

DECISION & AWARD

In the Matter of Arbitration)

Between)

National Weather Service, NOAA, U.S.)
Department of Commerce, Silver)
Spring, MD)
(NWS/Agency))

-and the-)

National Weather Service Employees)
Organization, Washington, DC)
(NWSEO/Union))

FMCS Case No. 190325-05498
(Filling Vacant Unit Positions)

Before: Laurence M. Evans
Arbitrator

Appearances:

For the NWS: Mollie Dennison, Eq.
Allison Ziegler, Esq.
Washington, DC

For the NWSEO: Richard J. Hirn, Esq.
Washington, DC

I. Statement of the Case

This dispute raises four (4) issues. They are as follows: (1) Was the Union’s December 4, 2018, grievance in this matter timely filed pursuant to the provisions of Article 10, Section 9.B of the parties’ collective bargaining agreement (CBA)?¹ (2) Does

¹ Article 10, §9.B, in relevant part, provides: “Union grievances shall be initiated in writing by the NWSEO President, or designee and presented to the Assistant Administrator, or designee, within 30 calendar days of the receipt of the action or condition giving rise to the grievance.” In this regard, on June 11, 2019, the Agency submitted a “Motion to Dismiss” on the ground that the Union’s grievance was not timely filed. That “Motion” was deferred to the arbitration hearing in July 2019, at which time both parties

the Agency's September 23, 2004, "Management Plan [to] Revise WFO Staffing/Alaska Region WFO September 2004" and the Union's subsequent September 28, 2004, "acceptance" of the "Plan" constitute a binding and enforceable "collective bargaining agreement" within the meaning of the Federal Service Labor-Management Relations Statute (Statute), 5 USC §7103(a)(8) and (12)?² (3) If so, did the Agency violate the "agreement" by its actions described below? (4) If the Agency violated the "agreement," what shall the appropriate remedy be?³ What happened here follows.

Apart from the timeliness question discussed more fully below, this dispute fundamentally concerns the Agency's September 2004 WFO Staffing Plan and the Union's "acceptance" of it.⁴ In relevant part, the "Plan/Agreement" provides "1) Weather Forecast Office Hydrometeorological Technician (HMT)/Meteorologist Intern Units will be staffed with either HMTs or Meteorologist Interns. All HMT/Interns position vacancies will be simultaneously advertised as GS-1341-11, area of consideration NWS only, NWS status applicants only...promotion potential to [GS] 1..." "2) NWS will establish an Observing Program Leader (OPL) position at every WFO...The OPL will be classified as a GS-1341-12 team leader, non-supervisory position, and will be part of the bargaining unit. NWS will begin recruiting for this position beginning October 17, 2004." "2)a) Current Data Acquisition Program Managers (DAPM) will be offered the opportunity to convert to the OPL position within one year of the implementation of this plan." "2)b) At those WFOs which do not presently have a DAPM, a vacancy announcement will be issued for the OPL beginning October 17, 2004, but no later than October 25, 2004. The area of consideration will be limited to NWS status applicants in the local commuting area....**As DAPMs or OPLs retire or leave the WFO for other reasons, the same recruitment process will be conducted.**" "3) The establishment of the OPL will result in a

argued their respective positions. I decided not to rule on the Agency's "Motion" at hearing and deferred that procedural decision to this Decision & Award.

² The 2004 "Plan/Agreement" was amended in 2008 and again in 2016,

³ The parties were unable to stipulate to the issues in this matter and so I have framed them as set forth above.

⁴ Record evidence shows that there are 122 Weather Forecast Offices in the NWS. It is uncontested that at the time the Union filed its grievance there were 114 OPL and eight (8) DAPM positions agency-wide, with 32 unfilled OPL vacancies. **In its post-hearing brief, the Agency represents that as of September 10, 2019, there were 25 unfilled OPL positions.**

change to the GS-1341 HMT Position Description (PD) under its supervisory control section....In addition, a review of the GS-1341 HMT PD has resulted in a change of Fair Labor Standards Act classification from exempt to non-exempt...4) Meteorological Technicians at all Alaska Region Weather Service Offices (WSO) will be assigned short-term forecasting and other related duties. As a result of this addition of duties, it has been determined that the full performance level of the 33 GS-1341-9 Meteorological Technicians positions in these offices should be reclassified as GS-1341-10....” (Emphasis added.)

On September 23, 2004, Agency Chief Financial Officer/Chief Administrative Officer Irwin T. David wrote Union Chief Negotiator/General Counsel Richard J. Hirn, stating in relevant part:

As noted in our letter of September 10, 2004, during the discussions over the agency’s September 2003 proposal to revise WFO staffing, the parties conducted a series of informal discussions in which they explored staffing changes that would advance the mission of the NWS while enhancing career opportunities for employees in the HMT unit. As promised in our September 10 letter, please find enclosed a new Management Plan that takes into consideration the ideas and information offered by NWSEO during these discussions. To meet the Plan implementation dates, please let us know whether implementation of the Plan is acceptable as proposed.

On September 28, 2004, Union Chief Negotiator Hirn wrote the Agency stating: “Management’s proposal of September 23, 2004 to revise WFO staffing is accepted.”

Years later, hearing anecdotally that the Agency was not fulfilling certain of its September 2004 “Plan/Agreement” obligations and commitments, the Union, at the National level, submitted an October 2018 information request to the Agency seeking information about unfilled OPL positions. The Agency’s November 30, 2018, response to the information request showed that 32 OPL positions remained unfilled as of November 30th, some for as long as four (4) years.

Several days later, on December 4, 2018, the Union filed the National level grievance at issue here. In its grievance, among other things, the Union stressed that Agency’s

violation(s) of the “Plan/Agreement” constituted a “continuing” violation of Article 10, §9 of the parties’ CBA.

Additionally, concerned that there might be an Agency claim that the “Plan/Agreement” did not constitute a binding and enforceable “agreement” within the meaning of the Statute, the Union pointed out that the Agency itself had referred to and considered the “Plan” to be an “agreement.” In correspondence over a grievance involving the 2004 “Plan/Agreement” the Union had filed on August 20, 2014, the Agency, in response on September 26, 2014, stated, among other things that:

In September 2004, the parties entered into an Agreement, Management Plan [to revise WFO Staffing/Alaska Region WFO September 2004 (Agreement or 2004 Agreement)], which established an Observing Program Leader (OPL) position at every WFO. Section 2(b) of the Agreement was modified by the parties in February 2008. The relevant sections of the Agreement, including the 2008 modification, are below[.] (Emphasis in original.)⁵

On the merits, the Union pointed out that:

The 2004 agreement states that NWS will fill subsequent OPL vacancies as they arise. The last sentence of section 2(b) states: “As DAPMs or OPLs retire or leave the WFO for other reasons, the same recruitment process will be conducted.” However, we have recently learned from your November 30, 2018 response to a union information request that management has not timely initiated the recruitment process to fill 32 OPL positions which remain vacant. Twenty-five of these positions have been vacant for a year or more, and four of these positions have been vacant since 2014.

As relief, we demand that the NWS immediately initiate the recruitment process for these 32 vacant positions [to include back pay as appropriate, to grant temporary promotions where appropriate and to award attorney fees.]

On March 1, 2019, the Agency responded to the Union’s December 4, 2018, grievance, in writing, denying it in its entirety. Preliminarily, the Agency took the position that the Union’s grievance was not timely filed under Article 10, §9.B of the parties’ CBA. The Agency pointed out that the alleged violation of the “Plan/Agreement” occurred, at a minimum, over a year prior. Moreover, the Agency noted that the Union has

⁵ In addition, as discussed more fully below, the Union also finds support for its position that the “Plan” was in fact an “agreement” within the meaning of the Statute, and so recognized by the Agency, when the Agency referred to the “Plan/Agreement” as a “Memorandum of Understanding” with regard to a subsequent June 16, 2016, Memorandum of Understanding they entered into in June 2016 which amended the September 2004 “Plan/Agreement” in certain limited respects.

its own representatives in every WFO and thus these representatives should have known at a relevant and appropriate time that the Agency had not timely filled a vacant OPL position. The Agency dismissed the Union's assertion as unpersuasive that it only recently learned of the alleged violations of the "plan/agreement" through an information request.⁶

Even assuming that the Union's grievance had been timely filed, the Agency maintains that the grievance is wholly without merit. In essence, the Agency denied the Union's grievance because "nothing in the Management Plan at issue requires management to "fill OPL vacancies as they arise." Rather, the "Plan" only requires management to establish an OPL position in its WFOs—it is not obligated to fill these established vacancies, relying on 5 U.S.C. §7106(a)(2). In fact, the Agency suggests that it has had an established past practice of not filling the disputed vacancies. The Agency contends that "[i]t is within management's right to hire and place employees. Positions are filled at management's discretion in light of mission, budget, and logistical concerns."

The arbitration hearing in this matter was held on July 24, 2019, at NWS Headquarters in Silver Spring, MD. The parties had ample opportunity to examine and cross-examine witnesses under oath, present evidence and advance their respective positions. The proceeding was transcribed by a court reporting service and the transcript was subsequently provided to the parties' counsel and the arbitrator. On September 30, 2019, the parties' counsel filed post-hearing briefs with the arbitrator. The record was closed on October 1, 2019.

II. The Positions of the Parties

A. The Position of the Union

Before turning to the specific issues raised by this matter, the Union, as background, points out that between 1989 and 2000, the National Weather Service underwent a significant restructuring, resulting in the creation of 122 WFOs. Over the years, staffing be-

⁶ Careful review of the Agency's March 1, 2019, response to the Union's grievance shows that at that time the Agency did not assert or claim that the "Management Plan" was not a binding and enforceable agreement within the meaning of the Statute.

came an issue. The Agency wanted to reduce its “HMT intern” unit⁷ and create an “IT” officer position. The Union points out:

As time progressed, the NWS felt that there was less a need for the remaining HMTs, and that there was need to increase the intake of Meteorologist interns. In 2003 management proposed to the union to convert all but one of the remaining HMT positions to intern positions in order to bring more professional forecasters into the NWS...The Union resisted these efforts because the HMT position would become a dead end - the union felt that these men and women had a great deal that they could contribute to the NWS’s mission and that their job shouldn’t be phased out. Further, although the NWS was going to reduce the number of HMTs through attrition, the remaining HMTs would no longer have any mobility...to transfer to other offices in other sections of the country since vacant positions...would only be open to young men and women who had professional meteorology degrees.

The Union goes on to stress that in Alaska there were staffing problems which predated the Agency’s restructuring. “The only way [an Alaska employee] could ever get a promotion and get out of the backwoods of Alaska was to be able to bid on an HMT vacancy at [an WFO]. Management’s proposal would have ended that opportunity.”

These staffing circumstances led the Agency, on September 23, 2003, to make certain “proposals” to the Union.⁸ On October 17, 2003, the Agency sent out an “all-hands” e-mail regarding WFO staffing. The e-mail, in part, notified employees that “In accordance with the law and our [CBA], we have notified [the Union] 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.”⁹

In this respect, the Union notes that in January 2004 the parties began “formal” negotiations over the proposed staffing plan. Soon thereafter, the negotiations became “informal.” After months of informal negotiations the parties reached an agreement that was mutually acceptable to both sides. According to the Union, the agreement “took the form of an exchange of letters.” On September 23, 2004, the Agency sent Union GC Hirn its

⁷ HMT is short for hydrometeorological technician. HMTs promotion potential then was to GS-11.

⁸ The Agency’s made seven (7) staffing proposals. See Union Exhibit 4 for the entirety of management’s proposals, incorporated by reference herein.

⁹ The day before, on October 16, 2003, an Agency official by e-mail stated “The entire implantation plan is currently under negotiation. At this point, it would not be appropriate for me to comment on any aspect[.]”

latest counter-proposal which Hirn accepted in writing on September 28, 2004, on behalf of the Union.

Thereafter, and significant to the Union, the Agency immediately began to honor the 2004 agreement by implementing the agreed-upon procedures set forth in the agreement. However, in the Union's view, something changed over time

In the fall of 2018, Union President Sobien started receiving complaints that the Agency was not filling OPL positions, either permanently or temporarily. (The Union maintains that the Agency's failure to fill vacant OPL positions on a temporary basis violates an arbitration award issued in 2002 by Arbitrator Robert Simmelkjaer. In that dispute over a "side" agreement, the arbitrator ruled that the Agency was obligated to fill Agency vacant positions on a temporary basis which had been vacant for more than 20 days. As discussed below, the Union, I gather, seeks relief here for alleged Agency violations/non-compliance with the Simmelkjaer award regarding the filling of OPL vacancies on a temporary basis).¹⁰

On October 29, 2018, Union President Sobien, alarmed about what he had heard about vacant OPL positions, requested information from the Agency about the alleged Agency failure to fill vacant OPL positions. On November 30, 2018, the Agency responded to the Union's information request, revealing that 32 out of 122 OPL positions were vacant, some for many years. Based on this information, on December 4, 2018, the Union filed the instant National level grievance pursuant to the parties' CBA.

1. The Union's December 4, 2018, National grievance was timely filed under the parties' CBA.

¹⁰ The arbitrator's award was upheld by the FLRA in *DOC, NWS, NOAA and NSWEO*, 58 FLRA. 490 (2003). The Union's December 4, 2018, National level grievance did not raise or allege a violation of, or non-compliance, with the Simmelkjaer award. The instant grievance sought "temporary promotions," the subject of the Simmelkjaer award.

Preliminarily, the Union stresses that the burden is on the Agency to show that the Union's grievance was not timely filed, which it has failed to do. In the Union's view, its December 4, 2018, grievance was timely filed "because management's failure to backfill these vacancies is a continuing violation of the commitment it made in the 2004 agreement to 'conduct...the same recruitment process...as DAPMs or OPLs retire or leave the WFO.'" Citing *Brown & Pipkins, LLC v. Serv. Employees Int'l Union*, 846 F.3d 716, 725-26 (4th Cir. 2017), the Union finds support for its reliance on a "continuing violation" theory of timeliness: "One such substantive background principle of law is the common-law continuing violation doctrine, which arbitrators have invoked—and courts have to various degrees acknowledged—as standing for the proposition that a violation which is continuous in nature gives rise to a new grievance each day."

In further support of its position that its grievance constitutes a "continuing violation," the Union relies on certain undisputed record evidence. Agency Chief Operating Officer (COO) John Murphy testified that it normally takes the Agency 180 days from the beginning of the hiring process to the time the employee commences employment.¹¹ Moreover, Murphy testified that when positions are "unfunded" the Union is not notified of this circumstance.

In view of COO Murphy's testimony, the Union argues that "a grievance could not have been filed when the positions became vacant [as claimed by the Agency in its Motion to Dismiss and in its post-hearing brief] because the union had no way to know that management did not intend to fill these positions until time had elapsed and no recruiting action was taken. Management's decision not to fill particular vacancies only became apparent after the positions were vacant for an extended amount of time." Thus, the Agency's claim that the Union had 30 days to file a grievance upon learning of a vacancy at an WFO is simply incorrect and inconsistent with record evidence. The Union points out that "it takes much longer than [30 days] to backfill a vacant position, and the time varies greatly when management decides to fill a vacancy, and the union has no way to

¹¹ In other circumstances described by Murphy the time frame can be shorter.

know whether a position that has remained vacant for 30 days is one which management intends to fill or not.” Thus, the contractual 30 day filing requirement is not applicable in this matter, contrary to the assertions of the Agency.

Accordingly, the Union urges the arbitrator to find that the Union’s December 4, 2018, National level grievance was timely filed and is actionable on its merits.

2. The Agency did not advance the argument that its “Management Plan” was not an “agreement” at the appropriate time; even if it had done so, the “Management Plan” is a binding and enforceable “agreement” within the meaning of the Statute.

Preliminarily, the Union maintains that the Agency is precluded from asserting its position, raised for the first time at the arbitration hearing, that the September 2004 “Management Plan” is not a binding and enforceable “agreement” within the meaning of the Statute. In support, the Union cites Article 10, §4(f) of the CBA which provides that: “New issues may not be raised by either party or the grievant after the decision is rendered at Step One of this procedure, however the parties may mutually agree to join new issues to a grievance in process. The parties may mutually agree to amend a grievance at any step.”¹² (Emphasis added.) Additionally, in this regard, the Union emphasizes that the Agency’s March 1, 2019, grievance decision contained no claim or assertion that the Agency was denying the Union’s grievance on the ground that the “Management Plan” was not a binding and enforceable “agreement” within the meaning of the Statute.

Thus, based on the foregoing alone, procedurally, the Union requests that the arbitrator dismiss the Agency’s position that the “Management Plan” is not an “agreement” within the meaning of the Statute.

¹² I gather the Union is advancing the well-established rule in arbitration that issues not raised by one side or the other in the processing a grievance cannot be raised in arbitration. Here, the quoted language would appear to apply to both individually filed employee grievances and Union National level grievances, as here, because the language quoted appears in Article 10, §4 entitled “Procedural Information” of the CBA.

Assuming the Agency is not barred procedurally from raising the above argument, the Union maintains that the “parties’ agreement need not take the form of a formal, countersigned collective bargaining agreement or Memorandum of Understanding to be binding and enforceable in arbitration.” In support, the Union cites the FLRA’s decision in *FAA, Louisville, KY and NATCA*, 53 FLRA 312, 317 (1997) where the Authority held that “[a]n agreement, for the purposes of section 7114(b)(5) of the Statute, is one in which authorized representative of the parties come to a meeting of the minds on the terms over which they have been bargaining.”

In further support of its position, the Union cites a relevant analysis written by (distinguished) Arbitrators Arnold Zack and Richard Bloch in “Labor Agreement in Negotiation and Arbitration” where they pointed out that:

Regardless of their duration, letters of understanding are viewed as firm commitments between the parties, and thus subject to the same rules of interpretation and application as provisions of the main agreement itself. Unless there is a special agreement to the contrary, most arbitrators will view the side agreement or letter of understanding as they would the agreement itself.^[13]

Further evidence that the “Management Plan” was a statutory agreement is seen by the Agency’s own written admissions over the years. (These admissions are quoted and set forth above in Section I.) After stating on several occasions in writing that the parties were engaged in discussions and bargaining, the Agency sought the acceptance of the Union of the Agency’ last proposal, which Chief Negotiator Hirn did, in writing (above). Even as late as 2016, the Agency was still referring to the “Management Plan” as an MOU. Thus, record evidence makes it clear that the parties had a “meeting of the minds” which created a binding and enforceable agreement.

¹³ The award of Arbitrator Simmelkjaer incorporated the reasoning of Arbitrators Zack and Bloch regarding a side-bar agreement the parties had entered into.

3. The Agency violated and repudiated the parties' 2004 "Agreement by its actions herein.

Simply put, the Union's argument is that "[t]he agency has violated the September 2004 agreement by failing to recruit for OPL vacancies when DAPMs or OPLs retire or leave the forecast office."¹⁴ In the Union's view, the September 2004 agreement "explicitly commits the NWS to staff each WFO with an OPL and to recruit for a new OPL every time a vacancy subsequently arises." The Union rejects the Agency's claim that it is only committed to the "establishment of the OPL at every office, which has occurred."

Citing record evidence, the Union relies on the following to buttress its argument that the Agency has and is violating the parties' 2004 agreement.

[T]he agency filled all 13 of the OPL positions that became vacant in 2013. [footnote omitted.] However, the NWS has only filled about half of the OPL vacancies that became vacant in 2016. Then, starting in 2017, the NWS has left almost all OPL positions vacant. Only five of the 15 OPL positions that became vacant in 2017 have been filled; and only two of the positions that became vacant in 2018 have been filled. There are now 31 vacancies which is approximately one-quarter of all OPL positions nationwide. Of the 40 OPL positions that have become vacant since 2016, the NWS has backfilled only 14.^[15]

The Union also points out that there are 49 GS-11 HMTs in the Agency who are eligible for promotion to existing vacancies, "including 13 who are at offices where there is a GS-12 OPL vacancy[.]"

Additionally, the Union stresses that the 2004 agreement represents a properly negotiated "permissive" matter under Section 7106(b)(1) of the Statute, that is, the Agency elected to negotiate with the Union over "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty[.]" Citing, *Department of Transportation, FAA and NATCA*, 62 FLRA 90, 92 (2007), the Union, quoting the Authority, points out that "Section 7106(b)(1) is an exception to §7106(a) such that bargaining over matters encompassed by §7106(b)(1) is permitted notwithstanding that those matters also affect rights under §7106(a)."

¹⁴ Section 2(b) of the parties' September 2004 agreement.

In addition to violating the 2004 agreement, the Agency argues that at the arbitration hearing, the Agency “explicitly” repudiated the 2004 agreement when its counsel stated that “the 2004 staffing plan was not an agreement. It was never intended to be an agreement.” Moreover, record evidence shows that even prior to arbitration the Agency had in fact repudiated the agreement by its conduct as described above. In its March 1, 2019, grievance decision, the Agency made it clear that the 2004 “agreement” did not contain mutual commitments and obligations and that “management’s discretion” controlled the filling of these disputed vacancies.

Finally, the Union disputes the Agency’s proffered reasons for not filling OPL vacancies. Among other reasons for not filling OPL vacancies,¹⁶ Agency COO Murphy maintained that the Agency did not have adequate funding to fulfill its 2004 agreement obligations and commitments. The Union rejects Murphy’s claims in their entirety: “Nonetheless, simply stated, the NWS is flush [with funds]. Congress has fully funded the agency and has repeatedly gone on record objecting to the NWS failure to fully staff the agency despite adequate funds.” The Senate Appropriations Committee wrote in connection with the FY 18 Appropriations Act that:

The Committee is very concerned with the continued number of NWS employee vacancies. Given the importance of the NWS mission to protect lives and property of our Nation’s citizens, extended vacancies are unacceptable – particularly when the Committee has provided more than adequate resources and direction to fill vacancies expeditiously for the past several fiscal years...NWS is directed to continue to fill all all vacancies as expeditiously as possible. [Senate Report. NO. 115-139, 115 Cong. 1st Session, at 43.]

The foregoing language was virtually repeated by the Senate Appropriations Committee for FY 19 appropriations. Additionally, the House Appropriations Committee for FY 19 pointed out in its Report that it had fully funded salaries and benefits of NWS employees. (House Report No. 115-704, 115th Congress 2nd Session, at 22.)

¹⁵ In the main, this analysis is not disputed by the Agency.

¹⁶ Murphy also cited “inflation” as a reason for the Agency’s failure to fill the vacant OPL positions.

Thus, the Union maintains that an agency cannot disregard its contractual commitments based on budget concerns, citing *Overseas Education Association and DODDS*, 27 FLRA 492, 495 (1987) and *AFGE v. FLRA*, 785 F.2nd 333, 337,338 (D.C. Cir. 1986).

Based on the foregoing, the Union requests that its National level grievance be sustained in its entirety. As a remedy for the Agency's contractual transgressions, the Union requests, among other things, (1) a directive requiring the Agency to initiate recruitment actions so as to backfill for all unfilled OPL vacancies; (2) vacancies filled pursuant to this case shall be retroactive to the date the position became vacant or promote as appropriate; (3) temporarily promote qualified HMTs to vacant OPL positions pursuant to the Simmelkjaer Decision & Award; and (4) award attorney fees as appropriate.

B. The Position of the Agency

The thrust of the Agency's position in this matter is that the arbitrator "lacks jurisdiction" to hear the Union's grievance on the merits. The Agency bases its position on two (2) grounds. First, the Agency maintains that the Union's December 4, 2018, grievance was not timely filed under the parties' CBA. Second, the Agency insists that the "Management Plan" at issue here "does not constitute a binding agreement between the parties, nor was it ever intended to be a binding agreement between the parties."¹⁷ A discussion of the Agency's positions follows:

1. The Union's grievance was not timely filed under Article 10 of the CBA.

The Agency emphasizes that arbitrators must respect and enforce negotiated time limits for the filing of Union grievances. (Citations omitted.) Here, the parties' CBA clearly provides that "Union grievances shall be initiated in writing by the NWSEO President...and presented to [the Agency] within 30 calendar cays of the receipt of the action or the condition giving rise to the grievance." Simply put, in the Agency's view, the "clock began to run" on the filing of a timely grievance when "each OPL vacancy be-

¹⁷ For completeness, the Agency contends that even if the Union's grievance had been timely filed and could be construed as an "agreement" within the meaning of the Statute, the Agency did not violate the "Management Plan."

came known to NWSEO and its representative [following which] the Union had thirty (30) days to grieve that vacancy.” The Union’s position on timeliness is undermined because the Union admits that the OPL vacancies “have been vacant for a year or more.”

In support of the foregoing, the Agency argues that no OPL position became vacant within 30 days of the filing of the Union’s grievance. Moreover, where there were OPL vacancies unfilled, the Union had a steward at each WFO; the steward “on site...was fully able to observe and know of the departure of every employee from every OPL position[.]” Thus, the Union’s claim that it “just recently learned” of OPL vacancies is unpersuasive and contrary to clear record evidence. In addition, the Agency represents that its “recruitment and job posting process” is available on a public website, thus further establishing that the Union cannot credibly claim that it “recently learned” of the OPL vacancy situation.

With respect to the Union’ claim of a “continuing violation’ of the 2004 “Management Plan,” the Agency points out that “[t]here is no continuing violation where an identifiable condition with a determinative start serves as the subject matter of the aggrieved situation,” citing *IFPTE, Local 386 and Department of the Army*, 66 FLRA 26 (2011). Here, the Agency contends that the Union itself at hearing conceded that “the date of the vacancy is the date the Union would expect action on the part of the Agency.” Given this admission, the Agency insists that the Union cannot reasonably or validly advance a “continuing violation” theory of timeliness for its December 4, 2018, grievance. Accordingly, the Union’s grievance must be dismissed as untimely filed under Article 10 of the parties’ CBA.¹⁸

2. The “Management Plan” is not a binding and enforceable Agreement.

Critical to the Union’s position that the “Management Plan” is not an “agreement”

¹⁸ In this regard, Article 10, §3.B of the parties’ agreement provides that “Failure of NWSEO, the grievant, or the grievant’s representative to observe any time limit shall nullify the grievance.”

within the meaning of the Statute is the undisputed fact that the parties began to discuss the staffing matter in “formal” discussions but ended up resolving the matter during “informal negotiations.” Citing FLRA case law, the Agency maintains (its words) that where “no formal negotiations were conducted; therefore, no agreement exists.”¹⁹

Also critical to the Agency’s position is the testimony Agency official Mickey Brown. In 2003-04, Brown was the Deputy Director for NWS’s Eastern Region. He was also a member of the Agency’s “negotiating team,” and he was involved in the “negotiations” over the 2004 staffing plan at issue here. In relevant part, Brown testified on direct examination in arbitration as follows:

In 2003 management proposed a change to that staffing plan that was transmitted to NWSEO for their review and implementation negotiations....[A]t some point between 2003 and the implementation of this plan the 2003 plan was withdrawn and we had discussions with NWSEO over a revised staffing plan[.]...I would say that the negotiations associated with the 2003 plan were difficult [over ground rules]...,The original intent of the 2003 negotiations...was to implement that 2003 staffing plan that was proposed to NSWEO....

I don’t believe [the staffing plan] was an MOU. I believe it was a management plan.... I intended to implement a staffing plan through a process that we tried to use pre-decisional involvement as per our [CBA], to get together to move the Agency forward with this staffing plan....I believe the 2003 staffing plan didn’t include an OPL....I believe that management and labor both received benefit [from the staffing plan].... The [OPL] position became a GS...12...an opportunity for a higher graded position[.]

On cross-examination Brown testified, among other things, that:

[T]here were face-to-face discussions that [I, GC Hirn and others] had over different iterations of what was going to happen....I believe [another Agency official] was giving [the Union] notice of [management’s intent to implement, and therefore meeting our requirement under labor law, so that [the Union] had the opportunity to provide bargaining proposals should [the Union] deem it necessary.

Also significant to the Agency is the fact that it entitled the document at issue here “Management Plan – WFO Staffing.” In the Agency’s view, “[t]he plain appearance of the document itself clearly confirms that it was not meant to be binding and that neither

¹⁹ *DHS, Customs and Border Protection, Detroit, Michigan and AFGE, National Border Patrol Council*, OALJ 13-16 May 2, 2013). Here, FLRA Chief ALJ Center concluded, among other things, that statutory negotiations did not take place because relevant discussions took place in “working group meetings.”

party understood it to be binding. The Staffing Plan is not named as an “agreement” or “MOU” in its title heading; it contains no signature block and no signatures from either party, nor any specific date of execution. It is merely the Agency’s statement on the direction it wishes to take toward staffing, hiring, and the creation of a position in its WFOs; it is clearly a plan and nothing more.”

The Agency also rejects the various written Agency communications (set forth above) referring to the “Management Plan” as an “agreement” or “MOU” as the work of a non-attorney “laymen” unaware of the significance of his or her words.²⁰

In view of the foregoing, the Agency requests that the arbitrator find that the 2004 “Management Plan” at issue here is not an “agreement or MOU” within the meaning of the Statute. Therefore, it is not enforceable in arbitration.

3. “Even if the Staffing Plan constitutes an agreement, the Agency never violated it.”

The Agency takes the position that through 2004 it fully complied with the 2004 staffing plan, honoring all of its required commitments and obligations. In the Agency’s view, the staffing plan “makes no promise of future action beyond the initiation of hiring actions to start in October 2004. In effect, according to the Agency, the staffing plan contains no “express promise” to do anything in the “future.” The staffing plan only “promised...to create the OPL position and to begin recruiting for the open positions by October 25, 2004.” In the Agency’s reading of the staffing plan, “if the Agency intended to and agreed to immediately fill every OPL position that ever became vacant with the senior HMT on station in perpetuity, the Staffing Plan document would have said that.”

²⁰ Interestingly, the Agency communications referred to here were issued by Agency “non-attorney laymen,” Ted David, Agency Chief Financial Officer/Chief Administrative Officer, Dean Gulezian, Eastern Region Director (and “boss” of Union witness/negotiator Mickey Brown, also a “non-attorney layman”), John Jones, a high enough Agency official to send out an all-hands e-mail on negotiations, and Paul Schlatter, signatory to the June 2016 MOU, as Management Representative. Presumably, these high level Agency officials would know something about labor relations and the parties’ CBA.

Moreover, the Agency points out that nowhere in the staffing plan is there language dealing with “temporary promotions.” In this regard, the Agency maintains that the Decision and Award of Arbitrator Simmelkjaer has no bearing on the instant proceeding in any respect. It is a 17 year old case predating the instant dispute involving different circumstances.

Finally, the Agency contends that what the Union fundamentally seeks through its grievance is to have the Agency fill or backfill vacant OPL positions, with back pay. Relief of this sort, the Agency stresses would violate management’s prerogatives under Section 7106(a) of the Statute: “The demand that the Agency hire as directed by the Union is clearly an infringement upon that [prerogative].”

In view of the foregoing, the Agency requests that the Union’s December 4, 2018, grievance be dismissed in its entirety.

III. Analysis & Opinion

I have carefully considered the entire record in this matter, including the testimony of parties’ witnesses, the documentary evidence submitted, the arguments advanced by the parties’ counsel in their post-hearing briefs and the legal authorities provided. As discussed more fully below, I find that the Union’s December 4, 2018, National level grievance was timely filed; I find that the September 2004 “Management Plan/Agreement is a binding and enforceable agreement within the meaning of the Statute and, in addition, I find that it is an enforceable “permissive” agreement as to “numbers, types, and grades” under Section 7106(b)(1) of the Statute;²¹ I find that the Agency violated the 2004 Agreement in recent years by failing in good faith to implement certain provisions, commitments and obligations set forth in the 2004 Agreement, relying instead on the unpersuasive and unsupported testimony of Agency COO Murphy that the Agency lacked sufficient funding to fill vacant OPL positions and that rates of inflation negatively impacted

²¹Alternatively, it must also be noted, in agreement with the Union, that the Agency did not raise its claim that the “Management Plan/Agreement” was not an agreement within the meaning of the Statute at any

the Agency's ability to fund the vacant positions; However, I am unable to agree with the Union that the Agency "repudiated" the 2004 Agreement by its actions described above—record evidence is insufficient to establish a "repudiation"; I also find that the Union failed to raise alleged Agency non-compliance with the Simmelkjaer Award in its December 4, 2018, National level grievance and therefore that claim cannot be considered in the instant matter.²² Finally, I further find that under Section 7106(a)(2) of the Statute, the Agency cannot be compelled to fill temporarily or permanently any vacant OPL position at issue here. An appropriate Award has been entered below consistent with the foregoing.

A. The Union's December 4, 2018, National level grievance was timely filed.

The Union's grievance was timely filed because it was filed as a National level grievance under Article 10, §9.B of the CBA challenging the Agency's substantial, widespread and dilatory failure to abide by certain provisions of the parties' September 2004 Agreement. Contrary to the argument of the Agency, this was not the kind of grievance in nature and scope that could have or should have been filed piecemeal in local WFOs as vacancies arose, under Article 10, §7 (Employee Grievances) of the CBA, as the Agency contends.

I credit the testimony of Union President Sobien that in the fall of 2018 he learned anecdotally for the first time that the Agency was not filling a substantial number of OPL vacancies in various WFOs nationwide. Upon receiving these reports, the Union submitted an information request to the Agency and subsequently learned that 32 OPL vacancies had not been filled, some for years. Within days of receiving the Agency's November 30, 2018, response to the Union request for information, the Union filed the instant and timely grievance. Article 10, §9.B (Union/Management Grievance Procedure) states that the Union has "within 30 calendar days of the receipt of the action or the condition

time prior to the arbitration hearing. Thus, under established arbitration precedent and the parties' CBA, I do not have to address the Agency's claim on its merits but have done so nonetheless.

²² Moreover, with respect to temporary promotions (if even applicable here), it does not appear that the Union has ever invoked contractual or statutory procedures to assert that the Agency has failed to comply with the Simmelkjaer Award.

giving rise to the grievance” to initiate its grievance.” (Emphasis supplied.) In the instant matter, the “condition giving rise to the grievance” was the Union’s receipt of information at the National level from the Agency that a substantial number of OPL vacancies existed, and some for years.

The Agency’s argument that individual local grievances should have been filed when an OPL vacancy occurred in a WFO is misplaced and not applicable in the particular circumstance of this dispute. Given the fact that the 2004 Agreement contains no timetable for filling OPL vacancies and given the fact that the Agency has a statutory right to hire, among other things, under Section 7106(a)(2) of the Statute, the “clock” could not have begun to run at the time of the establishment of an OPL vacancy. In this respect Agency COO Murphy testified that the Union is not notified when the Agency decides not to fill a vacancy due to lack of funding: “I know we’re not nationally making any sort of notification.” In these circumstances, record evidence makes it clear that the Union at the National level does not know what the Agency intends to do with vacant OPL WFO positions and cannot be held accountable for allegedly failing to file earlier timely grievances; were the Union at the local level to file a grievance when the position becomes vacant, the Agency would likely make the argument that any such grievance is premature because the Agency had yet to determine whether or when it will start the recruitment process to fill the vacancy. I therefore find unpersuasive the Agency’ arguments on timeliness.²³

B. The September 2004 “Management Plan” is a binding and enforceable Agreement within the meaning of the Statute.

It is undisputed that initially in 2003 the parties agreed to deal with the staffing issues through formal negotiations. However, formal negotiations stalled over ground rules issues. Seeking another approach, the parties agreed to discuss the staffing issues informally. Record evidence shows that discussions took place and ultimately the negotiators arrive at an agreement. On September 23, 2004, in writing, the Agency sent Un-

ion Chief Negotiator Hirn a revised staffing plan resulting from a “series of informal discussions” and asked Hirn whether the plan was “acceptable” to the Union. As noted above, on September 28, 2004, in writing, Hirn “accepted” the revised WFO staffing plan. Record evidence shows that as a result of the parties’ “discussions” the Agency’s original set of proposals (Union Exh. 4) underwent changes during the bargaining process. Among other adjustments seen in the final product was the Agency’s agreement to “classify” the OPL position in the future as a GS-12 (previously a GS-11). This concession, standing alone, constitutes sufficient contractual “consideration” to find the “Management Plan” to be an agreement within the meaning of the Statute.

The Agency’s contention that the “plain appearance” of the final document “clearly confirms that it was not meant to be binding and that neither party understood it to be binding” is both incorrect on one hand and contrary to record evidence of the other. Even assuming that the final “document” resulted from a series of exchanges between the Agency and Chief Negotiator Hirn, there is no question that the final “document” represents “a meeting of the minds between the parties,” following their discussions/negotiations. That the final product might be described as non-traditional is irrelevant; the legal authority cited by the Union above and in its post-hearing brief is persuasive, particularly the analysis rendered by Arbitrators Zach and Bloch, directly applicable in the instant circumstances.

Finally, undisputed record evidence shows that as late as June 2016 high level Agency officials, on several occasions, had referred to the “Management/Plan” as an “agreement/MOU,” thus undermining the self-serving testimony of Agency negotiator Brown to the contrary. (In the regard, see footnote 20).

C. The Agency has not implemented the September 2004 Agreement in good faith.

Record evidence establishes that the Agency has not implemented the disputed

²³ In view of this determination, I decline to determine whether the Union’s December 4, 2018, National level grievance was timely filed on the theory of a “continuing violation.”

Agreement in good faith, particularly with respect to paragraph 2.b of the 2004 Agreement: “As DAPMs or OPLs retire or leave the WFO for other reasons, the same recruitment process will be conducted.” Record evidence shows that the Agency has been unjustifiably dilatory in implementing the Agreement. Given the Agency’s managerial prerogatives under the Statute, the Agency has discretion as to when it fills vacant positions. But it must exercise that discretion in good faith. Having entered into lawful agreement with the Union under the Statute, the Agency cannot simply ignore or put-off its commitments and obligations thereunder, except for *bona fide* and legitimate operational considerations. Here, I cannot conclude that the Agency failed to fill vacant OPL positions based on *bona fide* and legitimate operational considerations.

To support its position in this matter, the Agency primarily relies on the testimony of Agency COO John Murphy. Simply stated, the thrust of Murphy’s testimony was that the Agency lacked sufficient funding to fill the vacant OPL positions. According to Murphy, a significant adverse financial factor was the rate of inflation over recent years. A sample of Murphy’s relevant testimony follows:

- “I would love to fill every office in the Weather Service, be we don’t have the appropriation for that.”
- “[We] have to keep a certain number of positions vacant to keep - - to stay within the appropriation.”
- “We just don’t have the money to advertise the position or offer the position.”
- “[I]n other words we had filled the ones we had funding for and there’s a couple hundred in the queue that are in the process somewhere along the way.”
- “[O]ur appropriation hasn’t kept up with inflation.”
- “[Congress has] not cut the budget, it just has not kept up with inflation.”
- “[W]e didn’t fully spend the money, the PCS portion of the budget.”
- “[In 2018, we] had \$17 million leftover.”

Murphy’s testimony is at odds with the above-cited Senate (and House)

Appropriation Committee Reports. To repeat the relevant language,

The Committee is very concerned with the continued number of NWS employee vacancies. Given the importance of the NWS mission to protect lives and property of our Nation's citizens, extended vacancies are unacceptable – particularly when the Committee has provided more than adequate resources and direction to fill vacancies expeditiously for the past several fiscal years...NWS is directed to continue to fill all all vacancies as expeditiously as possible. [Senate Report. NO. 115-139, 115 Cong. 1st Session, at 43.]

Additionally, I take judicial/administrative notice of the fact that in recent years the rate of inflation in the U.S. economy has bordered on historic lows. Thus, given the foregoing, I am unable to credit the Agency's defense, through the self-serving testimony of COO Murphy, that it had, in effect, *bona fide* and legitimate operational reasons to put-off and not fill a substantial number of OPL vacancies in the Agency over the years. In short, by failing to fill the OPL vacancies at issue here, the Agency failed to honor its obligations and commitments under the 2004 Agreement and failed to act in good faith in implementing the Agreement.

Accordingly, I am sustaining the Union's 2004 National level grievance to the extent set forth below.

IV. The Award

Consistent with the foregoing, the Agency's June 11, 2019, "Motion to Dismiss" the Union's grievance herein on grounds of timeliness is denied. The Union's December 4, 2018, National level grievance is sustained to the following extent:

(1). The Agency is hereby directed to implement and honor the provisions of the September 2004 Agreement in good faith. Should the Agency determine that it must delay implementing the terms of the 2004 Agreement, it may do so but only for *bona fide* and legitimate operational reasons, consistent with statutory authority.

- (2). After the Award becomes final and binding, I will retain jurisdiction over it for 180 days in the event any disputes arise over its application or interpretation.
- (3). No other remedy was found to be appropriate or warranted in the circumstances presented by this grievance

Laurence M. Evans
Laurence M. Evans
Arbitrator

October 10, 2019
Rockville, MD