BEFORE THE FEDERAL MEDIATION AND CONCILIATION SERVICE
JOSEPH M. SHARNOFF, ARBITRATOR

FMCS No. 13-02465-A

NATIONAL WEATHER SERVICE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
U. S. DEPARTMENT OF COMMERCE,

and the

NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION

UNION'S POSTHEARING BRIEF

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INTRODUCTION

According to the National Academy of Sciences, the ability of the National Weather Service to protect the public from the hazards of severe weather is highly dependent on sufficient staffing. In a 2012 report, the Academy's Committee on the Assessment of the NWS's Modernization Program wrote:

> The quality of the NWS's warning capability corresponds with its capacity to muster an ample, fully trained local staff at its WFOs [Weather Forecast Offices] as severe weather unfolds. With current staff levels, there are always two people working each shift, 24 hours a day, seven days a week. Though this works well in fair weather, it can become problematic in severe weather, particularly when events develop rapidly under seemingly benign conditions. While managers at individual

> WFOs generally plan ahead to add sufficient staff to cover forecasted dangerous weather situations, more innocuous weather scenarios that suddenly and unexpectedly "blow up"often lead to shortcomings that are directly attributed to having insufficient manpower. Several recent Service Assessments (e.g., NWS, 2003, 2009, 2010) illustrate the critical role that adequately enhanced staffing (or lack thereof) plays in the success (or weakness) of NWS performance during major events. Appropriate levels of staffing, beyond normal fair weather staffing, during major weather events, are critical for fulfilling the NWS's "protection of life" mission.

NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, THE NATIONAL WEATHER SERVICE MODERNIZATION AND ASSOCIATED RESTRUCTURING: A RETROSPECTIVE ASSESSMENT, 60-61 (2012). Union ex. 75. The National Academy of Public Administration reported last May that "[w]hile staffing levels have been relatively constant over the past decade, in the last three years, the NWS has realized personnel losses at a greater rate than it has been hiring." NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, FORECAST FOR THE FUTURE: ASSURING THE CAPACITY OF THE NATIONAL WEATHER SERVICE, 39 (2013). Union ex. 76. The Senate Appropriations Committee noted in early 2013 that "[s]ince 2010, NWS has seen a reduction of 290 positions, or approximately 6 percent of its workforce, with many forecaster and other positions left vacant across the country." S.REP. No. 113-78, 113 Cong. 1st Sess. 38 (2013). According to NAPA, the vacancy rate had reached 8 percent by the second quarter of 2013. NAPA warned that "[i]f this trend continues,

the NWS is in danger of losing a significant segment of the workforce and will not be able to renew itself at sustainable levels unless it revises staff functions and allocations across programs and offices." FORECAST FOR THE FUTURE, at 38, 39. Union ex. 76. On March 27, 2013, this problem was compounded when the NWS imposed a freeze on hiring and promotions.

In May, 2013, the NWS issued a "Service Assessment" on its performance during Hurricane/Post-Tropical Storm Sandy in October, 2012. The agency concluded that its performance during this event was hampered by vacancies in critical positions. Eight vacancies at the NWS's Eastern Region Headquarters "limited the ability of the Acting ERH Director to help offices provide DSS [Decision Support Services] and to staff the Regional Operations Center." This assessment revealed that the Upton, NY, Forecast Office (which services New York City and Northern New Jersey) could not provide numerous forecast products, such as tropical storm wind speeds at skyscraper heights, because the Information Technology Officer position was vacant. The assessment also noted that there was a "severe staffing shortage" in the branch of the National Hurricane Center that maintains the computer systems, communication support, and software development for the Center. The Assessment made the following recommendation:

> NWS should identify and fill critical positions at operational facilities. If these positions cannot be filled, NWS

> should ensure awareness at higher levels in NOAA that these vacancies may result in reduced levels of service, including constraints and potential failure on the delivery of products and services during the next significant weather event.

U.S. DEPARTMENT OF COMMERCE, SERVICE ASSESSMENT: HURRICANE/POST-TROPICAL CYCLONE SANDY, OCTOBER 22-29, 2012, 43-44 (May 2013). Union ex. 77.

Fortunately, the nation was spared during last year's hurricane season. However, due to the hiring freeze, there are now almost 500 vacant positions in the National Weather Service - a vacancy rate which continues to grow, as does the risk to our nation. NWSEO has brought this case to arbitration in an effort to protect the American public as well as its members' career opportunities, and because the ever-increasing workload on the remaining employees is unsustainable.

By agreement, the parties have consolidated four related grievances. The first three grievances were filed before the hiring and promotion freeze, and essentially challenged the agency's failure to fill numerous journeyman forecaster, lead forecaster and hydrometorological technician/meteorologist intern positions. These grievances allege that the failure to fill these positions violates a series of agreements covering staffing in the NWS's 122 Weather Forecast Offices ("WFOs") and River Forecast Centers ("RFCs"), the first of which was negotiated in 1993 and was subsequently amended in 2000 and

2004. The grievance that concerns the failure to fill journeyman forecaster positions also alleged that the NWS violated the parties' CBA, which entitles employees to moving expenses, or, in the alternative, violated past practice, by cancelling five advertised journeyman forecaster positions in the NWS's Southern Region after the agency decided not to pay "permanent change of station" or "PCS" relocation costs associated with those positions.

The fourth grievance was filed after the hiring freeze was implemented. It alleged that the freeze on hiring and promotions violated the agreements covering the staffing of WFOs and RFCs. This grievance also alleged that the NWS violated the parties' CBA and committed an unfair labor practice in violation of the Federal Service Labor Management Relations Statute by unilaterally implementing a freeze on hiring and promotions without prior (or even post-implementation) bargaining on positions that are not covered by these staffing agreements, and, to the extent or in the event that it was found that the WFO staffing agreements were not violated, by unilaterally implementing a hiring freeze on those positions, as well. In addition, this fourth grievance alleged that the NWS violated the CBA and the FSLMR Statute by failing to respond to a request for information submitted by the union needed for bargaining over the freeze, and that the NWS failed to provide the union with pre-decisional involvement concerning the freeze as required by Article 8 of the CBA.

UNION'S PROPOSED ISSUES

Did the employer breach the parties' 1993, 2000 and 2004 staffing agreements by failing to fill vacant bargaining unit positions at the Weather Forecast Offices and River Forecast Centers?

Did the employer commit an unfair labor practice in violation of the FSLMR Statute and also violate Article 8 of the parties' CBA when it unilaterally implemented a hiring freeze without providing the union with prior notice and an opportunity to bargain?

Did the employer's violation of the staffing agreements also constitute an unfair labor practice because the breach of those agreements was "clear and patent"?

Did the employer's freeze on the hiring of forecasters and hydrologists violate Article 8, § 1 of the CBA which requires that the agency provide the union with an opportunity for pre-decisional consultations on the exercise of "traditional management prerogatives"?

Did the employer violate Article 23, § 2 and Article 30, § 3 of the CBA when it cancelled Southern Region forecaster vacancies to avoid paying PCS costs?

Was the employer's failure to respond to the union's March 28 information request an unfair labor practice and/or a violation of the CBA?

If so, what shall the remedy be?

STATEMENT OF THE FACTS

A. The NWSEO bargaining unit and organizational structure of the National Weather Service.

The National Weather Service Employees Organization is the certified collective bargaining representative of a nation-wide unit of all non-supervisory, non-managerial, non-confidential employees of the National Weather Service. Most unit employees are found at the nation's 122 Weather Forecast Offices, which are located from Fairbanks, Alaska, to Caribou, Maine, to San Juan, Puerto, and as far east as Guam. Union ex. 1. These offices are staffed and operate 24 hours a day, seven days a week, and issue routine forecasts as well as warnings of severe weather. The NWS field structure also includes 13 River Forecast Centers that are responsible for issuing hydrological predictions for river basins around the country. There are also 12 smaller, "Weather Service Offices" or "WSOs" at remote locations in Alaska and three WSOs in the Pacific, as well as Tsunami Warning Centers in Hawaii and Alaska. In addition, there are "Center Weather Service Units" staffed by four NWS meteorologists at each of the FAA's 21 Air Route Traffic Control Centers.

This far-flung field structure is overseen by six Regional Headquarters and the NWS Headquarters in Silver Spring, MD. Agency ex. 2, 3. While

most of the staff at these headquarters units are administrative or programmatic, the Regional and National Headquarters has some operational elements, such as the Telecommunications Gateway in Silver Spring. The forecasting and warning responsibilities of the field offices are supported by the NWS's "National Centers for Environmental Prediction" ("NCEP"), many of whose employees are located at a new facility in College Park, Maryland, from where generalized forecast guidance is issued that is adapted, localized and updated by the WFOs and the other NWS field offices. Among the other "centers" which are organizationally part of the "National Centers for Environmental Prediction" are the National Hurricane Center in Miami; the Storm Prediction Center in Norman, Oklahoma which issues tornado and severe storm watches; the Space Weather Prediction Center in Boulder, Colorado, which monitors solar activity; and the Aviation Weather Center in Kansas City. http://www.ncep.noaa.gov/; Agency ex. 3. There are also three other facilities in Kansas City that report to NWS Headquarters in Silver Spring: the National Weather Service Training Center and the National Reconditioning and the National Logistics Support Centers, where weather equipment is repaired, reconditioned and warehoused.

According to the National Academy of Public Administration, the NWS had approximately 4,700 employees as of the second quarter of 2013, although it is "very difficult for management to determine its actual on-board

count" at any given time. FORECAST FOR THE FUTURE at 38. Union ex. 76. Of these, 3,614 are bargaining unit employees according to a report provided to the union by management in August, 2013.

B. The NWS and NWSEO negotiated Weather Forecast Office and River Forecast Center staffing in 1993 during the NWS modernization and restructuring.

The NWS of today is the result of a ten-year "modernization and restructuring" which began in the 1990s and involved acquisition of new technology and a massive restructuring of field operations. In an attempt to forestall employee dislocations, NWSEO filed a number of lawsuits against the first Bush Administration. *E.g. City of Harrisburg, et al v. Franklin, Secretary of Commerce,* 806 F. Supp. 1181 (M.D. Pa. 1992)(challenging relocation of Philadelphia Forecast Office and Harrisburg River Forecast Center).

However, early in his first term, President Clinton signed Executive Order No. 12871 which ushered in a period of collaboration between Federal agencies and their employees' unions, including the NWS and NWSEO. President Clinton ordered his agency heads to "create labor-management partnerships" in order to "involve employees and their union representatives as full partners with management representatives to identify problems and

craft solutions to better serve the agency's customers and mission." Exec. Order 12871, § 2(a),(b). In order to effectuate such "partnerships," President Clinton ordered Federal agencies to negotiate over subjects covered by Section 7106(b)(1) of the Federal Service Labor Management Relations (FSLMR) Statute which were otherwise negotiable only at the agency's election. Exec. Order 12871, § 2(d). The "managements rights" clause of the Statute, 5 U.S.C. § 7106(a), excludes a host of substantive matters from negotiations, including the assignment of work, the number of employees, and "the personnel by which agency operations will be conducted." However, subsection (b) provides an exception to the management rights clause in subsection (a):

> Nothing in this section shall preclude any agency and any labor organization from negotiating -
>
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organization subdivision, work project, or tour of duty, or on the technology, methods and means of performing work.

5 U.S.C. § 7106(b). These subject matters, which encompass staffing issues generally, are commonly referred to as "permissive" subjects of negotiation.

As a result, in 1993 NWS and NWSEO negotiated a comprehensive master plan for the restructuring of NWS field operations which, *inter alia*,

guaranteed every displaced employee a job in the new NWS, and in many cases guaranteed a position upgrade or promotion. Joint ex. 6 at 29. The agreement took the form of a formal "memorandum of understanding," (joint ex. 5), which modified and incorporated by reference a 42-page document with appendices known as the "Human Resources and Position Management Plan for the NWS Modernization and Associated Restructuring." Joint ex. 6.

What is important for the purposes of this case is that the Human Resources Plan set forth in detail where the new "Weather Forecast Offices" and "River Forecast Centers" would be located and *how they would be staffed.* At the hearing, former NWSEO President Ramon Sierra testified about the negotiations over the Human Resources Plan and explained the impact of the restructuring on NWS employees. Mr. Sierra had a dual role in the NWS modernization which makes him an authoritative source. Not only was he the union's chief negotiator of the Human Resources Plan, but he was appointed by the Secretary of Commerce as a member of the "Modernization Transition Committee" created by the Weather Service Modernization Act of 1992, Pub. L. No. 102-567, 15 U.S.C. § 313 note. This Committee, comprised of representatives of various Federal agencies and NWS customers, conducted public hearings across the country on the NWS modernization and restructuring, and was charged with certifying that there would be no

degradation in weather services, and with publishing its findings in the Federal Register. Tr. 62-64. Mr. Sierra explained that:

- In the "old" NWS, approximately 200 of the agency's 250 field offices were staffed by paraprofessional "meteorological technicians" or "met techs" rather than professional meteorologists/forecasters. It was the goal of the NWS to change this "mix" so that the "new" NWS was staffed primarily by professional forecasters. Joint ex. 6 at 7-8. Tr. 64.

- Each of the 115 new Weather Forecast Offices ("WFOs") were to be staffed by five GS-13 "lead" or "senior forecasters" and typically three to five GS-12 "journeyman" or "general forecasters." (There are now 122 WFOs). Tr. 71, 74.

- This professional operational staff would be augmented by a six person "HMT unit" or "Public Service Unit" which would be comprised of a mix of remaining met techs (renamed "hydrometeorological technicians" or "HMTs") and a supervisor know as a "Data Program Acquisition Manager." The HMT positions were graded at a GS-11. Tr. 71, 72, 76.

- Each WFO also include between one and four electronics technicians and a secretary (now known as "Administrative Support Specialists"). Tr. 70.

- A Service Hydrologist would be assigned at 78 WFOs. Tr. 70.

- There would be four additional management personnel - the Meteorologist-In-Charge ("MIC"), a Science Operations Officer, a Warning Coordination Meteorologist and an Electronic Systems Analyst Tr. 69-70.

Joint ex. 6, at 10. The exact number of each of these employees to be assigned to each WFO was set forth in charts that appear in Appendix 7.4 to the agreed-upon HR Plan. Joint ex. 6; tr. 64. At some point, the parties later

agreed to an on-the-job training slot for newly-hired men and women who had recently obtained professional meteorology degrees. These "meteorologist interns" would be hired at the GS-5 or GS-7 level and progress to the GS-11 level through non-competitive promotion, at which point they could bid on vacant GS-12 journeyman positions. While in their "internship" they would (and continue to) perform the same work and cycle through the same shift rotation as the office's non-degreed HMTs; take supplemental training, and, on occasion, work a "forecaster desk" under the guidance of a lead forecaster.

The HR Plan also addressed staffing levels for the new River Forecast Centers. This staffing included the following bargaining unit employees:

- 1 "Senior" and 2 "Journeyman" Hydrometeorological Analysis and Support ("HAS") Forecasters;
- 4 Senior Hydrologic Forecasters (with the exception of Anchorage, which would have 2).
- 4-9 Journeyman Hydrologic Forecasters

Joint ex. 6, p. 10; table 2-6; pp. 27, 28 and table 3-3.

C. The NWS and NWSEO expanded their labor-management "partnership" and continued to make joint decisions on WFO staffing.

In 1994, the NWS and NWSEO negotiated a "Quality through Partnership" agreement in which the agency committed "to negotiate over

matters that, under the Federal Service-Labor Management Relations Statute, are at the election of agency management" until Executive Order No. 12871 was rescinded. Union ex. 2, at 1; tr. 78. The next year, the parties negotiated a successor master collective bargaining agreement in which the agency again committed itself in Article 4 to negotiate over "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" for the life of the Executive Order. Union ex. 3, at 3; tr. 81-82.

Over the next several years, the parties used the nomenclature "partnering" when they engaged in less formal negotiations. Tr. 86. For example, in 1997, the parties negotiated, through "partnership," a process to fill the 300 GS-13 senior or lead forecaster positions at the new WFOs over a two year period. This agreement was announced in the form of a joint communique to NWS employees, signed by NOAA's Acting Assistant Administrator for Weather Services (a/k/a, the NWS Director) and NWSEO President Sierra. Tr. 86-87. In this agreement, the parties reaffirmed their 1993 agreement that "5 Senior Forecasters will be selected and assigned" at every WFO. Joint ex. 7, at 1.[1]

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[1] This document refers to the existence of "met interns," which indicates that the parties must have agreed to the creation of that position sometime between 1993 and December 1997. As discussed below, in 2000 the parties agreed to dedicate one position in the HMT unit for an intern.

The NWS extended its commitment to "partnership" with NWSEO when the NWS Director invited NWSEO President Sierra to serve as a full member of the NWS "Corporate Board." Tr. 84-85. This Corporate Board is comprised of the NWS Director, Deputy Director, Regional Directors and senior office directors. Tr. 85. During this time, Board decisions were made by consensus, which essentially required the agreement of all members - including NWSEO President Sierra. Tr. 85. This forced the Board to forge a compromise on whatever issue came before it. As Mr. Sierra explained, this would obviate the need for subsequent formal bargaining with the union following the Board's decision on a particular course of action. Tr. 86.

D. The parties agreed to amend their 1993 staffing agreement by creating an Information Technology Officer at each WFO and by designating one of the HMT slots as a "floater" that could be assigned, by mutual agreement, to another job category or WFO.

In 2000, the Corporate Board "including NWSEO President Ramon Sierra, agreed to restructure the six positions" in the HMT unit. Joint ex. 8 at 1. As a result of the internet explosion, the agency wanted to add an "Information Technology Officer" (or "ITO") to every forecast office, and do so without adding to overall staffing levels. Tr. 89; joint ex. 8. The Board determined, after a workload analysis and nearly a year's worth of

deliberation, that the 6 person HMT unit could be reduced, through attrition, by two positions, leaving three HMTs and one intern. One of the two slots that were freed up was used to create the ITO position at each office. The second position could be retained as an HMT, or could be used to increase the number of forecasters, create a hydrologist or additional electronics technician position. See Joint ex. 8, at 1, ¶ 2; tr. 96-97. This position - known as the "floater" - could be retained to the WFO or reallocated to another WFO in the same region. Tr. 97, 99-100. Hence, this new staffing regime became known as the "Floater Plan."

The determination of whether to retain the "floater" as an HMT or to assign the position to another job category was to be determined based on an algorithm or formula which weighted the varying workloads and program responsibilities of each of the WFOs, such the number of TAFs (Terminal Aerodrome Forecasts), the frequency of severe weather, additional marine or fire weather forecasting responsibilities, complexity of terrain, number of observing stations, and NOAA Weather Radio programs. The WFOs were rated in quartiles and those in the quarter with the highest need for an additional forecaster were assigned one; and those in the quarter with the highest additional need for an HMT were assigned one. The Floater Plan also provided that the Regional Director, "in partnership with regional NWSEO," could decide to allocate up to 10% of the floater positions as additional service

hydrologists, and up to 10% of the floater positions as additional electronics technicians based on a priority list contained in the Floater Plan. Exhibit G to the Floater Plan contains a chart which specifically identifies to which WFOs the floater positions are to be reallocated according to this formula, and to what position. After these allocations, the Floater Plan provided that "at the RD's [Regional Director's] discretion, in partnership with regional NWSEO, remaining floaters may be assigned to another office or filled at the same office with either a Meteorologist, Hydrometeorological Technician, Service Hydrologist, or Electronics Technician." See "Exhibit A- Approved Concept for Use of Data Acquisition Program Manager/Hydrometeorological Technician/ Meteorological Intern Slots" and "Exhibit E- Implementation Guidelines," which are part of Joint Exhibit 8.

There was one overriding rule in the assignment or allocation of the floaters, however. It was agreed that "WFOs with 9 or less core forecasters would retain their floater as an HMT" so that "[n]o WFO would have its staffing reduced below the level which would permit two persons to be on shift around the clock." See "Exhibit A"; "Exhibit D," slide 6; "Exhibit E," ¶ 4 to Joint ex 8. This restriction was necessary because it takes 5 persons to cover each 8 hour shift, 24/7. [2] Tr. 100-101. As will be discussed later,

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[2] 3 shifts a day x 7 days equals 21 shifts per week. It takes 5 employees working 5 shifts a week to cover 21 shifts, and this permits 4 shifts per week

management has taken the *reason* why the Floater Plan requires that WFOs with less than 9 forecasters are required to retain the Floater as an HMT out of context to mistakenly argue that the Floater Plan does not require the filling of any positions at any WFO that are in excess of those necessary to ensure that two shifts a day are covered.

As NWSEO President, Mr. Sierra was integrally involved in the development of the Floater Plan and the evidence demonstrates that the final version of the plan constitutes a binding agreement between the parties. In a March, 2000 message to all NWS employees, NWS Deputy Director John Jones wrote that "before a final decision is made there will be more NWSEO involvement." Union ex. 5. A June, 2000 memorandum from the Pacific Region Director, who developed the first iteration of the Plan, states that "the policy has been established and partnered with the NWSEO. The next step should be partnering of an implementation plan with NWSEO." Union ex. 10 at 1. Mr. Sierra was then appointed to a subcommittee of the Board to develop the implementation plan. Tr. 91; union ex. 6. The agreement was effectively "executed" when Mr. Sierra signed a concurrence to its language on November 13, 2000. Union ex. 7, at 3; tr. 94-95. The final plan/agreement was released in writing to all NWS employees on November 22, 2000. The

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to cover leave.

document specifically characterizes the plan as an agreement reached between NWSEO President Sierra and senior NWS leadership. "In February, the Corporate Board, including NWSEO President Sierra, *agreed* to" the restructuring. Union ex.8, at 1 (emphasis supplied).

E. In 2004 the parties again agreed to alter the staffing within the HMT or "Public Service Unit" to create a GS-12 bargaining unit position for an HMT at every WFO, and, in return, to allow management to use the remaining HMT positions to hire more Met Interns.

Following the changes made by the 2000 Floater Plan, the HMT unit consisted of three or four HMTs (one of which was a GS-12 supervisor known as a "DAPM"), and one Met Intern. In September, 2003 management proposed to eliminate all but one of the HMTs and use the remaining positions to hire additional meteorology graduates as Met Interns. Union ex. 21. In an October, 2003 "Global Announcement," the NWS Deputy Director, John Jones, assured all employees that any changes to WFO staffing would be bargained with the union:

> . . . National Weather Service management has developed a plan to modify the profile of WFO staffing. The plan is based on an analysis of WFO workload. The workload analysis concluded that the traditional duties performed by the HMT/Intern unit are changing and skill sets required by WFO staff are evolving rapidly due to improvements in science and technology.

> In accordance with the law and our Collective Bargaining Agreement we have notified NWSEO of our plan regarding changes in WFO staffing. We are currently engaged in the bargaining process, and we will continue to fulfill our bargaining obligations. Employees will be notified of the status of this matter at the completion of bargaining.

Union ex. 22. As one Regional Director explained, "[t]he entire implementation plan is currently under negotiation." Union ex. 23.

The parties held several formal bargaining sessions, with four member bargaining teams. As the union's notes from a bargaining session on January 8, 2004 reflect, the union's counsel explained that the agency miscalculated its need for as many additional intern training slots as it sought, and that the remaining HMTs were concerned about their career ladder and lack of opportunities for career growth. The union said that it would be amenable to a reduction in the number of positions designated in each office for HMTs by one if management would enhance the career opportunities for the HMTs by creating a GS-12 bargaining unit lead HMT position in each office and convert the remaining GS-11 HMTs to FLRA non-exempt status so that they could earn true time and one-half overtime. Union ex. 24, at 8-9; tr. 148-149.

The parties continued their negotiations in what management has characterized as "informal discussions" over the ensuing months. Joint ex. 25, at 1. On September 23, 2004, management sent the union a new, written counterproposal which adopted the concessions sought by the union.

Management proposed that in the future, rather than reserving a specific number of positions in the HMT unit for either HMTs or Interns, all vacancies would be bid as both HMT and Intern and open to internal HMT candidates (who sought to relocate) as well as to applicants for the NWS's Met Intern program. However, one position was reserved for the creation of a lead GS-12 HMT bargaining unit position as an "Observing Program Leader" or "OPL" and existing GS-12 supervisors in the unit (the "Data Acquisition Program Manager") were given the option to convert to this bargaining unit position. Management also agreed to convert the GS-11 HMTs to FLSA non-exempt status, and to upgrade the GS-9 meteorological technicians located as the smaller, remote Weather Services Offices in Alaska, to GS-10 to enable them to competitively bid on GS-11 HMT positions at the larger forecast offices. Tr. 150-51. Importantly for the purposes of this case, management agreed that '[t]he size of the HMT/Intern Unit will remain the same as described in the October 2000 staffing [Floater] plan," and that the "recruitment process will be conducted" to fill the OPL position "as DAPMS or OPLs retire or leave the WFO for other reasons." Joint ex. 25, at 2-3. On September 28, 2004, the union responded by writing that "[m]anagement's proposal of September 23, 2004 to revise WFO staffing is accepted." Joint ex. 25, at 5; tr. 151.

F. Management continued to staff WFOs in accordance with the staffing agreements through 2010.

The assignment of the "floaters" identified in the 2000 staffing agreement remained dynamic during the last decade. NWS and NWSEO continued to negotiate on and agree to how and where these floaters would be used through email exchanges and at "regional labor council" meetings. See, e.g., union exs. 26 - 39; tr. 152. For example, the joint minutes of an RLC meeting refer to "negotiations at the next RLC meeting regarding the most effective use of floater positions." Union ex. 39, at 4.

At one Western Region Labor Counsel meeting in 2008, management assured the union "that all vacancies have been filled as soon as possible" in accordance with a NOAA Workforce Management Office ("WFMO") hiring model. Union ex. 40, at 1. WFMO has adopted an "80-calendar day" hiring model that specifies deadlines by which positions are to be advertised via Job Opportunity Announcements ("JOA"), posted to the www.usajobs.gov website, applications evaluated, "certificates of eligibles" issued to "selecting officials," selections made and jobs offered. Although numerous ministerial steps in this process are performed by an "intake coordinator" and human relations specialists at NOAA's WFMO, the responsibility for submitting a request to fill a position and the decision to make a selection rest with hiring officials in the particular NOAA line office - in this case, the National Weather Service.

Union exs. 41, 42, 43. And although this hiring process allows 80 days for completion, management informed the union that "[t]he total process from when Workforce Management receives a complete hiring package normally lasts no longer than 70 day[s]." Union ex. 40, at 1.

G. Congress increases NWS funding in anticipation of sequestration, and urges the agency to reprogram funds to offset the impacts of sequestration on NWS operations.

In January, 2013, Congress enacted Pub. L. No. 113-2, the Disaster Relief Appropriations Act of 2013, commonly known as the "Hurricane Sandy Supplemental" appropriations bill. In Chapter 2 of Title X of this law, Congress appropriated the NWS an additional $25 million "to improve weather forecasting and hurricane intensity forecasting capabilities." Union ex. 64, at 2. In March, 2013, Congress finally enacted the Commerce, Justice, Science and Related Agencies Appropriations Act of 2013, which was included as Division B within the Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113-6. Union ex. 66. As explained within the Report accompanying this act, Congress appropriated an additional $17.1 million above the President's request for the line item, "Local Warnings and Forecasts," out of which most of NWS's employees' salaries are funded. Union ex. 65, at 3 (page numbered 16). Section 103 of this act also gave the Commerce Department the explicit authority to transfer funds from

one line item to another under the expedited "reprogramming" procedures (which are more commonly used to repurpose funds within particular line items, such as "local warnings and forecasts"). This reprogramming simply requires notice to, (and implicitly requires the assent of) the Appropriations Committee 15 days in advance, rather than new legislation. See Section 505 of Division B of Pub. L. No. 113-6. Union ex. 66.

On March 5, 2013, Rep. Frank Wolf, the Chairman of the Commerce, Justice and Science Appropriations Subcommittee, wrote the Acting Secretary of Commerce to urge her to use this reprogramming authority to ensure that the sequestration did not negatively impact the National Weather Service:

> On March 1, 2013, the President ordered that agencies begin applying sequestration to their budgets in accordance with section 251A of the *Balanced Budget and Emergency Deficit Control Act.* As a result, a variety of services provided by the Federal government will be impacted. One of the most important Federal services is weather forecasting, which families and businesses rely on every day.
>
> In order to ensure that sequestration does not negatively impact the National Weather Service's ability to forecast the weather . . . the Committee would be willing to consider a programming on an expedited basis.

Chairman Wolf appended the following handwritten note to the Acting Secretary: "THIS IS VERY IMPORTANT. PLEASE CALL ME." Union ex. 69.

On April 12, Chairman Wolf sent the Acting Secretary another letter, in which he referred to the hearing which the Subcommittee held several days earlier on the Department's FY 14 budget request:

> Finally, we also discussed the National Weather Service (NWS) and I reminded you about a letter I had sent you on March 5, 2013 stating that the Committee would consider on an expedited basis a reprogramming should the NWS need additional funds during FY 2013 as a result of the sequester. As we approach summer severe storm season, I urge you to ensure that the NWS has the funding necessary to adequately forecast the weather.

Union ex. 70.

H. Management assures the union that it will continue to fill operational positions during pre-decisional discussions about the impact of sequestration.

In Article 8, section 1 of the CBA, management has promised to provide NWSEO with the opportunity for "predecisional involvement" prior to making decisions that might eventually lead to impact or other bargaining. This "pre-decisional involvement" is to take place "prior to the final decision" even on those matters which "are traditional management prerogatives." This contractual guarantee is consistent with Executive Order No. 13522 (December 9, 2009), § 3(a)(ii), which directs agencies to:

> . . . allow employees and their union representatives to have predecisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 U.S.C. 7106; provide adequate information on such matters expeditiously to union representatives where not prohibited by law; and make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 U.S.C. 7106(b)(1), through discussions in labor-management forums.

On February 27, 2013, the Office of Management and Budget issued a Memorandum for the Heads of All Executive Departments and Agencies, on "Agency Responsibilities for Implementation of Potential Joint Committee Sequestration." (OMB M -13-05). In this directive, OMB wrote that:

> With regard to any planned personnel actions to reduce Federal civilian workforce costs, consistent with Section 3(a)(ii) of Executive Order 13522, agencies must allow employees' exclusive representatives to have pre-decisional involvement in these matters to the fullest extent practicable and permitted under the law.

Union ex. 53, at 2.

On January 23, 2013, NWS management representative David Murray sent the union an email to "continue pre-decisional dialogue to generate ideas that would put us in the best position to protect our employees and continue mission critical operations." This email identified "some management ideas to help mitigate" potential budget problems. Among these ideas was to "delay

hiring actions - *non-mission critical positions only."* Union ex. 56, (emphasis added). Representatives of management and the union met on either February 28 or March 5 to conduct "pre-decisional" discussions on how funding reductions that might result from the anticipated sequestration could be accommodated in the NWS. Tr. 467. During this meeting, John Longenecker, the NWS's Acting Chief Financial Officer, said that the agency was considering a partial hiring freeze, but assured the union that it would not freeze hiring of forecasters and hydrologists. Tr. 197-200; 467.

I. In March, 2013, the union discovered that management had not filled dozens of positions covered by the staffing agreements.

The "Recruitment Analysis Data System" or "RADS" is a web-based system that tracks all agency recruitment actions. Union ex. 43, at 7. On March 12, 2013, agency counsel sent union counsel "the latest RADS report" so that the union could monitor compliance with an August 2012 agreement settling another grievance. Union ex. 47; tr. 182. This RADS report revealed that, despite what the agency's CFO had told the union just two weeks earlier, recruitment actions to fill nine Lead Forecaster vacancies had been frozen in January after the vacancy announcements had closed; recruitment actions for one Lead Forecaster vacancy was frozen in February, and another

in December. The report also revealed that the NWS had not taken any actions to even initiate the recruitment process to fill at least nine other Lead Forecaster vacancies of which the union was aware. The union filed the first of four related grievances. This grievance alleged that these actions with respect to the 21 or more Lead Forecaster vacancies - (or more precisely, the agency's inactions) - violated the negotiated staffing agreements or, in the alternative, constituted a unilateral change in conditions of employment in violation of Article 8 of the CBA and an unfair labor practice in violation of § 7106(a)(1) and (5) of the Federal Service Labor Management Relations Statute. Joint ex. 2a.

A further examination of the March 12 RADS report revealed that the NWS had not initiated any recruitment actions to fill at least 13 HMT/Intern vacancies of which it was aware (some of which had been vacant for a year or more), and had frozen recruitment actions that had been initiated to fill 8 other HMT/Intern vacancies. On March 15, the union filed a second grievance alleging that management had violated the staffing agreements, including the 2000 Floater Plan and the 2004 agreement that modified the composition of, but kept the size of, the HMT unit, by failing to fill these vacancies. Joint ex. 2b.

The union filed a third grievance on March 21, alleging that the NWS had violated the staffing agreements by failing to initiate any actions to fill

six known journeyman forecaster vacancies. The grievance also alleged that management violated the staffing agreements by cancelling the vacancy announcements for several forecaster positions in the NWS Southern Region after the announcements had been closed and after numerous bargaining unit employees had applied for the positions. Applicants were told that the decision to cancel these recruitment actions had been made by management at the NWS Southern Region, ostensibly because of a lack of "PCS" or "permanent change of station" funds. Union exs. 48, 49. This grievance also alleged that the agency's actions or inactions constituted a unilateral change in conditions of employment in violation of the CBA and FSLMR Statute. The union amended this grievance on March 25 to specifically allege that the agency's unwillingness to pay PCS relocation expenses violated two provisions of the CBA: Article 23, section 2, which states that employees "shall receive . . . allowable travel expenses," and Article 30, section 3, which entitles employees to third party relocation costs. Joint ex. 2c.

J. The NWS imposed a freeze on hiring and promotion without providing the union with notice and an opportunity to bargain.

On March 27, 2013, labor relations specialist Peggy Morse notified NWSEO that the agency had unilaterally implemented an indefinite hiring

freeze ostensibly because of "an emergency budget situation associated with sequestration and impending FY '13 budget cuts related to H.R. 933." Tr. 202; union ex. 57. Ms. Morse's email explained that despite this hiring freeze, any positions for which the application deadline had closed would be filled: "Job Opportunity Announcements"(JOAs) that have been advertised and closed by the date of this memo will continue to be processed to the completion of hire." The email explained that the hiring freeze was part of "emergency controls on spending until we can properly reprogram funds." The email closed by assuring the union that although the agency had unilaterally implemented this hiring freeze, "we recognize our labor obligations and will engage in post-implementation bargaining."

This email transmitted a Memorandum signed earlier that day by Kathryn Sullivan, the Acting Under Secretary of Commerce for Oceans and Atmosphere (a/k/a/, the Administrator of NOAA), formalizing the hiring freeze. In her Memorandum, Dr. Sullivan stated, as had the transmitting email, that positions for which vacancy announcements had closed would, nonetheless be filled. The Sullivan Memorandum also established two other exceptions to the hiring freeze. It directed Line Office Deputy Assistant Administrators (which includes the Deputy Director of the NWS) to:

> review all other vacancies . . . to determine those that they believe are high priority to fill. . . Careful consideration

> should be given to determine which of these vacancies/positions are assigned to mission critical activities that, if left unfilled, will cause mission failure.

The Deputy Assistant Administrators were directed to submit these priority lists to a Hiring Freeze Board for approval to fill these vacancies.

The third exception contained in Dr. Sullivan's memorandum permitted internal promotions to continue. She wrote that NOAA would "submit a request to the Department of Commerce to allow NOAA to advertise promotions 'NOAA-only.'" The Department approved this request. Union ex. 59.

On the same day, the NOAA's Deputy Administrator for Weather Services (who acts as the Director of the National Weather Service) Louis Uccellini sent an "all hands" announcement to NWS employees informing them that the NWS "will suspend spending on all personnel actions and will follow NOAA's new hiring freeze policy." Union ex. 58.

On the following day, NWSEO President Dan Sobien wrote Dr. Uccellini protesting the NWS's unilateral implementation of the hiring freeze. Union ex. 63; tr. 214. "Although Ms. Morse's letter and your broadcast emails state that the NWS now faces 'some serious fiscal challenges,'" wrote Mr. Sobien, "this does not justify abandoning your obligation to bargain with us

before implementing these actions." Mr. Sobien explained that the NWS's claim of fiscal necessity was unsupported. His letter noted that:

- The NWS had already achieved substantial labor savings because it had reduced the bargaining unit workforce by 5% since October 2010.

- The NWS spends over $100 million a year on over 800 contractors, the cost of each of which averages nearly twice that of an FTE, and that these contractors could be terminated at any time for the convenience of he government.

- The NWS distributes over $20 million annually in grants that could be curtailed.

- The agency could seek a reprogramming of funds, *which had been solicited by the Chairman of the House Appropriations Subcommittee on Commerce, Justice and Science in order for the NWS to avoid the impact of sequestration.*

Mr. Sobien's letter noted that during meetings with the NWS's CFO on March 5, the union was assured that any hiring freeze would not apply to

forecaster or hydrologist positions. His letter also explained that the hiring freeze violated the explicit terms of the 1993 and 2000 staffing agreements that specified minimum staffing levels at each WFO. Mr. Sobien warned Dr. Uccellini that the union would grieve the violation of these agreements if the freeze was not cancelled.

Although he urged Dr. Uccellini to comply with the parties' agreements and rescind the freeze, in order to protect the union's rights Mr. Sobien demanded to bargain over the impact and implementation of the freeze. Under Article 8, section 3c of the parties' CBA, the union must submit bargaining proposals within 15 days of any notice of the agency's intent to change conditions of employment. The deadline for submission of proposals is stayed, however, if the union submits a clarification of the agency's proposed change within 7 days. In his letter of March 28, Mr. Sobien submitted 17 questions, the answers to which were necessary to understand the agency's hiring freeze and how it would be implemented, so that the union could draft bargaining proposals. The letter specifically stated that the information was also being sought pursuant to § 7114(b)(4) of the FSLMR Statute which requires agencies to provide unions with data necessary for the purposes of collective bargaining.

Despite Ms. Morse's assurance that the agency would at least engage in post-implementation bargaining, it never answered Mr. Sobien's

bargaining demand, nor supplied any of the information or clarifications the union sought. Tr. 215. On May 1, the union filed a grievance over the hiring freeze. This grievance alleged that:

- The freeze on hiring of positions at the WFOs and RFCs violated the 1993, 2000 and 2004 staffing agreements, and that the freeze constitutes a clear and patent breach that goes to the heart of the agreements and, as such constitutes a repudiation of the agreements in violation of 5 U.S.C. § 7116(a)(1) and (5).

- The freeze violated Article 8, section 1 of the CBA which requires "predecisional discussions" inasmuch as the union was told that forecaster and hydrologists positions would not be frozen and had no opportunity to consult on that issue before the decision was made.

- Even assuming that the freeze on positions at WFOs and RFCs did not constitute a violations of extant staffing agreements, the NWS committed an unfair labor practice and violated the CBA by unilaterally implementing a freeze on hiring of those and hundreds of other bargaining unit positions not covered by the staffing agreements, without providing the union with an opportunity to negotiate.

- And the NWS committed a separate unfair labor practice and violated the CBA by failing to respond to the union's March 28 information request.

Joint ex. 2d.

Management did not answer the union's three "pre-freeze" hiring grievances until late April and early May. Joint exs. 3a, 3b, 3c. In its grievance denials, the NWS stated that some of the lead forecaster positions identified in the grievance had been filled in the interim.[3] The NWS also claimed that the 1993 MOU was no longer in effect because "it was valid through Stage 2 Operations of the Modernization and Associated Restructuring" which has been completed. It made the absurd claim that although the 2000 Floater Plan did, indeed, establish the number and types of positions at each WFO, ***the agreement should not be read as a promise to actually fill these positions!*** As discussed above, the Floater Plan provides that at those offices which had nine or fewer forecasters, staffing will not be reduced below that which would prevent the office from

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[3] Several of the other lead forecaster positions were subsequently filled after submission to the NOAA hiring freeze board. The union seeks back pay for the selectees because the delay in filing these positions was caused by the hiring freeze. Six other lead forecaster positions identified in the grievance (Raleigh, Minneapolis, Bismark, Jacksonville, Miami, Melbourne) have not yet been filled. Union ex. 82B.

having two people on shift when the Floater was initially allocated to other WFOs. The NWS's grievance denial took this language out of context and claimed that "management must only maintain minimum staffing levels necessary to maintain 24/7 operations" and could forgo hiring any positions identified in the plan. Finally, management also claimed that it has "little control over several stages of the hiring process," which are ostensibly in the hands of NOAA.

Management denied the union's hiring freeze grievance on June 7. Joint ex. 3d. Management essentially disavowed any legal responsibility for the hiring freeze. Despite its earlier assurances that it would bargain over the freeze post-implementation, management wrote that "the NWS is not required to, nor could we, bargain with NWSEO over a topic that we had no control over." Although it claimed that it had no responsibility for the freeze, it claimed that it was legally permitted to implement the freeze without bargaining because it was an emergency within the meaning of 5 U.S.C. § 7106(a)(2)(D). Management also claimed that the freeze did not violate the staffing agreements for the same reasons it gave in its denial of the three earlier grievances.

As discussed earlier, there were three exceptions contained in the March 27 Hiring Freeze notice and memorandum. Positions for which vacancy announcements were closed by March 27 would be filled; positions

that are assigned to mission critical activities would be filled; and internal promotions would continue. However, the NWS has failed to do any of these.

According to a RADS reports and other disclosures provided to the union in preparation for this hearing, there are 32 bargaining unit vacancies with Job Opportunity Announcements that closed before March 28 and that remained vacant as of the agency's December 11 response to the union's information request. Union ex. 84 (incorporating data from Union exs. 79E and 83). Applications were reviewed and evaluated and Certificates of Eligibles were issued to NWS selecting officials for at least six of these vacancies, but no selections were made as of the date of the agency's response. Union ex. 84.

Although Dr. Sullivan instructed Deputy Assistant Administrators to send a priority list of vacancies of *all* "mission critical" positions to the NOAA Hiring Freeze Board so that they could be filled, the NWS has failed to do so. David Murray, the Director of NWS Management and Organization Division and chief negotiator, explained that "mission critical" meant employees who were not based in headquarters. Tr. 548. In fact, the overwhelming majority of bargaining unit members, including all employees at WFOs, River Forecast Centers, and other operational forecasting units are classified as "emergency/essential" due to their mission critical responsibilities, and were excepted from the October, 2013 government shutdown furloughs and worked

without pay on that basis. Union exs. 60, 61, 62; tr. 211-213. However, management has submitted only requests to fill no more than a dozen forecaster, HMT/Intern and Hydrologist positions at WFOs and RFCs to the Board. Union ex. 80

Finally, with limited exceptions, the NWS did not continue internal promotions, although the Department of Commerce has approved doing so. Had internal promotions continued, lead forecaster vacancies would have been filled by aspiring journeyman forecasters, and journeyman forecaster vacancies would have continued to be filled by meteorologist interns who have completed their apprenticeships. The GS-11 HMT vacancies could have been filled by the GS-10 meteorological technicians from the smaller Weather Service Offices in Alaska who are seeking promotion or relocation, and the GS-13 ITO positions could have been filed by "computer-savvy" GS-12 meteorologists. Tr. 207-210.

Management's disclosures also reveal scores of other vacancies in the NCEP forecasting units, the regional headquarters, and in other specialized forecasting units. Union ex. 82C. On February 14, 2014, management provided a report showing 114 bargaining unit vacancies in programmatic or administrative positions at NWS headquarters or other headquarters elements. Union ex. 82D.

The hiring freeze began to thaw during the winter of 2014. On January 31, 2014, Dr. Sullivan issued a new memorandum formally cancelling the hiring freeze. This new memorandum, however, continued limitations on hiring. She wrote that the Assistant Administrators were to "continue prudent and responsible fiscal judgment in submitting vacancies to WFMO for recruitment" and "certify that filing the vacancy (1) serves priority NOAA missions, and (2) will be resourced by current appropriation funding levels." Union ex. 87. Job Vacancy announcements covering about 40 vacant bargaining unit positions were posted on the www.usajobs.gov website by the middle of February, 2014. Union ex. 90.

ARGUMENT

I. Management breached the parties' 1993, 2000 and 2004 staffing agreements by failing to fill vacant bargaining unit positions at the Weather Forecast Offices and River Forecast Centers.

A. Management has failed to fill approximately 200 positions covered by the staffing agreements.

In preparation for this hearing, the agency provided a breakdown of the assigned staffing levels at each operational unit, by region, which includes all WFOs, RFCs, WSOs, CWSUs, NCEP forecasting units and the Telecommunications Gateway at the NWS headquarters. According to this report, (union ex. 82C, identified as NWS.WFO.Composition and Vacancies 12.3.13.xlsx, attached to Ms. Cioafflo's' email of December 11, union ex. 82A), there were well over 300 bargaining unit vacancies in NWS operational units, including approximately 175 vacant positions covered by the staffing agreements.

These vacancies include the following positions at WFOs that were established by the 1993, 2000 and 2004 staffing agreements:

- 22 Lead Forecasters
- 35 Journeyman Forecasters
- 62 HMTs/Interns

- 21 Electronics Technicians
- 11 Administrative Support Assistants
- 8 Information Technology Officers
- 10 Observing Program Leaders
- 4 Service Hydrologists

The vacancies also include the following positions at RFCs that are covered by the 1993 staffing agreement:

- 3 HAS Forecasters (Slidell, Portland and Atlanta)

The number of journeyman hydrologic forecasters at the Portland, Sacramento and Alaska RFCs has also fallen below the minimum number of four required by the 1993 HR Plan. Joint ex. 6 at 10, Table 2-6. There are numerous other vacant senior and journeyman hydrologic forecaster positions at other RFCs, but the staffing remains above the nominal staffing required by the HR Plan.

In its grievance denials, management asserted that the agreements that established the precise types and numbers of positions at each WFO and RFC do not actually require the agency to hire anyone for these positions. In the 20 years since the HR Plan was first negotiated, management has never before made such a bizarre claim, and its practice belies it. Section 4.3 of the 1993 HR Plan, "Filling Positions," specifically states that the new positions *will be filled* - either through competitive procedures, reassignment or

referrals from placement efforts. Joint ex. 6, at 30. In 1997, the parties' negotiated and jointly announced a Meteorologist Placement Plan which contains a detailed and elaborate process to ensure that people were hired for all the forecaster positions at the WFOs. Exhibit E to the 2000 Floater Plan, "Implementation Guidelines," contains mandatory language that directs the filling of positions as vacancies occur. Joint ex. 8. Paragraph 2(b) of the 2004 agreement also contains a process by which the newly created Observing Program Leader positions were to be initially filled, and also mandates that "[a]s DAPMs or OPLs retire or leave the WFO for other reasons, the same recruitment process will be conducted." Joint ex. 9, p. 2 and p. 3, ¶ 2(e). During a discussion of staffing of WFOs and RFCs at the May, 2008 Western Region Labor Council meeting, management gave the union assurances that "all vacancies have been filled as soon as possible." Union ex. 40, p. 1.

Management's claim that it is not obligated to hire anyone for the positions created in these staffing agreements frustrates the purpose of those agreements. "The contract must be construed to effectuate its spirit and purpose." *Hercules Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). "Contracts must be read as a whole, and if possible, courts must interpret them to effect the general purpose of the contract." *Postlewaite v. McGraw-Hill, Inc.,* 411 F.3d 63, 67 (2nd Cir. 2005). As Elkouri notes:

> Judicial doctrine recorded in the *Restatement (Second) of Contracts* holds that when the principal purpose that the parties intended to be served by a provision can be ascertained, the purpose is to be given great weight in interpreting the words of the provision. Arbitrators agree that an interpretation in tune with the purpose of a provision is to be favored over one that conflicts with it.

ELKOURI & ELKOURI, *How Arbitration Works*, 461 (6th ed. 2003).

B. The staffing agreements are enforceable because they concern permissive matters covered by § 7106(b)(1) and therefore supercede the "management rights" enumerated in § 7106(a).

In its grievance denials, management also claimed that "it is within management's right to hire and place employees." Although the FSLMR Statute lists the right to hire among the "management rights" in 5 U.S.C. § 7106(a), the prefatory language of § 7106(a) states that the management rights enumerated therein are "subject to subsection (b) of this section." And § 7106(b) states in turn that:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating-
>
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

In its opening statement, the agency claimed that a staffing agreement is unenforceable because "such an agreement . . . would have egregiously violated management's non-waivable rights with respect to hiring." Tr. 46. This is a misstatement of law. The prefatory language of both subsection 7106(a) and 7106(b) recognize that there is a tension between the rights reserved to management by subsection (a) and the three categories of negotiable matters listed in subsection (b). Where the two conflict, the management rights listed in subsection (a) are subordinate. *American Fed. of Gov't. Employees, Local 2782 v. FLRA*, 702 F.2d 1183, 1185-86 (D.C. Cir. 1983). Once it is determined that a matter is covered by subsection b(1), it is no longer necessary to enquire whether it interferes with the management rights listed in subsection a. *NAGE Local R5-184 and Dep't. of Veterans Affairs Medical Center,* 51 FLRA 386, 395 (1995).

The phrase "numbers, types, and grades of employees or positions assigned to any organizational subdivision" contained in § 7106(b)(1) "applies to the establishment of agency staffing patterns, or allocation of staff, for the purposes of an agency's organization and the accomplishment of its work." *NAGE Local R5-184 and Dep't. of Veterans Affairs Medical Center,* 55 FLRA 549, 552 (1999); *accord*, *NAGE Local R5-184 and Dep't. of Veterans Affairs Medical Center,* 52 FLRA 1030-33 (1977). The NWS previously conceded, and the FLRA confirmed, that a 2004 NWSEO proposal to increase the staff at

the Anchorage Forecast Office by five forecasters, four HMTS or interns, and an ITO, was covered by subsection (b)(1). *NWSEO and Dep't. of Commerce, National Weather Service, Alaska Region*, 61 FLRA 241, 243 (2005).[4] In reviewing proposals that require an agency to add staff or positions to organizational units, the FLRA recognizes that the natural implication or intent of such staffing proposals is to require the agency to actually hire employees for those positions - not just add them on paper as the NWS apparently claims is the effect of its staffing agreements with NWSEO. *NFFE Local 2148 and Dep't. of the Interior, Office of Surface Mining, Reclamation and Enforcement*, 53 FLRA 427, 430, 433-35 (1997). Proposals that explicitly require management to hire or fill vacancies are still covered by subsection (b)(1). *AFGE Local 3354 and Dep't. of Agriculture, Farm Services Agency, Kansas City Management Office*, 54 FLRA 807 (1998).

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[4] The FLRA initially rejected NWSEO's claim that its proposal to increase the staff at Anchorage was a mandatory subject of bargaining under subsection (b)(3) as an "appropriate arrangement" for employees adversely impacted by additional workload at this forecast office. The FLRA's decision was set aside by the Court of Appeals in *NWSEO v. FLRA*, 197 Fed. Appx. 1, 2006 WL 2226567 (D.C. Cir. 2006). On remand, the Authority held that the proposal was an appropriate arrangement and ordered the NWS to bargain over it. *NWSEO and Dep't. of Commerce, National Weather Service, Alaska Region*, 64 FLRA 569 (2010). The parties' eventually agreed to add four forecasters to the Anchorage WFO.

Although Federal agencies have no obligation under the Statute to bargain over "permissive" matters covered by § 7106(b)(1) (such as staffing), once they do so, any agreement reached is binding:

> [M]atters covered under section 7106(b)(1) are negotiable only at the election of the agency. However, when an agency does elect to bargain and a provision that concerns a matter covered under section 7106(b)(1) is included in an agreement, the provision is enforceable through grievance arbitration.

U. S. Dep't of the Treasury, Internal Revenue Service and National Treasury Employees Union, 56 FLRA 393, 395 (2000). A provision negotiated pursuant to § 7106(b)(1) "is fully enforceable in arbitration." *Social Security Administration and AFGE, SSA General Committee,* 66 FLRA 569, 572 (2012). Or, as the NWS's own former chief negotiator said at the hearing, "if management alters that agreement without negotiation, it does it as its own risk." Tr. 628.

Following this reasoning, the FLRA has enforced an arbitration award that found that the FAA violated an agreement which mandated minimum staffing levels. "[T]he Authority has found that the phrase, 'numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty' in § 7106(b)(1) applies to the establishment of agency staffing patterns, or allocation of staff, for the purpose of an agency's organization and the accomplishment of its work."

U.S. Dep't of Transportation, Federal Aviation Admin. and Professional Airway Systems Specialists, 60 FLRA 159, 162 (2004).

In its grievance response, management asserted that it was entitled to freeze hiring because the management rights clause, § 7106(a)(2)(D)**,** permits it "to take whatever actions may be necessary to carry out the agency mission during emergencies," and sequestration was such an emergency. The union will address in more detail why sequestration was not an "emergency" within the meaning of § 7106(a)(2)(D) in its discussion of how management committed an unfair labor practice. However, to the union's knowledge, the FLRA has never held that § 7106(a)(2)(D) is a valid defense to a breach of contract case. Further, as noted immediately above, an agreement over a permissive matter negotiated pursuant to § 7106(b)(1) *supersedes* the management rights enumerated in § 7106(a) (which includes the right to act in an emergency) and is enforceable even if it infringes on those management rights. It must be remembered that "§ 7106(b)(1) *is* indisputably an exception to § 7106(a)." *Association of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA,* 22 F.3d 1150, 1155 (D.C. Cir. 1994) (emphasis in original).

C. The 1993 Memorandum of Understanding is still in effect.

Management erroneously argues that the 1993 MOU incorporating the MAR Human Resources Plan is no longer in effect. Section III(d) of this MOU states that:

> This MOU shall become effective after its signing and will remain in effect until its applicability is no longer considered necessary on a site by site basis *by both parties* due to certified stage 2 operations.

Joint ex. 5, at 11 (emphasis added). Former NWSEO President Sierra and current NWSEO President Sobien both testified that there never came a time when NWSEO no longer considered the MOU as necessary, nor were there any discussions or agreements with management to that effect. Tr. 125, 139. In one of its information requests submitted in preparation for the hearing in this case, the union asked management to "provide copies of any documents, agreements, or any evidence demonstrating that NWSEO has ever indicated or stated that it no longer considered the 1993 MOU necessary." Management responded on July 19 that there were "no responsive documents to this request." See NWS Responses to RFIs regarding vacancies, pp. 1-3, ¶ 1. (Union exs. 79B, 79C, 79D). Finally, the very fact that the parties used the staffing profiles established in the HR Plan as a basis for the 2000 Floater Plan and for the 2004 agreement demonstrates that both parties considered

the staffing profile agreed to in 1993 remained valid. In other words, the very act of amending the previously agreed-upon staffing levels continued forth the earlier agreement to the extent that it was not amended. When a subsequent agreement modifies the terms of an earlier agreement, both "must be taken together and construed as one contract." *In Re New York Skyline, Inc.,* 432 B.R. 66, 78 (S.D.N.Y. 2010).

D. The 2000 Floater Agreement is binding even though it was negotiated in an informal process because Clinton-era "partnership" discussions were a form of collective bargaining.

At the hearing, the agency for the first time denied that the 2000 Floater Plan (as well as the 2004 amendment that altered the mix of HMTs and interns and created the OPL position) was a negotiated agreement. However, management's response to the grievance over the alleged breach of the 2000 Floater Plan agreement specifically acknowledges that it is an "agreement," but simply claims it wasn't breached:

> . . . In fact, the October 2000 Revised Staffing Plan (known as the "Floater Plan") provides only that management will not reduce the staffing at any WFO to a level which would prevent the WFO from running in a 24/7 environment with two persons per shift on duty. Ergo***, the agreement itself*** contemplates that not every position will be filled at all times. . .

Joint ex. 3b. (Emphasis added). Similarly, management's response to the grievance filed over the failure to fill the journeyman forecaster positions as well as the grievance challenging the hiring freeze also collectively refer to the 1993 MOU and the 2000 Floater Plan agreement as "the agreements you refer to . . ." Joint ex. 3c, at 1, last line; joint ex. 3d, at 3, ¶ 2.

Management has historically recognized the 2000 Floater Plan as a collectively bargained and binding agreement. In 2010, Acting Regional Director Schwein, who testified at the hearing, wrote in response to questions from Central Region union chair Martin Lee about floater placements that "I determined the floater locations based on the 2000 NWS/NWSEO agreement which reorganized the DAPM and HMT unit." Union ex. 38 at 1.[5] In 2004, Western Region manager Rich Douglas wrote the union's regional chair that management was required to follow the 2000 staffing plan until "the NLC-National NWSEO re-negotiate the matter, then the new agreement will supercede this." Union ex. 27.

The fact that NWSEO reached agreement with the NWS over the 2000 Floater Plan through collaborative processes and informal discussions, rather than traditional bargaining methods, does not undermine the enforceability

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[5] As noted in Ms. Schwein's responding email, the answers to Mr. Lee's questions were inserted into the text of Mr. Lee's email following each individual question.

of that agreement. The FLRA has held that informal agreements reached as a result of "partnership" efforts are binding:

> The fact that the sessions were conducted in a partnership atmosphere, as opposed to 'traditional' collective bargaining, does not preclude a conclusion that the sessions constituted collective bargaining within the meaning of the Statute. The definition of collective bargaining set forth in Section 7103(a)(12) does not prescribe any particular method in which collective bargaining must occur. It is well-recognized that collective bargaining may occur in a variety of ways, including the use of collaborative or partnership methods.

Federal Aviation Administration and National Air Traffic Controllers Ass'n, 53 FLRA 312, 319 (1997). "Consensus decision-making is not distinct from bargaining; rather it is one manner in which bargaining may be conducted." *American Federation of Government Employees, National Council of HUD Locals 222 and U. S. Dep't of Housing and Urban Development*, 54 FLRA 1267, 1998 WL 685172, * 12 (1998).

In fact, the parties' current agreement explicitly acknowledges that the parties collectively bargained over staffing issues that arose during the modernization. The first paragraph of Article 8, Section 1 states:

> During the past decade, management has obtained employee input, through NWSEO, prior to making decisions about the restructuring of the workforce and the agency's method of operations. Similarly, *the parties successfully bargained and reached mutual agreement over the restructuring*

> *of the NWS during and at the conclusion of the agency's modernization.*

Joint ex. 1 at 17 (emphasis supplied).

That the Floater Plan was a collective bargaining agreement reached through "partnership," there can be little doubt. The November 22, 2000 NWS Global Announcement from NWS Director Kelly stated that at the April, 2000 NWS Corporate Board meeting, NWSEO President Sierra "***agreed*** to restructure the six positions in the DAPM/HMT/MI unit." Join ex. 8, at 1 (emphasis added). The detailed implementation plan was developed during the following months by Mr. Sierra and three management officials. Union ex. 4, at 3, ¶ 11; union ex. 6. In a June 7, 2000 memorandum, the NWS Pacific Region Director, Richard Hagemeyer, who chaired the team that developed the Floater Plan, wrote:

> At this point, I believe that the policy has been established and partnered with NWSEO. The next step should be the partnering of an implementation plan with the NWSEO.

Union ex. 10, at 1.

Mr. Sierra gave his written "concurrence" to the final plan and Global Announcement on November 13, 2000. Union ex. 7, at 3. The fact that the agreement did not take the form of a formal memorandum of understanding is immaterial to its enforceability. The FLRA recognizes that even "tacit

agreements" are enforceable in the Federal sector as they are in the private sector. All that is required is a meeting of the minds. *Dep't. of Commerce, Patent and Trademark Office and Patent Office Professional Assn.,* 60 FLRA 869, 880-81 (2005); *Dep't. of the Treasury, Bureau of Engraving and Printing and International Plate Printers, Die Stampers and Engravers Union, Washington Plate Printers Local 2*, 44 FLRA 926, 940 (1992). The parties' CBA envisions that agreements reached during mid-term negotiations will be reduced to writing in the form of an MOU. Article 8, § 5. However, the decision of the parties' to memorialize their agreement in the form of a formal announcement rather than an MOU does not affect its enforceability. *Dep't. of Homeland Security, Customs and Border Protection, San Diego and AFGE Local 2805*, 61 FLRA 136 (2005) (agreement to union's proposal for 15% official time enforceable even though not executed in accordance with parties' CBA; all that was required was a "meeting of the minds" as in the private sector).

E. The 2000 Floater Agreement requires more than merely ensuring that there are two people on duty 24/7.

Management takes a discrete sentence in the Floater Plan out of context to argue that, despite all the other detailed provisions contained therein, it is only required to staff the WFOs with manning sufficient to

ensure there are two people on shift at any time. The speciousness of this argument is self-evident because the Floater Plan covers positions that are not even shift workers - Information Technology Officers, Electronics Technicians and Service Hydrologists.

When the sentence upon which management relies is read *in context* it is clear that it refers only to the initial allocation of the fifth MHT or "floater" and not to overall staffing levels of WFOs in the future:

> April 2000 - At the Board meeting, the following points were briefed and agreed to:
>
> 1. No WFO would have its staffing reduced below the level which would permit two persons to be on shift around the clock. WFOs with 9 or less core forecasters would retain their floater as an HMT.

Joint ex. 8, Exhibit A, "Approved Concept." Similarly, the Floater Plan's "Implementation Guidelines" (Exhibit E to joint ex 8) states, in ¶ 4:

> No WFO will have its staffing reduced below a level which would prevent two persons to be on shift around the clock (i.e., one meteorologist and one HMT/Intern or two meteorologists) WFOs with nine ofrless core forecasters retain their floater as an HMT.

To explain: mathematically, it takes five employees in each job classification, working a rotating shift rotation, to man 3 shifts, 7 days a week. There are (supposed to be) five lead forecasters at each WFO, which ensures that there

is at least one lead forecaster on every shift who is ultimately responsible for the warnings and forecasts issued by the particular WFO. At those offices where there are nine or fewer forecasters, there will therefore be only four or fewer journeyman forecasters available, which is insufficient to provide coverage for all 21 journeyman shifts per week. (3 eight hour shifts per day, 7 days a week). So, in order to ensure that there was a second body on shift at all times, management and the union agreed at the April 2000 Corporate Board meeting that those offices with less than five journeyman would keep their fifth HMT as either an HMT or Intern to ensure that there were sufficient HMTs and Interns to provide 24/7 coverage in their rotation. Tr. 101. This would, in turn, guarantee that there would be a second shift worker on duty when the journeyman forecaster shift was not covered.

The bargaining history of the Floater Plan confirms the limited intent behind the sentence in dispute because it was only used in the context of a discussion about the original allocation of the floater. Tr. 101. For example, in an April 17, 2000 memo from NWS Pacific Region Director Hagemeyer to NWSEO President Sierra and others developing the Floater Plan, Mr. Hagemeyer wrote that "[a]ll assignments of 'floaters' as METS have to be made before you can determine what WFOS need to retain the 'floater' to fulfill the requirement that all WFOs be staffed to be able to have two persons on duty 24 hours/day." Union ex. 8, at 1. In an April 26, 2000 email,

Mr. Hagemeyer refers to the "retention of the floater on station to meet the 2 on shift around the clock requirement" while discussing whether floaters would be available to create addition electronics technician positions. Union ex. 9, p. 2. The management officials who developed the Floater Plan with NWSEO President Sierra debated whether to allow the floater at those offices where there were nine or fewer forecasters to be assigned as either an HMT or a meteorologist. Tr. 111. Some of the emails in which this point was debated reveal, again, that the language requiring that staffing be sufficient to enable two people to be on shift was intended to apply to the initial allocation of the floater, rather than a license to reduce WFO staffing below limits found elsewhere in the Floater Plan at some future date. See June 7, 2000 email of Central Region Director Jack May; September 29, 2000 email of Western Region Director Vickie Nadolski; October 4, 2000 email from Southern Region Director Bill Proenza; October 4, 2000 email of Western Region Director Nadolski; October 10, 2000 email of Southern Region Director Proenza; October 10, 2000 email of Western Region Director Nadolksi; and October 12, 2000 email from Central Region Director May; union exs. 11, 12, 13, 14, 15, 17, 18, 19.

As can be seen from these exchanges and union exhibit 16, the language in dispute was developed and written by management. Accordingly, any ambiguity must be construed against the author under the doctrine of

contra proferentem. "If language supplied by one party is reasonably susceptible to two interpretations . . . the one that is less favorable to the party that supplied the language is preferred." ELKOURI & ELKOURI at 477, *quoting* FARNSWORTH, CONTRACTS § 7.11(3rd ed. 1999).

Implicit in the phrase under examination is a promise that there will indeed be two people on duty during every shift, and the union has relied upon this language to that effect in the past. However, that is not the same as saying that all the other positions addressed in the Floater Plan may be left vacant provided sufficient staffing remains to have two people on duty.

F. The 2004 Plan to Revise WFO Staffing was also a collectively bargained and binding agreement which required management to fill OPL positions.

Although management denied at the hearing that the 2004 revision to the 2000 Floater Plan was the result of collective bargaining, on cross-examination the agency's chief negotiator at the time conceded that the parties' bargaining teams met *in the very same room in which the hearing was being held* to collectively bargain over the agency's proposal to alter the composition of the HMT unit. Tr. 618. He conceded that management's original proposal to eliminate all but one HMT was withdrawn over the course of both formal and informal negotiations or "discussions" with the

union; and that the parties eventually compromised on an agreement that would require all vacancies in the HMT unit be open to both HMT and intern applicants; and that to sweeten the pie, management agreed to a union demand that one of the positions be upgraded to a GS-12 position called an "Observing Program Leader" in order to provide HMTs with an opportunity for career advancement; that GS-9 meteorological technician positions at the smaller Weather Service Offices in Alaska be upgraded to GS-10 so that these employees would qualify to bid on GS-11 HMT jobs at the WFOS; and that the remaining GS-11 HMT positions be converted to FLSA non-exempt status. Tr. 622-24. These concessions sought by the union (which first were proposed by union counsel at the parties' January, 2004 bargaining session, see union exhibit 24, at 8-9) were, as a result of give and take, later offered in management's counter-proposal of September 23, 2004, to which the union agreed. Union ex. 25. That's collective bargaining, no matter how you otherwise try to characterize it.

In fact, the Deputy Assistant Administrator sent an email to all employees in October 2003 informing them that management proposed to change the composition of the HMT unit and that "[w]e are currently engaged in the bargaining process and will continue to fulfill our bargaining obligations." Union ex. 22 at 2. Mr. Brown's boss, Eastern Region Director Dean Gulezian, wrote one employee at the time that "the entire

implementation plan is under negotiation." Union ex. 23. In October 2004, when those negotiations were complete, one Western Region manager, John Livingston, wrote his staff that "NWS management and the union have agreed on some changes to the WFO staffing plan." Union ex. 34.

Once again, the lack of a formal MOU does not affect this agreement's enforceability. The terms of what was agreed to are not ambiguous; a written counterproposal was sent by mail to the union, and the union responded in writing unequivocally accepting the proposal. Union ex. 25. In an earlier case, Arbitrator Simmelkjaer rejected the NWS's claim that an email exchange between NWS and NWSEO, in which the union said that it "agreed" to management's proposal to make temporary promotions under certain circumstances, was not a binding agreement. "In the Arbitrator's opinion, the net effect of the May 2001 email correspondence between Messrs Sierra and Kensky was to establish a side agreement amending Article 16." *National Weather Service and NWSEO,* 103 FLRR-2 29 (Simmelkjaer, 2002). This award was affirmed by the FLRA in 58 FLRA 490 (2003).

This 2004 agreement specifically requires management to fill the OPL positions when they become vacant. Section 2(b) contains a recruitment procedure for initially filling the OPL vacancies, that include the initial advertisement of the position to NWS employees in the local commuting area only and special consideration to the most senior HMT applicant on station.

Section 2(b) also commits management to back fill the positions when they become vacant rather than leaving them open: "As DAPMs or OPLs retire or leave the WFO for other reasons, the same recruitment process will be conducted." Union ex. 25, at 2. There are currently ten OPL positions vacant:

Columbia, SC	Blacksburg, VA
Huntsville, AL	Nashville, TN
Wichita, KS	Goodland, KS
Green Bay, WI	Flagstaff, AZ
Los Angeles, CA	Las Vegas, NV

Union ex. 82C.

G. NWS cannot escape its responsibly for compliance with its staffing agreements by blaming NOAA.

i. The NWS and NOAA are not distinct entities. In fact, the Director of the NWS signed the parties' CBA in his capacity as the Assistant Administrator of NOAA. See Joint ex 1, p. 1. In accordance with Article 10, section 9(B), the grievances in this case were filed with the Assistant Administrator of NOAA. The NWS is responsible for compliance with its collective bargaining agreements, even if it relies on a NOAA-wide Office of Workforce Management to administer aspects of those agreements. Section 4.01 NOAA Administrative Order 202-711 states that "Line and Staff Office management is responsible for the fulfillment of its labor-management

relations obligations." Section 4.02 in turns states that "WFMO provides guidance and support to LO/SO management in fulfilling its labor-management relations obligations." Union ex. 45. Section 2.01 of the Attachment to NAO 202-711 provides that:

> Authority on matters relating to LMR has been delegated to the maximum extent consistent with the need for uniformity. Delegation to appropriate local management ensures meaningful interaction between NOAA management and its employees or their representatives on personnel policies, practices and matters affecting general conditions of employment.

Section 2.04 of the Attachment also states that "[t]he authority to make decisions concerning LMR matters rests with Line and Staff Office (LO/SO) management." Union ex. 40.

It is pursuant to this authority that the NWS has negotiated - and until recently complied with - the staffing agreements that are at issue in this case. The NWS has negotiated a comprehensive article governing the merit promotion process in Article 14 of the parties' master CBA, demonstrating that it has authority to make commitments on hiring and promotion, even though it relies on NOAA's Office of Workforce Management to administer this article.

NOAA has also delegated to the NWS authority to hire. As late as November 2012, the Acting Assistant Administrator for Weather Services

(a/k/a, Acting Director of the Weather Service) issued a revised NWS Instruction 1-201, "Delegation of Authority for Hiring," which notes that the "NOAA Under Secretary delegated full hiring authority to the Assistant Administrator (AA) of each NOAA Line Office in a memorandum dated February 6, 2002." She, in turn, redelegated hiring authority to lower level NWS managers. (See Section 3 -"NWS Hiring Authority," union ex.44). Attached to this Instruction was a copy of the February 2002 Memorandum from the Under Secretary of Commerce for Oceans and Atmospheres (a/k/a, the Administrator of NOAA) to the Assistant Administrator for each Line Office, in which he wrote:

> I hereby delegate full hiring authority to your respective NOAA Line/Staff Office . . . As you deem appropriate, you have discretion to redelegate hiring authority - in full or in part. . . .

Union ex. 44, at. 4.

ii. Furthermore, as a factual matter, the failure to fill the currently vacant positions covered by the staffing agreements *before the hiring freeze* can be traced back to failures on the part of NWS managers rather than the NOAA Office of Workforce Management. There was a conscious decision on the part of NWS management to leave positions covered by the staffing agreement vacant or to delay filling them. The Central Region is a good example.

Acting Central Region Director Schwein testified at length about purported delays in processing personnel actions that ostensibly occurred at WFMO. However, when she was asked on cross-examination about the actual positions at issue in this case listed on union exhibit 82B, she could not identify a single delay at WFMO:

> Q: Is there anything on Exhibit 82B that indicates - could you show me one example here where workforce management delayed in any way in timely processing central region requests to recruit and fill vacancies?
>
> A: There's nothing on this chart that indicates that.

Tr. 848. In fact, union exhibit 82B shows, and Ms. Schwein confirmed, that the Central Region delayed submitting eight HMT/Intern and two Lead Forecaster vacancies to WFMO for recruitment for periods ranging from two months to two years, but that WFMO advertised each of these vacancies within one month or less of actually receiving the request to do so. Tr. 843-845; 846. In addition, eight HMT/Intern, two Lead Forecaster and two General Forecaster positions in the Central Region became vacant before the freeze was announced, but were never submitted to WFMO for recruitment at all. Union ex. 82B; tr. 842-43, 846, 847.

The Acting Southern Region Deputy Director also claimed that his region submitted all vacancies to WFMO for recruitment, but that WFMO

delayed taking action on them. However, when confronted on cross examination with documentary evidence to the contrary he conceded that there were at least four Southern Region positions that had been vacant since as early as June 2012 - a Lead Forecaster position in Jackson, MS; HMT/intern positions in Ft. Worth and Norman; and an ITO position in Shreveport - that were never submitted to WFMO for recruitment. Tr. 750-53. He initially testified that WFMO took no action to recruit for six General Forecaster vacancies submitted to WFMO in late 2012. However, once again, when confronted with documentation that WFMO had advertised one of those positions (Morristown) and actually issued a certificate of eligibles for another from which a selection was never made by the NWS (Huntsville), he conceded that he could not say for certain that WFMO had not taken action on any of them. Tr. 738-46. Whether WFMO delayed recruiting for these six forecaster positions is actually immaterial, because he admitted that recruitment actions for these six positions, as well as for two Lead Forecaster positions (Miami and Melbourne) and for an HMT/intern position (Lubbock) were cancelled in February 2013 at his request. Tr. 722, 725-26, 746-47. In fact, the Southern Region "pulled back" a majority of its recruitment requests *before* the March 2013 freeze. Tr. 713.

A review of union exhibit 82B similarly reveals that the Eastern Region delayed submitting Lead Forecaster vacancies at Sterling and Raleigh

and HMT/Intern vacancies at Burlington, Mt. Holly and Wakefield for two months after they became vacant, and failed to submit HMT/intern positions at Buffalo, Wilmington, and Charleston at all. Only one of these positions was filled as a result.

The Western Region Chief of Administrative Services also parroted the same rehearsed complaints about delays at WFMOs. But when he was asked to identify when these delays took place, he said it was in 2012 - the year before these grievance arose. Tr. 857. He then identified eight Western Region positions that became vacant before the freeze was implemented, but that were never submitted to WFMO for recruitment. Tr. 863, 891.

Union exhibit 82B, page 2, shows that the Alaska Region also delayed submitting requests to recruit for General Forecaster vacancies at Juneau and Anchorage and two at Fairbanks for 10 months, 5 months, 8 months and 5 months respectively before the freeze was implemented. Only one of these positions has since been filled as a result. Agency ex. 20, p. 2.

In summary, the spreadsheets provided by the agency and submitted as union exhibits 79F and 82B reveal that:

- The NWS failed to submit a request to WFMO to fill at least 19 forecaster, intern, HMT and ITO vacancies before the effective date of the hiring freeze; (see "not submitted" in "status" column on union ex. 82B).

- recruitment actions for 9 vacancies were returned to the NWS in February 2013 at its request after initially being submitted to WFMO (see "case returned to line office" in "status" column on union ex. 82B and Mr. Coyne's testimony at tr. 722, 725-26, 746-47).

- three general forecaster vacancies at Fairbanks were not filled in late 2012 or early 2013 when the NWS selecting official simply failed to select an applicant from the first certificate of eligibles issued by WFMO (see "status" column on file data_hiring_7.19.13, union ex. 79F).

iii. Even if the NOAA hiring freeze could validly excuse the NWS's compliance with the staffing agreements, the NWS retained authority to fill many, if not most, of the positions covered by the staffing agreements despite the freeze:

- The March 27 Hiring Freeze memorandum stated that "Job Opportunity Announcements that have been advertised and closed by the date of this memo will continue to be processed to completion of hire." However, *Acting Central Region Director Schwein testified that despite Dr. Sullivan's directive to fill these*

positions, NWS headquarters instructed the regions "not to do so." Tr. 849. The disclosures supplied by management reveals that the NWS did not hire anyone for at least 32 positions whose vacancy announcements closed before that date. All but three of these positions (two meteorologists at Center Weather Service Units and a NCEP Space Weather Forecaster) are positions covered by the staffing agreements. Union ex. 84.

- In her March 27 Hiring Freeze memorandum, Dr. Sullivan wrote that NOAA "will submit a request to the Department of Commerce to allow NOAA to advertise promotions 'NOAA-only," thereby allowing employees to advance without increasing the overall number of employees on board during the freeze. Union ex. 57, at. 2. The Department of Commerce granted NOAA this authority. Union ex. 59. However, the NWS refused to exercise it. With this authority, the NWS could have filled all outstanding GS-13 Lead Forecaster vacancies with GS-12 Journeyman Forecaster applicants, and in turn fill all GS-12 Journeyman Forecaster vacancies from among GS-11 Met Intern applicants, which is the normal career progression. Similarly, the GS-12 Observing Program Leader vacancies can

be filled by GS-11 HMT applicants, as specifically envisioned by the 2004 staffing agreement which created those positions. NWSEO President Sobien testified that about half of the GS-13 ITO positions have been filled over the years by internal applicants from among the ranks of GS-12 Journeyman Forecasters who have IT experience or expertise. Tr. 208-09.

- Finally, in her March 27 Hiring Freeze Memorandum, Dr. Sullivan directed line offices to "determine which of these vacancies/positions are assigned to mission critical activities" and submit the list of those vacancies to the NOAA Hiring Freeze Board for authority to fill. NWS Director of Workforce Management David Murray testified that mission critical positions were those outside of headquarters. Tr. 68. *All* of the positions covered by the staffing agreements are therefore "mission critical" and thus the incumbents of those positions were required to work during the October 2013 government shutdown. Article 19, § 7.A of the parties' CBA states that "the NWS has decided all employees scheduled for operational work . . . are "emergency employees" and must report to work even if government agencies are closed due to severe weather or other

emergencies. Nevertheless, as of November 14, 2013, the NWS had only submitted requests to fill 12 forecaster, HMT/Intern and Hydrologist bargaining unit positions at the WFOs and RFCs. Union ex. 80.

H. The agency's alleged "fiscal challenges" do not excuse the breach of the staffing agreements.

In his March 27 email to employees, Dr. Uccellini claimed that sequestration created "some serious fiscal challenges" which warranted the hiring freeze. However, the Acting Alaska Deputy Regional Director, John Dragomir, candidly testified to the contrary:

> Prior to the freeze, because we were funded really fairly well with labor dollars, we didn't have to worry about whether we would have the budget to cover any of the vacancies that we had if we needed to fill them . . . After the hiring freeze, we still had funds in labor, we just couldn't hire people.

Tr. 771.

Furthermore, economic necessity is not a defense to a breach of contract claim. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 768 n.12 (1983). "The law is clear that a party may not escape its obligations under a collective bargaining agreement because of financial difficulties." *Standard Fittings v. NLRB*, 845 F.2d 1311, 1315 (5th Cir. 1988); *accord, IBEW Local*

No. 90 Welfare, Annuity and Pension Funds v. Dexelectronics, Inc., 98 F.Supp.2d 265, 271 (N.D.N.Y. 2000).

The NWS was not authorized to forgo expenditures for which funds were appropriated (such as labor) in anticipation of sequestration. According to the GAO,

> The Impoundment Control Act . . . requires that agencies obligate the amounts that Congress has appropriated.
>
> * * *
>
> Agencies must continue to comply with the Impoundment Control Act as they prepare for a possible sequestration. We have previously concluded that an agency may not set aside funds or intentionally slow down spending in anticipation of proposed cancellations or rescissions of previously appropriated funds. If any agency proposes to defer the obligation of funds in the wake of a possible sequestration, it would need to show that the deferral met a statutory exception and it would need to send a special message to Congress.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *Agencies Must Continue to Comply with Fiscal Laws Despite the Possibility of Sequestration,* GAO-12-675T (April 25, 2012) at 3, 6. Nor does the agency's concern about the prospect of insufficient appropriations in FY 14 or later justify its continuing failure to comply with the negotiated staffing agreements. "[A]n agency may not rely on political guesswork about future congressional appropriations as a

basis for violating existing legal mandates." *In Re Aiken County,* 725 F.3d 255, 260 (D.C. Cir. 2013).

II. Management committed an unfair labor practice in violation of the FSLMR Statute and also violated Article 8 of the parties' CBA when it unilaterally implemented a hiring freeze without providing the union with prior notice and an opportunity to bargain. Management's violation of the staffing agreements also constituted an unfair labor practice because the breach of those agreements was "clear and patent."

A. The Arbitrator has jurisdiction to adjudicate a statutory unfair labor practice allegation.

Both the unfair labor practice provisions and the enforcement mechanisms of the Federal Service Labor Management Relations Statute and the National Labor Relations Act are similar. Both the NLRA and the FSLMR Statute make the failure to negotiate in good faith an unfair labor practice. 5 U.S.C. § 7116(a)(5). The General Counsel of the Federal Labor Relations Authority, as does the General Counsel of the NLRB, investigates and prosecutes unfair labor practice charges before Administrative Law Judges, whose decisions can be appealed to the FLRA, and then to the appropriate circuit of the U.S. Court of Appeals. 5 U.S.C. §§ 7118, 7123.

But, uniquely, the FSLMR Statute creates a two-track system for adjudication of statutory unfair labor practices. In lieu of filing an unfair

labor practice charge with the appropriate Regional Director of the FLRA, a union may file a grievance alleging that the unfair labor provisions contained in § 7116(a) of the FSLMR Statute have been violated. This grievance may, but need not be, coupled with an allegation that similar or companion contractual provisions have also been violated (as has been done in the grievances *sub judice*). When a grievance specifically alleges a statutory unfair labor practice, the Arbitrator stands in place of an FLRA Administrative Law Judge. His or her decision, like all arbitration decisions (except those which involve major adverse actions), can be appealed to the FLRA. But only those arbitration decisions which involve statutory unfair labor practice claims may subsequently be judicially reviewed. *See generally, Overseas Education Assn. v. FLRA*, 824 F.2d 61 (D.C. Cir. 1987); *U. S. Dep't. of Health and Human Services Region V and NTEU Chapter 230*, 45 FLRA 737, 743 (1992).

B. The hiring freeze unilaterally changed conditions of employment.

The grievance filed by NWSEO specifically alleged that management's implementation of a hiring freeze constituted a statutory unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5). Management's failure to provide the union with prior notice of and an opportunity to bargain over the impact

of the hiring freeze on positions not covered by the staffing agreements before implementation constituted a unilateral change in conditions of employment.[6]

The impact on conditions of employment was profound and widespread. The vacancies the freeze created have increased the workload on the remaining staff, which constitutes a change in conditions of employment that requires pre-implementation bargaining. *Department of the Air Force, Air Force Materiel Command, Space and Materiel Systems Center Detachment 12, Kirkland Air Force Base and AFGE Local 2263*, 64 FLRA 166, 176 (2009). For example, professional forecasters are now being routinely required to take time away from their forecasting duties to launch weather balloons, work traditionally performed by lower-graded paraprofessional HMTs. Tr. 235. When the work load triples or quadruples during severe weather, there

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[6] Management's implementation of the hiring freeze on positions covered by the staffing agreements constitute an unfair labor practice under a different theory - that such a freeze constituted an illegal repudiation of these agreements. Such a repudiation occurs when a breach of an agreement is "clear and patent" and the provision or term breached goes to the heart of the agreement. *Dep't. of the Air Force, 375th Mission Support Squadron, Scott Air Force Base,* 51 FLRA 858, 862 (1996). Management would not have been permitted to implement a freeze on the positions covered by the staffing agreements even if it had provided the union with notice and an opportunity to bargain over the impact of the freeze; management was required to reopen and renegotiate the substance of the staffing agreements themselves. But, to the extent and in the event that the Arbitrator finds that the staffing agreements were not valid or otherwise not enforceable, the implementation of the freeze on the positions covered by those putative agreements would, then, in the alternative, constitute a unilateral change in conditions of employment.

are fewer people off duty who are available to report to the forecast office to assist. Tr. 240-42. Interns are working forecaster shifts more frequently, thereby increasing the oversight responsibilities of the lead forecasters. Tr. 239-41.

The decreased staffing has also changed conditions of employment because it has restricted or altered unit employees' work schedules and their ability to take leave due to the need to cover operational shifts with fewer people. Tr. 249. *Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station and NAGE Local R12-85*, 51 FLRA 797, 822 (1996) (ALJ decision) (unilateral change in crew assignments changed conditions of employment because it impacted employees' scheduled days off and leave scheduling). Leave has been cancelled. Tr. 773-74, 792. Training has also been cancelled because there are fewer supernumerary shifts on which training is conducted due to staffing reductions. Tr. 237.

Although NOAA sought and obtained from the Department of Commerce authority to advertise vacancies "in-house" so that promotions would continue, the freeze, *as it was implemented by the NWS*, applied to promotions as well. A unilaterally imposed moratorium on promotions constitutes an unfair labor practice. *Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, OH and AFGE Council 214*, 25 FLRA 541 (1987).

Employees have lost not only promotional opportunities, but the opportunity to transfer in grade to a preferred geographic location. Tr. 251. Incident Meteorologists ("IMETs") are not being deployed to the field to assist wildland firefighting crews as regularly, and are losing overtime opportunities are a result. Tr. 250. Other employees have been sent on temporary duty assignments to other forecast offices to cover for short staffing. Tr. 580, 733-34. And managers are performing bargaining unit work with more regularity. Tr. 250-51, 774.

When management notified the union of its unilateral implementation on March 27, it assured the union that it would be provided an opportunity to negotiate post-implementation. The union demanded to bargain the very next day, (union ex. 63), but management has never bothered to respond to this bargaining demand. Tr. 215. "The statutory obligation to bargain includes, at a minimum, the requirement that a party respond to a bargaining request." *Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, CA and AFGE Local 1857*, 35 FLRA 764, 769 (1990).

C. The unilateral implementation of the hiring freeze also violated Article 8 of the parties' CBA.

Article 8, section 3.C sets forth the procedures by which the parties are to negotiate over the substance or impact of management proposed changes

to conditions of employment during the term of the agreement. It requires management to provide the union with "as much advance notice as is practicable *in advance* of the proposed effective date." The union then has 15 days to demand bargaining and submit proposals. Management has committed to face to face negotiations unless the parties agree otherwise. The deadline to submit proposals is delayed, however, if the union submits a request for clarification of management's proposed change within 7 days of management's notice. The 15 days period for submission of the union's bargaining proposals commences only after management responds to the request for clarification. See Article 8, section 4. Management has promised to maintain the status quo pending bargaining. See Article 8, section 6.

NWS management failed to give the union any notice of the hiring freeze before it was implemented. In its notice, it assured the union that it would engage in post-implementation bargaining (even though this is legally and contractually insufficient). The union promptly demanded bargaining on March 28, just one day after receipt of the notice of the hiring freeze. The union submitted a request for clarification over the freeze and how it would be implemented in its bargaining demand. Despite its promised to engage in post-implementation bargaining, management *never* responded to the union's March 28 bargaining demand. Nor has it responded to the union's request for

clarification of how the freeze would be implemented, thereby stymieing the union's ability to even draft responsive bargaining proposals.[7]

D. The NWS may not escape liability for the unfair labor practice by blaming NOAA.

As discussed in section I.G above, NOAA and the NWS are not distinct entities or parties. The grievance was filed with the Assistant Administrator of NOAA. In his grievance response, his designee wrote that the decision to implement the freeze:

> . . . was not made by NWS, but by NOAA, whose decision I must follow. The NWS is not required to, nor could we, bargain with NWSEO over a topic that we had no control over.

Joint ex. 3d. Even if NOAA and NWS were not separate entities, *and even if Dr. Uccellini was not, himself, the Assistant Administrator of NOAA*, this is simply not a correct statement of the law. Rather,

> where a union holds exclusive recognition in a component of an agency, that component is obligated to bargain over conditions of employment despite the fact that control over a

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[7] As will be discussed, *infra.,* the failure of the agency to respond to the union's March 28 request for information constitutes a separate, independent unfair labor practice as well as a violation of Article 6, §2 and Article 8, § 4.

> particular condition of employment rests with a different organizational component in the same overall agency.

Overseas Education Ass'n. and Dep't. of Defense Office of Dependents Schools, 22 FLRA 351, 361 (1986); *accord, NTEU and Dep't of Homeland Security, U.S. Customs and Border Protection,* 66 FLRA 892, 897 (2012) (Customs and Border Patrol required to bargain over manner in which DHS Office of Inspector General conducts investigations of unit employees even though OIG, a separate component of DHS, has control over those conditions of employment). A subordinate agency, at the level of recognition, is, still liable in an unfair labor practice proceeding even if was carrying out a directive from higher authorities:

> Where, as here, agency management at a higher level is not a named respondent, agency management at a subordinate level will be held to have violated the Statute, even where subordinate level management was merely following orders.

U.S. Dep't. of Labor, Office of the Assistant Secretary for Administration and Management, San Francisco, CA and AFGE Council of Field Labor Locals, Local 2391, 33 FLRA 429, 432 (1988), *enf'd. sub nom. FLRA v. Dep't of the Navy, Navy Resale and Services Support Office,* 958 F.2d 1490 (9th Cir. 1992), *opinion withdrawn on other grounds on rehearing,* 22 F.3d 898 (9th Cir. 1994); *accord*, *Dep't. of Transportation, Federal Aviation Admin. Fort Worth, TX and*

Professional Airways System Specialists, 55 FLRA 951, 960 (1999)(ALJ decision); *Dep't. of the Navy, Naval Underwater Systems Command Center, Newport, RI,* 28 FLRA 1060, 1068 (1987); *Dep't. of the Treasury, Internal Revenue Service and Internal Revenue Service Austin District and Internal Revenue Service Houston District and NTEU,* 23 FLRA 774, 779 (1986).

Moreover, as discussed in detail above, the freeze that the NWS implemented extended far beyond that which was required by Dr. Sullivan's March 27 memo. The NWS failed to fill over two dozen positions for which job vacancy announcements had closed, *even though it was instructed to do so by NOAA*. It failed to submit a priority list of mission critical vacancies to the NOAA hiring freeze board. And it has failed to continue to advertise positions within-house so that promotions would continue.

E. Sequestration was not an "emergency" within the meaning of § 7106(a) that entitled management to implement a hiring freeze without bargaining.

The management rights clause in § 7106(a) of the FSLMR Statute includes the authority "to take whatever actions may be necessary to carry out the agency mission during emergencies." 5 U.S.C. § 7106(a)(2)(D). As discussed above, the management rights clause of Subsection (a) of § 7106 is subordinate to § 7106(b). Thus, agreements concerning permissive matters (such as the staffing) negotiated under the authority of § 7106(b)(1) are

enforceable even if they interfere with management's rights listed in Subsection (a), and therefore the NWS's right to act during emergencies cannot serve as a defense to a breach of the staffing agreements. Nor, in this case, does management's right to act in emergencies entitle or allow the agency to impose a hiring freeze without fulfilling its bargaining obligations.

To the union's knowledge, in its 45 year history, the Authority has found that an agency's right to act in an emergency excused it pre-implementation bargaining obligation *in only one case.* This case involved the necessity to carry out a drug sting operation on short notice, in which the Authority reasoned that the "special operation might well have been compromised had the union been given timely notice and opportunity to bargain" in advance. *U.S. Customs Service and NTEU*, 29 FLRA 307 (1987).[8]

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[8] In a second case, an Administrative Law Judge concluded that the Border Patrol implemented a shift schedule change taken in response to the events of September 11, 2001 under the authority of § 7106(a)(2)(D). However, the parties in that case conceded that immediate action was necessary, and the dispute involved whether there was a duty to bargain post-implementation. Further, the § 7106(a)(2)(D) issue was addressed only in the ALJ's decision, and was neither addressed or adopted by the full Authority in its review of exceptions made to other aspects of the ALJ's decision. *Dep't. of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection and NTEU*, 61 FLRA 272 (2005).

1. Budget cuts are not an "emergency" within the meaning of § 7116(a)(2)(D) that would entitle an agency to act without negotiating.

Among the numerous cases in which the FLRA has rejected the "emergency" defense to a unilateral change in working conditions is one very similar to the case at bar. In *National Labor Relations Board, Washington, D.C. and National Labor Relations Board Union*, 61 FLRA 41 (2005), the Authority rejected the NLRB's claim that it was entitled to suspend employee awards under the "emergency action" provision of § 7116(a)(2)(D) in the face "budget crisis" that resulted from a 6.5% reduction in its annual appropriation.

The FLRA has approved a definition of "emergency" as used in § 7106(a)(2)(D) that precludes its applicability to financial shortfalls. In *IBEW Local 350 and Dep't of the Army, Army Corps of Engineers, St. Louis District*, 55 FLRA 243 (1999), the Authority held that limiting the definition of an emergency in a collective bargaining agreement to "a temporary condition posing a threat to human life or property" was consistent with management's rights under § 7106(a)(2)(D) "although it is not clear than an emergency is always a temporary condition." 55 FLRA at 245 n. 2.

The Court of Appeals for the District of Columbia Circuit addressed the issue of whether budget cuts justified the EEOC's unilateral implementation

of a freeze on hiring and promotion. Although this decision did not specifically address the applicability of § 7106(a)(2)(D), it soundly and in broad terms rejected any claim that financial hardships or reduction in appropriations could ever justify unilateral action or a failure to bargain. In that case, the AFGE filed an appeal in the D.C. Circuit of the FLRA's General Counsel's settlement of an unfair labor practice complaint it had issued against the EEOC because the settlement did not provide for *status quo ante* relief in the form of back pay for employees who had been denied promotions during the freeze. Although the Court of Appeals ultimately held that the FLRA did not abuse its discretion in this particular case because it was one of first impression, it wrote that a *status quo ante* remedy must be provided in similar cases in the future because the failure to bargain over the impact of budget cuts before implementing a hiring and promotion freeze cannot be justified:

> In the future, however, the general argument that budget cuts (coupled with a claim that some disruption will result from *status quo ante* relief) is a legitimate reason for the FLRA to exercise its discretion to deny *status quo ante* relief will not be upheld. If the Authority's overall argument were accepted, it could be stretched to preclude effective relief in any case where the employer is motivated by budgetary considerations. But economic hardship is a fact of life in employment, for the public sector as well as private. Such monetary considerations often necessitate substantial changes. If an employer was released from its duty to bargain whenever it had suffered economic hardship, the employer's duty to bargain would practically be

> non-existent in a large proportion of cases. Congress has not established a collective bargaining system in which the duty to bargain exists only at the agency's convenience or desire, or only when the employer is affluent. . .
>
> Federal agencies with collective bargaining agreements should not think that henceforth they can disregard, because of changes due to budgetary problems, their collective bargaining obligations, at the risk of no more than a slap on the wrist. Congress did not intend rights of federal unions and employees to be so much different from those of private employees and unions under the National Labor Relations Act.

American Fed. of Gov't Employees v. FLRA, 785 F.2d 333, 337-38 (D.C. Cir. 1986). Thus, it would be wholly inconsistent with the statutory scheme, and would essentially eliminate collective bargaining when it is most needed, to interpret § 7106(a)(2)(D) to apply to budget cuts.

2. Sequestration was not an "emergency" within the plain meaning of the word because it was anticipated in advance.

The March 1, 2013 Sequestration did not constitute an "emergency" within the plain meaning of the word because it was not unforeseen. An "emergency" is "sudden unexpected happening; an unforseen occurrence or condition." *Black's Law Dictionary*, (6th ed. 1990). *Merriam-Webster* defines "emergency" as "an unexpected and usually dangerous situation that calls for immediate action." The sequestration was a known possibility as early as the Budget Control Act of 2011. OMB had been issuing guidance to agencies to

prepare for sequestration for months in advance. Union exs. 52, 53, 54, 55. As the ALJ noted in *Dep't. of Homeland Security,* 61 FLRA at 292, §7106(a)(2)(D) might excuse pre-implementation bargaining "with respect to emergencies *that could not be anticipated in advance*." (emphasis added).

3. The NWS has failed to demonstrate, as a matter of fact, that an emergency existed or that it had no alternative but to impose hiring freeze.

"[T]he Authority has never held that, pursuant to § 7106(a)(2)(D), an agency is free to label any particular set of circumstances an emergency and act unilaterally." *Dep't. of Veterans Affairs, VA Regional Office, St. Petersburg, FL and AFGE Local 1594,* 58 FLRA 549, 551 (2003). The agency has the burden of demonstrating to the Arbitrator that an emergency existed based on record evidence. *Id.* As the Statute grants an agency the right to "take whatever actions may be *necessary* to carry out the agency mission during emergencies," § 7106(a)(2)(D) is not applicable when "alternative methods of dealing with" the purported emergency are available. *Id* at 552. (Member Pope, concurring).

a. The agency has failed to demonstrate in this case that a fiscal emergency existed at the National Weather Service that warranted the hiring freeze.

Laura Furgione, the Deputy Assistant Administrator of NOAA, testified that the agency didn't even know at the time what its actual financial state was as a result of sequestration, or how big a shortfall (if any) it was likely to have:

> Q: So is it correct to say you really didn't know how deep a hole you were in at the time?
>
> A: Yeah.

Tr. 401. When asked how much the agency anticipated saving from the hiring freeze she replied "the problem with the hiring freeze was we didn't actually know - we couldn't get a specific amount because we never knew how many vacancies we were going to have." Tr. 401. In fact, under cross-examination Ms. Furgione admitted that "in regards to the number of FTEs, or the number of billets that we had in place, we could not even calculate that at the time." Tr. 400. The Acting Alaska Deputy Regional Director was more candid about the agency's financial state: "After the hiring freeze, we still had funds in labor, we just couldn't hire people." Tr. 771. He conceded that his region had sufficient funds to continue to hire during the second half of FY 13 had there not been a hiring freeze. Tr. 791.

The impact of the Sequestration fell more lightly on the NWS than on other agencies. Although Sequestration reduced the amount available to the NWS by 5% of the amount that had been appropriated to the agency, Congress had substantially increased the NWS's FY 13 appropriation above the level in the President's FY 13 budget request. Congress appropriated an additional $17.1 million in the line item "Local Warnings and Forecasts" (from which the bulk of NWS employees salaries are paid) in the final FY 13 Department of Commerce Appropriations Act above the amount requested by the agency. Pub.L.No. 113-6. Union ex. 65. In January, 2013 Congress appropriated an additional $25 million to the NWS as part of the "Disaster Relief Appropriations Act" (a/k/a the "Sandy Supplemental") to "improve weather forecasting capabilities." Pub.L. No. 113-1. Union ex.64. Although Ms. Furgione testified that Sandy funding could not be used for "anything that has a tail," (i.e, recurring expense), she admitted that there is nothing in the Sandy Supplemental that actually mandated that. Tr. 395-7. The Sandy Supplemental funds were fungible. Even if they were reserved for one-time only expenses unrelated to labor, this funding freed up an equivalent amount of funds in the "Local Warnings and Forecasts" account (which makes up a majority of all the agency's funding) which could then be used for labor. They certainly could have been used for the one-time only PCS costs which have no "tail."

Even if the Sequestration reduced the NWS funding by 5%, the NWS had already reduced its workforce by several hundred positions and had an overall vacancy rate of 8% by the second quarter of FY 13. Therefore, a hiring freeze was unnecessary to absorb the 5% reduction in available funds occasioned by Sequestration, (notwithstanding the fact that the 5% was cut from an appropriation amount that had been increased over and above the agency's base line budget request). Ms. Furgione admitted that the agency failed to take into consideration the savings that it had already attained by reducing its workforce since 2010 when it decided to implement the hiring freeze in 2013. Tr. 399-400.

The documentary evidence produced at the hearing show that the NWS "overshot" its mark in its efforts to save money, and that the hiring freeze was unnecessary to avoid being anti-deficient. As Mr. Murray testified and as union exhibit 86 demonstrates, there was $125 million left in the "local warnings and forecast" account just a few weeks before the end of the fiscal year. The NWS claims that it ended the fiscal year with "only" $9.4 million left in that account (which could have paid for a lot of promotions as well as the salaries of scores of entry level GS 5 HMTs or Interns), but failed to explain how $115 million magically disappeared from that account in the last month of the fiscal year. Nonetheless, astonishingly, the NWS ended the fiscal year with $125 million of appropriated funds unspent. Agency ex. 18.

As will be discussed below, these funds were readily available for reprogramming into the Local Warnings and Forecast account.

Finally, the hiring freeze was not actually necessary to cope with Sequestration because most savings produced by the March 18 freeze would not be realized in FY 13 anyway. As the NWS made painfully clear at the hearing, it takes several months to recruit for and fill positions. In other words, if there was an immediate financial crisis in March 2013 that required "emergency" action, a freeze that would not realize any savings for months was not an action designed "to carry out the agency mission" during that emergency.

b. The record demonstrates that there were numerous "alternative methods of dealing with" any financial shortfall that existed.

The NWS dispenses $20 million or more in grants to third parties annually. Union ex. 73. The NWS also has over 800 contractors, who are being paid over $100 million annually, whose contracts can be terminated at any time "for the convenience of the government." Union ex. 72. Ms. Furgione testified that NOAA mandated that the NWS cut grants and contractor costs, but admitted that "I could not state in all honesty if we cut grants or not." Tr. 394. She testified that she was unaware of even how many contractors the NWS had when she was making decisions last spring, or how much the NWS

was spending on contractors, or by how much the agency reduced contractor costs. Tr. 385-86, 389. The CFO conceded that the NWS is under no obligation to dispense *any* grant money. Tr. 685.

Acting NWS CFO John Longenecker testified that the union proposed during the predecisional discussions of the hiring freeze (during which the union was told that forecasters and hydrologists would still be hired) that, in lieu of a freeze, recruitment and selection continue, but that selectees be given an October 1, 2013 reporting date, when Sequestration expired. Tr. 468. Mr. Longenecker claims that he checked with WFMO and ostensibly was told that a postponed reporting date was not permissible. However, Ms. Wylie, who supervises both the NOAA CFO and WFMO, testified that there is no such restriction. Tr. 509-11. Managers from the NWS Southern Region and testified that they indeed delay selectees' reporting dates in order to delay or spread out PCS costs. Tr. 701.

Mr. Murray testified that the union also proposed that GS-11 interns be given career ladder promotions on station into vacant GS-12 general forecaster slots when they became eligible for promotion, and thus avoid bidding those positions nationwide and incurring PCS costs. Tr. 547.

But perhaps most importantly, in Section 103 of the Commerce, Justice, Science and Related Agencies Appropriations Act 2013, Congress gave the Department of Commerce and its bureaus authority to transfer

funds from one project or budget line item to another on an expedited basis by using the "reprogramming" provisions of Section 505 of the Act. Section 505 that simply requires that the agency provide the House and Senate Appropriations Committees notice 15 days in advance of the reprogramming of funds. Union ex. 66. The agency is no stranger to reprogramming: it reprogrammed $35 million in funds from and to various accounts in FY 12 "to provide funding for existing field staff and ongoing operations." Union ex. 67, at 3. As part of its advice to Federal agencies on how to cope with Sequestration, OMB directed agencies to "use any available flexibility to reduce operational risks and minimize impacts on the agency's core mission in service to the American people" by "tak[ing] into account funding flexibilities, including the availability of reprogramming and transfer authority." *Memorandum for Heads of Executive Departments and Agencies: Planning for Uncertainty with Respect to Fiscal Year 2013 Budgetary Resources* (M-13-03) (January 14, 2013). Union ex. 52, at 2. OMB later directed agencies to utilize whatever reprogramming authority they may have in law "to realign funds to protect mission priorities" during Sequestration. *Memorandum for Heads of Executive Departments and Agencies: Ongoing Implementation of the Joint Committee Sequestration* (M - 13-11) (April 4, 2013)(union ex. 55, at 1). The Chairman of the House Appropriations Subcommittee on Commerce, Justice, Science and Related

Agencies wrote the Secretary of Commerce a series of letters urging the agency to seek reprogramming of funds to protected the NWS from the effects of Sequestration. Union exs. 69, 70, 71. In the email it sent to the union notifying it of the hiring freeze, the NWS assured the union that the "emergency controls on spending" would only be in effect "until we can properly reprogram funds." "[W]e need time to prepare the necessary administrative actions associated with reprogramming funds to blunt the worst effects on our ability to conduct our missions, protect the public, and avoid violating the Anti-Deficiency Act" the agency wrote. Union ex 57, p.1. The NWS did, in fact, seek and obtain a reprogramming of funds during the summer of 2013 to forestall possible furloughs, but it simply chose not to reprogram enough funds to fill vacant positions. Tr.493-495. However, as noted above, the NWS ended FY 13 with $125 million in unspent appropriated funds, including substantial funds remaining from the Sandy Supplemental enacted in January 2013, which could have been the source of additional reprogrammed funds. But Maureen Wylie, NOAA's Chief of Resource and Operations Management (who overseas both the NOAA CFO and WFMO) testified that when the FY 2013 reprogramming request was being prepared last year, *no* consideration was given to reprogramming sufficient funds to fill forecaster or other operational vacancies at the NWS. Tr. 512-13.

To sum up: the union is not saying that the Arbitrator should find that the agency was obligated to take any of these actions, only that the availability of these alternatives precludes the agency from asserting that it was excused from pre-implementation bargaining due to an "emergency" within the meaning of the Statute. *Veteran's Affairs,* 58 FLRA at 552.

III. Management's freeze on the hiring of forecasters and hydrologists violated Article 8, § 1 of the CBA which requires that the agency provide the union with an opportunity for pre-decisional consultations on the exercise of "traditional management prerogatives."

In the event that the Arbitrator determines that the management was not obligated to fill vacant forecaster and hydrologist positions under collectively bargained staffing plans, the Arbitrator must determine whether the NWS provided the union with an opportunity to engage in pre-decisional consultations before it imposed a hiring freeze on those positions. Article 8, § 1 of the CBA reads in pertinent part:

> The parties also recognize that predecisional involvement in decisions which are traditional management prerogatives may obviate the need for subsequent bargaining over the impact and implementation of management decisions. During the past decade, management has obtained employee input, through NWSEO, prior to making decisions about the structuring of the workforce and the agency's method of operations. Similarly, the parties have successfully bargained and reached mutual agreement over the restructuring of the NWS during and at the conclusion of the agency's modernization. The union and the

> employees' input has resulted in decision making that has received widespread support within the workforce and has resulted in fewer grievances and improved job satisfaction, as well as better service to the public.
>
> It is the intent of the parties to continue to build on these achievements in bilateral cooperation during the term of this new agreement . . . .
>
> . . . Both parties will practice pre-decisional involvement, which is defined as soliciting employee input, through the procedures contained in this article, into decisions which affect them prior to a final decision. Inasmuch as NWSEO has been certified as the exclusive representative of bargaining unit employees, the parties recognize that all employee input will be provided through appropriate union representatives. . . .

Article 8, § 2.A.3. establishes a "national labor council" made up of the union's President, the Assistant Administrator of NOAA (or his designee) and additional representatives that "will function . . . as a forum for pre-decisional input on decisions affecting the bargaining unit as a whole or which impact more than one region."

The NWS sent the union a list of "pre-decisional ideas for potential budget uncertainties" on January 23, 2013. Included on this list was to "delay hiring actions - - non-mission-critical positions only." Union ex. 56. The parties met to discuss the ideas on this list (which also included proposals to restrict employee awards, travel and PCS moves) and to obtain the union's input and suggested alternatives. The NWS's Acting Chief Financial Officer, John Longenecker, served as lead management spokesperson. Mr.

Longenecker told the union representatives that management was considering a hiring freeze *but he assured the union that forecasters and hydrologists would be excluded.* The freeze that was implemented a few weeks later included these positions.

By assuring the union that if a hiring freeze would not apply to forecasters and hydrologists if adopted, the NWS deprived NWSEO of its contractually guaranteed opportunity to provide pre-decisional input on the decision to freeze the hiring of forecasters and hydrologists. In this situation, the violation was more an act of commission rather than simple omission. It has undermined the "trust and respect" and "integrity" that Article 8, § 1 was specifically designed to promote. The NWS's failure to provide the union with an opportunity to consult beforehand on a decision to freeze the hiring of forecasters and hydrologists is inconsistent with Executive Order No. 13522 (December 9, 2009), § 3(a)(ii), which directs agencies to "allow employees and their union representatives to have predecisional involvement in all workplace matters to the fullest extent practicable." Union ex. 51, at 3. The NWS also disregarded the February 27, 2013 Memorandum from OMB which instructed agencies that "[w]ith regard to any planned personnel actions to reduce Federal civilian workforce costs . . . agencies must allow employees' exclusive representatives to have pre-decisional involvement in these matters." Union ex. 53, at 2.

IV. Management violated Article 23, § 2 and Article 30, § 3 of the CBA when it cancelled Southern Region forecaster vacancies to avoid paying PSC costs.

During the winter of 2013, management advertised forecaster vacancies at five Southern Region Forecasts Offices: Memphis and Morristown, Tennessee; Little Rock; Houston; and Huntsville, Alabama. Before the freeze took place, management cancelled these recruitment actions after employees had already applied and had been interviewed. Joint ex. 2C, 3C, union ex. 48.[9] On February 22, the Meteorologist-in-Charge of the Huntsville WFO wrote in an email to the employees he interviewed that read:

> I was informed this afternoon that the certificate has been cancelled for the vacant WFO Huntsville vacancy and no selection is going to be made at this time. That decision was made at the regional (SRH) level due to lack of PCS (moving) funds. I have no idea when the job may be re-bid, but I would encourage you to re-apply should it come open again. Also, I appreciate the time each of you took to participate in the phone interview process. It was great talking to each of you.
>
> I apologize for any inconvenience or confusion this may have caused. I literally just found out about this 10 minutes ago.

Union ex. 49.

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[9] As discussed above in section I.H, there were other recruitment actions cancelled by the Southern Region at the same time to avoid payment of PCS costs, but these were the five recruitment cancellations known to the union at the time and included in the grievance.

There is no dispute that these five recruitment actions were cancelled solely due to the agency's unwillingness to pay relocation costs. See May 8, 2013 grievance response, joint exhibit 3c p. 2, ¶ 4. Management, however, denies that there is any CBA provision that provides for PCS expenses for bargaining unit employees selected from a vacancy announcement. *Id, ¶* 6. This is in error; there are two.

Article 23, § 2 reads:

> Employees required to travel by Management *shall receive* per diem or subsistence expenses *and other allowable travel expenses* subject to applicable laws and regulations.

(emphasis added). The "NOAA Travel Regulations" contain the agency's rules on temporary duty and other travel expense entitlements and reimbursements. Union ex. 46. Travel for the purposes of relocation is one of the forms of "travel" governed by these regulations, and Chapter 302 of the NOAA Travel Regulations is devoted entirely to "Relocation Allowances." Exhibit 302-2A on page 2-10 lists the expenses to which employees who transfer are entitled. They include commercial transportation or mileage allowance as well as per diem expenses, which are specifically mentioned in Article 23, § 2. So it cannot reasonably be disputed that relocation expenses are "travel expenses" as the term is used within the agency and within the

meaning of Article 23. (Industry practice is, of course, a guide to interpreting contract language. ELKOURI, at 460-61.)

In Article 30, § 3, management has also agreed that it will pay relocation service company fees for residences up to a certain dollar limit.[10]

V. Management's failure to respond to the union's March 28 information request was both an unfair labor practice and a violation of the CBA.

In his March 28, 2013 bargaining demand, NWSEO President Sobien submitted a request for clarification of how the freeze would be implemented as well as 17 requests for information that was necessary to draft bargaining proposals, such as whether career ladder promotions would be frozen; a list of currently vacant positions; what actions the agency would be taking to reprogram funds; whether annual leave had been denied as a result of existing vacancies; and how the agency planned to ensure that shifts would be covered. Union ex. 63, at 2-4. In its June 7, 2013 grievance response, management assured the union that a response would be forthcoming. "We are in the process of researching & gathering such information. Upon completion, the requested information will be provided to NWSEO." Joint ex.

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[10] It is also interesting to note that this provision actually states that *NOAA* agrees to pay these expenses, further illustrating that there is no functional difference between NWS and NOAA.

3d, at 2. As of the date of the hearing, the union had not received a response. The agency's chief negotiator, David Murray, testified that "I thought I had responded to it or prepared responses to it, but apparently I could not find any documentation to prove that I actually sent something to Mr. Sobien." Tr. 546. As noted earlier, the failure to supply this information thwarted the union's ability to draft responsive proposals and effectively denied the union any opportunity to engage in even post-implementation bargaining.

Long ago, the NLRB held that the duty to bargain under the NLRA inherently includes the obligation to provide unions with information needed for the purposes of collective bargaining. When it enacted the FSLMR Statute in 1978, Congress specifically identified the obligation to provide such information as part of the statutory duty to bargain. Title 5 U.S.C. § 7114(b)(4) states:

> The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation–
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data–
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining; and

> (c) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . .

The failure to provide information as required by § 7114(b)(4) constitutes an unfair labor practice in violation of § 7116(a)(1),(5) and (8). *E.g., Dep't. of Commerce*, *National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, MD and NWSEO*, 30 FLRA 127 (1987). Even if the information is not available or does not exist, the simple failure to respond to the information request itself constitutes an unfair labor practice. *U.S. Naval Supply Center, San Diego, CA,* 26 FLRA 324 (1987).

The NWS has also contractually obligated itself to provide the union with information it needs for collective bargaining. Article 6, § 2 provides:

> Management will answer most information requests within thirty (30) days of receipt. If unable to answer information within the thirty (30) day time frame, Management will notify the Union in writing of the reason for the delay and the expected date the request will be answered.

The union has never been provided a reason for the ten month delay in providing the information nor a date by which the union should expect a response.

RELIEF REQUESTED

"[A]n arbitrator enjoys broad discretion to remedy a meritorious grievance even if the remedy affects management rights under § 7106(a) . . . This wide-ranging authority includes authority to render meaningful remedies tailored to the circumstances of particular cases." *Federal Deposit Insurance Corp.*, *Division of Supervision and Consumer Protection, San Francisco Region and NTEU Chapter 273*, 65 FLRA 102, 106-07 (2010).

Although the March, 2013 hiring freeze was lifted after the hearing on these grievances was concluded, limitations on hiring continue. Union ex. 88. Assistant Administrator Uccellini notified NWS employees via an "all hands" message that despite the lifting of the freeze, there would be limits on hiring:

> With the lifting of the hiring freeze NWS will ensure that we approach the filing of vacancies in a thoughtful fashion. Deputy Administrator Laura Furgione will continue to work closely with management throughout the NWS in identifying critical vacancies, with a priority on meeting our mission mandates and ensuring we are operating within out current appropriations.

Union ex. 89. Therefore, these is still a need for a remedy that directs positions be filled, and that awards selectees with back pay.

A. Remedy for violation of the staffing agreements.

If the Arbitrator determines that management violated the staffing agreements by failing to fill positions at the WFOs and RFCs, he should order the agency to immediately initiate recruitment actions and timely fill those positions in accordance with NOAA's 80 day hiring model or to fill all positions covered by the staffing agreements through other means (i.e, reassignment), thus preserving management's right to select from any other appropriate source. The Arbitrator has authority to enforce minimum staffing agreements by requiring the agency to take immediate action to bring staffing up to the levels guaranteed by the staffing agreements. *Dep't of Transportation, Federal Aviation Administration and Professional Airway Systems Specialists*, 60 FLRA 159 (2004) (sustaining arbitrator's award requiring FAA to "immediately take action consistent with law to raise the total number of technical employees" to the minimum level specified in the staffing agreement with the union and "maintain that level for the duration of the agreement.")

An award of back pay is authorized under the Back Pay Act when an arbitrator finds that an employee is affected by an unjustified and unwarranted personnel action and the personnel action results in the withdrawal or reduction in the employee's pay. *Dep't. of the Treasury, Internal Revenue Service, St. Louis, MO and NTEU Chapter 14*, 67 FLRA

101, 105 (2012). "As to the first requirement, a violation of the parties' agreement constitutes an unjustified and unwarranted personnel action." *id.* And "if an award sufficiently identifies the specific circumstances under which employees are entitled to back pay, there is no additional requirement that the Arbitrator identify the specific employees entitled to the remedy." *id.* The Authority routinely approves retroactive promotions and back pay awards when employees are denied promotions as a result of a contract violation. *E.g., Social Security Admin. Chicago Region, Cleveland Ohio District Office, University Circle Branch and AFGE Local* 3348, 56 FLRA 1084 (2001); *AFGE Local 31 and Dep't. of Veterans Affairs Medical Center, Cleveland, OH*, 41 FLRA 514 (1991).

Unfortunately, however, the Back Pay Act does not authorize a back pay award for those applicants for employment who would have been hired into the entry level (i.e., meteorologist intern) positions had the agency complied with the staffing agreements. The Back Pay Act only applies to current and former employees, and not applicants for employment even if they have been improperly denied employment. *Lewis v. General Services Admin.,* 54 MSPR 120, 123 (1992). Therefore, the Arbitrator's remedy cannot and should not include any relief for those from outside the Federal government who suffered as a result of the agency's violations. (Thus, the NWS will still save millions of dollars in payroll costs as a result of its

violations. The actual back pay liability will be limited to only the incremental difference in wages paid to those employees who would have received promotions had the staffing agreements been complied with.)

An Arbitrator has authority to order selections to be made from among the original candidates, and to award retroactive promotions with back pay to the eventual selectees, in order to remedy a contract violation. *AFGE Local 3627 and Social Security Admin., Office of Hearings and Appeals, Tupelo, MS.*, 66 FLRA 207 (2011).

i. There were at least 32 bargaining unit positions at WFOs and RFCs for which job vacancies closed before the effective date of the hiring freeze. The agency should be ordered to prepare certificates of eligibles from the original qualified applicants for those positions from which selections should be made if those positions remain unfilled. The eventual selectees should be given retroactive promotion with back pay. NWS employees often seek, through competitive procedures, to relocate to another office in grade. If any of the selectees would have received a higher salary in grade because the new duty station is in a geographical area with a higher locality pay, the selectee should be paid the difference in locality pay as back pay. *C.f., Scott v. Dep't of Agriculture*, 108 MSPR 177, 182 (2008).

ii. In a number of these cases, applications were evaluated and certificates of eligibles were issued by WFMO before the effective date of the freeze, but NWS selecting officials failed to make a selection. Union ex. 84. The NWS should be directed to make selections from these original certificates and the eventual selectees should be given retroactive promotions with back pay if their selection resulted in a promotion. Those who relocate in grade should be given the difference in locality pay as back pay if the new position is an area with higher locality pay than the office from which the employee is transferring. This category should includes those forecaster positions in the Southern Region which were not filed because management decided not to pay relocation costs. Management should be directed to pay PCS costs for those positions.

In those cases in which vacancy announcements ("Job Opportunity Announcements") had not been issued or had not been closed by the effective date of the hiring freeze, the eventual selectees should be given a retroactive promotion if it can be determined that the selectee had gained the necessary qualifications and met the eligibility requirements for the position by the date the positions would have been advertised under the NOAA 80-day hiring

model, had the agency timely initiated recruitment actions after the position became vacant.

In all of these cases, the effective date of such appointment or promotion should be calculated by using the NOAA 80-day hiring model.

Six of the lead forecaster positions identified in the union's initial grievance were filled after submission to the NOAA Hiring Freeze Board. Although they were eventually filled, the hiring freeze resulted in a substantial delay in employees receiving their promotions:

WFO Sterling (one position)- 10 months

WFO Sterling (second position) - 6 months

WFO Pittsburgh - 9 months

WFO Pleasant Hill - 10 months

WFO Duluth - 7 months

WFO Honolulu - 9 months

Union ex. 82B, p. 1; tr. 906. Similarly, the General Forecaster vacancy at Fairbanks identified in the union's grievance, joint exhibit 2C, (RADS case no. 4651) was eventually approval by the Hiring Freeze Board, and readvertised as RADS case no. 5178, and filled. But as a result of the delay caused by the hiring freeze, the selectee did not enter on duty until more than a year after the position became vacant. Union ex. 82B, p. 2. Each of these seven positions had been vacant for more than 80 days prior to the date the

hiring freeze was implemented. The Arbitrator should award the employees back pay from the date of the hiring freeze until the date on which the employees ultimately received their promotions.

On February, 2014, the www.usajobs.gov website contained job vacancy announcements for a number of positions that are covered by the staffing agreements, including 13 senior (lead) forecaster vacancies, and two general (journeyman) forecaster vacancies. The eventual selectees for these positions (and any others that are advertised and filled before the award is issued) should similarly be given a retroactive promotion if it can be determined that the selectee had gained the necessary qualifications and met the eligibility requirements for the position by the date the positions would have been filled under the NOAA 80-day hiring model, had the agency timely initiated recruitment actions after the position became vacant notwithstanding the freeze.

B. Remedy for unilateral implementation.

If the Arbitrator determines that management unilaterally implemented the hiring freeze in violation of the FSLMR Statute and Article 8 of the CBA, he should order the agency to immediately initiate recruitment actions and timely fill all bargaining unit positions in accordance with NOAA's 80 day hiring model or through other appropriate means. Selectees

shall receive retroactive appointments with back pay if they are bargaining unit employees who received a promotion or an increase in locality pay as a result. As discussed earlier, the D.C. Circuit wrote in the case involving the EEOC hiring and promotion freeze that a *status quo ante remedy* that provides back pay for employees who were denied a promotion during the freeze is mandatory. *AFGE v. FLRA.,* 785 F.2d 333, 336-37 (D.C. Cir. 1986). *See also Air Force Flight Test Center, Edwards Air Force Base and AFGE Local 3854*, 55 FLRA 116, 124 (1999)(back pay appropriate remedy when agency unilaterally terminated career ladder promotions).

In the alternative, if the Arbitrator determines that the hiring freeze as announced by NOAA did not violate the union's statutory and contractual rights, but the manner in which the NWS implemented the freeze did so, he should order management to:

i. Complete hiring actions for positions for which job opportunity announcements closed by March 27; and make retroactive appointments with back pay if the selectees were bargaining unit employees who received a promotion or an increase in locality pay as a result; and

ii. Advertise all other bargaining unit vacancies in-house and make retroactive appointments with back pay if the selectees were

bargaining unit employees who received a promotion or an increase in locality pay as a result.

In all cases, the effective date of such appointment or promotion should be calculated by using the NOAA 80-day hiring model, and the retroactivity of any promotion shall be contingent on the selectee having met the eligibility requirements and qualifications for the position by the earlier date. If certificates of selections had been issued before the freeze, then selections should be made from those certificates. If applications had closed before the implementation date of the freeze but no certificate of eligibles had been prepared, the original applications should be used as a basis for the preparation of the certificates.

If the Arbitrator does not find that management violated the staffing agreements, but that the hiring freeze was illegal or improper, the seven lead forecasters identified above whose promotions were delayed due to the freeze should be awarded back pay from the date of the freeze until the date they were ultimately promoted.

The Arbitrator should also order the NWS to cease and desist from unilaterally implementing a hiring freeze or otherwise changing conditions of employment without first providing NWSEO an opportunity to bargain over the change. The NWS should also be ordered to post a notice comparable to

that required by the FLRA as a remedy in unfair labor practice cases. (see, e.g., notice and posting order at end of ALJ decision in *Air Force Flight Test Center,* 55 FLRA 116 (1999)). The NWS should be ordered to post a copy of this notice (the suggested language of which is attached to this brief after the signature page) in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted, at each location at which bargaining unit employees are stationed. This notice should be posted for sixty days, signed by the Assistant Administrator of NOAA for Weather Services, Louis Uccellini. The agency should also be ordered to distribute that notice to all unit employees by email. *U.S. Dep't. Of Justice, Federal Bureau of Prisons*, *Federal Transfer Center*, 67 FLRA No. 57 (2014)(electronic posting is traditional remedy in future ulp cases).

C. Remedy for violation of the union's Article 8 pre-decisional consultation rights.

The NWS should be ordered to provide the NWSEO with the opportunity for pre-decisional rights before making any decision to change conditions of employment, including those matters which are "traditional management prerogatives" or which affect the NWS workforce. To the extent that similar relief has not been ordered to remedy a violation of the staffing agreements or the unilateral imposition of a hiring freeze, the NWS should

also be ordered to recommence recruitment and hiring for all positions which the union was assured, during the pre-decisional consultations that took place in early March, would not be affected by hiring freeze if one was proposed as a result of Sequestration. Unit employees who receive promotions or increases in locality pay as a result of the resumption in recruitment and hiring for these positions should receive retroactive appointments or promotions with back pay, if they were otherwise qualified for and met the eligibility requirements for the promotion at the time the position would have initially been filed in accordance with the 80-day hiring model.

D. Remedy for the violation of Article 23, § 2 and Article 30, § 3.

The NWS should be ordered to pay relocation expenses to unit employees ultimately selected for the five Southern Region forecaster positions that were cancelled as a result of management's decision not to pay PCS expenses. To the extent not covered by the remedy for other violations covered above, the NWS should be ordered to recruit and hire for these five positions and management should be ordered to utilize the original certificates of eligibles that were prepared for these positions. If certificates were not yet prepared for one or more of these five positions, management should be ordered to prepare certificates of eligible from the original

applicants. Unit employees who receive promotions or increases in locality pay as a result of the recruitment and hiring for these positions should receive retroactive appointments or promotions with back pay, if they were otherwise qualified for and met the eligibility requirements for the promotion at the time the position would have initially been filled in accordance withe the 80-day hiring model.

E. Remedy for failure to provide information requested on March 28 necessary to bargain over the hiring freeze.

Management should be ordered to provide the information requested by the union on March 28, 2013, within 15 days of the award. Language remedying this particular violation of the FSLMR Statute has been included in the proposed notice attached to this brief. If the Arbitrator does not order that a notice be posted remedying the unilateral implementation of the hiring freeze, he should order that such a notice be posted to remedy this violation of the Statute. The NWS should be ordered to post a copy of this notice in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted, at each location at which bargaining unit employees are stationed. This notice should be posted for sixty days, signed by the Assistant Administrator of NOAA for Weather Services, and distributed to all unit employees by email.

F. Additional remedial measures.

The Arbitrator should retain jurisdiction over this dispute for the purpose of issuing any clarification of the remedy, and to resolve any disputes that arise over implementation of the ordered remedies. See Article 11, § 9.c. The Arbitrator should retain jurisdiction to adjust or modify the remedy as may be needed to conform with his Opinion due to the passage of time in the event that the Agency files exceptions to his award with the FLRA.

In addition, in the event that any form of back pay is ordered (which may include travel allowances mandated by Article 23), the union will be entitled to attorney fees under the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii). Under Article 11, § 6(B), the Arbitrator is required to retain jurisdiction after issuance of the award in order to entertain an application for attorney fees.

Respectfully submitted,

RICHARD J. HIRN
General Counsel
National Weather Service Employees Organization
5535 Wisconsin Ave NW
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202-274-1812

March 21, 2014

NOTICE TO ALL EMPLOYEES

AS ORDERED BY ARBITRATOR JOSEPH SHARNOFF TO EFFECTUATE THE POLICIES OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes to conditions of employment, including the implementation of a hiring freeze, without providing the National Weather Service Employees Organization, the exclusive representatives of our employees, with notice and an opportunity to bargain over such changes in the future.

WE WILL NOT fail to timely provide the National Weather Service Employees Organization with information necessary to prepare for or conduct collective bargaining in the future.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the hiring freeze unilaterally implemented on March 27, 2013 as its relates to bargaining unit positions.

WE WILL take such further corrective actions, including making retroactive promotions with back pay in accordance with the Back Pay Act, 5 U.S.C. § 5596, as ordered by Arbitrator Joseph Sharnoff.

NATIONAL WEATHER SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

by: _____
ASSISTANT ADMINISTRATOR FOR WEATHER SERVICES

date: _____

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing posthearing brief was served by first class mail this date on the agency's counsel of record, addressed as follows:

Monique Cioffalo
Office of the General Counsel-
Employee Labor Law Division
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March 21, 2014