this case, there can be no bypass because there was no duty to bargain over what it views as the re-implementation of CWS/AWS at HRO. (*Id.* at 48-50).

ANALYSIS AND CONCLUSION

The Authority has consistently held that “alternative work schedules for bargaining unit employees are ‘fully negotiable’ subject only to the Work Schedules Act itself or other laws superseding it.” *AFGE, AFL-CIO, Local 2361*, 57 FLRA 766, 767 (2002) (quoting *AFGE, Local 1934*, 23 FLRA 872, 873-74 (1986), modified as to other matters, *NTEU, Chapter 24*, 50 FLRA 330, 333 n.2 (1995)); *U.S. DOL, Wash., D.C.*, 59 FLRA 131, 134 (2003) (*DOL*) (“implementation and administration of alternative work schedules is fully negotiable, subject only to the . . . Work Schedules Act . . . or other laws superseding the Act, and without regard to management rights under the Statute.”). An agency’s duty to bargain under the Work Schedules Act encompasses “the institution, implementation, administration

and termination of alternative work schedules[.]” *Nat’l Treasury Employees Union*, 52 FLRA 1265, 1293 (1997) (*NTEU*) (quoting S. Rep. No. 365, 97th Cong., 2d Sess. 14-15 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News at 565, 576-77); see also *Space Sys. Div., L.A. AFB, L.A., Cal.*, 45 FLRA 899, 903 (1992) (*Space Systems*) (“the substance of the decision to terminate a CWS program is negotiable.”). Consequently, when an agency changes CWS/AWS for bargaining unit employees without first negotiating over the substance of its decision, it will be found to have engaged in an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute unless it establishes that it was entitled under either the Work Schedules Act or the Statute to alter CWS/AWS without bargaining. See *Def. Logistics Agency, Def. Indus. Plant Equip. Ctr., Memphis, Tenn.*, 44 FLRA 599, 400 (1992) (*DLA*).

The Respondent’s decision to establish CWS/AWS at the HRO was not “covered by” a negotiated agreement

At the heart of Respondent’s defense to the Complaint’s allegations that it violated the Statute is the claim that the CWS/AWS policy established by the August 27, 2009 memorandum was negotiated with the Union and allows for the changes to be made without any requirement for additional bargaining. In Case No. DA-CA-13-0410, I rejected this claim and concluded that the “covered by” defense was not factually or legally available to the Respondent because the evidence did not establish that the August 27, 2009, policy memorandum was negotiated with the Union. None of the evidence introduced in this proceeding warrants a different conclusion. Instead, based on my review of the record including the parties’ arguments, I have determined that the evidence falls well short of demonstrating that the CWS/AWS policy established by the August 27, 2009, memorandum for support employees in the San Antonio Field Office was negotiated with the Union or developed through informal consultations as contended by the Respondent. Thus, the factual and legal predicates for invoking the “covered by” defense – the existence of a negotiated agreement covering the challenged change in conditions of employment – have not been established. See *Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009) (“to be successful . . . [a “covered by” defense] require[s] a determination that a disputed matter is addressed in some manner in an agreement.”).

The Respondent also relies on Article 29, Section A(5) (Posted Schedules / Individual Changes) to support its claim that the establishment of CWS/AWS at the HRO was already “covered by” a negotiated agreement and, therefore, exempt from any additional bargaining obligations. This claim has no merit. Under the “covered by” doctrine, which typically arises in the context of a union attempt to initiate mid-term bargaining over a matter that an employer considers to be already addressed in a collective bargaining agreement, a party properly may refuse to bargain over a matter that is either “expressly addressed” in the parties’ agreement or “inseparably bound up with, and thus an aspect of, a subject covered by the agreement.” *Soc. Sec. Admin.*, 65 FLRA 199, 202 (2009). Article 29, Section (a)(5) expressly addresses the posting of shift schedules and the procedures the Respondent must follow when making individual changes in shift assignments. Article 29 contains a separate Section C that deals with CWS/AWS which is addressed *infra* in terms of whether it permitted the Respondent to establish CWS/AWS at HRO without bargaining. As for

Article 29, Section A(5), which is silent on CWS/AWS, I find that this contract provision does not expressly address CWS/AWS. I also find that CWS/AWS is not inseparably bound up with the shift posting and change procedures established by Article 29, Section A(5) which, rather, has nothing to do with CWS/AWS. Accordingly, I conclude that the establishment of CWS/AWS at HRO was not simply a shift posting or shift assignment matter that was covered by the parties' collective bargaining agreement.

The Union did not waive its right to bargain over the establishment of CWS/AWS for HRO support employees

In Case No. DA-CA-13-0410, I concluded that the Union did not waive any right to bargain over future changes to CWS/AWS by failing to request negotiations over implementation of the pilot program in 2009 or protest the implementation of the August 27, 2009, memorandum. The Respondent implicitly suggests again in this case that the Union waived any right to bargain over the decision to establish CWS/AWS at HRO because the August 27, 2009, memorandum specifically provided for schedule changes with one day's notice and no requirement for negotiations. The rationale underlying the finding of no waiver in the earlier case is equally applicable here. While a statutory right, "such as the right to bargain prior to the implementation of a proposed change, may be waived as long as the waiver is clear and unmistakable[.]" *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 527 (2009), a "[u]nion's failure to request bargaining on some other occasions of changes in duty hours d[oes] not constitute a clear and unmistakable waiver of its right to request bargaining in connection with [future] changes." *Dep't of the Air Force, Scott AFB, Ill.*, 5 FLRA 9, 22-23 (1981) (ALJ decision adopted by the Authority). Moreover, the Authority has specifically rejected waiver claims on facts closely analogous to those relied on by the Respondent in the instant case. In *Air Force Accounting & Fin. Ctr., Lowry AFB, Denver, Colo.*, 42 FLRA 122, (1991) (*Lowry AFB*), AWS hours of work were initially established by an interest arbitration award. (*Id.* at 1227). Thereafter, the agency issued a regulation which incorporated the AWS hours and provided that AWS could be terminated upon a management determination of adverse agency impact, reduced productivity, diminished level of services, or an increase in cost. (*Id.* at 1227-28). The union was given notice of the regulation, which did not provide for negotiations over future changes to AWS, but did not request to bargain. (*Id.*). Noting the well-established precedent that a waiver of a statutory right must be clear and unmistakable, the Authority found no merit to the agency's defense that the union had waived its right to bargain over a subsequent change in AWS hours when it did not request bargaining over the regulation:

In agreement with the Judge, we reject the Respondent's argument that the Union waived its right to be notified of changes in employees' arrival and departure times by failing to request bargaining over the revision of the regulation. Nothing in the revision of the regulation or the Union's failure to request bargaining over the revision demonstrates that the Union clearly and unmistakably waived its right to be notified about, and to bargain over the impact and implementation of, changes in the arrival and departure times of employees to ensure sufficient office coverage. Moreover, once the Union found out about the change in the AWS, it requested negotiations, but the

Agency refused to negotiate. Based upon the foregoing, we reject the AFAPC's argument that the Union waived its right to bargain concerning the impact and implementation of the change in arrival and departure times in the SJA Office.

(*Id.* at 1240.)¹² Based on *Lowry AFB*, I conclude that the Union's failure to exercise its bargaining rights either with respect to the CWS/AWS pilot program established by the August 27, 2009, memorandum or the subsequent "permanent" extension of the program did not waive its right to bargain over the decision to establish CWS/AWS for HRO employees in January of 2014.

The 2000 Agreement did not permit the Respondent to implement CWS/AWS at the HRO without bargaining over the decision with the Union

In addition to arguing that the Union waived its bargaining rights, the Respondent asserts that pertinent provisions in the 2000 Agreement relating to alternate work schedules did not require negotiations over the decision to establish CWS/AWS for HRO support employees. In cases where a respondent asserts that a contractual provision specifically permitted it to take a disputed action, the Authority must "determine the meaning of the parties' collective bargaining agreement and . . . resolve the unfair labor practice complaint accordingly." *IRS, Wash., D.C.*, 47 FLRA 1091, 1103 (1993) (*IRS*). Resolution of the unfair labor practice depends on whether the respondent has "establish[ed] by a preponderance of the evidence that the parties' collective bargaining agreement allowed the respondent's actions." (*Id.* at 1110). In determining the meaning of a collective bargaining agreement, an administrative law judge (ALJ) utilizes the standards and principles of interpreting collective bargaining agreements applied by arbitrators and the Federal courts. (*Id.*). Specifically, the ALJ must first consider the plain language of the agreement, avoiding interpretations that would clearly produce a harsh and inequitable result. *U.S. DOJ, INS, Wash., D.C.*, 52 FLRA 256, 261 (1996) (*INS*) (citing *O. Fairweather Practice & Procedure in Labor Arbitration*, 177 (3d ed. 1991); *Elkouri & Elkouri, How Arbitration Works*, 342 (4th ed. 1985)). The ALJ must also examine the "structure" of the pertinent negotiated language "as a whole" to determine the agreement's intent and "[w]hen possible . . . attempt to construe ambiguous language in one provision of an agreement so as to be compatible with the language in other provisions of the agreement." (*Id.* at 262).

¹² The Authority concluded that the agency's bargaining obligations with respect to the changes in starting and quitting times was limited to the impact and implementation, but not the substance, of the decision because the case involved the agency's right under § 6122(a) of the Work Schedules Act, 5 U.S.C. § 6122(a), "to adjust employee arrival and departure times within the flexible hours of the AWS to ensure office coverage during the hours that the office was open for business." (*Id.* at 1238). The instant case does not simply concern an adjustment in arrival and departure times that is reserved to agency management under § 6122(a), but rather a decision to establish CWS/AWS which, as discussed above, is substantively negotiable. See *EPA, Research Triangle Park, N.C.*, 43 FLRA 87, 94 (1991) (distinguishing *Lowery AFB* in a case involving termination of AWS).

Agency refused to negotiate. Based upon the foregoing, we reject the AFAPC's argument that the Union waived its right to bargain concerning the impact and implementation of the change in arrival and departure times in the SJA Office.

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As the Respondent notes, Article 29, Section C of the 2000 Agreement addresses alternate work schedules and provides in relevant part that the Respondent's Directors may establish AWS and that "terms and conditions of employee participation (e.g., whether mandatory or voluntary) in alternative work schedules are to be determined through local consultations and negotiations as provided below and as consistent with Article 50." (Jt. Ex. 1 at 56). And, as the Respondent further notes, Article 50 allows for the negotiation of local supplemental agreements (LSAs) on certain matters including alternate work schedules provided that the local union initiates a request to negotiate a LSA no later than eighteen months after the effective date of the 2000 Agreement.¹³ (*Id.* at 101). I find the language of these two contract provisions to be at best ambiguous as to whether they authorized the Respondent to implement CWS/AWS at the HRO without bargaining with the Union. Accordingly, I will look to other related provisions in the 2000 Agreement to determine whether the negotiated language, considered as a whole supports the interpretation urged by the Respondent. In this regard, Article 29, Section C(4) states,

Consultations. Where local management or the local union believes that productivity and services to the public will be promoted by the establishment of an alternative work schedule, they shall informally consult with the other party about proposed arrangements after providing written notice. Assuming the parties find the arrangements acceptable, such a schedule may be established without the necessity of negotiating an agreement.

(Jt. Ex. 1 at 57-58). And Article 29, Section C(5) states,

Negotiations. If, after consultations, the Local Union objects to the establishment or termination of an alternate work schedule, management may propose the establishment or termination of such a schedule in accordance with Article 9A. If management objects to the establishment of such a schedule, the Local Union may propose negotiations over such a schedule in accordance with Article 50 Supplemental Negotiations. In any negotiations over the establishment of an alternative work schedule, the parties shall be governed by the provision of subsection B of this Article and all requirements of applicable regulations and the law.

(*Id.* at 58).¹⁴ The language of these two provisions is clear. Either party may initiate informal consultations over CWS/AWS, and, if they agree on the arrangements, CWS/AWS may be implemented without further negotiation. However, if the Union objects to a proposal to establish or terminate a CWS/AWS program, the Respondent must follow the notice and bargaining requirements of Article 9, Section A. On the other hand, if the Respondent objects to a Union proposal to *establish* CWS/AWS, the Union can proceed to

¹³ The 2000 Agreement was signed by the INS Commissioner and the AFGE President on June 8, 2000, and Article 49 provides that it shall be in effect for three years from that date.

¹⁴ Subsection 2(b) (Legal Restrictions) of Article 29, Section C recites the legal parameters for CWS/AWS under the Work Schedules Act. (Jt. Ex. 1 at 57).

negotiations to the extent permitted under Article 50. Thus, Article 19, Section (C)(5) expressly preserves the Union's right to negotiate over management proposals to establish or terminate CWS/AWS while it limits the Union's right to insist on negotiations over a Union proposal to establish CWS/AWSS to the LSA provisions of Article 50.

In addition to Article 29, the Respondent asserts that Article 9, Section G(1) permitted it to establish CWS/AWS at HRO because there were CWS/AWS shifts with off-days other than Mondays and Fridays in use at HRO within the 12-month period preceding January 26, 2014. Article 9, Section G ("Covered By the Agreement") in pertinent part states,

Mid-term agreements may be negotiated at the level of recognition covering subjects or matters not specifically covered in this agreement. The parties agree that, notwithstanding the Federal Labor Relations Authority's "covered by the agreement" rule, the Employer is required to provide the Union with notice and an opportunity to negotiate pursuant to this article with regard to management-initiated changes concerning the following matters:

(1) **Tours of Duty.** Implementation of new tours of duty and/or shifts including reimplementation of shifts not used in the previous twelve (12) months.

(Jt. Ex. 1 at 22). The plain and undisputed meaning of this provision is that the Respondent is not required to give the Union notice and an opportunity to negotiate before implementing a shift or tour of duty that has been used within the preceding 12 months. To support application of this provision to the implementation of CWS/AWS at HRO, the Respondent introduced time and attendance records which show that one employee at HRO selected Wednesday as his off-day under a CWS/AWS tour during the 12-month period preceding January 26, 2014. However, as discussed above, "tour of duty" and CWS/AWS are not fungible concepts under the 2000 Agreement which rather has separate provisions dealing with each matter. Moreover, the Respondent did not simply re-implement a "tour of duty" that has been used within the previous 12 months; it established a new CWS/AWS program that was concededly different from that which previously existed at HRO before the suspension of that program in April of 2013. That is, the original CWS/AWS allowed participating employees to select any weekday, including Monday and Friday, for their off-day, while the CWS/AWS program implemented on January 26, 2014 limited off-days to Tuesdays and Wednesdays.

Given that the decision to establish CWS/AWS at the HRO was made by the Respondent's managers, I conclude that when all of the negotiated provisions are considered with an eye toward avoiding harsh and inequitable results and resolving any ambiguities in a manner that is harmonious with the structure and language of the agreement as a whole, Respondent has not demonstrated by a preponderance of the evidence that the 2000 Agreement permitted it to establish CWS/AWS at the HRO in the face of Union objections to implementation without bargaining.

Since I have rejected the Respondent's various defenses, I conclude that the Respondent was not relieved of its obligation under the Work Schedules Act to negotiate over the decision to implement CWS/AWS for HRO support employees. The question at this

point is whether the GC has met its burden of proving that the Respondent failed to satisfy its statutory bargaining obligations before it established the CWS/AWS program at HRO. As to this question, the answer is an emphatic “no” since the Respondent and its witnesses made it abundantly clear that they believed they were under no obligation to negotiate with the Union, that they did not in fact engage in any negotiations and that any dealings with the Union over CWS/AWS were done as a courtesy. Nevertheless, the Respondent argues that it reached an informal agreement with the Ms. Romo who subsequently attempted to renege without good cause. Granted, the Respondent did meet with the Union in an effort to reach a consensus on restoring CWS/AWS for support employees at the HRO, and it was not unreasonable for the Respondent’s managers to have formed the belief prior to the January 10, 2014, meeting that Ms. Romo was not objecting to the concept of a CWS/AWS program that limited off-days to Tuesday or Wednesday. However, I have credited Ms. Romo’s testimony that she informed the Respondent at the January 10, 2014, meeting that if Tuesdays and Wednesdays were all that management had to offer, she would have to discuss the matter further with the Local President and Vice President. In addition, the Respondent’s witnesses confirmed that Ms. Romo objected to the management plan to implement its proposal on January 26, 2014, and also indicated that she needed to confer with her superior Union officers. While this may have been a frustrating development for the Respondent, it provided no basis for ignoring the Union’s objections and claiming that an informal agreement had been reached so that implementation of the Respondent’s proposal could proceed on January 26, 2014. By implementing its proposal for CWS/AWS without completing negotiations with the Union, I conclude that the Respondent violated § 7116(a)(1) and (5) of the Statute.

An agency unlawfully bypasses an exclusive representative when it “communicate[s] directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship.” *U.S. DOJ, BOP, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1346 (1996) (quoting *Dep’t of HHS., Soc. Sec. Admin., Balt., Md. & Soc. Sec. Admin., Region X, Seattle, Wash.*, 39 FLRA 298, 311 (1991) (*SSA Region X*)). The Authority has determined that such conduct constitutes direct dealing with an employee and violates § 7116(a)(1) and (5) of the Statute because it interferes with the union’s rights under § 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit. (*Id.*). Direct dealing with unit employees also constitutes an independent violation of § 7116(a)(1) of the Statute “because it demeans the union and inherently interferes with the rights of employees to designate and rely on the union for representation.” (*Id.* at 1346-47). At the same time, Authority precedent recognizes that not all communications between an agency and bargaining unit employees is destructive of collective bargaining and actionable as an unfair labor practice. For example, the Authority has held that meetings between employees and agency representatives covering administrative matters in an instructional manner do not unlawfully bypass the union. *See Dep’t of HHS, Soc. Sec. Admin.*, 16 FLRA 232, 243 (1984) (no bypass during employee orientation in absence of evidence that the agency attempted to “deal or negotiate directly with employees, or urged employees to put pressure on the [u]nion to take a certain course of

action, or threatened or promised benefits to employees”); *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 14 FLRA 475, 478 (1984) (no bypass where meeting was held solely to announce new sick-leave procedure because there was no attempt to “negotiate or to otherwise deal directly with employees concerning the change”).

In this instant case, supervisors at the HRO met directly with bargaining unit employees to find out whether they were interested in participating in CWS/AWS and, if they were interested, whether they wanted Tuesday or Wednesday as their off-day. Considering that the matter of CWS/AWS and, specifically, what off-days should be made available to participating employees was a subject over which the Respondent is obligated to negotiate with the Union, I conclude that these direct communications with bargaining unit employees amounted to an unlawful bypass and violated § 7116(a)(1) and (5) of the Statute. *See Dep’t of the Treasury, IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 57 FLRA 126, 129-30 (2001) (bypass found where managers communicated and negotiated directly with unit employees regarding seating arrangements for the day shift).¹⁵

REMEDY

Where an agency has an obligation to bargain over the substance of a matter, and fails to meet that obligation, the Authority will grant a status quo ante remedy in the absence of special circumstances. *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins AFB*, 53 FLRA 1664, 1671 (1998). Thus, restoration of the status quo that existed prior to the unfair labor practice is an appropriate remedy where an agency fails to fulfill its statutory bargaining obligations with respect to CWS/AWS. *See DLA*, 44 FLRA at 400. Here, however, a return to the status quo ante would effectively end CWS/AWS for HRO employees for whom CWS/AWS was not available prior to January 26, 2014. Perhaps recognizing this potential dilemma, the GC has not requested a status quo ante remedy, but rather that the Respondent be ordered to return affected employees to the CWS/AWS schedule which existed in April of 2013 prior to the termination or suspension that was the subject of Case No. DA-CA-13-0410, and they be permitted to stay on the schedule until the parties have completed bargaining. The GC did not seek this remedy in the prior case, and I conclude that it is inappropriate in the context of the present litigation. Accordingly, I will order that the Respondent negotiate with the Union over CWS/AWS, if requested by the Union, to the extent required by the Statute and the Work Schedules Act. As requested by the General Counsel, I will also issue an appropriate cease and desist order and order the Respondent to post a notice, signed by the San Antonio Field Office Director, in all locations within the Respondent’s San Antonio Field Office, and to disseminate a copy of the notice electronically to all San Antonio Field Office employees. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 226 (2014).

¹⁵ It is noted that one HRO employee ultimately went to the Union when his request for Tuesday as his off-day was denied by Supervisor Jimenez. However, I consider Mr. Garza’s conduct in contacting the Union to have been a purely fortuitous event that did not have the effect of curing or ameliorating the Respondent’s unlawful bypass.

CONCLUSION

Having found that the Respondent failed to negotiate with the Union to the extent required by the Statute regarding its decision to establish a compressed and alternate work schedule and that it bypassed the Union and dealt directly with bargaining unit employees over implementation of the schedule, I conclude that the General Counsel has established that the Respondent violated § 7116(a)(1) and (5) of the Statute as alleged in the Complaint.

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

ORDER

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

1. Cease and desist from:

(a) Unilaterally implementing compressed or alternate work schedules or making other changes in conditions of employment without first notifying the American Federation of Government Employees, AFL-CIO, Local 1944 (Union), the exclusive representative of bargaining unit employees, about any such proposed changes and providing the Union with an opportunity to negotiate concerning the change to the extent required by the Federal Service Labor-Management Relations Statute.

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

(c) Bypassing the Union and communicating or negotiating directly with bargaining unit employees concerning their conditions of employment including their interest in participating in compressed or alternate work schedules and their desired off-days under such schedules.

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

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

(a) Upon request, negotiate with the Union to the extent required by the Federal Service Labor-Management Relations Statute concerning compressed or alternate work schedules for bargaining unit employees assigned to the Harlingen Resident Office.

(b) Post at its facilities where bargaining unit employees represented by the Union are located in the San Antonio Field Office, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they

shall be signed by the Director, Field Operations Division, San Antonio, Texas, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

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

Issued, Washington, D.C., December 9, 2015



SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Homeland Security, Immigration and Customs Enforcement, San Antonio, Texas, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement compressed or alternate work schedules or make other changes in conditions of employment without first notifying the American Federation of Government Employees, AFL-CIO, Local 1944 (Union), the exclusive representative of bargaining unit employees, about any such proposed changes and providing the Union with an opportunity to negotiate concerning the change to the extent required by the Statute.

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

WE WILL NOT bypass the Union and communicate or negotiate directly with bargaining unit employees concerning their conditions of employment including their interest in participating in compressed or alternate work schedules and their desired off-days under such schedules.

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

WE WILL, upon request, negotiate with the Union to the extent required by the Statute concerning compressed or alternate work schedules for bargaining unit employees assigned to the Harlingen Resident Office.

(Agency/Respondent)

Dated: _____

By: _____
(Signature) (Title)

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

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