FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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OALJ 24-12

DEPARTMENT OF DEFENSE DEPARTMENT OF DEFENSE EDUCATION ACTIVITY DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS SOUTHEASTERN DISTRICT RESPONDENT AND NATIONAL EDUCATION ASSOCIATION FEDERAL EDUCATION ASSOCIATION, STATESIDE REGION CHARGING PARTY	Case No. AT-CA-21-0324

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For the General Counsel

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For the Respondent

Richard Tarr
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Although an agency normally has a duty to negotiate with a union when it makes changes in the conditions of employment of its employees, it has no such duty if the subject matter of the change is covered by a provision in the parties' collective bargaining agreement (CBA). This has come to be referred to as the "covered by" defense or doctrine. Our case today involves two questions relating to the scope and application of this doctrine.

The first question is whether a contractual provision that was not agreed to by one of the parties, and was instead imposed by an order of the Federal Service Impasses Panel (FSIP or the Panel), is considered a "negotiated agreement" to which the "covered by" doctrine

applies. Because the Authority has historically and continuously considered terms imposed by the Panel to be incorporated into the parties' CBA, the answer is that the "covered by" doctrine applies.

The second question is whether a specific provision in the parties' FSIP-imposed contract – a provision allowing management to require employees to work up to 24 more hours per quarter than they had in the past – covers management's change to employees' starting or quitting times. Because the addition of hours to an employee's workday will unavoidably change the employee's starting or quitting time, the answer is that the change is covered by the CBA and further negotiation is not required.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On June 22, 2021, the National Education Association, Federal Education Association – Stateside Region (the Union or Charging Party) filed a ULP charge against the Department of Defense, Department of Defense Education Activity, Domestic Dependent Elementary and Secondary Schools, Southeastern District (the Agency, DDESS, or Respondent), alleging that the Agency violated § 7116(a)(l) and (5) of the Statute by unilaterally changing the starting and quitting times for bargaining unit employees without negotiating with the Union. GC Ex. 1(a). After investigating the charge, the Acting Regional Director of the FLRA' s Atlanta Region issued a Complaint and Notice of Hearing on August 11, 2022, on behalf of the FLRA's Acting General Counsel (GC), similarly alleging that the Agency violated § 7116(a)(l) and (5). GC Ex. l(b). The Agency filed its Answer to the Complaint on September 13, 2022, denying that it violated the Statute. GC Ex. l(f).

On February 15 and 16, 2023, a hearing was held in this matter, with parties participating on the MS Teams platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses; a court reporter prepared a transcript of the hearing. The GC, the Charging Party, and the Respondent filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACTS

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. Its parent agency, the Department of Defense Education Activity (DoDEA), oversees the operation of roughly 160 schools for DOD dependents around the world; Respondent's

Southeastern District[1] manages schools on eight military bases in the Southeast United States. Resp. Brief at 2-3; GC Ex. 4 at 2, GC Ex. 5 at 2. The Union -- a labor organization within the meaning of section 7103(a)(4) of the Statute – is the exclusive representative of education professionals who work in the Southeastern District as well as other DoDEA schools in the Americas. Tr.121; *see* Jt. Ex. 1, Article 7 and Appendix A. This case involves employees in the Southeastern District.

The Union has had a series of collective bargaining agreements with DDESS, covering employees in the Southeastern and Mid-Atlantic Districts. The most recent CBA that was executed by both parties took effect in 2005, and the parties engaged in negotiations for a successor agreement from at least 2010 through 2018. Tr. 149, 182; Resp. Brief at 3.[2] Ultimately, the Agency requested the assistance of the Federal Service Impasses Panel in the fall of 2018 to resolve approximately forty unresolved provisions. *DDESS*, 72 FLRA at 601. With the assistance of a Panel mediator in late October of 2018, the parties were able to consensually resolve most of those issues, including Article 18, Section 1(a) ("Hours of Work and Scheduling"), which is the focus of the ULP dispute before me. Tr. 35-38, 95-96, 169.

Section 1(a) of Article 18 – "Workday" – was one of the most contentious issues in the negotiations, but the mediator was able to persuade the parties to reach a compromise. Tr. 95-96, 108-10, 168-69. The Agency wanted to extend the employees' workday by one hour, while the Union had refused any extension; ultimately the parties agreed that the Agency could add up to 96 hours per school year, or 24 hours per quarter,[3] to the workday, under the provisions set out in Section 1(a). Tr. 95-96, 108-10, 168-69.[4] The Union expressed concerns about how management would go about requiring employees to work these additional hours, so the Agency agreed to draft a "side memo" or "clarification memo" that would set several specific, additional limitations on what management would be allowed to do. Tr. 96-97, 171-72. It was understood by the parties, however, that the clarification memo would not be part of the CBA itself, and that Agency Chief Negotiator Frank King would draft it after the CBA was executed. Tr. 96-99, 176-80. Benjamin Hunter, the Union's Chief Negotiator, reminded King on January 8, 2019, that King still needed to draft the clarification memo. Resp. Ex. 7 at 2. And on February 8, 2019, King sent Hunter the side agreement, which incorporated the previously-discussed restrictions on how the additional 24 work hours would be assigned. Tr. 95, 97-98, 175, 178. There were no negotiations concerning the text of the memo, but Hunter acknowledged that it addressed the three primary concerns that they had discussed in October regarding Article 18, Section 1(a). Tr. 96-99, 178-79; *see also* Jt. Ex. 2, Resp. Ex. 7.

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[1] The district is sometimes identified in the record as the Southeastern District and sometimes as the Southeast District. I utilize the name listed in the Complaint, GC Ex. 1(b).

[2] The parties' bargaining history regarding this successor agreement is the subject of litigation that is apparently ongoing. It was described at some length by the Authority in *U.S. Dep't of Def. Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 601-02 (2021) (*DDESS*); *recon. denied*, 73 FLRA 149 (2022). The Union has indicated that its appeal of those two Authority decisions is still pending at the Court of Appeals. Tr. 104; Union Brief at 8.

[3] 24 hours per quarter amounts to roughly a half hour per day.

[4] The CBA is Joint Exhibit 1, and Article 18 is in the Appendix to the agreement, immediately after Appendix W.

Ten issues could not be resolved with the mediator, however, and the parties' final proposals and arguments on those issues were submitted to the Panel. *In re DOD Educ. Activity, Domestic Dependent Elementary & Secondary Schs.*, 18 FSIP 073 (2018). Although the Union argued that the Panel did not have jurisdiction over one of the disputed provisions (Article 18, Section 3(f)), the Panel rejected that argument and issued an order on December 14, 2018, imposing contract terms for all ten unresolved issues. Panel Order at 5.

After receiving the Panel's decision, officials of the Agency compiled the various portions of the CBA on which the parties had signed tentative agreements during negotiations; they added the contractual language that the Panel had imposed on the disputed provisions, and sent the entire package to the agency head for review pursuant to Section 7114(c) of the Statute. Tr. 182-83. At approximately the same time, the Agency sent the package to Hunter and the Union, but didn't advise him that the agency head was already reviewing it. On January 8, 2019, the two lead negotiators discussed executing the agreement. Tr. 174-75; Resp. Ex. 7. The Union indicated the following day that it still needed clarification on a couple of issues, and it reiterated its ongoing insistence that the Panel had no jurisdiction to resolve Article 18, Section 3(f). Resp. Ex. 7 at 2. Somewhat contradictorily, however, Hunter asked King not to submit the CBA to the agency head for review until both parties had executed it, while also indicating that it had the right to challenge the Panel decision by refusing to execute the CBA. *Id.* Ignoring the Union's request for delay, the agency head formally approved the CBA on January 11, 2019, and implemented it; the Union received notification of that action on January 14. Tr. 93, 176-77.[5]

As part of the Agency's implementation of the new CBA, Dr. Judith Minor, an official of DoDEA-Americas, sent a memo in March of 2019 to school administrators and employees in schools covered by the new CBA, advising them that the Agency would be increasing employee work schedules by 24 hours per quarter, starting with the fourth quarter of School Year 2018-2019. Resp. Ex. 6.[6] Dr. Minor indicated that this change was authorized by Article 18, Section 1(a) of the new CBA. This provision states:

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[5] As the Authority described more fully in its *DDESS* decision, the Union filed two grievances in early 2019, challenging the Agency's implementation of the CBA. While the grievances were pending, the Union also withdrew its agreement to Article 18, Section 1(a). 72 FLRA at 602; Tr. 120. At arbitration, the Union argued that the CBA should not have been submitted for agency-head review, because the Panel did not have jurisdiction to rule on Article 18, Section 3(f), and because Article 18, Section 1(a) was unenforceable. The Arbitrator agreed with the Union, ruling that the Agency had improperly implemented the CBA and that by doing so it had repudiated the 2005 CBA. 72 FLRA at 602. However, the Authority vacated the arbitrator's award, finding that it violated both Sections 7114 and 7119 of the Statute. It held that the Union's grievances and the arbitrator's award disregarded Section 7119's mandate that a decision of the Panel is binding on the parties and is not directly reviewable. *Id.* at 603. It found that once the Panel issued its decision in December 2018, there were no unresolved issued left to negotiate, and the Agency was required to seek agency-head review of the CBA within thirty days of the Panel decision. Even though the Union had refused to execute the CBA, the CBA was considered executed on the date of the Panel decision, and the Agency was justified in implementing it upon agency-head approval thirty days later. *Id.* at 604-05.

[6] Although the memo is undated, testimony indicated that it was sent in March 2019. Tr. 83, 85.

Section 1. Workday.

a. The workday for full-time bargaining unit members shall consist of eight (8 hours). Unit members must be physically present at the worksite for seven and one-half (7 ½) hours which includes a 30-minute non-paid duty-free lunch period. Unit employees are expected to perform additional preparation and professional tasks necessary for the completion of their assigned work, either at or away from the work site. At the Agency's discretion, management may require employees to work up to an additional 24 hours at the work site during each school quarter without additional compensation. The Agency will normally provide three (3) workdays notice when employees are required to be at the worksite more than seven-and-one-half (7 ½) hours. Bargaining unit members may leave the worksite without obtaining permission during their non-paid, duty-free lunch time.

Appendix to Jt. Ex. 1. Dr. Minor's memo stated that each school principal would determine how the additional 24 hours would be implemented at their school; some principals chose to add 30 minutes every day, while others chose to add an hour on certain days. Resp. Ex. 6; Tr. 29, 48, 150-51, 157-58; *see also* Tr. 114. (By adding a half hour to the workday, this added a total of approximately 24 hours per school quarter. Tr. 47-48, 152.) Later that same spring, the Agency decided to implement a district-wide policy for the upcoming 2019-2020 school year, under which 30 minutes were added to every workday at every school, with some schools adding the extra time at the beginning of the workday and other schools adding it at the end. Tr. 114, 151-52; Jt. Ex. 6.[7] For the 2020-2021 school year, the Agency continued the same schedules as 2019-2020, with teachers at every school working a half hour more every day than they had under the 2005 CBA. Tr. 58, 115, 133, 153.

The management action that prompted the Union's ULP charge occurred in May of 2021, when the Agency decided to modify the schedule for School Year 2021-2022. Instead of adding 30 minutes to every workday, as they had the two previous years, the Agency decided to add a full hour to the workday twice a week, with no added time the other three days. Tr. 63-64, 78-79, 121, 153. This would still result in employees working approximately 24 hours more per quarter than they had under the 2005 CBA, but they would now be working a different schedule on different days of the week. For instance, teachers at a Fort Benning school were now required to be onsite from 7:20 a.m. to 3:50 p.m. (8 ½ hours including the 30-minute unpaid lunch) on Tuesdays and Wednesdays, and from 8:20 a.m. to 3:50 p.m. (7 ½ hours including lunch) on Mondays, Thursdays, and Fridays. Tr. 125, 130-31; *see also* Tr. 31-32, Jt. Ex. 4.

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[7] While Agency officials made at least some attempt to discuss these changes with local union leaders, the Union had already filed grievances challenging the entire CBA, so it advised its local officials not to engage management regarding the new schedules and to defer the matter to the FEA general counsel. Tr. 83-84; *see also* GC Ex. 9 at 2. For similar reasons, the Union did not file a ULP charge regarding the SY 2019-2020 schedule changes. Tr. 114-15.

This unbalanced schedule created planning problems for many employees, particularly those with school-age children, as they had to drop off and pick up their own children at different times each day. The early 7:20 a.m. start time was particularly difficult for these employees, because some of them couldn't drop off their own children early enough to get to work on time. Tr. 126-27, 131-33. The Union immediately protested to management, explaining that the new schedule was a severe hardship to many employees and objecting to the Agency's failure to conduct impact and implementation (I & I) bargaining before announcing the change to employees. Jt. Ex. 5 at 2; GC Exs. 8, 10. In addition to the Union's longstanding opposition to the implementation of the CBA and the 24-hour expansion of the workday per quarter, the Union noted that the new changes to employee starting and quitting times represented a change in conditions of employment that required the Agency to bargain. GC Ex. 10 at 1. In an email response dated June 3, 2021, an Agency official noted that in 2019 the Union had rejected its offers to "collaborate" on how to implement the scheduling provisions of the new CBA, and she again solicited the Union's recommendations regarding scheduling. GC Ex. 9 at 2. However, no negotiations on this issue occurred.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel[8] alleges that the Agency unlawfully changed the conditions of employment of employees in the Southeastern District when it changed their starting and quitting times for School Year 2021-2022. Specifically, instead of being required to work on-site for eight hours a day (including an unpaid half-hour lunch), as they had for the previous two school years, employees were required to work on-site for eight-and-a-half hours two days a week and seven-and-a-half hours three days a week. Thus, while they continued to work roughly the same total number of hours per week as they had the two previous years, they were coming to work earlier, or staying at work later, than before, and their schedules varied from day to day. The GC offers alternative theories as to when the Agency actually violated its duty to bargain: either it occurred on May 19, 2019, when Dr. Minor notified the Union and employees simultaneously of the new schedule (thereby depriving the Union of an opportunity to bargain), or in June of that year, when the Union demanded the opportunity to bargain and management refused to do so. GC Brief at 1, 22.

The GC cites the Authority's decision in *Dep't of the Air Force, Scott Air Force Base, Ill.*, 33 FLRA 532, 544 (1988) (*Scott AFB*), for the principle that while an agency is not required to bargain over the substance of a change in employee starting or quitting times, it must negotiate over the impact and implementation of that change. GC Brief at 12-13; Union Brief at 13; *see also Dep't of Veterans Affairs, VA Med. Ctr., Phoenix, Ariz.*, 47 FLRA 419, 422 (1993) (*VA Phoenix*). Moreover, an agency must provide its exclusive representative with sufficient notice of the change to enable bargaining to occur prior to implementation. GC Brief at 13; Union Brief at 15-16. The GC faults the Agency for announcing the new

[8] Within this section, I also summarize the arguments of the Union.

SY 2021-2022 schedules to employees, the Union, and the public simultaneously; this conveyed the message that the change was not subject to modification and was instead a fait accompli. *See U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 856 (2002).

The GC further argues that the change in employee schedules had both a "more than de minimis" and a "substantial" impact on conditions of employment. Noting that in *U.S. Dep't of Educ.*, 71 FLRA 968 (2020) (*Education*), the Authority modified its standard for evaluating when a change triggers an obligation to bargain; that the Authority's decision was vacated by the Court of Appeals in *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 25 F.4th 1 (D.C. Cir. 2022) (*AFGE v. FLRA*); and that the Authority has yet to establish a new standard, the GC argues that it really doesn't matter which standard is used in this case, because the impact of the change in schedules was substantial, and bargaining was required under either test. GC Brief at 12, 21-22. The GC points to the testimony of Ms. Frasier and Ms. Stockdale describing how difficult it has been for them and other employees to find child care and transportation arrangements that fit within their new schedules. *Id.* at 21; Union Brief at 13-14; Tr. 126-32. It cites *VA Phoenix,* 47 FLRA at 422, among other cases, in support of its argument. GC Brief at 21.

Next, the GC refutes the Respondent's contention that the School Year 2021-2022 schedule changes were covered by Article 18, Section 1(a) of the CBA, or by the clarification memo that Mr. King had drafted regarding that provision. The GC makes two related arguments on this point: First it insists that even though the CBA was lawfully implemented by the Agency in January of 2019, based on the terms imposed by FSIP, neither the contract nor the clarification memo is a "negotiated agreement" that the "covered-by" doctrine is intended to apply to. *Id.* at 15-16. Second, it insists that even if the covered-by doctrine is applicable to the CBA, the schedule changes imposed by the Agency for School Year 2021-2022 do not satisfy either prong of the doctrine. *Id.* at 16-20.

In support of its first argument, the GC submits that our case is governed by the Authority's decision in *Nat'l Treasury Emps. Union, Chapter 137*, 60 FLRA 483 (2004) (*CBP*). In *CBP*, the agency proposed a new overtime assignment policy and offered to negotiate with its union over the impact and implementation of that policy, but when the parties reached an impasse on those issues, the agency unilaterally implemented the policy. When the agency made specific assignments in accordance with the new policy, the union filed a grievance, which the agency denied on the ground that the assignments were "covered by" the new policy and thus were not negotiable. 60 FLRA at 484-85. The Authority held, however, that although the new assignment policy had been lawfully implemented after negotiations broke down, the "covered by" doctrine is intended to apply only to "negotiated agreements," and this unilaterally imposed policy was not negotiated. *Id.* at 487-88. While the Authority found that the agency had no duty to bargain locally on the assignment in dispute, it made it clear that the "covered by" doctrine could not be applied to a management policy that the union had never agreed to. *Id.* In our case, the GC argues that the Union never signed the CBA, and that it withdrew its earlier agreement to Article 18, Section 1(a) in mid-2019, when it objected to the way the Agency was applying it. GC Brief at 15-16.

Therefore, just as in *CBP*, the General Counsel reasons that since the contract had not been negotiated and agreed to by both parties, it would "contravene the purposes of the 'covered by' doctrine." *Id.* at 16.

Alternatively, even if the "covered by" doctrine is applicable, the GC insists that Article 18, Section 1(a) does not cover the schedule changes made in May 2021. That contract provision entitles management to require employees to work 24 additional hours per quarter without additional compensation, but it says nothing about tours of duty or starting and quitting times. GC Brief at 16-17; Union Brief at 4. The Union notes further that changing the starting and quitting times for employees was not discussed by the parties during negotiations. Union Brief at 20-24. Management had added 24 hours per quarter during the 2019-2020 school year and continued the same basic schedules for the 2020-2021 school year, and the Union had not filed a ULP charge over those changes. But the schedules announced in May 2021 for the following year were substantially different, in that they imposed variable schedules for all employees, requiring them to work different hours on different days of the week. The GC submits that the "plain language of the MLA does not contemplate such year-long changes to employees' starting and quitting times," and both the GC and the Union further submit that the history of the contract negotiations gave no indication that management would be entitled to change starting or quitting times unilaterally. GC Brief at 17-20; Union Brief at 20-24. Accordingly, they argue that the changes were neither "expressly contained in," nor "inseparably bound up with" the language of Article 18, Section 1(a). *Id.*

The GC also points to Section 1(b) of Article 18 to demonstrate that Section 1(a) was not intended to confer on management the right to unilaterally change the manner in which the additional 24 hours could be assigned. *Id.* at 18. Section 1(b) explicitly provides that if employees' duty-free lunch is extended beyond a half hour, management may extend the employees' workday by a similar amount without additional compensation. The GC argues that if Section 1(a) were intended to allow management to change starting and quitting times as part of the additional 24 hours per quarter, the parties would have added similar explicit language to that effect, as it had for Section 1(b). *Id.* at 18. Therefore, the GC insists that the May 2021 changes to starting and quitting times are only tangentially related to the CBA's authorization of 24 extra hours per quarter; in such cases, the Authority has held that the change is not "covered by" the CBA. *See U.S. Dep't of the Treasury, IRS, Nat'l Dist. Ctr., Bloomington, Ill.*, 64 FLRA 586, 592 (2010); *Soc. Sec. Admin.*, 64 FLRA 199, 203 (2009).

Respondent

In support of its contention that it had no duty to bargain with the Union over the SY 2021-2022 schedule changes, the Respondent insists that its actions were covered, and permitted, by Article 18, Section 1(a) of the CBA and by the clarification memo of February 8, 2019.[9] Resp. Brief at 7-10. Focusing on the language of the CBA provision, the

[9] Although the Respondent denied most of the allegations in the Complaint, it did not present any evidence contesting the allegations that the 2021-2022 schedule changed employees' conditions of employment and that it had a substantial impact on employees.

Respondent asserts that Section 1(a) expressly entitles management, at its discretion, to require employees to work 24 additional hours per quarter, which amounts to approximately a half hour per day, over and above what they had previously been working. Respondent emphasizes the phrase "at the Agency's discretion," and submits that "any implementation of the negotiated 24 hours per quarter unavoidably necessitates a schedule change." *Id.* at 9. Thus the first prong of the covered-by test is satisfied: the schedule changes are expressly contained in Article 18, Section 1(a). Respondent cites *U.S. Dep't of the Treasury, IRS, Denver, Colo.*, 60 FLRA 572, 573 (2005), and *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000) in support of its position. Resp. Brief at 8.

Respondent further points to the requirement in Section 1(a) that management provide employees with three days' notice when they are required to be at the worksite more than 7 ½ hours. The parties understood that this requirement was meant to enable employees to make whatever personal arrangements necessary to work the additional time, not to enable the Union to engage in impact-and-implementation bargaining each time employees' schedules were changed. *Id.* 8-9. When the Agency first added 24 hours to employee schedules in the spring of 2019, the Union did not file a ULP charge objecting to the change, nor did it do so when the SY 2020-2021 schedules were announced. *Id.* at 9, 10. Respondent argues that it is not "plausible" why the changes made in these earlier years were acceptable and the SY 2021-2022 changes were not. *Id.* at 9.

Respondent insists that the February 8, 2019 clarification memo, like the CBA itself, is also a "negotiated agreement" to which the "covered-by" doctrine is applicable. *Id.* When the parties hammered out the 24-hours-per-quarter compromise during the CBA negotiations in October of 2018, the two chief negotiators discussed some of the Union's concerns about the provision, and the Agency's chief negotiator agreed to draft the "side agreement" after the contract was executed, to alleviate some of those concerns. *Id.* at 9-10; Tr. 112-13. When the memo was sent to the Union in February 2019, after the new CBA had gone into effect, the Union did not object to any of its language, because it conformed with the understanding reached at the bargaining table. Resp. Brief at 9.

Finally, the Respondent asserts that the Union's ULP charge was not filed "timely." *Id.* at 10-12. Rather than filing its charge in 2019, when the CBA was implemented and the 24 hours were added to employee schedules, the Union filed it in 2021. When new schedules were announced in the spring of 2019 and 2020, the Union didn't object; by waiting until 2021 to file its charge, the Union's effort "should fail under the theory of laches." *Id.* at 11. According to Respondent, this delay was unreasonable, and the Respondent was materially prejudiced by it. *Id.* at 12. The Respondent does not allege, however, that the Complaint is barred under Section 7118(a)(4) of the Statute.

ANAYLSIS AND CONCLUSION

The Respondent was not obligated to bargain

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *See, e.g., U.S. Dep't of*

the Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Mich., 68 FLRA 734, 737 (2015). Even when the change involves the exercise of a management right under § 7106(a) of the Statute, the agency still must engage in I & I bargaining, if the resulting change will have more than a de minimis impact on a condition of employment. *Id.*[10]

There is no doubt, and the Respondent does not dispute here, that the new schedules for SY 2021-2022 represented a change in conditions of employment. As held by the Authority in *Scott AFB*, the substantive decision to change an employee's hours is negotiable only at the election of management, but management nonetheless is required to bargain over the impact and implementation of the change. 33 FLRA at 853-54. The testimony of the employees who had their schedules changed in SY 2021-2022 demonstrates that the impact of the change exceeds the threshold to require bargaining, regardless of what legal standard is used. Tr. 126-32.

However, as all the parties recognized in their briefs, the Agency had no duty to bargain with the Union over the schedule changes if that subject was covered in the CBA. That, indeed, is the crucial issue in this case. As I will explain, while the clarification memo of February 8, 2019 is not a negotiated agreement to which the "covered by" defense can be applied, the CBA itself is such an agreement. Therefore I must apply the principles set forth in the case law applicable to the "covered by" defense and determine whether Article 18, Section 1(a) of the CBA excused the Agency from bargaining regarding the new 2021-2022 schedules. Applying those principles, I conclude that it did.

First, I must reject the GC's argument that the CBA is not a "negotiated agreement," as that term is understood in "covered by" case law. The GC cites the Authority's decision in *CBP* as governing our situation, but the GC's reasoning expands *CBP* far beyond the boundaries and the purposes of that decision, and it ignores other decisions by the Authority that fit more closely with our case.

The first case to understand here is *Interpretation and Guidance*, 15 FLRA 564 (1984), which considered for the first time whether an agency head could disapprove provisions of an agreement that were imposed by the Panel. It reconciled an apparent conflict between the language of Sections 7119(c)(5)(C) -- that final actions of the Panel are "binding" -- and 7114(c) – that empowers agency heads to approve or disapprove agreements

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[10] I noted earlier that the case law for determining the threshold of when a change requires bargaining is unsettled. In its *Education* decision, the Authority raised the threshold from a "more than de minimis" impact to a "substantial" impact; 71 FLRA at 971. The U.S. Court of Appeals for the D.C. Circuit vacated that decision in *AFGE v. FLRA*; 25 F.4th at 2-3, and the Authority has not yet indicated whether it will return to the de minimis standard or articulate something else. In a decision issued earlier this year, I explained at some length why I found it appropriate, in the absence of definitive guidance from the Authority, to return to the "more than de minimis" threshold. *Social Security Administration, Baltimore, Md.*, Case No. WA-CA-20-0257 (Jan. 30, 2024), 2024 WL 688503. I will not repeat that analysis here, both because I have otherwise concluded that the schedule changes here are covered by the CBA and because the impact of the schedule changes is both "more than de minimis" and "substantial."

– by holding that since Panel actions must not be inconsistent with the Statute, an agency head is authorized to disapprove actions that are inconsistent with the Statute. *Id.* at 565-67. In so ruling, the Authority reasoned: "It is well established that the procedures of the Panel are part of the collective bargaining process and that any agreement, mandated or otherwise, resulting therefrom is a part of the collective bargaining agreement." *Id.* at 567. This decision was affirmed *sub nom AFGE v. FLRA*, 778 F.2d 850 (D.C. Cir. 1985), and similar reasoning was applied in a different context in *AFGE Locals 225, 1504, and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 646 n.24 (D.C. Cir. 1983).

While the Authority's language quoted above from *Interpretation and Guidance* was not strictly part of its holding, it has subsequently applied that rationale in cases that closely match the context of our case. In *U.S. Dep't of Labor, Wash., D.C.*, 60 FLRA 68 (2004) (*DOL*), the agency and union negotiated over a proposed interim child care subsidy program but could not reach an agreement; the agency then declared an impasse and indicated its intent to implement its final proposal. *Id.* at 68. The union did not respond or invoke the Panel's assistance, but it filed a ULP charge when the program was implemented. Not only did the Authority hold that the agency was justified in implementing the program, but it also held that the agency did not need to notify the union or bargain before making the interim program permanent, as that action was covered by the terms of the interim program. *Id.* at 71-72.

FLRA case law had long held that an agency is entitled to implement its final proposal upon an impasse in negotiations, if its union fails to seek the Panel's assistance, but in *DOL* the Authority emphasized that such unilaterally-implemented provisions become a part of the parties' CBA. *Id.* Quoting the same language from *Interpretation and Guidance* that I cited earlier, the Authority stated that there is no meaningful distinction between a provision that is imposed by the Panel and a provision that is unilaterally imposed after the union chooses not to go to the Panel; otherwise, parties might be incentivized to avoid the Panel. *Id.* at 72. Finally, once the interim program became a part of the CBA, the Authority held that its terms covered a procedure for making the program permanent, and further negotiations were not necessary to do so. *Id.* at 72.

A few months after its *DOL* decision, the Authority ruled somewhat differently in the *CBP* case, on which the General Counsel seeks to rely. CBP management unilaterally terminated its prior, nationwide, inspection-assignment policy and offered to engage in I & I bargaining with the union, but the union refused; the agency then unilaterally implemented its new policy. 60 FLRA at 483-84. In an earlier decision,[11] the Authority had held that the unilateral implementation of the nationwide policy was lawful, as the agency had satisfied its I & I bargaining obligation, and in *CBP* it further held that management had no duty to bargain on a local level over the policy. 60 FLRA at 487. The Authority refused, however, to invoke the "covered by" doctrine as a basis for its ruling. It stated that "the 'covered by' doctrine has been applied only in the context of negotiated agreements" and determined that the inspection policy was not such an agreement: it was not part of the parties' master CBA, nor was it subject to that CBA. *Id.* It distinguished this case from its earlier ruling in *DOL*,

[11] *U.S. Dep't of the Treasury, Customs Service, Wash.*, D.C., 59 FLRA 703 (2004).

because the child care policy in DOL was expressly "made a part of and subject to the duration of the [collective bargaining] agreement." *Id.* at 487 n.12, 488 n.13. In a concurring opinion, Chairman Cabaniss stated that while she agreed the agency had no duty to bargain over the inspection policy, she saw no difference between CBP's inspection policy and DOL's child care policy; accordingly, she would consider both to be "negotiated agreements" to which the "covered by" defense should apply. *Id.* at 489.

We could expend considerable energy debating (as the Members in *CBP* did) why the unilaterally-imposed policy in *DOL* was a "negotiated agreement," while the unilaterally-imposed policy in *CBP* was not, but neither possible outcome of that debate would support the GC's current argument that the FSIP-imposed terms of our CBA do not constitute a negotiated agreement under the "covered by" doctrine. Neither *DOL* nor *CBP* involved contractual provisions imposed by the Panel, and that is the critical factor here. The Authority's reasoning in *DOL* drew part of its support from the fact that the parties there engaged in actual, substantive negotiations on the proposed child care policy, and as a result the union had the opportunity to go to the Panel to resolve the impasse; the Authority indicated that it might motivate parties to avoid the Panel if it declined to apply the "covered by" doctrine. 60 FLRA at 72. The Authority in *DOL* started from the premise (established in *Interpretation and Guidance*) that contract terms imposed by the Panel are part of the CBA and subject to the "covered by" defense, and it then held that the same policy should apply to provisions that could have been resolved by the Panel, had the union chosen to seek its assistance. The *CBP* decision did not challenge that underlying premise. In the case before us, we don't have to debate whether the negotiating parties could have, or should have, sought FSIP's assistance: they did so, and once the Panel issued its order, those terms covered by the order were incorporated into the CBA, regardless of whether the Union or the Agency had agreed to them.[12] In both the *DOL* and *CBP* decisions, all Members of the Authority agreed that Panel-imposed contract provisions were subject to the "covered by" doctrine, so the GC's reliance on *CBP* is misguided.[13]

I agree with the General Counsel, however, that the "covered by" defense cannot be applied to the "clarification agreement" drafted in February 2019 by Agency negotiator King. Both parties' bargaining spokesmen, King and Hunter, testified that they wanted the clarification memo to be separate and apart from the overall CBA. Tr. 96-99, 176-80. While the memo addressed the Union's primary concerns regarding the implementation of Article 18, Section 1(a), it did not address all of them, and the Union never signed the document drafted by King. It was, as the Respondent argues, "negotiated," but those

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[12] The Union's attempt to revoke its agreement to Article 18, Section 1(a) in February of 2019, two months after the FSIP decision had been issued, does not change the fact that the entire CBA was binding. It could not unilaterally and retroactively nullify the Panel's decision or the terms of the CBA.

[13] Indeed, the GC's reliance on the *CBP* decision, without even referring to the *DOL* decision, raises questions regarding its sincerity. Chairman Cabaniss's concurrence in *CBP* explicitly discussed, and drew support from, the *DOL* decision, and the majority explicitly discussed why it viewed *CBP* as distinguishable. 60 FLRA at 487, 489. If the GC wished to rely on *CBP*, it should at least have attempted to distinguish it from *DOL* and from *Interpretation and Guidance*.

negotiations did not result in a signed agreement, and it was not meant to be a part of the CBA. The memo may be useful to the parties in understanding how to interpret and apply Article 18, Section 1(a), but it cannot support the Respondent's "covered by" defense.

Having determined that the CBA imposed by the Panel is subject to the "covered by" doctrine, I now must apply that doctrine to the schedule changes announced by the Agency in May of 2021 for School Year 2021-2022. The contours of the doctrine are by now well-known to the parties, who have already described it in their briefs. As articulated by the Authority in *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004 (1993), I must first determine whether the disputed changes are expressly contained in the CBA. This does not require an exact congruence of language, however: I will find the necessary similarity if a reasonable reader would conclude that the CBA provision settles the matter in dispute. *Id.* at 1018. If the CBA provision does not expressly encompass the disputed changes, then I must determine whether those changes are inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by the contract. *Id.* In other words, I will evaluate whether the subject matter of the change is so commonly considered to be an aspect of the matter addressed in the contract that the negotiations are presumed to have foreclosed further bargaining on the matter. *Id.* Such an analysis may require evidence concerning the bargaining history of the disputed provisions, or other evidence shedding light on the intent of the parties. *Id.* at 1018-19. But "[i]f the subject matter in dispute is only tangentially related to the provisions of the agreement and . . . it was not a subject that should have been contemplated as within the intended scope of the provision," then it is not covered by the CBA and must be negotiated. *Id.* at 1019. *See also, generally*, the Authority's recent decision in *AFGE National ICE Council 118*, 73 FLRA 309, 310-11 (2022) (*ICE Council 118*).

Such an analysis naturally begins with the text of the contractual provision in dispute, Section 1(a) of Article 18. The full text of Section 1(a) was quoted earlier, but the key sentence is, "At the Agency's discretion, management may require employees to work up to an additional 24 hours at the work site during each school quarter without additional compensation." The Union and the GC concede that this explicitly permits management to require employees to work more hours than in the past, but they insist it doesn't permit management to change employees' starting or quitting times. It seems to me that such an argument defies the laws of physics: regardless of what schedule employees previously worked, they were going to have either their starting time, or their quitting time, or both, changed when the Agency exercised its discretion to require them to work additional hours. This certainly occurred in School Year 2019-2020, as well as the following year, when some schools required employees to stay a half hour later than before and other schools required them to show up a half hour earlier. The same thing occurred again in 2021-2022 – employees were required to work roughly the same number of hours per quarter as they had in the previous two years – except that the hours were distributed differently than before. Now, employees' schedules varied from day to day, but the number of hours worked was the same as in the previous two years. The variable nature of the work schedule undoubtedly created adjustment problems for the employees, but management was simply exercising its contractual discretion to add 24 hours per quarter to their schedule.

In the circumstances of this case, the two prongs of the "covered by" test are so close as to be virtually indistinguishable. I am tempted to conclude that Section 1(a) "expressly" permits the Agency to change employee starting and quitting times, because I think it is fairly clear from the text, but the text is not explicit in this regard. Instead, I think it is more accurate to say that this type of change is "inseparably bound up with" the Agency's right to add 24 hours to employees' work schedules. When management was given the discretion to add up to a certain number of hours to an employee's schedule, the distribution of those hours was also up to management, and employees can have no reasonable expectation that the additional hours will always come in the morning, or in the afternoon, or on certain days of the week. Thus, while management's discretion to change starting/quitting times may not be explicitly contained in the literal text of the provision, it is "plainly an aspect of" that text.

The fourth sentence of Article 18, Section 1(a)[14] further supports the Respondent's position. The three-day notice requirement is located immediately after the sentence allowing management to require employees to work an additional 24 hours per quarter at the worksite, and it clearly is intended to give employees an opportunity to make transportation and work-life adjustments to accommodate management-imposed schedule changes. This suggests that such schedule changes could be imposed at various times during the school year and that negotiations would not be required on each occasion, as long as employees are provided proper notice.

While the Union argues that the 2018 negotiations never addressed the possibility of changing employee starting and quitting times, that issue is inseparable from the number of hours employees are required to work.[15] Indeed, the employees here had their starting or quitting times changed at the start of the 2019-2020 school year, when they either had to report a half hour earlier than in 2018-2019 or they had to stay a half hour later. Although

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[14] That sentence reads: "The Agency will normally provide three (3) workdays notice when employees are required to be at the worksite more than seven-and-one-half (7 ½) hours."

[15] This line of argument is familiar to me, as it echoes views that I expressed in 2015, in a case involving the Federal Bureau of Prisons and a contractual provision governing the manner in which correctional officers were assigned from a "relief roster" to fill in for sick or absent officers. *U.S. DOJ, Fed. Bureau of Prisons, FCC Coleman, Fla.*, 69 FLRA 447 (2016). There, the wardens of several institutions in a prison complex had established separate relief rosters pursuant to the CBA, but the CBA did not address how positions could be filled after the several rosters were consolidated into one. I reasoned that the language of the CBA did not address how to fill positions in a roster that had not existed when the CBA was drafted; accordingly, I ruled that the agency needed to negotiate such procedures. *Id.* at 469-71. The Authority agreed with me. *Id.* at 449-50. But the Court of Appeals for the District of Columbia Circuit ruled that we were taking too narrow a view of the "covered by" defense, and it held that the disputed contract provision indeed precluded bargaining over assignments from one institution to another. It said, "It does not matter that the parties did not specifically contemplate consolidated relief rosters when they negotiated the Master Agreement. What matters is that consolidated relief rosters are within the compass of [the disputed contract provision]." *U.S. DOJ v. FLRA*, 875 F.3d 667, 670 (D.C. Cir. 2017). The court further explained, "[i]f the obligation to bargain could be imposed whenever a party insisted upon reopening bargaining because it did not understand the full reach of the parties' agreement when it was executed, this would wreak havoc in bargaining relationships." *Id.* at 674. In its 2022 decision in *ICE Council 118*, the Authority directly referred to these words from *DOJ v. FLRA* in finding that a contractual provision recognizing management's exclusive role in developing and administering training obviated the need for bargaining when management developed a training policy in a new subject area. 73 FLRA at 311. Thus while the GC's argument is reasonable, it does not reflect the developments in the case law.

the Union's failure to file ULP charges at that time did not constitute a waiver of its right to do so in 2021, it illustrates that a change in starting/quitting times cannot be separated from a change in the number of hours worked.[16]

Accordingly, I find that the change in employee starting and quitting times imposed by the Respondent in May of 2021 was covered by Article 18, Section 1(a) of the CBA and as such, the Respondent was not required to notify the Union in advance of the change or to negotiate over its impact and implementation. Therefore, the Respondent did not commit an unfair labor practice or violate the Statute as alleged.

I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the Complaint in Case No. AT-CA-21-0324 be, and hereby is, dismissed.

Issued, Washington, D.C., May 16, 2024

RICHARD A. PEARSON
Administrative Law Judge

[16] The Respondent's attempt to invoke the doctrine of laches here is misguided. The Agency exercised its contractual right to add 24 hours to the employees' schedule in 2019, and it did so again in 2020 and 2021. The Union's choice not to file a ULP charges in 2019 or 2020 did not preclude it from doing so when management again exercised its right in 2021. Section 7118(a)(4) of the Statute requires a charge to be filed within six months of the alleged ULP; in this case the charge was filed on June 22, 2021, and the ULP was alleged to have occurred in May of that year.