UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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| SOUTHWEST DIVISION, NAVAL FACILITIES ENGINEERING COMMAND. SAN DIEGO, CALIFORNIA<br><br>Respondent<br><br>and<br><br>NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2096<br><br>Charging Party | Case No. 8-CA-00352 |

John A. Townsend, Esq.
For Respondent

Gerald M. Cole, Esquire
For 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 whether respondent, on and after January 22, 1990, in violation of §§ 16(a)(1) and (5) of the Statute refused to negotiate the subject of an alternate work schedule at facilities other than Camp Pendleton and

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

whether, on and after March 11, 1990, Respondent rescinded the alternate work schedule at Camp Pendleton prior to completion of negotiations over the change.

This case was initiated by a charge filed on May 2, 1990, (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on August 30, 1990, pursuant to which a hearing was duly held on November 26, 1990, in San Diego, California, 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. At the conclusion of the hearing, December 31, 1990, was fixed as the date for filing post-hearing briefs, which time was subsequently extended, on timely motion of Respondent to which General Counsel did not object but to which charging party did object, for good cause shown, initially to January 25, 1991, and finally to February 1, 1991. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, February 5, 1991, which have been carefully considered. Upon the basis of the entire record including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

## Findings

1. The National Federation of Federal Employees, Local 2096 (hereinafter referred to as the "Union") on March 28, 1989, was certified as the exclusive representative of, "All employees of the Department of Navy, Engineering Field Activity, Southwest, San Diego, California, duty-stationed at Camp Pendleton, CA; Bridgeport, CA; San Clemente, CA; and in the San Diego, California area" with certain exclusions (G.C. Exh. 2). There are about 150 employees in the bargaining unit at seven facilities (Tr. 20).

2. Southwest Division, Naval Facilities Engineering Command, San Diego, California (hereinafter referred to as "Respondent") and the Union commenced collective bargaining negotiations in August 1989; ground rules were signed off on August 9, 1989 (Res. Exh. 1); and the parties reached agreement on a Collective Bargaining Agreement (hereinafter referred to as the "Agreement") on November 14, 1989, effective December 12, 1989 (G.C. Exh. 3).

3. The parties stipulated that prior to March 11, 1990, there were approximately five employees at the Camp Pendleton facility on Alternate Work Schedule (AWS), i.e., they worked

nine hours a day for eight days, eight hours for one day, and had the next day off, or what is referred to as the "549 Schedule." (Stipulation, Tr. 8, 9.)

Indeed, the record shows without contradiction that: (a) these employees at Camp Pendleton were on AWS before the commencement of collective bargaining (in August 1989); (b) the Union and Respondent were each fully aware of the fact that these employees at Camp Pendleton (about five) were on AWS; and (c) that no other employees in the bargaining unit were on AWS. (Tr. 22-23, 74, 75.)

4. The Union's negotiating team consisted of: John MacDonald,[2/] Chief negotiator; Robert Price; and James Stephens (G.C. Exh 3; Tr. 21). Respondent's negotiating team consisted of: Ismu (Sam) Yoshida, Chief negotiator; Edmond L. Rogers; and Alfonzo Hilliard.

5. The following provisions of the ground rules are pertinent. First, Article II, Section E which provides in material part as follows:

> "E. The UNION will provide copies of a proposed agreement to the EMPLOYER not later than five (5) work days after signing this Memorandum of Understanding. The EMPLOYER will submit counter-proposals, if any, not later than fifteen (15) work days after receipt. . . . Contract proposals offered, as well as any counter-proposals, will serve as the agenda for the negotiations. . . ." (Res. Exh. 1, Article II E.)

Second, Article II, Section L, which provides in material part as follows:

> "L. The Chief Negotiators . . . will have the authority to speak for their respective parties and to reach agreement on all negotiable matters." (Res. Exh. 1, Article II L.)

Third, Article II, Section M which provides as follows:

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2/ Mr. MacDonald was then president of the Union. Mr. Price, then vice president, succeeded Mr. MacDonald as president on, or about, September 30, 1990 (Tr. 19).

"M. When agreement is reached on any item, it will be initialed and dated by both Chief Negotiators." (Res. Exh. 1, Article II M.)

6. Pursuant to the ground rules, the Union submitted its proposals consisting of 43 pages (Res. Exh. 2; Tr. 34-35) and Respondent submitted its counter-proposals consisting of 37 pages (Res. Exh. 3; Tr. 60, 62-63, 82, 95).

7. Article XII, of the Union's proposals is entitled "Hours of Work" (Res. Exh. 2, p. 22). Sections 2-5 of Article XII concerned AWS and Flextime and, Section 4, provided as follows:

"SECTION 4 AWS shall consist of eight (8) nine-hour work days, one (1) eight-hour work day with one (1) day off, in one complete pay period. The employee may select any Monday or Friday as his/her day off during the pay period, depending on workload and number of employees participating." (Res. Exh. 2, Article XII, Section 4).3/

8. Respondent's counter-proposals also contained an Article XII entitled "Hours of Work" (Res. Exh. 3, p. 21); but Respondent's proposed Article XII contained no provision for either Flextime or AWS.

9. The parties began negotiations with the preamble proposals (each party used an existing collective bargaining agreement between the parties in another bargaining unit as

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3/ Although Mr. Price testified that,

"A Well, I felt Flextime -- Alternate Work Time Schedule was basically the same thing." (Tr. 38.)

the Union's proposal shows that Flextime is quite different from AWS in that Flextime means the working of eight hours but with starting time being flexible as stated in Section 5 of Article XII of the Union's proposal. ". . . Normally Flextime shall consist of any consecutive eight (8) hours between the hours of 0600 to 1730 in any one day. . . ." (Res. Exh. 2, Article XII, Section 5.)

a guide) and worked through the various proposals. The Chief negotiators - Yoshida for Respondent and MacDonald for the Union - signed or initialed each agreement and those proposals not agreed to were tabled. After working through all of the proposals, the parties each day would begin again at the preamble and work through all of the tabled proposals (Tr. 37, 38, 63-64).

In due course, Article XII, Hours of Work, was reached for discussion. As Section 1 of each proposal was identical, as was Section 6 of its Union's proposal (Res. Exh. 2, p. 22) and Section 2 of Respondent's proposal (Res. Exh. 3 p. 21), agreement was quickly reached on the language of these sections (Tr. 64, 85, 95-96); but the parties were in sharp and total disagreement as to AWS and Flextime-Sections 2 through 5 of the Union's proposal (Res. Exh. 2, p. 22). The Union intended that the entire bargaining unit be placed on AWS (Tr. 35-36). Respondent was firmly opposed to AWS for any employees (Tr. 74-75), asserting that it was incompatible with work requirements (Tr. 36-37, 64, 84). Respondent initially was also opposed to Flextime (Tr. 66) but later indicated it would consider flexible start time (Tr. 65, 84). As no agreement was reached on AWS or Flextime the issues were tabled (Tr. 65).

Mr. Price stated that AWS was discussed every day for three weeks (Tr. 42). Near the end of negotiations, specifically on October 12, 1989 (Tr. 67), Respondent made a counter-proposal of Flextime, "flexible start time" (Tr. 86); the Union looked at Respondent's wording and agreed to Respondent's Flextime proposal (Tr. 86) and immediately thereafter made its own counter-proposal, which Mr. Rogers described as "kind of a shocker" (Tr. 86), namely, that Respondent could choose,

> "Either office space or AWS or AWS or office space. One or the other." (Tr. 86.)

As to the effect of the choice, Mr. Rogers testified as follows:

> "Q . . . And what would become of the proposal that remained, the proposal that the Employer did not agree to?
>
> "A It would drift away as the other ones drifted away that we found compromise on.
>
> "Q What do you mean by 'drift away?'

"A It would be forever gone during the life of that agreement.

"Q Would it be withdrawn? Is that --

"A I guess if that's the official term, it was withdrawn." (Tr. 86-87.)

. . .

"Q Now, at the time that the Union made the trade proposal to you, to the management team at the bargaining table, did the Union say that they would have the right, as part of the trade package, that the Union would have the right to bring up mid-term bargaining on Alternate Work Schedule?

"A Not to my knowledge.

"Q Would the management team have agreed to such an arrangement if it had been proposed by the Union?

. . .

"THE WITNESS: No." (Tr. 88.)

On cross-examination, Mr. Roger further stated,

"Q Okay. Now, at the time that this counter -- or trade off was made, was basically everything else agreed to besides AWS and Union office space?

"A That was the last item. Those were the last two items." (Tr. 89.)

Mr. Yoshida described the event as follows:

"A At that point we had been negotiating for almost two weeks, and I think the last couple of items left on the negotiating table were the Alternate Working Schedule, on the hours of work, and office space under general provisions. . . .

"Q Okay. And was a trade offer made to you by the Union?

. . .

"A Yes. The offer was to -- for consideration for us providing the office space for the Union, they'll withdraw the Alternate Working Schedule proposal." (Tr. 68.)

Mr. Yoshida further testified.

"Q . . . Was agreement reached at the table that day?

"A No, it was not.

"Q What occurred?

"A The next thing that happened was, after the Union reps had left the office, we met, and I say 'we' --

. . .

"A -- Ed Rogers, Al Hilliard, and myself, the Employer's negotiation team met and discussed it briefly how we would consider the offer that was made that particular day. And we came to the consensus that we could probably accept the offer and provide the office space for the Union, as long as that we -- as long as they are willing to take the AWS out of the proposal.

"Q Okay. Now, did the Union propose to you that the Union would be permitted, as part of this trade, to renew bargaining at midterm on Alternate Work Schedule?

"A No.

"Q Was that mentioned at all?

"A No.

"Q Okay. Did you ever agree to such an arrangement?

"A No, I did not.

. . .

After we reached a consensus on our part, the following day, early in the morning, I contacted Mr. John MacDonald on the phone and --

. . .

"A And at that point I told him that we would accept his offer, and he said, 'Fine.' (Tr. 68-69.)

. . .

"A I had my secretary prepare the Hours of Work Article, as we agreed, and I drove over to see Mr. MacDonald and had him initial that off and I initialed it on the, I believe it was the 13th of October.

"Q Okay. I'm going to show Mr. Yoshida, Respondent's Exhibit Number 5. Do you recognize this document, Mr. Yoshida?

"A Yes.

"Q And what is it?

"A And this is the, as agreed to, Hours of Work Article.

"Q Okay. And whose initials are at the bottom?

"A My initials and also Mr. John MacDonald's initials.

"Q Okay. And is there any provision for Alternate Work Schedule in that document?

"A No, there is not.

"Q Would you have agreed to any provision for Alternate Work Schedule in that document?

"A No.

"Q And why not?

"A Because it was negotiated out." (Tr. 70.)

Mr. Hilliard testified as follows,

"Q . . . What was the proposal, the trade proposal involving working, Alternate Work Schedule, can you describe how it was explained to you?

"A Yes. Yes. The Union asked for the office space and it was our position that we would give them the office space for their promise not to press the issue of having AWS included in the agreement.

"Q . . .

"Did the Union propose to be allowed to bring up Alternate Work Schedule during the life of the Collective Bargaining Agreement?

"A No, they did not." (Tr. 98.)

There is no dispute whatever that the Union did make a "trade" offer to Respondent on October 12 for, as noted below, Mr. Price stated that they did. The difference is the effect of the choice. Mr. Price said that the effect of the choice was which got in the Agreement and the other was left for mid-term bargaining. Thus, Mr. Price testified,

"A Well, we went -- we had -- we went outside and talked it over, and we went back to manager -- or back to the table and stated that we would like to settle one or the other and put the other one on -- for mid-term bargaining. We either wanted an office or we wanted Alternate Work Schedule, and put the other one on hold." (Tr. 23-24.)

On cross-examination, Mr. Price further testified,

"Q . . .

Now let's focus a little bit on the Union's proposal on -- proposed resolution of Alternate Work Schedule, and the Union proposal for office space. It is true that the Union gave the Employer the option of choosing one Union proposal, and that the remaining Union proposal would be withdrawn?

"A No, that was not the intent.

"Q That's not the intent --

"A That wasn't the statement either, no.

"Q I see. That wasn't the statement?

"A Nope.

"Q What was the statement again?

"A The statement was, "We'll let you decide which subjects you want to discuss and negotiate on, we'll agree to one of them and the other we'll put on Alternate -- we'll put on mid-term bargain." (Tr. 50.)

10. Sometime prior to October 12, 1989, the parties had agreed upon Article X, entitled "Negotiation", which had been proposed by Respondent (Tr. 73). Section 5 of Article X provides as follows:

"SECTION 5 Past Practices: Privileges of employees which by custom, tradition, and known past practice have become an integral part of working conditions shall remain in effect unless modified pursuant to notification and bargaining when necessary." (G.C. Exh. 3, Article X, Section 5)(Emphasis supplied).

11. On October 12, 1989, the parties reached agreement on, and initialed, Article XXVII, entitled "Duration of Agreement" (Res. Exh. 4; Tr. 67). Section 2 is of

particular interest and concern herein and provides in pertinent part as follows:

> "SECTION 2 Supplements: This Agreement may be supplemented as follows:
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> . . .
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> b. By Union initiated proposals not previously set aside during negotiations or within the scope of the Agreement; . . ." (Res. Exh. 4; G.C. Exh. 3, Article XXVII, Sec. 2) (Emphasis supplied).

12. When Mr. Yoshida presented Article XII (Hours of Work) to Mr. MacDonald on October 13, 1989, he also presented Article XXVI, entitled "Facilities and Services", which in Section 6 provided for Union office space. Messrs. MacDonald and Yoshida initialed Article XXVI on October 13, 1989 (Res. Exh. 6; Tr. 71).

13. As noted previously, the Agreement became effective December 12, 1989 (G.C. Exh. 3, p. 39) and shortly thereafter Mr. Hilliard contacted the Officer in Charge at Camp Pendleton about terminating AWS at Pendleton (Tr. 103); however, in view of the upcoming holidays it was decided to defer action until after the first of the year (Tr. 103). Accordingly, on January 10, 1990, Mr. Hilliard, Labor Relations Specialist, wrote Mr. Price, then Vice President of the Union, as follows:

> "In accordance with Article 10 of the Collective Bargaining Agreement (CBA), we are advising you of our intent to terminate the Alternate Work Schedules Program at Resident Officer in Charge (ROICC), Camp Pendleton, effective 24 February 1990. This change is necessary to bring ROICC, Camp Pendleton, into compliance with other SOUTHWESTDIV activities and Article 12 of CBA. If you wish to comment or request bargaining, please do so in writing under the procedures contained in the CBA. . . ." (G.C. Exh. 4.)

14. Mr. Price replied by letter dated January 17, 1990, in which he stated, in relevant part, as follows:

". . .

"The Union is requesting to bargain on the matter of Alternate Work Schedule at Camp Pendleton and E.F.D. Southwest. . ." (G.C. Exh. 5).

15. Mr. Hilliard responded by letter dated January 22, 1990, in which he stated, in material part, as follows:

"In response to your letter dated 17 January 1990 in which the Union is requesting to bargain over the termination of alternate work schedules (AWS) at ROICC, Camp Pendleton, and proposing that AWS be implemented throughout the Southwest Division; we do not believe we have an obligation to bargain over either of these matters.

In our view, Article 12 of the Collective Bargaining Agreement between the parties, precludes any bargaining unit employee from working an AWS. Moreover, in Article 27 of the Agreement, the Union explicitly waived its rights to initiate proposals on matters set aside during negotiations. As you may recall, AWS was one of those matters. . . ." (G.C. Exh. 6).

16. Mr. Price responded again by letter dated January 31, 1990, in which he stated his disagreement with Mr. Hilliard's letter of January 22 and advanced various arguments (G.C. Exh. 7). Mr. Hilliard again responded by letter dated February 5, 1990, and reiterated his position stating, in part,

"Concerning the Union's initiated proposal to begin bargaining over the institution of AWS throughout the Division, it is still our contention that Article 27, Section 2b, serves as a zipper clause which precludes the Union from reopening negotiations over AWS." (G.C. Exh. 8.)

17. By memorandum dated February 12, 1990, Mr. R. L. Shultz, Resident Officer in Charge, Camp Pendleton, notified all civilian employees that:

"1. Effective 11 March 1990, AWS will be terminated at this office as directed by higher authority. Commencing Monday, 12 March 1990, we will be working a basic five (5) day work week, Monday through Friday, with a non-overtime work day not exceeding 8 hours.

. . . ." (G.C. Exh. 9)

Mr. Schultz further advised in his memorandum of February 12 of the availability of flexible start time.

## Conclusions

### 1. Parties negotiated elimination of AWS

There is no doubt that Alternate Work Schedule (AWS) was negotiated out of the Agreement. Thus, not merely is AWS not provided for, but the Agreement by its terms specifically prohibits AWS by specifying a five day work week and by prohibiting a non-overtime work day in excess of eight hours. Prior to the commencement of negotiations, about five employees at Camp Pendleton had been on AWS and the Union proposed both AWS and Flextime in its proposals (Res. Exh. 2, Art. XII). Respondent, on the other hand, proposed that both AWS and Flextime be eliminated (Res. Exh. 3, Art. XII). Respondent, was totally opposed to AWS, asserting that it was incompatible with work requirements, and initially was also opposed to Flextime but later indicated it would consider flexible start time. The parties each adamantly adhered to its position. Nor was it a one time confrontation. Mr. Price stated that AWS was discussed every day for three weeks. Finally, on October 12, 1989, Respondent broke the stalemate and made an offer of Flextime. The Union agreed to Respondent's proposed language on Flextime and, after a caucus, made its own counter-proposal, namely that Respondent agree either to Union office space, the only other remaining "open" item, and on which the parties were also in strong disagreement, or to AWS and the Union would withdraw the other demand. Again, there is no dispute whatever that the Union made this "trade" offer. The following day, October 13, 1989, Respondent notified the Union that it accepted the Union's offer and would provide the Union office space and the Union said "fine" (Tr. 69); Respondent had the two Articles in question typed, i.e., Article XII, Hours of Work, which in Section 3 provides for flexible start time (Res. Exh. 5), and Article XXVI, Facilities and Services, which in

Section 6 provides for Union office space (Res. Exh. 6), and the parties initialed each of the agreed upon Articles on October 13, 1989 (Res. Exhs. 5 and 6) thus completing the Agreement (G.C. Exh. 3).

General Counsel, in effect, asserts that because some five employees at Camp Pendleton had had AWS and nothing was said about Pendleton, AWS at Pendleton was not affected by the negotiated termination of AWS. Thus, General Counsel contends,

> ". . . nothing whatever was said by Respondent that by deleting its AWS proposal, the Union was agreeing (or "waiving") the employee's (sic) right to continue AWS at Camp Pendleton. . . ." (General Counsel's Brief, p. 7)

Nothing could be further from the fact. This is not a question of waiver. To the contrary, the Agreement by its terms applies to all employees, ". . . This Agreement is applicable to the unit which includes all employees working for Southwest Division. . . ." and, specifically, Article XII, Hours of Work, provides that, ". . . The basic work week is scheduled on five (5) days, . . ." and "The basic non-overtime work day shall not exceed eight (8) hours." (G.C. Exh. 3, Art. XII, Section 1a and b) (Emphasis supplied). In short, the Agreement by its terms prohibits AWS by: (a) specifying a five day work week; and (b) mandating a non-overtime work day of not more than 8 hours. It is axiomatic that the product of collective bargaining governs the conditions of employment of the whole bargaining unit. Alabama National Guard, Montgomery, Alabama, A/SLMR No. 895, 7 A/SLMR 767 (1977); Department of Defense, United States Army, Fort Sam Houston, Texas, 1 FLRA 588, 599-600 (1979); United States Customs Service, Region V, New Orleans, Louisiana, 4 FLRA 302, 328 (1980).

General Counsel asserts that Article X, Section 5, of the Agreement,[4/] preserved AWS at Pendleton (General Counsel's Brief, pp. 6-7). While I can not vouch-safe what

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4/ "Past Practices: Privileges of employees which by custom, tradition, and known past practice have become an integral part of working conditions shall remain in effect unless modified pursuant to notification and bargaining when necessary." (G.C. Exh. 3, Art. X, Section 5.)

Mr. Price thought, the plain, clear, and unambiguous language of Section 5 firmly lays to rest any such assertion. Section 5 states that certain past practices shall remain in effect, " . . . unless modified pursuant to notification and bargaining. . . ." Here, of course, there was notification, by Respondent in its pre-negotiation proposals of its intent to proscribe AWS, and, indubitably modification of the past practice - indeed, total elimination of AWS - through bargaining.

As noted above, the Agreement became effective December 12, 1989 (G.C. Exh. 3, p. 39). Respondent, pursuant to Article XII, could immediately upon the Agreement becoming effective have terminated AWS. Whatever right the Union had to seek bargaining on the impact and implementation[5/] of the elimination of AWS it lost when it negotiated the elimination of AWS without seeking such bargaining. Respondent did, immediately after the Agreement had become effective, discuss the termination of AWS at Pendleton internally; but in view of the up-coming holiday period decided to defer action until after the first of the year. Accordingly, Respondent by letter dated January 10, 1990, informed the Union that AWS at Camp Pendleton would be terminated as of February 24, 1990. Mr. Hilliard, erroneously, to be sure, did state in his January 10 letter, "If you wish to . . . request bargaining, please do so in writing under the procedures contained in the CBA." (G.C. Exh. 4). Although Respondent had no obligation to bargain about the termination of AWS which had just been negotiated,[6/] its offer of the right to request bargaining certainly created no right of the Union, nor any duty on the part of Respondent, to bargain. The condition of employment, i.e., specifically the eight hour work day and the five day work week, was established by the Agreement and implementation of the contractual provisions just negotiated, certainly

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5/ I.e., procedures which management will observe (§ 6(b)(2)) or appropriate arrangements for employees adversely affected (§ 6(b)(3)).

6/ General Counsel does not so argue; but continuation of AWS for slightly less than a month after the effective date of the Agreement did not, in my opinion, constitute an established practice contrary to the negotiated Agreement. Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA 736 (1980); Letterkenny Army Depot, 34 FLRA 606 (1990).

was not in violation of the Statute. U.S. Government Printing Office, 29 FLRA 1272 (1987); U.S. Department of Commerce, Bureau of the Census, 17 FLRA 667, 671 (1985). By letter dated January 17, 1990, the Union requested bargaining (G.C. Exh. 5); Respondent, by letter dated January 22, 1990 (G.C. Exh. 6), refused to bargain because, ". . . Article 12 . . . . precludes any bargaining unit employee from working an AWS . . . ."; the Union by letter dated January 31, 1990 (G.C. Exh. 7), quibbled over Respondent's letter of January 22 and again requested bargaining; Respondent by letter dated February 5, 1990 (G.C. Exh. 8) reiterated its position; and by letter dated February 12, 1990 (G.C. Exh. 9), Respondent notified all civilian employees at Pendleton that, effective March 11, 1990, AWS would be terminated and beginning March 12, 1990, the basic eight hour work day and five day work week would be in effect. For reasons previously stated, the implementation of the negotiated Agreement was not subject to further required bargaining.7/ Bureau of the Census, 20 FLRA 833, 836-837 (1985); Defense Logistics Agency, Defense General Supply Center, Richmond, Virginia, 20 FLRA 512, 514-15 (1985).

Of course, the bargaining history also shows beyond any possible doubt that AWS was negotiated out of the Agreement.

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7/ As noted in n.6, continuation of AWS for slightly less than one month after the effective date of the Agreement and the initial notice of the date of implementation of the termination of AWS did not, in my opinion, constitute an established practice contrary to the negotiated Agreement, nor did the further continuation of AWS for a further two months during the period of the exchange of correspondence with the Union concerning termination of AWS pursuant to Article XII or the Agreement. If, contrary to my conclusion, there was an obligation to bargain as to Pendleton because a few employees there were on AWS before the Agreement was negotiated, Respondent, at most, would have been obligated to bargain on impact and implementation of Article XII, but if the Union had such right, it lost it by failing to request bargaining on procedures or appropriate arrangements (I&I). Department of the Air Force, Headquarters 93rd Combat Support Group (SAC), Castle Air Force Base, California, 18 FLRA 642, 643 (1985). Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 18 FLRA 743, 744 (1985).

2. The Union Waived the Right to bargain over AWS for the Duration of the Agreement.

Article XXVII of the Agreement, entitled "Duration of Agreement", in Section 1 establishes the duration of the Agreement (initial 3 year period) and in Section 2 provides for supplementation, i.e., mid-term bargaining, in relevant part as follows:

> "SECTION 2 Supplements: This Agreement may be supplemented as follows:
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> . . .
>
> b. By Union initiated proposals not previously set aside during negotiations or within the scope of the Agreement; . . . ." (G.C. Exh. 3, Art. XXVII, Section 2b).

As General Counsel very correctly stated, the Authority, in Internal Revenue Service, 29 FLRA 162 (1987) held,

> "In agreement with the D.C. Circuit in this case and consonant with case law in the private sector, we conclude that the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved. Such a waiver of bargaining rights may be established by (1) express agreement, or (2) bargaining history. Further, any such waiver must be clear and unmistakable [footnote omitted] . . . ." (29 FLRA at 166.)

The Authority in Internal Revenue Service, supra, further explained:

> "As to the first category of waiver, a union may contractually agree to waive its right to initiate bargaining in

> general by a 'zipper clause', that is, a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement. Or, a union may waive its right to initiate bargaining over a particular subject matter. . . .
>
> "The second category of waiver, clear and unmistakable waiver as evidenced by bargaining history, concerns subject matters which were discussed in contract negotiations but which were not specifically covered in the resulting contract. . . . For example, where a union sought to bargain over a subject matter but later withdrew its proposal in exchange for another provision, a waiver of the union's right to bargain over the subject matter which was withdrawn would be found. . . ." (29 FLRA at 166, 167.)

As General Counsel states, the Union on January 17, 1990, ". . . not only requested to bargain about the employees at Camp Pendleton but also initiated a request to bargain midterm concerning the issue of AWS for all of Respondent's bargaining unit employees. By letter dated January 22, 1990, Respondent refused to bargain over the Union's request that AWS be implemented for all bargaining unit employees." (General Counsel's Brief, p. 8.)

There is no dispute, as fully noted herein above, that there was a very clear and specific yielding by the Union on AWS which it gave up in exchange for Union office space. To avoid Article XXVII, Mr. Price, it is true, did testify, ". . . we would like to settle one or the other and put the other one on -- for mid-term bargaining. We either wanted an office or we wanted Alternate Work Schedule, and put the other one on hold." (Tr. 23-24) (See, also, to like effect, Tr. 50). I do not credit Mr. Price's testimony that the demand not accepted, i.e., office space or AWS, would be, "on -- for mid-term bargaining", (Tr. 23) or "on hold" (Tr. 24) "on Alternative . . . on mid-term bargain" (Tr. 50). I did not find Mr. Price's testimony in this regard convincing. His testimony, that AWS was not withdrawn, was categorically denied by Messrs. Yoshida and Rogers, whom I found to be highly credible witnesses, and the testimony of Messrs. Yoshida and Rogers was fully corroborated by the testimony of Mr. Hilliard. Not only was

Mr. Price's testimony wholly devoid of corroboration, but neither Mr. Stephens, the Union's scrivener (Tr. 47), nor Mr. MacDonald, the Union's Chief Negotiator, was called as a witness and, while the record shows that Mr. MacDonald is now employed by the City of San Diego, the record shows no reason that either was not available to testify. Under the circumstances, I do draw the inference that their testimony would have been adverse to Mr. Price's testimony. Accordingly, I conclude, as Messrs. Yoshida, Rogers and Hilliard credibly testified, that the Union withdrew AWS in exchange for office space. Because the Union's waiver of the right to further negotiate for AWS during the life of the Agreement was clear, specific and unmistakable, Respondent did not violate §§ 16(a)(5) or (1) of the Statute by refusing to bargain on AWS during the term of the Agreement. Missouri National Guard, Office of the Adjutant General, Jefferson City, Missouri, 31 FLRA 1244 (1988); U.S. Department of the Navy, United States Marine Corps (MPL), Washington, D.C. and Marine Corps Logistics Base, Albany, Georgia, 38 FLRA 632 (1990).

Accordingly, having found that Respondent did not violate § 16(a)(5) or (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 8-CA-00352 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 13, 1991
Washington, DC