UNITED STATES OF AMERICA

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

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| U.S. DEPARTMENT OF JUSTICE<br>FEDERAL BUREAU OF PRISONS<br>FCI DANBURY, DANBURY, CONNECTICUT<br><br>Respondent<br><br>and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, AFL-CIO, LOCAL 1661<br><br>Charging Party | Case No. BN-CA-60527 |
| | |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MAY 19, 1997**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 17, 1997
Washington, DC

UNITED STATES OF AMERICA

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: April 17, 1997

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FCI DANBURY, DANBURY, CONNECTICUT

Respondent

and Case No. BN-CA-60527

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF PRISON
LOCALS, AFL-CIO, LOCAL 1661

Charging Party

Pursuant to Section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

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| U.S. DEPARTMENT OF JUSTICE<br>FEDERAL BUREAU OF PRISONS<br>FCI DANBURY, DANBURY, CONNECTICUT<br><br>Respondent<br><br>and<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, AFL-CIO, LOCAL 1661<br><br>Charging Party | Case No. BN-CA-60527 |
| | |

Amy Whalen Risley, Esquire
For the Respondent

Gerard M. Greene, Esquire
Gail M. Sorokoff, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns two questions: (a) Did Respondent change shift starting and stopping times without affording the Union an opportunity to negotiate to the extent required by law; and/or, (b) Did Respondent unilaterally change the shift starting and stopping times fixed by Agreement during the term of an Agreement? For reasons fully set forth hereinafter, I have concluded that Respondent did not give the Union notice and an opportunity to bargain on the change

[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "§ 16(a)(5)."

of shift starting and stopping times, and Respondent unilaterally changed the shift starting and stopping times during the term of the Local Agreement.

This case was initiated by a charge, filed on May 6, 1996 (G.C. Exh. 1(a)), which alleged violation of § 16(a)(1) of the Statute; by a First Amended charge, filed on July 31, 1996 (G.C. Exh. 1(c)); which alleged violation of § 16(a)(1) and (5) of the Statute; and by a Second Amended charge, filed on August 16, 1996 (G.C. Exh. 1(e)), which also alleged violation of §§ 16(a)(1) and (5). The Complaint and Notice of Hearing issued August 23, 1996 (G.C. Exh. 1(g)); asserted violation of §§ 16(a)(1) and (5); and set the hearing for October 8, 1996, pursuant to which a hearing was duly held on October 8, 1996, in New York City, New York, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 8, 1996, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on timely motion of Respondent, to which there was no objection, for good cause shown, to November 22, 1996. Respondent and General Counsel each timely mailed an excellent brief, received on, or before November 26, 1996, which have been carefully considered. Upon the basis of the

entire record[2], including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

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[2] General Counsel's Motion To Correct Transcript, filed with his post-hearing brief, was unopposed and is granted except as to the requested change on page 105, line 23, which is denied. My recollection is that another FLRA representative was conversing in a "stage whisper" to Mr. Greene. When Ms. Risley asked that ". . . we not have these interruptions. This is very distracting", the record then shows the statement, "Excuse me. I'm sorry. I apologize" which is attributed to Mr. Greene. I have no recollection that the statement was not made by Mr. Greene and, because, if it were not made by Mr. Greene it was made by the FLRA representative who was doing the "stage whispering", the attribution to Mr. Greene appears correct, the transcript will stand as written. The transcript is hereby corrected as follows:

| Page | Line | From | To |
|---|---|---|---|
| 11 | 11 | "anti-remedy" | "ante remedy" |
| 11 | 13 | "makeup remember" | "make whole remedy" |
| 23 | 15, 17, 20 | "Alamar" | "LMR" |
| 24 | 8, 9, 10 | "offices" | "officers" |
| 48 | 13 | "That disagreement" | "That this agreement" |
| 121 | 9 | "prevent" | "permit" |
| 128 | 21 | "Guzzilen" | "Gezelman" |
| 129 | 1 | "Guzzilen" | "Gezelman" |

## Findings

1. The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (hereinafter, "AFGE") is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining of the United States Department of Justice, Federal Bureau of Prisons (hereinafter, "FBP"). The American Federation of Government Employees, Council of Prison Locals, AFL-CIO, Local 1661 (hereinafter, "Union"), is an agent of AFGE for the repre-sentation of bargaining unit employees at FBP's Danbury, Connecticut, facility (hereinafter, "Respondent").

2. FBP and AFGE entered into a Master Agreement, effective September 1, 1992, (Res. Exh. 2), ". . . for 3 years from the effective date" (G.C. Exh. 8); however, notice of desire to amend the Master Agreement was given and Respondent states that, ". . . The Agency was and continues to be engaged in negotiating a new Master Agreement at the national level." (Respondent's Brief, p. 6). Article 37 of the Master Agree-ment - "EFFECTIVE DATE AND DURATION" provided, as material, as follows:

> "Section a. This Agreement will take effect on September 1, 1992 . . . .
>
> "Section b. This Agreement shall be in full force and effect for 3 years from the effective date, but may be extended in one-year increments thereafter by mutual consent of the parties. Written notice may be given by either party to the other not less than 60 days but not more than 90 days prior to the expiration date that it desires to amend the Agreement. In the event notice is given, the parties shall begin negotiating within 30 days. If negotiations are not completed by the expiration date, the Agreement will be automatically extended until a new Agreement is approved but not to exceed 6 months exclusive of periods during which issues are pending before third parties, with mediators being considered third parties.
>
> "Section c. If neither party desires to renegotiate this Agreement, the parties shall execute new signatures and dates.
>
> "Section d. . . . Local supplemental agreements may be opened by mutual consent." (G.C. Exh. 8, Article 37)(Emphasis supplied).

3. With regard to local negotiations, Article 9 of the Master Agreement provided, as material, as follows:

"ARTICLE 9 - NEGOTIATIONS AT THE LOCAL LEVEL

. . .

"Section b. The Master Agreement is governing and controlling at the local level. The purpose of a local supplemental agreement shall be to cover all those other appropriate matters which are more practicably negotiated at the local level. It is understood, however, that local supplemental agreements shall not:

"1. Deal with permissive matters or those matters negotiated at the national level;

. . .

"Section c. Notwithstanding the provisions of Section b., above, the parties may negotiate locally and include in any supplemental agreement any matter which does not specifically conflict with the provisions of the Master Agreement. . . .

. . .

"Section d. Once an agreement has been reached at the local level, it shall be reduced to writing and signed by the local parties within 15 calendar days from the conclusion of negotiations. A copy of the signed and dated proposed agreement shall be forwarded to the Labor-Management Relations Section by local management and another copy shall be forwarded by the local union to its regional vice president. . . .

"The parties at the national level shall have 30 days, from the date that the proposed agreement was signed, to independently review the agreement and determine if the proposed agreement complies with the provisions of this Agreement and applicable laws and regulations.

". . . At the end of the 30 day review period, the local supplemental agreement will go into effect . . . ." (Res. Exh. 2, Article 9, Section b., c. and d.) (Emphasis supplied).

4. The Union and Respondent on March 29, 1993, entered into a Supplemental Agreement, Article 18 of which provided, as material, as follows:

"ARTICLE 18 - Assignment and Hours of Work

"Section a: The principal day shift, for other than Correctional Services, will be from 7:30 a.m. to 4:00 p.m. The principal shift for Correctional Services shall be from 8:00 a.m. to 4:30 p.m.

"Other than those assigned to the principal shift, employees working a straight eight hours will be allowed to eat on their posts. . . ." (G.C. Exh. 7).

5. Article 9, Section a. of the Master Agreement provides, in relevant part, that:

"Section a. . . . It is understood that local supplemental agreements expire on the same date as the Master Agreement." (Res. Exh. 2, Article 9, Section a.).

Indeed, the Supplemental Agreement of March 29, 1993, in Article 37, "Effective Date and Duration" states, in relevant part, that:

"This Agreement is coterminous with the Master Agreement . . . ." (G.C. Exh. 7, Article 37).

6. In August, 1992, Respondent and the Union entered into a Memorandum of Understanding which provided, in material part, as follows:

"MEMORANDUM OF UNDERSTANDING

"It is agreed . . .

"1. Return to the practice that employees of the Federal Correctional Institution, Danbury shall not be considered to be tardy or late for work if employees are in the key line by the start of their workshift. . . ." (G.C. Exh. 3)(Emphasis supplied).

7. Mr. Dan Joslin, Chief, Paying Position Management, Headquarters FBP, Washington, D.C. (Tr. 37), stated that since 1982 there had been an on-going case against FBP over portal-to-portal issues, ". . . specifically, the compensation employees received at the beginning and during pre-shift activities, and then following post-shift activities." (Tr. 38). Mr. Joslin pointed out that in a prison setting, employees have to go through a security

check point to enter or leave; have to pick up items to perform their job, such as keys, radio, body alarm, etc.; move to their duty posts; and the officers being relieved go to the control center and turn in their equipment - keys, radios, etc., and then exit through the security check point (Tr. 39-40). Accordingly, the question was, "At what point did an employee's shift start and end? Was it when they first picked up the equipment, or was it when they arrived at that official duty post within the institution? . . . They could not leave their post for obvious security reasons until proper relief was there and somebody was there to take over the duty, and then that person could leave and proceed once again to the exit point . . . Sometimes they would drop off keys, other equipment for the job, and then . . . move on." (Tr. 39-40).

Mr. Joslin stated that the litigation had not been settled but, ". . . it was becoming apparent that settlement was nearing the end, and what we needed to do as management was, ensure that at a certain point, we could clearly identify where the new policy went into place and there would be no further liabilities, if there were any liabilities at all. So, we had to have a cut-off point, and ending point, as to what, if you will, the old shift starting and stopping times ended and when the new times began." (Tr. 41)

Consequently, Mr. Joslin participated in the formulation of an Operations Memorandum on shift starting and stopping times which was issued November 1, 1995 (Res. Exh. 1; Tr. 38, 42).

8. Warden Charles H. Stewart, Jr. received the Operations Memorandum on November 2, 1995, as noted by his initials on Respondent Exhibit 1 (Tr. 100). Warden Stewart met with Captain Donald P. Reich, who is in direct charge of the correctional staff (Tr. 60), about the Operations Memorandum on November 2, in his, Stewart's office (Tr. 61, 100). Warden Stewart instructed Captain Reich to meet with the Union, to advise them of the Operations Memorandum and to seek their advice and suggestions in creating a plan as required by the Operations Memorandum (Tr. 61, 100). Each credibly testified that Captain Reich asked if he could give the Union a copy of the Operations Memorandum and Warden Stewart said "yes" (Tr. 61, 107). Captain Reich stated that he did not remember whether he made a copy of the Operations Memorandum or whether Mr. Braulio Rodriquez, President of the Union (also referred to in the transcript as "Rod"), made a copy at their meeting; but he stated that, ". . . Rod got a copy, and he said that he was going to get a hold of Mr. Glover in the Regional office, and fax him a

copy." (Tr. 62) [Mr. Glover is Regional Vice President of AFGE Council of Prison Locals (Tr. 17)].

Mr. Rodriquez denied that he ever saw, or received, the Operations Memorandum (Tr. 34) and when asked if it were not true that he faxed a copy of the Operations Memorandum to Mr. Glover, he responded,

> "A Possible. I don't remember seeing this one.
>
> "Q You don't remember?
>
> "A No.
>
> "Q Or it's possible?
>
> "A I don't remember seeing this one (indicating) [i.e., the copy of the Operations Memorandum shown him by counsel for Respondent, later introduced as Respondent Exhibit 1] (Tr. 34-35).

I do not credit Mr. Rodriquez's denial that he received the Operations Memorandum and, rather, credit Captain Reich's wholly credible testimony that Mr. Rodriquez did receive a copy. I have not credited Mr. Rodriquez's denial for various reasons, including the following. First, Captain Reich was a convincing witness while Mr. Rodriquez was not. Second, Mr. Rodriquez stated that he told Captain Reich, ". . . we have an MOU, understanding of the key line. . . ." (Tr. 16, 62). His reference to the MOU, which stated,

> ". . . employees . . . shall not be considered to be tardy or late for work if employees are in the key line by the start of their workshift." (G.C. Exh. 3).

plainly was a retort to the provision of the Operations Memorandum which stated,

> "A. AN INSTITUTION EMPLOYEE WHOSE SHIFT STARTS AT 7:30 A.M. MUST BE AT THE CONTROL CENTER AND HAVE RECEIVED HIS/HER EQUIPMENT NO LATER THAT 7:30 A.M. TO BE CONSIDERED 'ON TIME' FOR THE START OF HIS/HER SHIFT. . . ." (Res. Exh. 1) (Emphasis supplied).

That is, a change, whereby an employee had to have his/her equipment by the start of the shift [in the example, 7:30 a.m.], rather than merely being in the key line [for issuance of equipment] by the start of the shift [in the

example, 7:30 a.m.], most certainly would have provoked assertion of the MOU and, necessarily, Mr. Rodriquez would have had to have known of the proposed change or his assertion of the MOU (". . . we have an MOU, understanding of the key line . . . ." (Tr. 16) would have been wholly unresponsive to what he said Captain Reich told him, namely, "We're thinking about changing the hours, starting and ending shifts." (Tr. 16).[3]

Third, Mr. Rodriquez placed this meeting, at which he said Captain Reich told him, "We're thinking about changing the hours, starting and ending shifts." (Tr. 16), as late November (Tr. 16); but the Operations Memorandum directed each Warden to submit a plan no later than November 15, 1995, and Warden Stewart on November 2 had directed Captain Reich to meet with the Union and seek their advice and suggestions on creating a plan (Tr. 100). It is not credible that Captain Reich would have delayed meeting with Mr. Rodriquez until late November. Fourth, as noted, Mr. Rodriquez's testimony con-cerning his having faxed a copy of the Operations Memorandum to Mr. Glover at best was equivocal and Mr. Rodriquez stated that he discussed the matter with Mr. Glover (Tr. 17); but Mr. Glover was not called as a witness.

Not only did I not find Mr. Rodriquez's denial of receipt of a copy of the Operations Memorandum credible, but I did not find any of Mr. Rodriquez's testimony concerning his meetings with Captain Reich credible, either as to the time of such meeting or the discussions that transpired, and do not credit his testimony when in conflict with the testimony of Captain Reich, whom I found to be a wholly credible witness. Again, there are various reasons for finding Mr. Rodriquez's testimony not to be credible, including the reasons set forth above. In addition, Mr. Rodriquez stated Captain Reich told him, "We're thinking about changing the hours, starting and ending shifts" (Tr. 16); that he, Rodriquez, responded, "I don't know, but we have an MOU, understanding of the key line, plus we have it in our Local supplement. It's written down. Anything could be negotiated, but we need to negotiate this" and Captain Reich responded, "He said -- well, at that period he went away." (Tr. 16). It is not credible that Captain Reich did not ask for the Union's input. The Operations Memorandum, "strongly encouraged" inclusion of

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[3] To be sure, Mr. Rodriquez's reference to the Local Supplement was responsive to changing the hours; but the issue of "tardiness", addressed only by the MOU, was a discrete question wholly independent of the starting time of any shift.

Union officials in the formulation of a plan (Res. Exh. 1, Par. 3. Implementa-tion) and Warden Stewart directed Captain Reich to meet with the Union and seek their advice and suggestions in creating a plan (Tr. 100), and Captain Reich's testimony, which is consistent with the Operations Memorandum and Warden Stewart's instructions to him, is wholly credible.

After the meeting at which Mr. Rodriquez said Captain Reich just "went away", he said he did not encounter Captain Reich again until, ". . . we bumped into each other in December" (Tr. 16), a meeting at which he was shown General Counsel Exhibit 24 (Tr. 17-18), which is dated December 15, 1995, and would place the date of the meeting as, presumably, Friday, December 15, and that he told Captain Reich, "We don't have a problem at Danbury" (Tr. 18); ". . . send the memo of understanding, also our Local supplement to the Regional Director to show that we don't have a problem at Danbury." (Tr. 19). Although Mr. Rodriquez "keyed" his testimony to "OPTIONS" in Paragraph 2 of General Counsel Exhibit 2, I did not find his testimony in this regard convincing. First, this memorandum in Paragraph 1 stated as follows:

> "1. Time in key line: If an employee arrives at the key line in a reasonable time to get equipment prior to the shift, but does not receive the equipment/keys by the beginning of the shift, this employee is not to be considered late." (G.C. Exh. 2).

This is not quite the language of the MOU ["shall not be considered to be tardy or late for work if . . . in the key line by the start of their workshift." (G.C. Exh. 3)] but it is very close, so close that one must question whether it would have provoked a comment that, "We don't have a problem at Danbury". On the other hand, the November 1, 1995, Operations Memorandum, which stated that to be considered "on time" the employee must have <u>received</u> his/her equipment by the beginning of the work shift (7:30 a.m. in the example

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Mr. Rodriquez stated that he never saw General Counsel Exhibit 6, a memorandum dated December 16, 1995, from Captain Reich to "All Correctional Officers" (G.C. Exh. 6), until May or June, 1996, when he received it from a representative of the Authority (Tr. 122). Necessarily, since he denied having seen it until five or six months later, he could not in December, 1995, have been aware of the reference on page 2 to the Operations Memorandum (Res. Exh. 1) which referred to the "tardiness" issue.

given in Res. Exh. 1), certainly would have provoked a comment.

Second, the January roster (G.C. Exh. 4) was signed on December 15, 1995, and before that time, on December 13 (Tr. 84), Mr. Rodriquez had been made aware of the change in hours (Tr. 125). With knowledge that the hours for the correctional staff were already changed on the January roster, Mr. Rodriquez could not, and would not, have asserted, "We don't have a problem at Danbury", although on November 2, 1995, when he was presented with the Operations Memorandum, he could have so asserted.

The Operations Memorandum, in addition to the reference in Paragraph 2A. to having received his/her equipment ". . . no later than 7:30 a.m. [i.e. the scheduled start of the shift] to be considered 'on time' . . .", also stated, in Paragraph 1, that, "Shift starting and stopping times for employees who work inside an institution shall be scheduled to begin and end at the point employees pick-up and drop-off equipment (Keys, Radios, Body Alarms, Work Detail Pouches, etc.) at the Control Center"; and in Paragraph 2C, ". . . waiting time in key lines prior to the beginning of a shift is not 'work time' . . ." (Res. Exh. 1, Paragraph 1, 2A and 2C). These provisions, absent from General Counsel Exhibit 2, because they specifically applied to portal-to-portal considerations, unquestionably would have provoked Mr. Rodriquez's ". . . concerns . . . that the portal-to-portal issue had not been settled on a national level, and that this was incorrect with what he was hearing in relation to the portal-to-portal issues" (Tr. 62), which I have found hereinafter he stated, all of which points to the fact that he met with Captain Reich on November 2, 1995, and that he received a copy of Respondent Exhibit 1.

Accordingly, I do not, in the main, credit Mr. Rodriquez's testimony but, rather, crediting the testimony of Captain Reich, I find that the first meeting took place on November 2, 1995, after hours, in Captain Reich's office (Tr. 62); that Mr. Rodriquez received a copy of the Operations Memorandum (Tr. 62, 72); and at the outset, ". . . Rod described to me some concern, where he felt that the portal-to-portal issue had not been settled on a national level, and that this was incorrect with what he was hearing in relation to the portal-to-portal issues. He said that our institution had a memo of understanding . . . and that the MOU was in place until such time as there was

a final resolution at the national level" (Tr. 62).[5] Captain Reich, ". . . explained to Rod that we needed together to sit down and put together some kind of plan that met the guidelines [of the Operations Memorandum] . . ." (Tr. 63); that, ". . . Rod said that, with the MOU . . . this didn't apply to us; that it applied to the institutions that were having portal-to-portal problems" (Tr. 63); that Captain Reich said, "We've got to put together a plan" (Tr. 63); that, ". . . Rod said, 'The MOU stands,' as far as he was concerned. The MOU was good and that the Union wasn't going to help us put together the plan to meet the ops memo; that we were violating the agreement . . . ." (Tr. 63). I am convinced that Mr. Rodriquez did, as he testified, also make reference to the Local Supplemental Agreement and I so find. That is, he referred both to the MOU, which dealt only with the tardiness issue of time in the key line, and to the Local Agreement, which fixed the principal shift for Correctional Services as 8:00 a.m. to 4:00 p.m. and further provided that employees, "Other than those assigned to the principal shift . . . working a straight eight hours will be allowed to eat on their posts." (G.C. Exh. 7, Art. 18).

As Captain Reich further stated, Mr. Rodriquez, ". . . just basically said that he saw this as management's way of trying to cut off what we saw was, we were going to lose the Court case, and it was a way of cutting off a time clock where they would cut off paying those involved in a portal-to-portal case. This was our way of going around it. There wasn't a settlement at the national level, and this was management's way of stopping the time clock as far as the length of time they had to pay people who were involved in the Court case." (Tr. 63).

9. When he met with Mr. Rodriquez on November 2, 1995, Captain Reich had no plan (Tr. 64); but thereafter he prepared a suggested schedule which was submitted on November 20, 1995 (Res. Exh. 3, Attachments, Tr. 66-67) and was rejected on November 22, 1995 (Res. Exh. 3). On December 7, 1995, a further proposed roster was submitted which was approved on December 13, 1995 (Tr. 84, 85); the roster committee was informed of the approval and the January, 1996, roster (G.C. Exh. 4) was finalized, signed and posted on December 15, 1995. The Union was not informed

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[5] The MOU provides in this regard as follows:

> "3. Both parties (management & local) agree that this will remain as status quo until settled by the current court proceedings at the national level." (G.C. Exh. 3, Par. 3).

of, nor furnished copies of, the various schedules proposed by Respondent (Tr. 84, 85); however, after November 2, 1995, Captain Reich spoke to Mr. Rodriquez a couple of times, ". . . in, I'd say, a general conversation . . ." and each time, "Rod was adamant and he said that do what we had to do, that if we went by this, that they would just file and they weren't participating and putting together the guidelines for this." (Tr. 64).

10. Mr. Rodriquez testified that he spoke to Warden Stewart about the proposed change of hours (Tr. 22); but Warden Stewart testified that neither Mr. Rodriquez nor any other representative of the Union ever approached him regarding the issue of the change of starting and stopping times (Tr. 107, 112-113, 129-130). I credit Warden Stewart's testimony and conclude that Mr. Rodriquez did not speak to Warden Stewart about the proposed change of hours.

Mr. Rodriquez also testified that he spoke to the Assistant Warden, Ms. Hogsden, and associated it with the December 15, 1995, memorandum (G.C. Exh. 2). As Assistant Warden Hogsden did not testify, Mr. Rodriquez's testimony, being unrefuted, is credited; nevertheless, since he had been told of the change of hours on December 13 and the January roster, which he stated he saw when it was posted (Tr. 124), had been posted on December 15, 1995 (Tr. 90), at the time he said he talked to Assistant Warden Hogsden, Respondent had, in fact, changed the hours of work. Mr. Rodriquez testified as follows:

> "A I went up to Ms. Hogsden, and I stated to her, 'I understand that the Captain wants to change the working hours.' I told her, 'He can't do that; we have to negotiate it. It's a negotiating item. We have an MOU in place in (sic) our Local supplement.'
>
> "She stated to me, 'Well, Rod, in January they're thinking about they're going to start January 1st.' I said, 'Well, January is only two weeks from now. We can't negotiate something in two weeks.'
>
> "Then I said, 'Well, no problem. If I see that you don't want to negotiate, I have to put a ULP,' and I walked out of her office . . . ." (Tr. 21-22).

11. The memorandum of December 15, 1995 (G.C. Exh. 2) specifically references a meeting between AFGE and FBP, i.e., at the national level, on December 11, 1995, . . . to

discuss the Union's concerns of Operations Memorandum 214-95 (Institu-tion shift starting and stopping times). The parameters listed below are to be followed . . ." (G.C. Exh. 2). Paragraph 3 of the memorandum provided, in part, as follows:

> "3. Union participation at the local and regional level in formulating these plans is key to assure a quick and smooth implementation." (G.C. Exh. 2, Par. 3).

12. The Union never told Captain Reich that they wished to negotiate the change in starting and stopping times (Tr. 65, 86). Captain Reich reported to Warden Stewart, ". . . that the Union is refusing to negotiate with us on the portal-to-portal issues." (Tr. 107) and Warden Stewart testified that, ". . . there were no negotiations at all because of the absolute refusal on their part to discuss those matters with Administration." (Tr. 133). The changed hours, as set forth in General Counsel Exhibit 4, became effective as scheduled.

## CONCLUSIONS

1. LOCAL SUPPLEMENT DID NOT VIOLATE THE MASTER AGREEMENT

Contrary to Respondent's assertion (Respondent's Brief, p. 8), the Local Supplement Agreement of March 29, 1993 (G.C. Exh. 7), was not violative of the Master Agreement and was a valid and lawful agreement. The Master Agreement does, initially, in Section b.1., provide that local agreements shall not:

> "1. deal with permissive matters or those matters negotiated at the national level; . . . ." (Res. Exh. 2, Article 9, Section b.1.).

Further, tours of duty, i.e. hours of work, are permissive subjects of bargaining within the meaning of § 6(b)(1) of the Statute. National Association of Government Employees, Local R12-33, 40 FLRA 479, 484-486 (1991); however, the Master Agreement in Section c. makes the following exception from the prohibition of Section b. as follows:

> "Section c. Notwithstanding the provisions of Section b., above, the parties may negotiate locally and include in any supplemental agreement any matter which does not specifically conflict with the provisions of the Master Agreement. . . ." (Res. Exh. 2, Article 9, Section c.).

Although the complete Master Agreement was not introduced as an exhibit, Respondent conceded that the Master Agreement does not address hours of work (Tr. 44) and, necessarily the Local Supplemental Agreement (G.C. Exh. 7), which, inter alia, fixed the principal shift for Correctional Services as 8:00 a.m. to 4:30 p.m., did not conflict with any provision of the Master Agreement which provided for hours of work; nevertheless, Respondent asserts that because Section b. prohibits local bargaining on permissive matters the Local Supplemental Agreement, because it deals with a permissive matter, does specifically conflict with Section b. of the Master Agreement and, therefore, is void. I do not agree.

As Respondent asserts Article 9 of the Master Agreement as a defense, the meaning of Article 9 must be determined. Internal Revenue Service, Washington, D.C., 47 FLRA 1091, 1103 (1993). Respondent presented no evidence or testimony in support of its interpretation of Article 9 except Article 9 (Res. Exh. 2). Plainly, Article 9, Section b.1. prohibits local agreements dealing with "permissive matters

or those matters negotiated at the national level". It is equally plain that Article 9, Section c. includes all of Section b. and, "Notwithstanding the provisions of Section b.", permits negotiation locally of, "any matter which does not specifically conflict with the provisions of the Master Agreement. . . ." (Article 9, Section c.). Respondent's construction, presumably, although not spelled out, that if, for example, the Master Agreement deals with a permissive bargaining matter, such as hours of work, Section c. would permit local negotiation of that same matter, if there was no specific conflict with the provisions of Master Agreement; but if, as here, the National Agreement does not deal with hours of work, it may not locally negotiate hours of work because that is a permissive matter and has not been negotiated at the national level, is illogical and wholly ignores the language of Sections b., c. and d. of Article 9. First, as noted, Section b.1. joins permissive matters and matters negotiated at the national level in the prohibition of local agreements. Second, as also noted, Section c., notwithstanding the prohibition of Section b.1., permits local negotiation of any matter which does not specifically conflict with provisions of the Master Agreement. Clearly, Section c. literally provides that any permissive matter or any matter negotiated at the national level may be locally negotiated if there is no specific conflict with provisions of the Master Agreement. Nothing in Section c. makes any reference to "permissive matters"; but, rather states that notwithstanding Section b., the parties may negotiate locally . . . any matter which does not specifically conflict with provisions of the Master Agreement"; the remainder of Section c. simply refers to service of intent to negotiate; substantive negotiations; and states that "Any matter . . . presented [at the national level] to . . . [the Authority or FSIP] may not be negotiated at the local level until such time as decisions are rendered and/or the parties at the national level have resolved the dispute." Again, no qualification, or mention, of "permissive" as distinguished from mandatory. Third, Section d. refers, simply, to "agreement . . . at the local level. . . ."; and provides that, ". . . Disputes as to whether a matter is improper for inclusion in a supplemental agreement shall be resolved as follows: . . . . [arbitration; negotiability dispute; etc.]. Despite provision in the Master Agreement for resolution of any dispute as to whether a matter is properly included in a local agreement, there was no dispute and, of course, no resort to the contractually mandated provisions. Fourth, Section d. also provides, "Once an agreement has been reached at the local level, it shall be reduced to writing and signed by the local parties within 15 calendar days from the conclusion of negotiations. A copy of the signed and

dated proposed agreement shall be forwarded to the Labor-Management Relations Section by local management and another copy shall be forwarded by the local union to its regional vice president. . . . The parties at the national level shall have 30 days, from the date that the proposed agreement was signed, to independently review the agreement and determine if the proposed agreement complies with the provision of this Agreement and applicable laws and regulations. . . . At the end of the 30 day review period, the local supplemental agreement will go into effect, except for those provisions which have been found by either party to be in conflict with this Agreement . . . ." (Res. Exh. 2, Article 9, Section d.). As noted above, there was no dispute as to whether a matter was improper for inclusion in the local agreement and the Local Supplemental Agreement became effective on, or about, March 29, 1993, and was in full force and effect on December 31, 1995 (G.C. Exhs. 1(g), Par. 16, 1(h), Par. 16). Respondent is now estopped to deny that the Local Supplemental Agreement does not comply with the Master Agreement. Fifth, if, contrary to my conclusion, it were determined that Section c. did not authorize local negotiation of permissive matters, this would mean only that local authorities could not, under the Master Agreement, exercise FBP's (i.e., agency's) discretion as to whether it wished to bargain on a permissive matter; nevertheless, the local parties could recommend a contract provision. Stated, otherwise, § 6(b)(1) of the Statute simply provides that "(b) Nothing in this section shall preclude . . . negotiating - '(1) at the election of the agency. . . .'" (5 U.S.C. § 7106(b)(1)). Indeed, to prevent unilateral local exercise of "agency's" (here FBP's) § 6(b)(1) option not to negotiate any particular permissive matter, Section d. specifically provided that the local signed and dated agreement is only a proposed agreement, subject to determination by FBP (and AFGE) of compliance with the Master Agreement. By permitting the proposed agreement to become effective, FBP, as a matter of law, thereby elected, within the meaning of § 6(b)(1) of the Statute and Article 9 of the Master Agreement, to bargain, through its local agent, the hours of work for FCI Danbury and, accordingly, the Local Supplemental Agreement of March 29, 1993, was a lawful and valid agreement.

2. The Local Supplemental Agreement had not expired when Respondent repudiated the Agreement.

The Master Agreement was effective September 1, 1992, for a period of three years (G.C. Exh. 8, Article 37, Sections a. and b.); but where, as here, notice has been given to amend the Agreement, Section b. further provided that,

> ". . . If negotiations are not completed by the expiration date, the Agreement will be automatically extended until a new Agreement is approved but not to exceed 6 months exclusive of periods during which issues are pending before third parties, with mediators being considered third parties." (id., Section b.)(Emphasis supplied).

Accordingly, the Master Agreement was automatically extended, by its terms, to at least March 1, 1996, and, because, ". . . local supplemental agreements expire on the same date as the Master Agreement" (Res. Exh. 2, Article 9, Section a.), the Local Supplemental Agreement, which itself also provided, "This Agreement is coterminous with the Master Agree-ment . . .", likewise, was automatically extended to at least March 1, 1996. Neither party has referred to the status[6] of the Memorandum of Understanding. Even though designated, "Memorandum of Understanding", it constitutes a local supplemental agreement and, therefore, pursuant to Article 9, Section a., of the Master Agreement (Res. Exh. 2), the Memorandum of Understanding expires on the same date as the Master Agreement notwithstanding the

[6] I am well aware that the Complaint does not make any allegation concerning the Memorandum of Understanding and the record shows that the current practice at Respondent is:

> "A If they're scheduled, the shift starts, for example, 4 o'clock, they must be in the key line at 4 p.m." (Tr. 95),

which, presumably, is in accordance with the Memorandum of Understanding (G.C. Exh. 3)(See, also, Tr. 35, 77), but note Mr. Rodriquez's statement:

> "Q . . . So, if your shift starts at 7:45, as long as you are in the key line at 7:45, you are on time?
>
> "A No, you're incorrect.
>
> . . .
>
> "A For being at work, yes, not for the relief. . . ." (Tr. 35).

Nevertheless, when Respondent's Operations Memorandum (Res. Exh. 1) was presented, the Memorandum of Understanding was in full force and effect and remained in full force and effect until at least March 1, 1996.

provision of Paragraph 3 that, "Both parties (management & local) agree that this will remain as status quo until settled by the current court proceedings at the national level." (G.C. Exh. 3).

Indeed, Respondent by its Answer admitted that the Local Supplemental Agreement was in full force and effect on December 31, 1995 (G.C. Exh. 1(g) and (h), Par. 16). During the term of an agreement, an agency is obligated to observe its terms, U.S. Department of The Navy, Philadelphia Naval Shipyard, 39 FLRA 590 (1991), and if, as here, it repudiates the agreement, it violates §§ 16(a)(1) and (5) of the Statute. Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211 (1991).

Respondent knowingly implemented the January schedule on December 15, 1995, when it posted the roster (Tr. 123). The Union had asserted both the Local Supplemental Agreement and the Memorandum of Understanding as bars to any change of hours or change concerning time in the key line and told Respondent it was violating the agreement (Tr. 63). Nevertheless, Respondent on December 15, 1995, by posting the January roster, changed the hours of work; and on December 16, 1995, Respondent in a memorandum to "All Correctional Officers" (G.C. Exh. 6), which President Rodriquez denied receiving but conceded he was shown another memorandum, also dated December 16, 1995 (G.C. Exh. 2), which also dealt with shift starting and stopping times, informed all correctional officers, inter alia, of the new, and changed, shifts.

The Supplemental Local Agreement provided that the principal day shift for Correctional Services was 8:00 a.m. to 4:30 p.m. and, except those assigned to the principal shift, Correctional Services would work a straight eight hours. (G.C. Exhs. 5 and 7). The January schedule (G.C. Exh. 4), implemented December 15, 1995, changed the principal day shift to 7:45 a.m. - 4:15 p.m.; changed the hours of duty of the evening shift from eight hours to eight and one-half hours and changed the hours from 4:00 p.m. - 12:00 (midnight) to 3:45 p.m. to 12:15 a.m.; left the midnight (morning) shift unchanged except for Sunday when the hours were changed to 11:45 p.m. to 8:00 a.m. and extended the shift by 15 minutes. These were major permanent changes that affected all correctional officers assigned the morning (midnight), day and evening shifts; changed hours of work; added thirty minutes to the duty time of the evening shift; and added 15 minutes to the duty time of the midnight (morning) shift on Sunday. The hours of work provision of Article 18 of the Supplemental Local Agreement was a major part of the agreement; dealt with a

matter of paramount concern of employees which had not been addressed by the Master Agreement; its abrogation by Respondent was a clear and patent breach of the heart of the Local Supplemental Agreement; and was, within the meaning of Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 52 FLRA 225, 230-232 (1996), a repudiation of the Local Supplemental Agreement, in violation of §§ 16(a)(1) and (5) of the Statute.

3. FBP gave notice of intent to change and to control local starting and stopping times.

As I have found, President Rodriquez was given a copy of FBP's Operations Memorandum (Res. Exh. 1) on November 2, 1995, and AFGE had notice of the Operations Memorandum as it met with FBP on December 11, 1995, "To discuss the Union's concerns . . ." (G.C. Exh. 2). Respondent is quite correct that the Authority has held that,

> ". . . if the parties reach agreement on a permissive subject, 'either party may elect not to be bound thereby upon the expiration of that agreement.'" U.S. Department of The Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Cincinnati, Ohio District Office, 37 FLRA 1423, 1431 (1990). See, also, United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 51 FLRA 768, 773 (1996).

As noted above, the Master Agreement, and local agreements which were coterminous therewith, had automatically been extended to March 1, 1996, and the Union plainly had refused to reopen its Local Supplemental Agreement. Nevertheless, FBP, by its Operations Memorandum, gave notice that it would not be bound by provisions concerning starting and stopping times; that it would establish the parameters for all shift starting and stopping times; and that local bargaining would be permitted only within the parameters it established. FBP

was free to take this action to change starting and stopping times upon expiration of the local agreement.[7]

4. Respondent gave the Union notice of FBP's intent to change starting and stopping times and invited the Union's input; but Respondent did not give the Union notice of its proposed changes of shifts and tours of duty.

As noted above, Respondent on November 2, 1995, gave President Rodriquez a copy of FBP's Operations Memorandum and, as I have found, Captain Reich told Mr. Rodriquez, ". . . we needed together to sit down and put together some kind of plan that met the guidelines [of the Operations Memorandum] . . ."; that Mr. Rodriquez responded that, ". . . with the MOU . . . this didn't apply to us; that it applied to the institutions that were having portal-to-portal problems"; that when Captain Reich insisted that, "We've got to put together a plan", Mr. Rodriquez responded, "'The MOU stands,' as far as he was concerned. . . . and that the Union wasn't going to help us put together the plan to meet the ops memo; that we were violating the agreement . . ." (Tr. 63).

Mr. Rodriquez certainly was correct in part; but he was incorrect in other respects. He was wholly correct that, by directing implementation during the terms of the Local Supplemental Agreement and the MOU, Respondent was violating the agreement. Respondent was incorrect that it could require deference of I&I bargaining until after implementation (Res. Exhs. 1, 4, "Effective Date"). Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532 (1988); Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Illinois, 44 FLRA 117, 125 (1992).

Mr. Rodriquez was incorrect that FBP could not limit the role of local negotiations and/or that either the Local

[7] Hours of work are permissive matters within the meaning of § 6(b)(1) of the Statute and the Master Agreement places control of permissive matters in FBP. Recognizing that Executive Order 12871 (October 1, 1993), in Section 2(d), directs the head of each agency to:

> "(d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same. . . .",

nevertheless, FBP remained free to control the negotiation of permissive matters and its determination to limit local negotiation was not inconsistent with E.O. 12871.

Supplemental Agreement or the MOU prevented a change of starting and stopping times, or time in key line, after expiration of the Master Agreement.

Respondent's argument that the Union waived its right to bargain by failing to request bargaining (Respondent's Brief, pp. 9-10), is not correct and is rejected. While it is quite correct that Respondent gave the Union notice of FBP's intent to change starting and stopping times and invited the Union's input, FBP's stated intent to implement changes during the term of local agreements, over the Union's protest, was not a lawful notice of intent to change starting and stopping times after expiration of the local agreements. The Union properly refused to help Respondent violate its local agreements and did not thereby waive its right to negotiate. Moreover, Respondent on November 2, 1995, had no plan (Tr. 64) and, obviously, failed to notify the Union of the specific changes it intended to make. U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky, 38 FLRA 647, 649 (1990). Respondent after November 2, 1995, did submit proposals to FBP for approval but the record fails to show that Respondent ever gave the Union notice of any proposal. On December 13, 1995, Respondent's proposed roster was approved (Tr. 84, 85); the roster committee was informed; and on November 15, 1995, Respondent implemented the change in starting and stopping times by posting its January schedule, thereupon, as more fully set forth hereinabove, repudiated its Local Supplemental Agreement, in violation of §§ 16(a)(1) and (5) of the Statute and, in addition, by unilaterally changing shifts and tours of duty, which had more than a de minimis effect on employees, without providing the Union notice and an opportunity to bargain, Respondent violated §§ 16(a)(1) and (5) of the Statute. United States Customs Service, Southwest Region, El Paso, Texas, 44 FLRA 1128 (1992).

Having found that Respondent violated §§ 16(a)(1) and (5) of the Statute, both by its repudiation of the Local Supplemental Agreement and by its unilateral change of shifts and tours of duty without notice of specific changes proposed and an opportunity to bargain, it is recommended that the Authority adopt the following:

## ORDER

Pursuant to § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Connecticut, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the American Federation of Government Employees, Council of Prison Locals, AFL-CIO, Local 1661 (hereinafter, "Union"), concerning shift starting and stopping times.

(b) Failing and refusing to abide by the Local Supplemental Agreement negotiated with the Union.

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

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

(a) Forthwith rescind the change of starting and stopping times for Correctional Services employees which it implemented on December 15, 1995, by the posting of its quarterly roster.

(b) Upon rescission of the change as set forth in sub-paragraph (a), above, reinstate the starting and stopping times for the Correctional Services employees as they had been before the unlawful change implemented on December 15, 1995, i.e., specifically, as shown on the quarterly roster for Correctional Officers which had been effective from October 1, 1995, through December 30, 1995, and maintain these reinstated shifts and hours of duty for not less than three calendar months, which is the period the Union was deprived of the fruits of its negotiated Local Supplemental Agreement by Respondent's unlawful repudiation thereof.

(c) Give the Union notice of any proposed change in the shifts and tours of duty reinstituted pursuant to sub-paragraph (b), above; upon request, bargain in good faith concerning such proposed action; and maintain all shifts and tours of duty until negotiations have been completed.

(d) Post at its facilities at FCI Danbury, Danbury, Connecticut, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall

be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to § 2423.30, of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 17, 1997
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Connecticut, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to bargain in good faith with the American Federation of Government Employees, Council of Prison Locals, AFL-CIO, Local 1661 (hereinafter, "Union"), concerning shift starting and stopping times.

WE WILL NOT fail or refuse to abide by the Local Supplemental Agreement negotiated with the Union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employee in the exercise of their rights assured by the Statute.

WE WILL forthwith rescind the change of starting and stopping times for Correctional Services employees which we unlawfully implemented on December 15, 1995, by the posting of the quarterly roster.

WE WILL, upon rescission of the change set forth above, reinstate the starting and stopping times for the Correctional Services as they had been before the unlawful change imple-mented on December 15, 1995, i.e., specifically, as shown on the quarterly roster for Correctional Officers which had been effective from October 1, 1995, through December 30, 1995, and WE WILL maintain these reinstated shifts and hours of duty for not less than three calendar months, which is the period the Union was deprived of the fruits of its negotiated Local Supplemental Agreement by our unlawful repudiation of it.

WE WILL GIVE THE UNION NOTICE of any proposed change in the shifts and tours of duty reinstituted as set forth above; WE WILL, UPON REQUEST, bargain in good faith concerning such proposed action; AND WE WILL maintain all shifts and tours of duty until negotiations have been completed.

(Agency or Activity)

Date: By:
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Boston Region, whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. BN-CA-60527, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

Amy Whalen Risley, Esquire
Assistant General Counsel
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Gerard M. Greene, Esquire
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Chief Steward
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National President
American Federation of Government
Employees, AFL-CIO
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Dated: April 17, 1997
Washington, DC