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

OALJ 13-19

DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE
WASHINGTON, D.C.
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2103
CHARGING PARTY

Case No. BN-CA-10-0257

Gerard M. Greene
For the General Counsel

Josh C. Hildreth
Mel Hutson
For the Respondent

Vincent R. Castellano, Sr.
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This unfair labor practice hearing was conducted pursuant to and in accordance with the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (Statute), and the rules and regulations of the Federal Labor Relations Authority (Authority), 5 C.F.R. Part 2423.

On April 23, 2010, the American Federation of Government Employees, AFL-CIO, Local 2103 (Charging Party/Union), filed an unfair labor practice charge against the Department of the Interior, U.S. Fish and Wildlife Service, Washington, D.C. (Respondent/Agency). After conducting an investigation, the Regional Director of the Boston Region issued a complaint and notice of hearing on July 5, 2011, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by repudiating an oral agreement it reached with the Union covering official time and travel.

On September 7, 2011, the General Counsel filed a motion for summary judgment, to which the Respondent filed a motion to strike on September 9, 2011. The motion for summary judgment was denied on September 12, 2011.

A hearing upon the matter was conducted in New York, New York, on September 14, 2011. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses.

After the hearing, the General Counsel filed a motion to strike the Respondent's post hearing brief, which is denied. In making this decision I have fully considered the post hearing brief filed by the General Counsel as well as the improperly styled document filed by the Respondent referred to herein as Respondent's Brief.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent and the Union reached a binding oral agreement covering official time and travel and that the Respondent unlawfully repudiated the agreement. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute, that employs wildlife inspectors at ports and international mail facilities throughout the United States, Guam and Puerto Rico. (G.C. Ex. 1(c); Tr. 22). The American Federation of Government Employees, AFL-CIO, Local 2103, is the exclusive collective bargaining representative of a unit consisting of wildlife inspectors in the Respondent's Office of Law Enforcement and is a labor organization within the meaning of § 7103(a)(4) of the Statute. (G.C. Ex. 1(c)).

The unit of approximately one-hundred and seven (107) wildlife inspectors was certified in September 2009. (Tr. 21-22). Before certification, the wildlife inspectors were not represented by an exclusive representative. (*Id.*). Kenneth Kitchell is a wildlife inspector at the Respondent's Valley Stream, New York facility. (Tr. 20-21). In November 2009, Kenneth Kitchell became president of the local Union. (Tr. 21).

Because this unit was newly recognized, there was no collective bargaining agreement (CBA) in existence covering the subject of official time. In January of 2010, Kitchell and other Union officers and stewards began to prepare for CBA negotiations anticipating that bargaining would begin the following June. (Tr. 41-42). To this end, they participated in evening conference calls while off duty to discuss draft language for the Union's negotiation proposals. (Tr. 42, 46-47). After requests that Kitchell and other Union officials be granted official time to prepare for CBA negotiations were denied, the Respondent's human relations office informed Kitchell that Benito Perez, Chief of the Office of Law Enforcement, was the Agency official authorized to make decisions regarding official time for the Union. (Tr. 25, 35-36, 42; G.C. Ex. 1(c)).

Correspondence Prior to the March 11, 2010, Conference Call Negotiations

In early March 2010, Kitchell contacted Benito Perez and requested a meeting to discuss the Union's role and the rights of Union officials to represent and negotiate on behalf of bargaining unit employees. (G.C. Ex. 2). Perez emailed a response indicating a willingness to meet via conference call, with Gary Mowad, Deputy Chief of the Office of Law Enforcement included as an addressee. (G.C. Ex. 1(c) & 4). Kitchell replied with an email that identified the topics he wanted to discuss on the call. His list included official time and compensation, official travel, use of government resources, availability of Union officials, current changes in working conditions, and Union access to members/nonmembers. (G.C. Ex. 5). Perez's response to that email included the following statement: "It is my intent to set some interim parameters in place to allow duty time, to be determined, for you and your officers and stewards to tend to union business." (G.C. Ex. 6). Perez indicated that the other issues that Kitchell identified might need to wait until a future meeting. (*Id.*).

In the process of scheduling the conference call, Mowad emailed Kitchell asking him to send a list of Union officials needing official time, the dates and times they needed it, and promising he would try to act upon the request that day. (G.C. Ex. 9). Mowad continued, "Please be advised, we hope to use this format for future times requests." (*Id.*). Mowad also stated that, going forward, management would prefer to receive the Union's official time requests at least one week in advance of the date of the requested official time. (*Id.*). Kitchell emailed a response stating that Union officials sometimes encounter situations requiring them to use official time to respond more quickly than Mowad's proposed procedure would permit. (G.C. Ex. 10). In lieu of the process outlined by Mowad, Kitchell proposed that the Respondent grant officers and stewards some amount of official time for use on an "as needed" basis. (*Id.*). In return, Kitchell promised that he would "ensure this time to be legitimate, actually needed and not [sic] used for recruiting, holding elections, or collecting dues." (*Id.*).

Ultimately, Mowad and Kitchell arranged for a conference call to be conducted on March 11, 2010. (G.C. Ex. 11 & 12). When Kitchell asked Perez if a member of the Respondent's administrative staff at the Valley Stream facility could take notes during the call, Perez indicated that local management would have to approve such a request. (G.C. Ex. 14 & 15). Local management at the Valley Stream facility denied Kitchell's request for administrative assistance and the opportunity to have an employee who was not in the bargaining unit create a record of the telephone negotiations was lost. (Tr. 53).

March 11, 2010 Conference Call Negotiations

On the March 11, 2010 conference call, Perez and Mowad represented the Respondent and Kitchell and Union steward Paul Cerniglia represented the Union. (Tr. 54, 131-32). While the Respondent now contends that no agreement was reached during these negotiations, neither side challenges the validity of the appointments or the authority held by the negotiators. As indicated in the chain of emails scheduling the conference call, the primary purpose of the conference call was to negotiate an agreement covering the use of official time by Kitchell and the other Union officers and stewards. (G.C. Ex. 2 - 15).

During the call, Kitchell indicated that he and the Union's officers and stewards needed official time to prepare for CBA negotiations, represent employees, and to inspect the working conditions of unit employees. (Tr. 55-56, 58, 110). The parties also discussed the three (3) hour conference calls Kitchell was conducting with the officers and stewards on a weekly basis to prepare for CBA negotiations. (Tr. 60). Ultimately, they agreed that Union stewards and officers below that of President would receive twenty-five percent (25%) official time which amounted to twenty (20) hours per eighty (80) hour pay period, and they agreed that the time Union stewards and officers spent on the weekly Union conference call would come from their allotment. (G.C. Ex. 21 & 24; Resp. Ex. 1; Tr. 59, 61, 110, 118, 132). The parties also agreed that Kitchell would receive fifty percent (50%) official time, or forty (40) hours per eighty (80) hour pay period. However, they agreed that the three hours Kitchell spent on the Union conference call each week would not come from his forty hour allotment, and he was granted an additional six (6) hours per pay period to participate in the weekly Union conference call, giving him a total of forty-six (46) hours of official time per pay period. (G.C. Ex. 21 & 24; Resp. Ex. 1; Tr. 60, 111, 118, 132). The parties also understood and agreed that these allotments were not absolute caps and that additional official time would be granted when warranted. (Resp. Ex. 1). Finally, to ensure they could meet in privacy, the parties agreed that Union officials could use government owned vehicles (GOVs) to travel off-site for their weekly conference calls. (Resp. Ex. 1; Tr. 64).

Other than agreeing that use of official time would be recorded in the Respondent's time keeping system, the parties did not reach any agreement on procedures to be used for requesting or scheduling the official time granted by the allotments. (Tr. 79). While there was conflicting testimony on the issue of whether supervisory approval of use was required in advance, I find that the parties did not agree that employees would obtain supervisory approval prior to using official time from the amounts allotted. Mowad testified that although the parties did not agree on a "specific procedure," "they were told to request time through their supervisor[,]" who would either approve it or seek guidance from a higher level supervisor. (Tr. 133). However, Kitchell testified that the Union only agreed to record the use of official time provided by the allotments in the Respondent's time keeping system. (Tr. 79). Cerniglia testified that the Union agreed to "notify" supervisors of official time use, but did not agree to request permission in advance of using the allotted official time. (Tr. 121).

Further, Mowad admitted that the possibility of a supervisor disapproving a request for official time "was not discussed on this call[ ]" (Tr. 133), and documents issued by the Respondent that memorialized and discussed the parties' agreement do not mention procedures for requesting use of official time from the allotments in advance. (G.C. Ex. 24; Resp. Ex. 1). A March 11, 2010, email from Mowad to other managers informing them of the agreement reached during the conference call states that Kitchell and Union officers and stewards "will be granted" the agreed upon amounts of official time with no indication that supervisory approval was required prior to use. (Resp. Ex. 1). In an April 7, 2010, email from Vonda Bell, Deputy Director of Human Capital Management for the Respondent, addressed to Benito Perez and Mowad, Bell indicated that "The March 11, 2010, conference call will need to take place again, as the current arrangement discussed in the call will not

suffice. It appears that the amount of official time granted and lack of a procedure for requesting/approving official time, is impacting management's ability to manage daily assignments/tasks." (G.C. Ex. 24). The record contains no indication that Perez or Mowad challenged Bell's assertion about the lack of procedures.

Finally, statements made by the Respondent as part of revoking the terms of the oral agreement indicated that use of official time would now be approved by supervisors was tacit admission that such approval was not previously required. (G.C. Ex. 21 & 24). For example, in his email to supervisors explaining the Respondent's plan to revoke the agreement, Perez told supervisors that after the agreement was "nullified," they could "anticipate the approval for official time requests will fall squarely within each of your purviews." (G.C. Ex. 24). As the weight of the evidence demonstrates that the negotiators did not agree to include a provision that required request and approval before the use of allotted official time, I find that the parties did not agree that those granted an allotment of official time had to request and obtain supervisory approval prior to use thereof. (Tr. 121).

During the conference call negotiations, Kitchell also raised the issue of travel expenses and the Respondent agreed to pay representational travel expenses. (Tr. 61). Kitchell proposed that he be able to visit ports where bargaining unit employees worked in order to inspect and become familiar their working conditions. (*Id.*). According to Kitchell, this proposal would assist him in responding to bargaining unit employees who raised complaints about their working conditions. (Tr. 61-62). While Perez and Mowad agreed that the Respondent would pay travel expenses for on-site inspections of the workplace by Kitchell, the parties also agreed that Kitchell would visit all locations in close proximity during a single trip to maximize the efficiency of the travel costs. (Tr. 62).

Kitchell also proposed that the Respondent pay his travel expenses to Brunswick, Georgia, to attend an upcoming training course for newly hired inspectors so he could meet and visit with the new employees and inform them of their right to representation by the Union. (Tr. 63, 140, 170). Kitchell made clear that he would not recruit new Union members during his visit with the course trainees and the Respondent agreed that it would pay for Kitchell's travel to the training course and give him time to meet with the new employees. (Tr. 63).

The parties also discussed a tentative timeline for the initiation of CBA negotiations. Because he was about to leave on a trip to Qatar, Perez was going to be unavailable, so the parties agreed to try to meet on April 12-13, 2010, to conduct ground rule negotiations, with a goal of conducting CBA negotiations during the wildlife inspectors' in-service training in June 2010. (Tr. 55-56, 136, 142). Although Kitchell requested that they sign a document that memorialized the terms reached during the conference call negotiations, Perez indicated that he had no time to do so as a result of his impending travel.[1] (Tr. 66).

[1] The Responded was not charged with an unfair labor practice over the refusal to execute a written document embodying the agreed upon terms.

Events After the March 11, 2010, Conference Call Negotiations

After completion of the conference call negotiations, Mowad sent an email to the Respondent's managers at 6:46 p.m. that evening, "to memorialize the agreement that Chief Perez had made with Mr. Kitchell". (Resp. Ex. 1; Tr. 135). The email stated that they had "reached an interim agreement on the use of official time for union business,"[2] and detailed the amount of official time the parties had agreed to award to the various Union officials, indicating that more official time may be granted for a specific issue. (Resp. Ex. 1). The email also advised that Union officials could conduct weekly conference calls off-site using GOVs, and that the "[t]ime spent on union work will be coded and tracked in Quicktime." (*Id.* at 2). The email concluded by stating that "Benny and I will meet with the union again in April or May. Additional or amended guidance may be generated as a result of that meeting." (*Id.*)

On March 12, 2010, Kitchell contacted Mowad about the trip to Brunswick, Georgia for the new employee training course discussed during the negotiations. (G.C. Ex. 16). Kitchell stated that "In order to maximize the efficiency of the trip," he would travel to the Respondent's port facility at Miami, Florida, as part of the visit. (*Id.*). On March 16, 2010, Mowad responded that he had been advised that the trip "may violate" 5 U.S.C. § 7131, and while he did not authorize Kitchell's travel to Miami (G.C. Ex. 17), he did authorize Kitchell's travel to Brunswick, Georgia, and Kitchell visited with the newly hired inspectors attending the new employee training course as previously agreed. (G.C. Ex. 17; Tr. 74-75). Both Kitchell's attempt to consolidate trips and Mowad's approval of the travel to Brunswick, manifested a meeting of the minds upon the terms of the previously negotiated oral agreement and demonstrated their intention to abide therewith.

While at the new employee training course, Kitchell became aware of an inspector who needed Union representation in a disciplinary matter. (Tr. 75). Kitchell asked Mowad if a particular Union official assigned to Respondent's office in Louisville, Kentucky, could represent that inspector and Mowad agreed. (Tr. 75-76). Mowad authorized reimbursement of that Union official's travel expenses from Louisville, Kentucky to Brunswick, Georgia. (Tr. 76, 152). Again, this approval by Mowad was consistent with the terms of the oral agreement and manifested a meeting of the minds with intention to abide by the terms of the oral agreement.

At some point, Mowad's March 11 email to subordinate managers providing information and guidance on the terms of the oral agreement covering official time came to the attention of Vonda Bell, Deputy Director of Human Capital Management for the Respondent. (G.C. Ex. 1(c); Tr. 176). Bell consulted with some of the Respondent's labor

[2] Mowad testified that when he used the phrase "union business" in the March 10 email he did not mean to imply "internal [union] business" within the meaning of 5 U.S.C. § 7131(b). (Tr. 165). Rather, he testified that he intended the term "union business" to include representational duties, and was unaware of the statutory distinction between "internal" union business and those representational activities for which unions may properly use official time. (Tr. 153).

relations specialists, including the "chief of labor relations," concerning the terms of the oral agreement reached during the March 11 negotiations. (Tr. 177-78). On April 7, 2010, Bell emailed Perez and Mowad concerning the interim agreement outlined in Mowad's March 11 guidance to managers. (G.C. Ex. 24). In this email, she expressed concern that the "arrangement" was impacting management's ability to manage daily work assignments, as a result of the "amount of official time granted and lack of a procedure for requesting/ approving official time". (*Id.*). Within her missive, she referred to the "amount of official time granted" as "quite excessive[ ]" and "excessive." (*Id.*). She also instructed Mowad and Perez that "[t]his arrangement will need to be halted immediately" expressing concern that the "current arrangement" could become "past practice." (*Id.* at 1).[3]

As a result of the Bell directive, Perez emailed Kitchell a communication on April 9, 2010, that set forth a summary of the terms previously agreed upon during the conference call negotiations and stated that, "effective immediately, the practice outlined above must cease and desist." (G.C. Ex. 21). Perez also stated, "We have been informed by the Service and the Department that this agreement is in direct violation of 5 U.S.C. [§] 7131, which outlines the regulatory uses [of] official time. Under no circumstances can official time be used to conduct the internal business of a labor organization." (*Id.*).

In addition to rescinding their oral agreement, the April 9 email from Perez unilaterally instituted new terms for the use of official time by the Union. Specifically, it stated that the Union would be granted a "reasonable amount of official time" for: "serving as a Union representative during meetings of joint committees established by agreement of the Parties;" "negotiating labor management agreements;" "participating for . . . the Union in . . . proceedings before the FLRA or the Panel;" and "representing another bargaining unit member in an arbitration proceeding." (*Id.*). The email required that all official time requests be "submitted through the individual requestor's regional line supervisory and management structure for approval[,]" and stated that "Regional management shall promptly respond in writing at the earliest opportunity possible, but no later than 24 hours, to the Union." (*Id.*). The email concluded by stating, "[t]his practice will be in effect until such time that management and the Union delivers a proposal on Official Time which is in accordance with 5 USC 71" (*Id.*).

After receiving the April 9 email from Perez, Kitchell and Cerniglia spoke directly with Vonda Bell via telephone. (Tr. 81, 183). During the call, Bell stated that the earlier conference call had not resulted in a binding agreement and that Kitchell was not legally entitled to use official time and government funds to travel to the various ports where unit employees worked. (Tr. 81, 184).

After the Perez email of April 9, some Union requests for official time were denied in their entirety and others were approved for less than the amount of time requested. (G.C. Ex. 22 & 23; Tr. 84, 86-88, 104-06, 108-09, 120). For example, several of Kitchell's

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[3] Respondent's concern that a negotiated agreement could develop into a past practice demonstrates a fundamental misunderstanding of Federal labor law that explains how it arrived at this juncture.

requests were denied and those that were approved usually granted no more than two hours, even when he had requested more official time based on the nature of representational duties to be performed. (G.C. Ex. 22 & 23; Tr. 109). As a result, Kitchell testified that he has performed representational work while on annual leave and during his non-duty hours. (Tr. 89-90).

The Respondent and the Union completed ground rule negotiations for the new CBA and reached an agreement covering the use of official time for bargaining preparation. (Tr. 182-83). However, that agreement did not cover the use of official time for other representational activities conducted by the Union. (Tr. 190). As of the hearing date, the parties had not completed negotiations for a new CBA.

DISCUSSION

Positions of the Parties

General Counsel

The General Counsel contends that the Respondent violated 5 U.S.C. § 7116(a)(1) and (5) by repudiating the binding oral agreement it reached with the Union during the March 11, 2010, conference call negotiations. The General Counsel argues that the oral agreement is binding because the parties reached a "meeting of the minds" and took steps thereafter to implement the terms of the agreement. *U.S. DOD, Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 746 (2010) (*Def. Language Inst.*). In particular, the General Counsel asserts that the parties reached a "meeting of the minds" concerning the duration of the agreement, contending that the agreement was to remain in effect until the parties met to negotiate ground rules, at which point they could memorialize the oral agreement or negotiate modification of its terms.

In addition, the General Counsel disputes the Respondent's contention that the terms of the oral agreement were illegal because they allowed the Union to use official time for internal union business in violation of 5 U.S.C. § 7131(b). Specifically, the General Counsel argues that there is no evidence that Kitchell or any other Union official misused official time in violation of § 7131(b) and that Respondent's contention that the agreement permitted illegal uses of official time is not a reasonable interpretation, nor would it establish illegality of the entire agreement. The General Counsel submits that if Kitchell or any other Union official misused official time, the Respondent had alternative courses of action available other than repudiating the agreement in its entirety.

Further, the General Counsel argues that the Respondent's repudiation was a "clear and patent" breach that went "to the heart of the parties' agreement", because the April 9, 2010, email from Benito Perez categorically annulled the entire oral agreement by announcing a cease and desist from all of the previously agreed upon terms and unilaterally replaced those terms with a substantially different process. *Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 862 (1996) (*Scott AFB*).

As a remedy, the General Counsel seeks an order requiring the Respondent to reinstate the terms of the oral agreement reached during the conference call negotiations, compliance with all of its provisions, and a make whole remedy for Kitchell and any other Union official who was denied official time as a result of the Respondent's repudiation of the official time allotments established by the oral agreement. Specifically, the General Counsel argues that the Respondent should restore any annual leave used to perform representational duties and compensate employees at straight-time rates where non-duty time was used for representational duties that otherwise would have been performed on official time allotted by the oral agreement. *U.S. Dep't of Agric., Food Safety & Inspection Serv.*, 62 FLRA 364, 368 (2008) (*Food Safety*); *U.S. DOD, Contract Audit Agency, Ne. Region, Lexington, Mass.*, 47 FLRA 1314, 1322-23 (1993) (*Contract Audit Agency*).

Respondent

The Respondent contends that it did not violate the Statute because the negotiators did not create a binding oral agreement during the conference call. The Respondent argues that there was no "meeting of the minds" concerning the duration of the agreement, or the method to be used for requesting official time. *Dep't of Interior, Bureau of Indian Affairs*, 31 FLRA 267 (1998)(*DOI-BIA*). (The incorrect citation 31 FLRA 767 was provided in Respondent's Brief).

Assuming that a binding oral agreement was formed, the Respondent submits that it lawfully ended compliance with the terms of the agreement because the agreement illegally permitted the Union to use official time for internal union business in violation of 5 U.S.C. § 7131(b). According to the Respondent, Kitchell used official time for internal union business such as membership solicitation and the Respondent acted lawfully by revoking an illegal agreement.

CONCLUSIONS OF LAW

The Parties Reached a Meeting of the Minds and Formed a Binding Oral Agreement

Under § 7114 of the Statute, an agreement exists where "authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining." *U.S. DHS, Customs & Border Prot., San Diego, Cal.*, 61 FLRA 136, 137 (2005) (*Customs*) (quoting *U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 317 (1977)) (internal quotation marks omitted). Although the parties are required to execute a written agreement when requested, formal execution is not necessary for an agreement to be binding. *Id.*; *U.S. DOD Dependents Schools*, 55 FLRA 1108, 1111 (1999) (*DOD Schools*). Thus, the Authority has held that parties may enter into binding oral agreements. *DOD Schools*, 55 FLRA at 1111.

While a meeting of the minds must occur before a binding contract is created, *Customs*, 61 FLRA at 138, conduct by the parties "manifesting an intention to abide by the agreed-upon terms", is one way of showing a meeting of the minds. (*Id.*) (quoting *Bobbie Brooks, Inc. v. Int'l Ladies' Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987)) (internal quotation marks omitted).

In this case, the evidence in the record including the conduct of the parties post negotiation, demonstrates that the parties reached a meeting of the minds during the March 11, 2010, conference call. They agreed that Union stewards and officers below president would receive twenty (20) hours of official time per pay period and that Union president Kitchell would receive forty-six (46) hours of official time per pay period. (G.C. Ex. 21 & 24; Resp. Ex. 1; Tr. 59-61, 110-11, 118, 132). The parties also agreed that Union officials could use GOVs to travel off-site for privacy during their weekly Union conference calls. (G.C. Ex. 21; Resp. Ex. 1; Tr. 64). The parties also decided that the Respondent would pay for travel expenses of Union officials engaged in representational activities. (Tr. 61). The Respondent does not dispute that the parties reached an oral agreement on these terms, and subsequent to the agreement the Respondent engaged in actions manifesting an intention to abide by the agreed upon terms. However, Respondent now argues that no enforceable agreement was formed because there was not a sufficient meeting of the minds concerning the duration of the agreement nor was there an oral agreement upon the process to be used for requesting and scheduling official time.

Regarding the duration of the agreement, I find that the parties reached a meeting of the minds by virtue of their agreement that the terms established during the conference call negotiations would remain in effect until they met for ground rule negotiations, at which point they would either formalize the oral terms previously agreed to, or renegotiate them if necessary.

In an email sent prior to the conference call, Kitchell told Perez that he was hoping to reach an interim agreement to "bridge the gap" until ground rule negotiations took place. (G.C. Ex. 5). Mowad testified that the agreement was to last until they could meet in person to negotiate ground rules. (Tr. 136, 142, 157-58). Although the parties planned for ground rule negotiations to take place in April, that plan was not achieved. However, that does not change the fact that the parties' agreed that the terms of the oral agreement reached during the March 11 negotiations would remain in effect until they either mutually agreed to formalize the oral terms or modified them through additional negotiation. (Tr. 136, 149).

While a proposal covering the duration of an agreement is a negotiable issue and the parties may include a duration provision in their CBA, the Authority has long held that existing personnel policies and practices and matters affecting working conditions must continue as established even upon the expiration of a negotiated agreement, absent an express agreement by the parties to the contrary or unless modified in a manner consistent with the Statute. *AFGE, Local 1931*, 32 FLRA 1023 (1988); *Dep't of the Air Force, 35th Combat Support Group, George AFB, Cal.*, 4 FLRA 22 (1980) (*35th CSG*). Thus, the absence of a duration provision is not fatal to a CBA, especially where the parties, as they did in this case, agree upon a date or event that permits reopening the agreement. As established by *35th CSG*, the terms and provisions set forth in a CBA remain in effect even when the parties agreed that the CBA expires upon a certain date unless they expressly agree that its terms will not continue. In this case, the parties' agreement upon the duration of the provisions related to official time and travel was that they would continue until they were renegotiated, either as part of ground rule negotiations or the initial CBA and that agreement was sufficient. Furthermore, the Respondent's citation to *DOI-BIA* in support of its duration

argument is incorrect for reasons beyond the improper citation provided in its brief. While that case involved an oral agreement, it did not involve the issue of agreement duration. Aside from the fact that the evidence of an oral agreement was scant in *DOI-BIA*, that case turned upon the fact that the alleged oral agreement failed to establish a date certain in the past for the purpose of calculating backpay for wages or premium pay. *DOI-BIA*, 31 FLRA at 278. Thus, the case provides no support for the Respondent's contention that a duration provision is required when negotiating an oral agreement.

Furthermore, although the Respondent argues that there was no meeting of the minds concerning duration because Kitchell testified that he intended the oral agreement to last until the end of contract negotiations whereas Mowad testified that it was to last until ground rule negotiations, I do not find Kitchell's testimony inconsistent with that of Mowad or with his own earlier email expressing a desire to reach an interim agreement to "bridge the gap".

Mowad testified that the parties planned to meet for ground rule negotiations and that the oral agreement on official time and travel reached during the conference call negotiations "may stand," or "may not stand," but would remain in effect until they met and negotiated new terms covering those subjects. (Tr. 136). Mowad also testified that when they met for ground rule negotiations they would either memorialize the terms orally agreed upon, or, if they were unhappy with the way the provisions were working, they would negotiate different terms. (Tr. 157-58). Thus, both parties understood that the agreement reached during the conference call negotiations could remain in effect until CBA negotiations were complete by virtue of subsequent written formalization, or they could be renegotiated as part of ground rule negotiations. Kitchell merely anticipated that the agreed upon provisions would prove beneficial and be formalized so that they remained in effect for the duration of the CBA negotiations, and that was not an unreasonable expectation given that continuation of the terms was the default position for the parties. Both understood and agreed that the official time and travel provisions would remain in effect unless they were reopened as part of ground rule negotiations and would be modified only through further negotiation and not unilateral fiat. Absent a reopening of negotiations, the terms were to be formalized and followed throughout the CBA negotiations. Thus, I find that there was a meeting of the minds concerning the duration of the oral agreement and duration can be expressed in terms other than a date certain. In this case, the parties agreed that the terms of oral agreement would remain in effect until they were either reduced to a written agreement or renegotiated.

Regarding the process to be used for requesting official time, I find that the parties' agreement was silent on this issue, but creating a request process was not essential to the agreement because the parties completed negotiations with the same understanding and agreement as to how official time would be used by those Union officials allotted a fixed amount of official time. As discussed above, I find that the parties agreed that for use of official time covered by an allotment, recording such use in the Respondent's timekeeping system was a process deemed sufficient by the negotiators and they did not agree upon any additional procedures for the use of official time that came from those allotments. (Tr. 79). In other words, the parties agreed that use of official time that fell within the bank of allotted

official time was preapproved and while its use had to be reported, it did not have to be further requested nor scheduled in advance. That this agreement amounted to a grant of official time made in advance was acknowledged by the Respondent in the April 7 email issued by Bell, wherein she referred to the arrangement as having "granted" official time. (G.C. Ex. 24).

Furthermore, as acknowledged by Bell's email, they did not agree that a Union representative would have to first obtain further supervisory approval before using official time from the allotment. (*Id.*). However, the fact that the oral agreement did not contemplate requesting or scheduling use of the preapproved grant of official time allotted by the Respondent does not invalidate the binding nature of the terms upon which they did agree. Accordingly, I find that the parties reached a meeting of the minds and that the terms agreed upon during the conference call negotiations formed a binding and enforceable oral agreement.

The Respondent Repudiated the Conference Call Agreement in Violation of the Statute

The Authority has identified a two-prong test for determining whether a repudiation has occurred. *Scott AFB*, 51 FLRA at 862. Under this test, the Authority examines two elements: (1) the nature and scope of the alleged breach of an agreement - - i.e., was the breach clear and patent; and (2) the nature of the agreement provision allegedly breached - - i.e., did the provision go to the heart of the parties' agreement? (*Id.*).

Although the Respondent did not expressly state that it "repudiated" the agreement, it concedes that the April 9 email from Perez to the Union "end[ed]" the agreement. (Resp. Br. at 10). This is consistent with the wording of the email, which states that the terms of agreement concerning the grant and use of official time and GOV utilization "must cease and desist." (G.C. Ex. 21). Thus, applying the first prong of the Authority's repudiation test, I conclude that the Respondent's breach of the previously agreed upon terms was clear and patent. *Def. Language Inst.*, 64 FLRA at 747 (finding clear and patent breach where party "clearly refused to comply with the agreement").

With respect to the second prong of the repudiation test, the agreement concerned Union officials' entitlement to official time, use of GOVs, and travel expenses. The April 9 email from Perez clearly revoked the terms of the agreement concerning the grant and use of official time and utilization of GOVs. (G.C. Ex. 21). Furthermore, I conclude from the April 9 email, the testimony of the parties, and the Respondent's contention that no part of the agreement was binding, that the Respondent annulled all of the terms agreed upon during the conference call negotiations, including those related to travel expenses. (G.C. Ex. 21; Tr. 81, 141-42, 177). Because the Respondent breached all the terms of the oral agreement under the theory that agreement was either missing an essential term or illegal, I find that the breached provisions "go to the heart of the parties' agreement." *Def. Language Inst.*, 64 FLRA at 747. Furthermore, even if the Respondent did not intend to declare a breach of the provision related to travel for representational purposes, I find that the primary purpose of

the conference call was to negotiate terms for the grant and use of official time and that the Respondent's breach of the provisions related to official time including those covering the fixed amount of official time granted and allotted to various Union officials goes to the heart of the agreement even if the Respondent honored all other terms of the oral agreement.

The Respondent defends its repudiation by claiming it lawfully ended the agreement because the terms illegally permitted the Union to use official time for internal union business in violation of 5 U.S.C. § 7131(b). The Authority has held that an agency's refusal to comply with a contract provision that is contrary to law is not an unlawful repudiation of the agreement. *Office of the Adjutant Gen., Ga. Dep't of Def., Atlanta, Ga.*, 54 FLRA 654, 661 (1998) (*Adjutant General*); *GSA, Wash., D.C.*, 50 FLRA 136, 139 (1995) (*GSA*). However, the Respondent's defense in this case fails in two respects: (1) the oral agreement reached during the conference call negotiations did not include an illegal provision; and (2) even if the agreement included an illegal provision that would enable the Respondent to refuse to comply with that illegal provision, it would not permit the Respondent to revoke all of the terms and provisions in the agreement including those that were not illegal.

Section 7131 of the Statute sets forth the rights and restrictions associated with the use of official time. Subsections (a) and (c) authorize union representatives' use of official time for bargaining and certain Authority-related activities, and subsection (b) bars the use of official time for "internal [union] business . . . including the solicitation of membership[.]" 5 U.S.C. § 7131. The use of official time for all other types of representational activities is subject to negotiation under subsection (d), which provides that union representatives "shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d)(2).

The Respondent argues that the agreement was "vague" and illegally permitted the Union to use official time to solicit Union membership, in violation of 5 U.S.C. § 7131(b). (Resp. Br. 11-12). I interpret the Respondent's claim of vagueness to refer to the absence of procedures discussed above, and the use of the term "union business" in emails written by Mowad and Perez, discussing plans for the negotiations and the oral agreement that was reached. (Resp. Ex. 1; G.C. Ex. 6). Specifically, Vonda Bell testified that she was concerned about Mowad's use of the words "union business" in his March 11 email to other managers because "[i]t was just very loose language[.]" (Tr. 192). However, Mowad testified that when he used the phrase "union business" in the March 11 email he did not mean to imply that the parties had authorized official time for "internal [union] business" within the meaning of 5 U.S.C. § 7131(b). (Tr. 165). Further, in correspondence prior to the conference call and on the conference call itself, the Union assured the Respondent that official time would not be used for the purpose of soliciting membership. (G.C. Ex. 10; Tr. 63, 118). Thus, I conclude that there was no oral agreement that permitted the Union to use official time for soliciting Union membership or to conduct internal union business. Accordingly, the oral agreement did not include an illegal provision that would allow the Respondent to repudiate all of the negotiated terms established by the oral agreement.

In addition, the Respondent argues that after implementation of the agreement, Kitchell used official time to solicit Union membership. However, such conduct was not proven at the hearing and even if such activity were proven, it would not establish that the

terms agreed to in the oral agreement were illegal. The use of official time to solicit Union membership was specifically addressed by Kitchell during the conference call and he assured the Respondent's representatives that official time and travel reimbursement would not be used for that purpose. Thus, under the terms of the oral agreement, the parties agreed that such activity would not be permitted. So, if Kitchell did use official time to solicit Union membership it was a violation of the oral agreement and 5 U.S.C. § 7131(b). However, such behavior would not demonstrate that the oral agreement authorized such unlawful activity. Where an agency feared that a contract provision allowing a union to use the agency's meeting rooms would result in unlawful use of government property, the Authority held that "[t]he possibility that some abuse may occur does not remove an otherwise negotiable proposal from bargaining." *NTEU*, 45 FLRA 339, 373 (1992) (Provision 12). Similarly, the oral agreement present in this case was not inherently unlawful, and the mere possibility that Kitchell may have misused the official time granted under the provisions of the oral agreement to engage in improper conduct by soliciting Union membership while on official time and travel does not render the terms of the oral agreement unlawful.

While the Authority has held that the illegality of a single provision justifies noncompliance with that illegal provision, it has not held that the presence of an illegal provision permits an agency to repudiate the entire agreement or to unilaterally institute new terms in place of previously negotiated provisions as the Respondent did here. *Adjutant General*, 54 FLRA at 661 (finding no repudiation where agency refused to honor only the portion of agreement that authorized illegal use of official time); *GSA*, 50 FLRA at 139 (finding no repudiation where agency refused to honor a single sentence in one provision of agreement that authorized illegal work schedules). Thus, even if the oral agreement reached during the conference call negotiations on March 11 had authorized the Union to use official time to solicit Union membership in violation of § 7131(b), the Respondent could lawfully refuse to comply with that illegal provision, but it would not justify the elimination of the official time allocations that were agreed upon just because they were deemed "excessive" by an employee of the Respondent who did not participate in the negotiations and had no understanding of, or appreciation for, the give and take that occurred during the negotiations. (G.C. Ex. 24).

A single illegal provision does not give a party the right to repudiate an entire agreement nor does it permit them to refuse to follow lawful provisions just because someone within the agency dislikes the lawful terms that were negotiated. It is clear from the April 7 email issued by Vonda Bell that the Respondent's greatest concern was the amount of official time granted under the terms of the oral agreement and the dubious claims about duration, completeness, and illegality are subterfuge for the real reason the Respondent repudiated the oral agreement in its entirety. (*Id.*).

The Respondent has not demonstrated that any provision of the oral agreement reached during the March 11, 2010, conference call negotiations was illegal, nor has it established that the illegality of a single provision permits the repudiation of the entire agreement. Accordingly, I find that the Respondent violated § 7116(a)(1) and (5) of the

Statute by announcing that it would cease and desist from compliance with the terms of the oral agreement and behaving in a manner that was inconsistent with the previously negotiated provisions.

Pay and Leave Restoration

As a remedy, the General Counsel contends that the Respondent should restore any annual leave used by Union officials to perform representational duties and compensate those employees at straight time rates where non-duty time was used for representational duties that would otherwise have been performed on official time.

The Authority has repeatedly held that "where official time authorized by the provisions of a collective bargaining agreement is wrongfully denied and the representational functions are performed on nonduty time, section 7131(d) entitles the aggrieved employee to be paid at the appropriate straight-time rates for the amount of time that should have been official time." *Contract Audit Agency*, 47 FLRA at 1322-23. *See also U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009) (*IRS*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 62 FLRA 49, 50-51 (2007) (*BOP*); *U.S. Dep't of Agric., Rural Dev., Wash., D.C.*, 60 FLRA 527, 529-30 (2004); *U.S. Dep't of Transp., FAA, Sw. Region, Fort Worth, Tex.*, 59 FLRA 530, 532 (2003) (*FAA*). The Authority has also ruled that leave restoration is appropriate when annual leave is taken to perform representational activities for periods when official time should have been granted but was improperly denied. *Food Safety*, 62 FLRA at 368; *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 126 (2005) (*Border Patrol*).

According to the terms of the agreement reached during the March 11, 2010, conference call negotiations as memorialized by Mowad in his March 11 email to other managers, the Respondent promised that twenty (20) hours per pay period "will be granted" to Union officers and stewards, forty-six (46) hours per pay period "will be granted" to the Union president, and "[m]ore time may be granted if union members (WIs) require union representation for a specific issue." (Resp. Ex. 1 at 2). As discussed above, under the terms of the oral agreement, Union officials were not required to obtain supervisory approval in advance of using the bank of official time allotted to them. However, they did have to keep a record and report the use of official time from their fixed allotment in the Respondent's Quicktime record keeping system.

When the Respondent repudiated the terms of agreement on April 9, 2010, it refused to comply with any of the terms previously negotiated, and unilaterally instituted different official time procedures that eliminated the allotments of official time previously established. (G.C. Ex. 21). After that, the Respondent only granted official time when supervisory approval was obtained in advance, and did not approve official time in the amounts agreed upon by the parties during the March 11, 2010, conference call negotiations. (G.C. Ex. 22 & 23; Tr. 84, 86-88, 104-06, 108-09, 120). Because of the Respondent's repudiation, Union officials may have performed representational work on annual leave and during non-duty hours. Therefore, where Union officials would have received official time under the terms of

the oral agreement reached during the conference call, but performed representational duties during non-duty hours as a result of the Respondent's repudiation of the official time allotments and denial of official time requests that would have been covered by their allotment, those employees are entitled to be paid at the appropriate straight-time rates for the amount of time that should have been available as official time. *IRS*, 63 FLRA at 159-60; *BOP*, 62 FLRA at 50-51; *FAA*, 59 FLRA at 532; *Contract Audit Agency*, 47 FLRA at 1322-23. Where Union officials would have received official time under the terms of the oral agreement, but performed representational duties while on annual leave as a result of the Respondent's repudiation of the official time allotments and denial of official time requests that would have been covered by their allotment, those employees are entitled to have their leave restored by the Respondent.[4] *Food Safety*, 62 FLRA at 368; *Border Patrol*, 61 FLRA at 126.

RECOMMENDATION

I find that the Respondent violated § 7116 (a)(1) and (5) of the Statute when it repudiated all of the terms negotiated and agreed upon during the March 11, 2010, conference call negotiations and recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the Department of the Interior, U.S. Fish and Wildlife Service, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the oral agreement reached with the American Federation of Government Employees, AFL-CIO, Local 2103 (Union) during the March 11, 2010, conference call negotiations covering official time and travel, to the extent it has not been superseded by the parties' ground rule negotiations covering official time for CBA negotiations.

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

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

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[4] Although the Respondent's allegations about Kitchell's improper use of official time to conduct internal union business do not establish that the conference call agreement is unenforceable, the Respondent is correct that official time may not be used for "[a]ny activities . . . relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) . . . ." 5 U.S.C. § 7131(b). Thus, any non-duty time or annual leave spent by Union officials soliciting members, or otherwise conducting internal union business within the meaning of § 7131(b), does not entitle the employee to leave or pay restoration.

(a) Rescind the official time procedures unilaterally implemented by the April 9, 2010, email from Benito Perez, and reinstate the terms of the oral agreement reached during the March 11, 2010, conference call negotiations, to the extent they have not been superseded by the parties' ground rule negotiations covering official time for CBA negotiations.

(b) Restore the pay and leave of those employees who were denied official time as a result of the repudiation of the oral agreement reached during the March 11, 2010, conference call negotiations covering official time and travel.

(c) Post at its facilities in the United States, Guam, and Puerto Rico where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the highest official of the Department's Office of Human Capital Management, 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.

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

Issued, Washington, D.C., June 27, 2013

CHARLES R. CENTER
Chief 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 the Interior, U.S. Fish and Wildlife Service, Washington, D.C. 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 fail or refuse to comply with the oral agreement reached with the American Federation of Government Employees, AFL-CIO, Local 2103 (Union) during the March 11, 2010, conference call negotiations covering official time and travel, to the extent it has not been superseded by the parties' ground rule negotiations covering official time for CBA negotiations.

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

WE WILL rescind the official time procedures unilaterally implemented by the April 9, 2010, email from Benito Perez, and reinstate the terms of the oral agreement reached during the March 11, 2010, conference call negotiations, to the extent they have not been superseded by the parties' ground rule negotiations covering official time for CBA negotiations.

WE WILL restore the pay and leave of those employees who were denied official time as a result of the repudiation of the oral agreement reached during the March 11, 2010, conference call negotiations covering official time and travel.

_____

(Agency/Activity)

Dated:_____ By:_____

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: (617) 565-5100.