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104 LRP 60627

**National Treasury Employees Union
Chapter 137 and Department of
Homeland Security, Bureau of Customs
and Border Protection**

60 FLRA 483

Federal Labor Relations Authority

60 FLRA No. 96

0-AR-3823

December 17, 2004

Related Index Numbers

**41.431 Bargain Collectively, Duties and
Obligations of Parties, Bargaining at Other Than
the Level of Recognition**

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**47.8611 Grievance Arbitration Awards, Review,
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**72.641 Unilateral Change in Term or Condition of
Employment, Changes After Expiration of
Contract, Continuation of Contract Terms After
Expiration**

Judge / Administrative Officer

**Dale Cabaniss, Chairman, and Carol Waller Pope
and Tony Armendariz, Members**

Ruling

Although the arbitrator used incorrect reasoning, his finding that the agency had no duty to bargain at the local level over changes in overtime assignment practices was upheld. The arbitrator properly relied on an earlier FLRA decision finding that the agency's unilateral implementation of a revised assignment policy was lawful.

Meaning

After the expiration of a term agreement, a party has the right to terminate provisions covering permissibly negotiable matters, including an agreement to bargain below the level of recognition. An award will not be

vacated when an arbitrator misinterprets FLRA precedent but arrives at a correct conclusion of law.

Case Summary

The arbitrator's award was based primarily on the FLRA's ruling in Customs, 104 LRP 9090. There, the FLRA found that the agency's unilateral implementation of a revised work assignment policy was lawful. The agency notified the union of its decision not to be bound by an agreement to engage in local negotiations over such matters as staffing levels and tours of duty or by any other existing agreements concerning permissive matters. The FLRA explained that a party has the right to terminate agreements over permissive matters upon the expiration of a term agreement. An agreement to negotiate below the level of recognition is permissive. When the union sought impact bargaining over the revised policy, but conditioned that bargaining on renegotiation of the term agreement, an issue beyond the scope of the revised policy, the agency was free to unilaterally implement.

The arbitrator decided the agency had no duty to bargain over changes in overtime practices at a Florida port. He determined the matter was 'covered by' the revised assignment policy and the union had waived its right to bargain. The FLRA found that the revised policy was not a negotiated agreement and the 'covered by' doctrine did not apply. Nor did the union waive its bargaining rights. However, consistent with Customs, the FLRA explained that the agency's revised assignment policy, removing permissive matters from the scope of bargaining both nationally and locally, was lawfully implemented.

The arbitrator's ultimate conclusion that the agency had no duty to bargain a change in overtime practices was correct.

Chair Dale Cabaniss argued that the 'covered by' doctrine should apply, because the agency satisfied its duty to bargain over the revised assignment policy, and the policy is therefore a collectively bargained agreement.

Full Text

Decision

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Roger Abrams filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions. Both parties also filed supplemental submissions.²

The grievance alleged that the Agency violated § 7116(a)(1) and (5) of the Statute as well as provisions of the parties' national collective bargaining agreement, past practice, and local agreement by refusing to bargain at the local level over the impact and implementation of a change in overtime assignment practices in Fort Pierce, Florida. The Arbitrator denied the grievance.

For the following reasons, we deny the Union's exceptions.

II. Background and Arbitrator's Award

This case arises out of a dispute stemming from the Agency's implementation in 2001 of its revised National Inspectional Assignment Policy (RNIAP).³ The RNIAP replaced an earlier NIAP that had been negotiated and implemented in 1995. The 1995 NIAP provided for the local negotiation of matters set forth in § 7106(b)(1) of the Statute, including staffing levels and tours of duty at the Statute, including staffing levels and tours of duty at the local level.

As relevant here, a Local Inspectional Assignment Policy (LIAP) was negotiated in February 1996 between NTEU, Chapter 137 (the local Union) and the Port of West Palm Beach, which includes the Fort Pierce station. The LIAP provided that "Sunday assignments and cruise passenger overtime will be scheduled according to current practice." Award at 10 (quoting Ft. Pierce Jt. Ex. 4).⁴

By letter dated August 2, 2001, the Agency notified the National Treasury Employees Union (the national Union) that it no longer intended to be bound by provisions in the parties' National Labor

Agreement (NLA) in which the Agency had agreed to bargain over [§ 7106](b)(1) matters.⁵ The letter also stated that the Agency would not be bound by provisions in other agreements, including the 1995 NIAP and existing LIAPs, "which contain provisions that involve § 7106(b)(1) matters, including several that require local level bargaining on such things as minimum staffing levels and tours of duty." Award at 5 (quoting Ft. Pierce Jt. Ex. 1). Along with this letter, the Agency transmitted a copy of its proposed RNIAP, which included the following language in section 3, entitled "Precedence and Function":

The policies and procedures contained in this [RNIAP] take precedence over any and all other agreements, policies, or other documents or practices executed or applied by the parties previously, at either the national or local levels, concerning matters covered within this [RNIAP].

The policies and procedures [in the RNIAP] reflect the parties' full and complete agreement on matters contained and addressed herein. No further obligation to consult, confer, or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained within this [RNIAP].

Id.

After receiving the August 2 letter and the proposed RNIAP, the national Union requested bargaining over the impact and implementation of the proposed RNIAP. The national Union also indicated that it intended to renegotiate provisions of the expired NLA along with the proposed RNIAP. The national Union proposed certain ground rules for the negotiations; however, the national Union and the Agency did not reach agreement on these ground rules.

Following an exchange of correspondence, the Agency implemented the proposed RNIAP nationwide on October 1, 2001, and notified the national Union on that date that it was doing so.⁶ The Agency directed all Directors of Field Operations and

Port Directors to implement the RNIAP, and "instructed its managers and supervisors to make determinations regarding shifts, assignments of overtime, tours of duty[,] and work hours ... without further bargaining with NTEU." *Id.* at 7-8.

On October 7, 2001, following the implementation of the RNIAP, local Agency management at Fort Pierce assigned a supervisor who was on a regularly scheduled shift to perform inspectional duties instead of assigning the duties to a bargaining unit inspector on overtime. When local Agency management did not provide the local Union with an opportunity to bargain over the change in assigning overtime to supervisory personnel, the instant grievance was filed. The grievance alleged, among other things, that the Agency's action violated the LIAP, past practice, and § 7116(a)(1) and (5) of the Statute. The grievance was not resolved and was submitted to arbitration.

The Arbitrator denied the grievance. Citing the Authority's decision in Customs Service, the Arbitrator found that the "underlying legality of the Agency's [RNIAP] has been determined" by the Authority, and that implementation of the RNIAP was "lawful" and "did not violate the parties' Agreement or national law." Award at 21, 25. The Arbitrator further stated:

If the policy was lawful, Agency actions taken pursuant to its terms must be lawful, otherwise declaring the policy's implementation lawful has no meaning. The policy reasons previously offered in support of the 'covered-by doctrine' apply here as well. Stability and repose in labor relations is fostered by the conclusion that matters included in a lawfully implemented policy be considered settled.

When an 'arrangement' (for want of a better word) results from a lawful, albeit unilateral, management implementation after impasse, it must be considered binding on the parties at least until the end of the bargaining impasse. In the present case, the [RNIAP] must be considered binding until altered in ... accordance with the provisions of the Statute. As far as the record indicates, that has not yet happened.

Id. at 26 (underscoring in Award; footnote omitted).

The Arbitrator then addressed "whether under the revised 'lawful' [RNIAP] the Agency had the obligation to bargain with the Union about the Ft. Pierce Sunday overtime assignment." *Id.* at 27. As to this question, the Arbitrator concluded:

[This is] an area where there cannot be too much controversy. Local bargaining is abolished under the [RNIAP]. The Agency's local action must stand, and the grievance must be denied.

Id. In this respect, noting that the local overtime assignment protested by the local Union occurred less than a week after the national implementation of the lawful RNIAP, the Arbitrator concluded that the "local action protested was 'covered by' the [RNIAP]." *Id.* The Arbitrator further stated that "[w]hen the parties negotiate their next National Agreement, the mandatory subjects involving the implementation of the Agency's policy on inspectional assignment are once again subject to the Statute's bargaining obligation[, and] [a]t that point, the Agency will be required to bargain with the Union." *Id.*

As his award, the Arbitrator stated:

The Agency's implementation of changes in working conditions regarding Sunday overtime assignments in Ft. Pierce under the umbrella of the [RNIAP] [was] lawful and did not violate the parties' [a]greement. Therefore, the grievance is denied.

Id. at 28.

III. Union's Exceptions

The Union maintains that the award is contrary to law on essentially two grounds.

First, the Union asserts that the Arbitrator erred in applying the "covered by" doctrine in a case where there is no underlying collective bargaining agreement. According to the Union, the Arbitrator reasoned that although the RNIAP was not a collective bargaining agreement, the "covered by" doctrine nonetheless still applied because the

Authority had determined that the RNIAP was lawfully implemented and, therefore, section 3 of the RNIAP permitted the Agency's action in this case. The Union asserts that the Arbitrator erred because in Customs Service "the Authority made no finding on whether Section 3 of the RNIAP was lawful, enforceable or had any viability precluding all future bargaining by the [U]nion over changes in working conditions." *Id.* at 5. The Union contends that the Authority has never applied the "covered by" doctrine in the absence of a negotiated agreement, and to allow the Arbitrator to apply it here would be inconsistent with a fundamental purpose of the Statute to allow employee participation through collective bargaining in decisions that affect employees.

Second, the Union maintains that the Arbitrator's finding that local bargaining was abolished by section 3 of the RNIAP is contrary to law because the Union did not clearly and unmistakably waive its future bargaining rights. In this regard, the Union maintains that: (1) there is no express agreement waiving the Union's right to bargain locally; and (2) there is no support in the record for the Arbitrator's "de-facto waiver theory"; namely, that the parties' bargaining history shows that the Union "waived its rights under Section 3 to bargain over all future changes in conditions of employment either at the local or national levels." *Id.* at 10. In particular, the Union maintains that although the Authority found in Customs Service that the RNIAP was lawfully implemented, "Section 3 cannot be enforced against the Union as the basis for concluding that all local future bargaining over matters contained [in the RNIAP] was abolished as the [A]rbitrator erroneously concluded." *Id.* at 13.

IV. Agency's Opposition

The Agency maintains that the Arbitrator properly concluded that the local change in overtime assignment policy in Fort Pierce was "covered by" the RNIAP. Opposition at 5. The Agency also maintains that the RNIAP "terminates the [A]gency's election to engage in -- local bargaining in Section 3[.]" *Id.* The Agency asserts that section 3 "specifically

repudiate[d] previous local agreements and practices and obviate[d] the need to bargain locally over inspectional assignments" upon implementation of the revised RNIAP. *Id.* The Agency notes that "[t]he level of recognition is indisputably at the national level, and thus any local bargaining was completely permissive." *Id.* Thus, the Agency maintains that the Union had no right to insist on bargaining with management officials on inspectional policies "at a local level" on or after the implementation of the RNIAP. *Id.* (emphasis in original).

In addition, the Agency maintains that section 3 did not create a waiver of the Union's statutory right to bargain. Rather, the Agency maintains that section 3 "merely seeks to have the [U]nion fully exercise its statutory right (not permissive right) to bargain up front at the national level of recognition, over the procedures and arrangements to be applied to future local inspectional assignment matters[,] ... instead of ad hoc bargaining on all future changes in local inspectional assignment policies[.]" *Id.* at 8.

V. Analysis and Conclusions

The Union excepts to the Arbitrator's award under § 7122(a)(1) of the Statute on the ground that the award is contrary to law. As the Union's exceptions concern whether the award is contrary to law, the Authority's review is de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See United States DoD, Dept's of the Army and Air Force, Ala. National Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The dispute in this case concerns whether the Agency had an obligation to bargain, at the local level, with respect to a change in a local condition of employment. As his award, the Arbitrator concluded that the Agency had no obligation to bargain at the

local level.

In so concluding, the Arbitrator relied on the Authority's determination in Customs Service that the RNIAP was lawfully implemented. In Customs Service, the Authority found, as an initial matter, that the Agency's implementation of the RNIAP constituted the Agency's exercise of its rights under § 7106(a) and § 7106(b)(1) of the Statute and, as a result, the Agency was obligated to bargain only over the impact and implementation of the RNIAP. The Authority concluded that the national Union improperly conditioned bargaining over the impact and implementation of the RNIAP on bargaining over a new term agreement to replace the expired NLA -- a matter that was outside the scope of the Agency's impact and implementation bargaining obligation concerning the RNIAP. Because the national Union improperly conditioned bargaining over the impact and implementation of the RNIAP in this manner, the Authority concluded that the Agency had satisfied its bargaining obligation and, therefore, the Agency's unilateral implementation of the RNIAP was lawful.⁷

As noted above, the Arbitrator found that since the Authority had held in Customs Service that the RNIAP was lawful, Agency actions taken pursuant to its terms must also be lawful. The Arbitrator further found that the policy reasons that were used by the Authority in support of the "covered by" doctrine apply here as well; that is, that stability and repose in labor relations is fostered by the conclusion that matters included in a lawfully implemented policy be considered settled. Because the relevant matter in the lawfully implemented RNIAP -- local bargaining over local overtime assignment scheduling -- was abolished by the RNIAP, the Arbitrator concluded, as his award, that the Agency's implementation of changes in working conditions regarding Sunday overtime assignments in Fort Pierce under the RNIAP was lawful and did not violate the parties' agreement.

The Union now excepts to the award essentially on the grounds that the Arbitrator erroneously applied the "covered by" and waiver doctrines. For the following reasons, which differ in part from those of

the Arbitrator, we find that the Arbitrator's conclusion that there was no obligation to bargain at the local level in the circumstances of this case is not contrary to law.

We begin our analysis by noting that the level of exclusive recognition here exists at the national level, that is, between the national Union and the Agency. Under Authority precedent, it is well established that there is no statutory obligation to bargain below the level of recognition. *See, e.g., United States Food and Drug Admin., Northeast and Mid-Atlantic Regions*, 53 FLRA 1269, 1274 (1998) (*U.S. Food and Drug Admin.*) (parties' mandatory bargaining obligation is limited to bargaining at certified level of exclusive recognition and therefore bargaining below level of recognition is a permissive subject of bargaining); *Dep't of Defense Dependents Schools*, 12 FLRA 52, 53 (1983) (since union's exclusive recognition is at national level, the Statute does not require negotiations at other than national level). As such, the statutory bargaining obligation with respect to the matter in this case resides at the national level, not the local level.

Consistent with that obligation, the parties at the national level negotiated the 1995 NIAP, which concerned inspectional assignment matters. In addition, and consistent with their ability to negotiate over permissive subjects of bargaining, the parties at the national level agreed to negotiate at levels below the level of exclusive recognition -- that is, at local levels -- over LIAPs that addressed staffing practices based on the specific needs of each port. As a consequence of this delegation, the local Union and local Agency management negotiated the 1996 LIAP, which covered local matters and applied to employees at the Fort Pierce facility.

When the parties' NLA expired in 1999, either party was free to lawfully terminate permissively negotiated matters. *See, e.g., United States Border Patrol Livermore Sector, Dublin, Cal.*, 58 FLRA 231, 233 n.5 (2002) (*Border Patrol*) (permissive terms of an expired contract remain in effect but may be unilaterally terminated by either party upon expiration

of agreement); *see also United States Dep't of Justice, Fed. Bureau of Prisons, FCI Danbury, Danbury, Conn.*, 55 FLRA 201, 206 (1999) (*FCI Danbury*) ("A party's right to terminate unilaterally a permissive bargaining subject is not contingent on first satisfying a bargaining obligation as to the substance, impact or implementation of the change."). That is what the Agency did when it lawfully implemented section 3 of the RNIAP: the Agency terminated its (permissively negotiated) obligation under the expired NLA and NIAP to bargain at the local level over inspectional assignment matters.⁸

By its terms, section 3 established the RNIAP as the governing policies and procedures with respect to inspectional assignment matters "over any and all other agreements" at the local level, and terminated the Agency's obligation to bargain at the local level over such matters. In addition, consistent with the clear terms of section 3, the Agency's August 2, 2001 letter to the national Union stated specifically that the Agency would no longer be bound by provisions in LIAPs, including those that required local level bargaining on such matters as minimum staffing levels and tours of duty.⁹

Consistent with its clear terms, section 3 terminated locally negotiated agreements concerning inspectional assignment matters, as well as the Agency's obligation to bargain at the local level regarding such matters.¹⁰ Moreover, the Agency's termination of its obligation to bargain at the local level concerning inspectional assignment matters under section 3 is consistent with its right to terminate permissive terms of expired agreements -- including Article 37 of the parties' 1999 NLA and the 1995 NIAP -- under Authority precedent as discussed above, and is, therefore, lawful. Thus, the Arbitrator's conclusion that, following the Agency's lawful implementation of the RNIAP, the Agency did not have an obligation to bargain at the local level over the change in Sunday overtime assignment to supervisory personnel at Fort Pierce is consistent with law.

In concluding that the award is not contrary to

law, we note two things. First, in agreement with the Union, we find that the Arbitrator erred in finding that the change in overtime assignment at the Fort Pierce facility was "'covered by' the [RNIAP]."¹¹ Award at 27. The "covered by" doctrine is set forth in *United States Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018-19 (1993). It applies as a defense to an alleged failure to satisfy a statutory bargaining obligation. *See Soc. Sec. Admin. Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001). Under the first prong of the "covered by" doctrine, the Authority examines whether the subject matter of the change is expressly contained in the agreement; under the second prong, the Authority determines whether the subject is inseparably bound up with, and plainly an aspect of, a subject covered by the contract.

The Arbitrator correctly recognized that the "covered by" doctrine has been applied only in the context of negotiated agreements and determined that the RNIAP was not such a negotiated agreement. *See* Award at 23. Nonetheless, the Arbitrator found that the Agency's "local action" was lawful because it "was 'covered by' the [RNIAP]." *See id.* at 27. For the following reasons, we agree with the Union that the Arbitrator's reliance on the "covered by" doctrine in these circumstances is in error because the RNIAP is not a negotiated agreement.

The Arbitrator applied the Authority's holding in *Customs Service* that the RNIAP was unilaterally, though lawfully, implemented. The Arbitrator found that the RNIAP was not a collective bargaining agreement. We agree. We note, in this regard, that neither party filed an exception to the Arbitrator's determination that the RNIAP was not a negotiated agreement. Moreover, by its terms, the RNIAP is not a part of any national agreement entered into by the parties; it is not subject to the parties' national agreement; and it has no term provision.¹²

Based on the foregoing, we find that the RNIAP is not a negotiated agreement.¹³ As the RNIAP did not constitute a negotiated agreement, we find that the Arbitrator erred in applying the "covered by" doctrine to it. Nonetheless, this error in the Arbitrator's

reasoning does not provide a basis on which to set aside the award, because the Arbitrator correctly concluded as his award that the Agency was not obligated to bargain at the local level over the change in assignment policy, under the terms of the lawfully implemented RNIAP. *See, e.g., Veterans Affairs, Denver*, 60 FLRA at 237 (arbitrator's misinterpretation of Authority precedent does not alter arbitrator's ultimate, correct conclusion); *United States Dep't of the Navy, Naval Training Ctr., Great Lakes, Ill.*, 51 FLRA 198, 201 (1995) (arbitrator's erroneous statement of law does not alter arbitrator's ultimate, correct conclusion); *United States Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Calif.*, 49 FLRA 802, 812 (1994) (arbitrator's mischaracterization of law provides no basis for finding award deficient).

Second, we also agree with the Union that the Arbitrator erred in finding that the Union had waived its rights under section 3 of the RNIAP to bargain over all future changes in conditions of employment at the local and national levels. Although the Union does not refer to the Arbitrator's specific findings in this respect, it appears that the Union is excepting to the Arbitrator's statement that "[w]hen the parties negotiate their next National Agreement, the mandatory subjects involving the implementation of the Agency's policy on inspectional assignment are once again subject to the Statute's bargaining obligation[, and] [a]t that point, the Agency will be required to bargain with the Union." Award at 27.

The Arbitrator's statement regarding the parties' bargaining obligations at the national level is in error. Section 3 of the unilaterally, but lawfully, implemented RNIAP did not extinguish the Agency's statutory bargaining obligations at the national level (that is, at the level of exclusive recognition) to bargain over all mandatory subjects of bargaining concerning overtime inspectional assignments. Indeed, the Agency acknowledges that it continues to have an obligation to bargain at the national level over assignment-related matters and that section 3 does not constitute a waiver of the Union's statutory

rights to bargain at the national level over future changes in inspectional assignment policies. *See* Opposition at 8. However, the Arbitrator's erroneous statement that the Agency is required to bargain only during negotiations on the next national agreement does not undermine the validity of his conclusion that the Agency was not obligated to bargain at the local level over the change in assignment policy, under the terms of the RNIAP. In addition, section 3 of the RNIAP does not preclude the parties from bargaining in the future at the level of exclusive recognition on permissive subjects, and agreeing to delegate bargaining responsibilities over inspectional assignments to lower levels, in a manner similar to that which was negotiated as part of the 1995 NIAP. *See, e.g., U.S. Food and Drug Admin.*, 53 FLRA at 1274.

In sum, by the terms of section 3 of the RNIAP, as lawfully implemented, the Agency terminated its obligations to bargain at the local level over inspectional assignment matters. In this respect, the Agency's termination of its obligation to bargain at the local level concerning inspectional assignment matters under section 3 was consistent with its right under Authority precedent to terminate permissive terms of expired agreements like the 1999 NLA and the 1995 NIAP, and was, therefore, lawful. As such, the Arbitrator's award, concluding that the Agency did not have an obligation to bargain at the local level over the change in Sunday overtime assignments to supervisory personnel at Fort Pierce, is consistent with law. Accordingly, we deny the Union's exceptions to the award.

VI. Decision

The Union's exceptions are denied.

¹Chairman Cabaniss' separate opinion is set forth at the end of this decision.

²The Union filed a submission in response to the Agency's opposition and the Agency filed a response to the Union's submission. We have not considered the supplemental submissions filed by the parties since neither party sought permission to file them.

The Authority's Regulations do not provide for the filing of supplemental submissions and such submissions will not be considered unless the moving party demonstrates a reason why the Authority should consider them. *See, e.g., Congressional Research Employees Association, IFPTE, Local 75*, 59 FLRA 994, 999 (2004) (Authority considered union's supplemental submission as the submission challenged claims made by agency that were first raised in agency's opposition). *See also United States Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 52 FLRA 622, 624-25 (1996) (agency did not establish sufficient reasons for filing supplemental submissions as the union's opposition did not raise matters that the agency did not have the opportunity to address in its exceptions).

³The Authority recently concluded that the Agency's implementation of the RNIAP was lawful. *See United States Dep't of the Treasury, Customs Service, Wash., D.C.*, 59 FLRA 703 (2004) (Member Pope concurring) (*Customs Service*), petition for review filed sub nom. *NTEU v. FLRA*, No. 04-1137 (D.C. Cir. Apr. 22, 2004). The Authority's decision in *Customs Service* is discussed more fully below.

⁴The practice was for local management" to offer non-supervisory personnel overtime for inspectional assignments on Sundays prior to offering such assignments to supervisory personnel.

⁵The parties' NLA expired in 1999, but continues to be applied by the parties pending its re-negotiation.

⁶The national Union filed a grievance challenging the Agency's implementation of the RNIAP. As noted earlier, the Authority concluded in *Customs Service* that the Agency's implementation of the RNIAP was lawful.

⁷In *Customs Service*, the Authority did not have occasion to specifically address the meaning and operation of section 3 of RNIAP, particularly as it relates to locally negotiated agreements, such as the LIAPs, and the Agency's obligation to bargain at the local level.

⁸As noted above, section 3 states, in pertinent

part:

The policies and procedures contained in this [RNIAP] take precedence over any and all other agreements, policies, or other documents or practices executed or applied by the parties previously, at either the national or local, concerning matters covered within this [RNIAP].

... No further obligation to consult, confer, or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained within this [RNIAP].

Award at 5 (quoting *Ft. Pierce Jt. Ex.* 1).

⁹Member Armendariz would also find that the Agency's August 2, 2001 letter to the national Union, standing alone, constituted sufficient notice to the national Union to terminate the Agency's obligations under provisions in LIAPs, including those that required local level bargaining on such matters as minimum staffing levels and tours of duty. *See FCI Danbury*, 55 FLRA at 205 (to be effective, party must give notice that explicitly contains a statement of intent to terminate a provision dealing with a permissive bargaining subject).

¹⁰With respect to the Agency's obligation to bargain at the local level, we note that Article 37 of the parties' expired NLA requires bargaining at the local level over proposed changes that apply only within one organizational office. *See Award at 6.*

¹¹Although we agree with the Union on this point for the reasons discussed below, it does not affect our conclusion that the Arbitrator correctly concluded that under the terms of the RNIAP, the Agency was not obligated to bargain at the local level over the change in Sunday overtime assignment policy. In this regard, the question before us is whether the Arbitrator's award is contrary to law; the question is not whether the Arbitrator's reasoning is correct. *See e.g., United States Dep't of Veterans Affairs, Denver Regional Office, Denver, Colo.*, 60 FLRA 235, 237 (2004) (*Veterans Affairs, Denver*)

(arbitrator's misinterpretation of Authority precedent does not alter arbitrator's ultimate, correct conclusion).

¹²We note that the Authority recently found in *United States Dep't of Labor*, 60 FLRA 68, 72 (2004) (*DOL*) that a provision that was unilaterally implemented in effect became part of the parties' agreement after: (1) the agency bargained to impasse and provided the union with an opportunity to seek impasse resolution from the Federal Service Impasses Panel (Panel); and (2) the union failed to seek the Panel's assistance. The Authority found that the provision was, by its terms, made a part of and subject to the duration of the agreement. *Id.* at 72. The Authority found in *DOL* that the agency's implementation of its child care program did not violate the Statute because implementation was consistent with the express terms of the provision, which permitted the agency to unilaterally implement the program without bargaining with the union during the term of the parties' agreement.

¹³Member Pope notes that the dissent appears to find that the RNIAP constitutes a collective bargaining agreement simply because the Authority found that the Respondent satisfied its duty to bargain with the Union before implementing it. This confuses two distinct concepts: the process of collective bargaining and an agreement resulting from collective bargaining. Compare 5 U.S.C. § 7103(a)(8) with § 7103(a)(12). Although parties are required to bargain in an attempt to reach agreement, there is no support for a conclusion that if bargaining is satisfied then an agreement necessarily results. In fact, the primary authority relied on by the dissent, *United States Immigration and Naturalization Service, Washington, D.C.*, 55 FLRA 69, 73 n.8, 9 (1999), identifies many situations where an agency may "satisf[y] its obligation to bargain" without reaching agreement.

Concurring opinion of Chairman Cabaniss:

I write separately to explain why I would find that the governing condition of employment in this case is a collective bargaining agreement rather than an agency regulation, and why the subject matter at

issue here is thus "covered by" a collective bargaining agreement.

Section 7103(a)(8) of our Statute defines a "collective bargaining agreement" as "an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter[.]" There is nothing in this agreement or our precedent that limits this definition to collective bargaining agreements having a set term/duration, and the Authority has found that the "covered by" doctrine applies to expired collective bargaining agreements, which by definition have no fixed term/duration. *United States Border Patrol, Livermore Sector, Dublin, Cal.*, 58 FLRA 231, 233 (2002). There also is nothing to distinguish this case based on the fact that the matter at issue involved the content of an agency regulation, as nothing precludes negotiations over the content of an agency regulation from being considered as a collective bargaining agreement. In that regard, § 7117(a)(2) recognizes that the content of agency rules or regulations are fully negotiable to the extent there is no "compelling need" for that regulation (a concept not applicable here). There is also nothing that mandates a finding that the concept of being "entered into" requires the mutual consent of the parties.

Section 7103(a)(12) of our Statute defines "collective bargaining" as the mutual obligation to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement upon bargaining unit conditions of employment. That definition does not require that mutual agreement upon the terms of a collective bargaining agreement must be reached, to the contrary, the definition explicitly recognizes that "the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]" As also noted by the definition, there is no requirement that there be a signed document as part of this process.

The record in this case indicates that the Agency in Customs Service submitted its proposed assignment policies to the collective bargaining process under the Statute, as it was required to do. See, e.g., *Fort Stewart Schools v. FLRA*, 495 U.S. 641

(1990). I find no basis for distinguishing the facts of this case so as to preclude a finding that the Agency fulfilled its obligation to engage in "collective bargaining" as defined by our Statute: I also would find no basis for not concluding that this agency regulation on assignment policies is "an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter[.]" i.e., that this is a collective bargaining agreement.

The Authority also has recognized that a union may consent to a proposed change in conditions of employment, either explicitly through agreement or implicitly through action or inaction. Thus, an agency may implement changes in conditions of employment when a union fails to request bargaining within a reasonable period of time after being notified of proposed changes, fails to bargain, or fails to timely invoke the services of the Panel[,] after the parties have reached impasse. *See, e.g., [United States INS I, 24 FLRA 786, 790 (1986)]*. In these situations, the agency has, in effect, *satisfied* its bargaining obligation. (Footnote omitted).

United States Immigration and Naturalization Service, Washington, D.C., 55 FLRA 69, 73 (1999) (INS) (emphasis in the original). The majority opinion notes that conditions of employment, created when a party fails to invoke the services of the Federal Service Impasses Panel, become part of the parties' collective bargaining agreement. *United States Dep't of Labor, 60 FLRA 68 (2004)*. I fail to see the distinction between that situation (where the condition of employment was considered a part of a collective bargaining agreement) and the present circumstance (where the majority does not find a collective bargaining agreement). Based upon the above, as the Agency here has satisfied its collective bargaining obligation under the Statute, I find no basis for not concluding that there is a collective bargaining agreement establishing bargaining unit assignment policies. And again, the fact that there is no apparent term (agreed upon length of time) to this collective bargaining agreement is immaterial, as there is no such requirement in our Statute or our precedent

mandating such in order to become a collective bargaining agreement.

I thus would find that the issue of assignment policies is "covered by" this agreement, as I note no substantive rationale that would justify treating this agreement differently than any other agreement which has been reached through the collective bargaining process. As noted by the Authority in the INS decision, in each instance discussed an agency fulfills its bargaining obligation under the Statute, and any attempts to parse a distinction based upon the extent to which a union has agreed to the agreement is at odds with that decision and has no justifiable basis. Therefore, I find no legally compelling basis for treating the collective bargaining agreement here any differently.*

*I find no basis for modifying this conclusion despite the matters set out in footnote 13 by Member Pope. As noted by the Authority in its *Dep't of Labor* decision, there is no basis for distinguishing between a contract term imposed by the Federal Service Impasses Panel (FSIP) and a contract term imposed after the parties bargain to impasse and the union fails to invoke the services of the FSIP. As the Authority noted, the agency there had satisfied its bargaining obligation under the Statute. In the present situation as well, the Authority found that the Agency had satisfied its bargaining obligation under the Statute. Therefore, I see no legitimate rationale for finding an enforceable contract term in *Dep't of Labor* but not here.

Cases Cited

59 FLRA 994
52 FLRA 622
59 FLRA 703
50 FLRA 330
43 F.3d 682
55 FLRA 37
53 FLRA 1269
12 FLRA 52
58 FLRA 231
55 FLRA 201
47 FLRA 1004
60 FLRA 235

57 FLRA 459

60 FLRA 68

51 FLRA 198

49 FLRA 802

55 FLRA 69

495 U.S. 641

24 FLRA 786

60 FLRA 68