**65 FLRA No. 88**

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929, AFL-CIO
(Charging Party)

DA-CA-09-0286

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DECISION AND ORDER

January 20, 2011

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

## I. Statement of the Case

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

The amended complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by changing an established practice of granting certain employees administrative leave on their birthdays without bargaining, and by failing to respond to the Charging Party's (Union's) request to bargain over that matter. The Judge dismissed the amended complaint as untimely.

For the reasons that follow, we reverse the Judge's decision and remand the amended complaint for a resolution on the merits.

## II. Background

The facts are set forth in detail in the Judge's decision and are only briefly summarized here. The Respondent had an established practice of first-line supervisors granting certain employees administrative leave on their birthdays (hereinafter "birthday leave"). Judge's Decision at 3. In July 2008, the Union's President (the President) "heard rumors" that the Respondent planned to eliminate that practice. *Id.* The President wrote a letter to the Respondent, in which the President "protested the termination of the practice and requested that the Respondent re-implement the practice immediately . . . ." *Id.* In response, the Respondent informed the Union that it was "rescinding the previous notice to the [employees]" regarding not granting birthday leave, and stated that "[i]f management determines to revisit this issue, the [U]nion will be given official notification." *Id.*

On July 29, 2008, the Respondent sent the President a letter stating, in pertinent part:

> This is to inform you that first line supervisors . . . do not have the authority or discretion to grant [employees birthday leave]. Therefore, effective December 28, 2008, management will terminate the practice of allowing first line supervisors the discretion of granting [birthday leave] . . . . Management will continue to approve or disapprove "excused absences" in accordance with regulations and policy.

*Id.* at 3-4.

On August 8, 2008, the President responded by letter stating, in pertinent part:

> While we are not entirely sure if the [Respondent's] proposal is intended to impact, in any way, the affected bargaining unit employees' entitlement to [birthday] leave,[1] we will, in an exercise of caution, nonetheless make known our demand to bargain over the proposed change(s), to the fullest extent allowed by law. Moreover, the Union hereby proposes and insists that the [Respondent] hold any change(s) pertaining to the [Respondent's] proposal in abeyance until the completion of all phases of bargaining . . . .

1. At the hearing, the President testified that he found it unclear whether the Respondent was proposing to change "what level of supervision[]" would be able to approve birthday leave, or whether the Respondent was proposing to change the entire practice of changing birthday leave. Tr. at 26. In this regard, the President testified that he believed that the Respondent would be obligated to bargain only in the latter situation, not the former. *Id.* at 27.

*Id.* at 4. The President then submitted five proposals and reserved the right to submit additional proposals. *Id.*

The Respondent did not respond to the President's letter or communicate further with the Union regarding this matter during 2008. *Id.* In 2009, an employee whose birthday was January 2 did not receive birthday leave. *Id.* Subsequently, other employees ceased receiving such leave. *Id.* at 4.

When the Union learned that employees had been denied birthday leave, the President contacted the Respondent's liaison with the Union (the liaison). *Id.* at 5. The liaison told the President that he would "look into the situation," but did not follow up with the President. *Id.* at 5. Later, the President again discussed the situation with the liaison, who suggested that the President should contact the Respondent's legal office. *Id.* The President did so, but on June 29, 2009, filed the ULP charge at issue in this case. *Id.*

## III. Judge's Decision

The Judge noted that, in its prehearing disclosure, the Respondent argued that the ULP charge was not timely filed and, thus, that the complaint should be dismissed based on § 7118(a)(4)(A) of the Statute.[2] Judge's Decision at 5. Addressing this issue, the Judge found that "[t]he Union was not aware that the change had been implemented, specifically that . . . employees were no longer receiving [birthday leave] until employees began to complain in early 2009." *Id.* at 6. In this regard, the Judge found that "[t]he first known instance in which an employee was not given [birthday leave] was on January 2, 2009[,]" which the Judge found was a Friday "in the middle of a pay period." *Id.* The Judge then determined that "[a]pparently, the beginning of the pay period . . . was December 28, 2008, the date referenced in the Respondent's July 29, 2008, letter to the Union." *Id.*

The Judge stated that although the Respondent's July 29 letter "is framed in terms of first line supervisors no longer having certain authority, it is also apparent that the asserted change will impact on bargaining unit employees . . . ." *Id.* The Judge also stated that the July 29 letter "gave an implementation date of December 28, 2008, and, although the Respondent did not afford the Union the opportunity to bargain prior to implementation, it also never indicated to the Union that it had rescinded the implementation date." *Id.* The Judge then concluded: "The Union was aware of the impact of the change on bargaining unit employees in early January 2009 and, therefore, should have been aware that the implementation date for the change was December 28, 2008." *Id.* The Judge dismissed the amended complaint as based on an untimely charge. For support, the Judge cited *United States Department of Labor*, 20 FLRA 296 (1985), *rev'd on other grounds*, 834 F.2d 174 (D.C. Cir. 1987) (*DOL*), and *United States Department of the Treasury, IRS & United States Department of the Treasury, IRS, Houston District*, 20 FLRA 51 (1985), *petition for review denied*, 798 F.2d 113 (5th Cir. 1986) (*IRS*).

## IV. Positions of the Parties

### A. GC's Exceptions

The GC argues that the Judge erred in finding that the charge was untimely filed. Exceptions at 9. As an initial matter, the GC argues that the disputed change occurred on January 2, 2009, and that the Judge erred in finding that it occurred on December 28, 2008. In this connection, according to the GC, the Respondent "has consistently taken the position that the change announced on July 29, 2008, was an intra-management change" -- i.e., a change in which specific management officials could approve birthday leave -- "over which [the Respondent] had no duty to bargain with the Union." *Id.* at 5. Also according to the GC, the Respondent's July 29 notice did not indicate that the policy of allowing birthday leave would change, and that the Union's August 8 letter sought clarification regarding the scope of the change. In this regard, the GC contends that if the proposed change merely changed the identity of the management official that could approve birthday

2. Section 7118(a)(4) of the Statute provides, in pertinent part:

> (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged [ULP] which occurred more than 6 months before the filing of the charge with the Authority.
> (B) If the [GC] determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of--
> (i) any failure of the agency . . . against which the charge is made to perform a duty owed to the person; or
> (ii) any concealment which prevented discovery of the alleged [ULP] during the 6-month period,
> the [GC] may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged [ULP].

leave, then the change would not be negotiable, but if it was intended to eliminate the entitlement to birthday leave entirely, then "this was a matter on which the Union wanted to bargain." *Id.* at 6. The GC asserts that, based on the Respondent's failure to respond to "the Union's request for clarification and bargaining[,]" the Union "interpreted the notice as meaning on its face [that] it was to be simply an internal management change." *Id.* Further, the GC asserts that the change actually implemented was different from the change announced, in that it discontinued the practice of granting birthday leave altogether, rather than merely change the first-line supervisors' authority to approve such leave. *Id.* at 7. The GC contends that, consequently, the Respondent's July 29 notice did not provide adequate notice of the change. *Id.* at 11.

The GC also argues that the Judge erred by relying on the Respondent's argument concerning § 7118(a)(4) because, even though the Respondent's pre-hearing disclosure raised the issue of timeliness, the Respondent did not raise timeliness as a defense in its answer or its post-hearing brief. *Id.* at 8. Further, the GC contends that the Judge erred by failing to draw an adverse inference from the Respondent's failure to call a particular witness during the hearing. *See id.* at 3-5. Finally, the GC requests that the Authority find that the Respondent violated § 7116(a)(1) and (5) of the Statute as alleged and order various remedies. *See id.* at 13.

B. Respondent's Opposition

The Respondent argues that the evidence supports the Judge's conclusion that the charge was untimely. Opp'n at 3. In this regard, the Respondent notes that the President was aware that several employees were denied birthday leave "during or before the summer of 2008[.]" *Id.* Further, the Respondent contends that the Judge appropriately exercised her discretion to decline to make an adverse inference. *Id.* at 5-7.

## V. Analysis and Conclusions

Section 7118(a)(4)(A) of the Statute requires that a charge be filed within six months of the alleged ULP. *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.*, 60 FLRA 943, 950 (2005) (then-Member Pope concurring in part and dissenting in part on other grounds), *rev'd on other grounds*, 446 F.3d 162 (D.C. Cir. 2006), *decision on remand*, 63 FLRA 406, *reconsid. denied*, 63 FLRA 600 (2009). The Authority has recognized that, at times, a charging party may not learn of an alleged ULP immediately, either due to a respondent's failure to perform a duty owed to the charging party or because of the respondent's concealment of the alleged ULP. 60 FLRA at 950. In such circumstances, § 7118(a)(4)(B) of the Statute permits the GC to issue a complaint when the charging party has filed a ULP charge within six months of discovery of the alleged ULP. *Id.*

In addition, the Authority has held that notice of a proposed change in conditions of employment must be sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining. *U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 692 (2006). For example, the notice must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change. *Id.* In this regard, the Authority has stated that "[t]he notice must be sufficient to inform the exclusive representative of what will be lost if it does not request bargaining." *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 82 (1997). Further, the Authority has held that the obligation to bargain under the Statute includes, at a minimum, the requirement that a party respond to a bargaining request. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 52 (2003) (then-Member Pope dissenting in part on other grounds).

Although the Judge stated that "the change was implemented, as announced, on December 28," Judge's Decision at 7, she did not find that the Respondent actually took any actions on that date. In addition, there is conflicting record evidence on this point. In this regard, while the employee whose birthday is January 2 testified that the Respondent announced the change "a week before my birthday," Tr. at 57, another employee testified that he "believe[d] it was the first of the year[]" when the Respondent announced the change. *Id.* at 66.

Even assuming that the Respondent actually implemented the change on December 28, the Union did not learn of the change immediately because the Respondent failed to perform duties owed to the Union. In this regard, the Respondent did not provide the Union with adequate notice of the scope and nature of the change -- specifically, whether it merely eliminated the authority of first-line supervisors to grant birthday leave, or whether it wholly eliminated employees' entitlement to such leave. Although the Union reasonably questioned the

scope and nature of the proposed change and requested bargaining as "an exercise of caution," Judge's Decision at 4, the Respondent neither clarified the scope and nature of the change nor responded to the bargaining request. In these circumstances, even assuming that the Respondent wholly eliminated employees' entitlement to birthday leave on December 28, the Union's lack of awareness, prior to January 2, that management had done so was due to the Respondent's failure to perform duties that it owed to the Union -- in particular, its duties to provide adequate notice of the change and to respond to the Union's bargaining request. Thus, the above-cited Authority precedent supports a finding that the charge, which was filed within six months of January 2, was timely filed.

The decisions cited by the Judge do not support a contrary conclusion. In this regard, unlike the charging party in *DOL*, the President did not merely wait over eight months after discovering the ULP before filing the charge. *See* 20 FLRA at 297. Instead, the President repeatedly attempted to seek more information from the Respondent, and filed the charge only after those attempts were unfruitful. *See* Judge's Decision at 5. Thus, unlike the charging party in *DOL*, the President had a reasonable reason for not immediately filing the charge.

Further, in *IRS*, the Authority found that: the Respondent announced an immediate change at "open meetings of employees[,]" to which the Union was invited; "thereafter, with rare exception," the newly implemented rule was followed; and the incident that the union asserted was the first time that it learned of the new rule "was but a continuation of the open and undisguised enforcement of this rule." 20 FLRA at 52. Similar circumstances are not present here.

For the foregoing reasons, we find that the charge was timely filed, and we reverse the Judge's dismissal of the amended complaint.

With regard to the GC's request that the Authority find a violation of the Statute and order various remedies, where a judge erroneously dismisses a complaint without addressing the merits of the complaint, and the record does not provide a sufficient basis for resolving those merits, the Authority remands the case. *E.g., U.S. Dep't of the Army, Human Res. Command, St. Louis, Mo.*, 64 FLRA 140, 144 (2009) (Member Beck dissenting in part on other grounds) (remanding where judge erroneously found complaint barred by § 7116(d) of the Statute). Here, before the Judge, the Respondent raised various affirmative defenses that the Judge did not resolve. *See, e.g.*, GC Ex. 1(g) at 4 (Respondent's Answer to Complaint). As the Judge did not resolve those defenses, and there is an insufficient basis in the record for doing so, we remand the amended complaint to the Judge for a determination on the merits.[3]

## VI. Order

The amended complaint is remanded to the Judge for a determination on the merits.

3. Accordingly, it is unnecessary to resolve the GC's remaining exceptions.

**Office of Administrative Law Judges**

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
RESPONDENT

AND

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929, AFL-CIO
CHARGING PARTY

Case No. DA-CA-09-0286

Nora E. Hinojosa, Esq.
For the General Counsel

Mark W. Hannig, Esq.
For the Respondent

James Stack
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

**DECISION**

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

On June 29, 2009, the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge with the Dallas Region of the Authority against the Department of Homeland Security, U.S. Customs and Border Protection, El Paso, Texas (Respondent). (G.C. Ex. 1(a)) On March 31, 2010, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to respond to the Union's request to negotiate over the termination of the practice of allowing first-line supervisors the discretion of granting excused absence/administrative leave to bargaining unit employees and by implementing said change without providing the Union with an opportunity to negotiate over this change to the extent required by the Statute. (G.C. Ex. 1(c)) On April 16, 2010, the Respondent filed an Answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(g)) On April 21, 2010, the Dallas Regional Director issued an Amended Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by terminating the practice of allowing first-line supervisors the discretion of granting excused absence/administrative leave to bargaining unit employees, thereby discontinuing the practice of granting administrative leave on or near the birthdays of the Sector Enforcement Specialists at the El Paso Sector. (G.C. Ex. 1(h)) At the hearing, Counsel for the General Counsel amended the complaint to change the date of the alleged termination of the above practice to January 2, 2009. (Tr. 6).

A hearing was held in El Paso, Texas, on May 11, 2010, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely post-hearing briefs, which have been fully considered.[1]

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

**STATEMENT OF THE FACTS**

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(c), 1(g), 1(h)). Victor Manjarrez occupied the position of Chief Patrol Agent for the El Paso Sector from approximately 2008 through 2010. He has since transferred to the Tucson Sector of U.S. Customs and Border Protection; Randy Hill has been the interim Chief Patrol Agent since May 2010. (G.C. Exs. 1(c), 1(g), 1(h); Tr. 86-87) At all times material to this matter, Manjarrez has been a supervisor and/or management official within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c), 1(g), 1(h)).

1. The GC's unopposed Motion to Correct the Transcript is granted.

The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. James Stack is a border patrol agent within the El Paso Sector and has served as President of AFGE Local 1929 since January 1999. (Tr. 19) Included within the bargaining unit are Sector Enforcement Specialists (SES), who work in communications and serve as support for border patrol agents in the field. There are approximately fifty (50) SES, with forty-three (43) located in El Paso and seven (7) located in Deming. SES work 24 hours a day, seven days a week. There are three shifts: 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to midnight; midnight to 8:00 a.m. (Tr. 19-21, 54, 63, 72, 110).

SES employees are considered essential personnel who must be present whenever border patrol agents are in the field. In general, this means when employees were granted administrative leave on Christmas Eve or New Year's Eve, SES employees remained at work, although they were apparently paid holiday pay for this time. (Tr. 32-33, 54-55) Prior to January 2009, a practice had developed that, in compensation for not being allowed to leave work on administrative leave like other employees, the SES employees were allowed administrative leave on or near their birthdays. The testimony indicated that this practice had been ongoing for several years, since around 1988. (Tr. 64) Employees were not required to request administrative leave for their birthdays and their birthdays were automatically included in the work schedules. If, somehow, a birthday was not on the schedule, the employee would ask about it and it would be placed on the schedule. Generally, employees took their specific birthday, but could also take the administrative leave at any time during that two week leave period. (Tr. 65-66, 76).[2]

In July 2008,[3] Stack heard rumors that the administrative leave for the SES was going to be eliminated and wrote to Alvon Williams, Supervisory Sector Enforcement Specialist, El Paso Sector. In his letter of July 3, Stack protested the termination of the practice and requested that the Respondent re-implement the practice immediately, while suggesting slight modifications to the manner in which the employees claim compensation for this date. (G.C. Ex. 2; Tr. 24).

On July 22, Chief Patrol Agent Manjarrez sent a letter informing Stack that he was rescinding the previous notice to the SESs, regarding the granting of a paid day-off for their birthdays. The letter also stated that "If management determines to revisit this issue, the union will be given official notification." (G.C. Ex. 3; Tr. 25-26).

On July 29, Manjarrez sent a letter to Stack, pursuant to provisions of Article 3A of the Negotiated Agreement between U.S. Immigration and Naturalization Service and National Border Patrol Council, stating, in part:

> This is to inform you that first line supervisors for the El Paso Sector do not have the authority or discretion to grant the El Paso Border Patrol Sector, Sector Enforcement Specialists (SESs), nor any other employee, excused absence to offset for time off-duty provided to other employees on Christmas Eve and New Year's Eve. Therefore, effective December 28, 2008, management will terminate the practice of allowing first line supervisors the discretion of granting excused absence/administrative leave related to holidays or birthdays. Terminating this practice on this date should provide affected employees, that is, those currently employed within El Paso Border Patrol Sector as of the date of this notice, with an adequate adjustment period. Management will continue to approve or disapprove "excused absences" in accordance with regulations and policy.

(G.C. Ex. 4).

Stack responded on August 8, stating that the Union was in need of additional information and clarification. The Union referred to its July 3 letter to Alvon Williams (G.C. Ex. 2) and requested certain information.[4]

Stack then stated:

> While we are not entirely sure if the agency's proposal is intended to impact, in any way, the affected bargaining unit employees' entitlement to excused absences/administrative leave, we will, in an

2. This practice only existed in the El Paso office; the SES in Deming did not receive administrative leave on or around their birthdays. (Tr. 110).

3. All dates are in 2008 unless otherwise specified.

4. The complaint in this matter does not include any allegations regarding section 7114 (b)(4) and this request for information.

> exercise of caution, nonetheless make known our demand to bargain over the proposed change(s), to the fullest extent allowed by law. Moreover, the Union hereby proposes and insists that the agency hold any change(s) pertaining to the agency's proposal in abeyance until the completion of all phases of bargaining, including any attendant third-party resolution procedures, such as, but not limited to, assistance from the Federal Mediation and Conciliation Service or the Federal Service(s) Impasses Panel.

The Union then submitted five proposals, while it reserved the right to submit additional proposals. (G.C. Ex. 5 at 2; Tr. 27-29).

The Union received no response from this letter and had no further communications with the Respondent on this issue until 2009.

Guillermo Acosta has been an SES since June 2006. He received administrative leave for his birthday, January 2, in 2007 and 2008. He did not receive administrative leave for his birthday in 2009. (Tr. 55) He expressed his concern to his supervisor (Tr. 59), as did other SESs. (Tr. 79) None of the other SESs have received administrative leave for their birthdays since January 2009. (Tr. 66, 76).

After learning that the SES were not receiving administrative leave for their birthdays, Stack contacted Bill Torres, a supervisory border patrol agent and the Respondent's liaison with the Union. Torres told him he would look into the situation, but Stack never heard from him. (Tr. 22, 42) Stack discussed this issue with Torres again, who suggested that Stack contact the Respondent's legal office. (Tr. 23) Stack spoke to attorneys in that office but eventually filed the unfair labor practice charge in this case on June 29, 2009. (G.C. Ex. 1(a); Tr. 23).

**TIMELINESS**

In its prehearing disclosure,[5] the Respondent raised the issue of timeliness, arguing that the unfair labor practice charge in this matter was not filed in a timely manner and thus, the complaint should be dismissed based on section 7118(a)(4)(A) of the Statute. The Respondent made no mention of this defense in its brief; however, the General Counsel (GC) did argue that the charge had been timely filed. Specifically, the GC asserted that the change in the established practice of granting eight hours of excused absence/administrative leave to the SES on or near their birthdays was implemented on January 2, 2009. The parties' collective bargaining agreement provides that the Union is to receive notifications from Respondent of intended changes and provide the appropriate level of bargaining when the Respondent proposes changes in the working conditions of bargaining unit employees. The GC asserts that the record evidence shows that adequate notice was not provided to the Union President of the change and that the Union was not provided an opportunity to bargain over the change prior to its implementation. Since the change was implemented on January 2, 2009, and the unfair labor practice charge in this matter was filed on June 29, 2009, the charge was timely filed and the Respondent's argument should be rejected.

Section 7118(a)(4) states:

> (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the chargewith the Authority.
>
> (B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of –
>
> (i) Any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person; or
>
> (ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period.

The General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

In *U.S. Army Armament Research, Development and Engineering Ctr., Picatinny Arsenal, N.J.*,

5. Section 2423.23 of the Authority's Rules and Regulations requires that the parties shall exchange information which includes "[a] brief statement of the theory of the case, including relief sought, and any and all defenses to the allegations in the complaint."

52 FLRA 527, 532 (1996), the Authority states that "[s]tatutes of limitation[s] are affirmative defenses and, as such, are waived unless raised in the pleadings or at trial." *Id.* at 532. The Authority further found that section 7118(a)(4) of the Statute "is an affirmative defense[.]" *Id.* at 534. Although the Respondent did not argue this defense in its brief, since the issue of timeliness was raised in the pleadings, I find this issue is properly before me.

The record evidence shows that the Respondent sent a letter to the Union on July 29, 2008, giving the Union notice that "… effective December 28, 2008, management will terminate the practice of allowing first line supervisors the discretion of granting excused absence/administrative leave related to holidays or birthdays. Terminating this practice on this date should provide affected employees, that is, those currently employed within El Paso Border Patrol Sector as of the date of this notice, with an adequate adjustment period…." (G.C. Ex. 4) The Union responded on August 8, requesting clarification and also requesting to bargain over the proposed change(s) to the fullest extent allowed by law. (G.C. Ex. 5) The Union received no further correspondence from the Respondent on this issue. The Union was not aware that the change had been implemented, specifically that SES employees were no longer receiving administrative leave/excused absence on or around their birthdays until employees began to complain in early 2009. The first known instance in which an employee was not given administrative leave for his birthday was on January 2, 2009. January 2 occurred on a Friday in 2009, which would be in the middle of a pay period. Apparently, the beginning of the pay period for the Respondent's employees was December 28, 2008, the date referenced in the Respondent's July 29, 2008, letter to the Union. (G.C. Ex. 4).

Although Respondent's July 29 notice to the Union is framed in terms of first line supervisors no longer having certain authority, it is also apparent that the asserted change will impact on bargaining unit employees, *i.e.* by essentially eliminating administrative leave on or around the SES birthdays. The evidence is clear that the Respondent's July 29 letter gave an implementation date of December 28, 2008, and, although the Respondent did not afford the Union the opportunity to bargain prior to implementation, it also never indicated to the Union that it had rescinded the implementation date. The Union was aware of the impact of the change on bargaining unit employees in early January 2009 and, therefore, should have been aware that the implementation date for the change was December 28, 2008. *See U.S. Dep't of the Treas., IRS and U.S. Dep't of the Treas., IRS, Houston District*, 20 FLRA 51 (1985) (Respondent's conduct did not prevent the Union from filing the charge within six months of the meetings where the dress code was announced.) *See also U.S. Dep't of Labor*, 20 FLRA 296 (1985).

Even though the GC amended the complaint to allege that the change was implemented on or about January 2, 2009, I find the record evidence establishes that the change was implemented, as announced, on December 28, 2008, rather than the date of the first affected employee's birthday. With the implementation date of December 28, 2008, the Union had six months from that date to file the charge in this matter. I find that the Respondent's conduct did not preclude the Union from filing the charge within six months. *Cf. Air Force Accounting and Finance Ctr., Lowry AFB, Denver, Colo.*, 42 FLRA 1226 (1991). Since the charge was filed on June 29, 2009, it was untimely filed under section 7118(4)(A) and thus no violation may be found.

Since I have found that the charge in this matter was untimely filed under section 7118(4)(A) of the Statute, no other discussion is necessary.

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

**ORDER**

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

Issued, Washington, D.C., September 16, 2010

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SUSAN E. JELEN
ADMINISTRATIVE LAW JUDGE