**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-08

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
WILLIAMSBURG
SALTERS, SOUTH CAROLINA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 525

CHARGING PARTY

Case No. AT-CA-11-0462

Patricia J. Kush
For the General Counsel

Angie Wiesman
For the Respondent

Thomas W. Peavy
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

## DECISION ON MOTION FOR SUMMARY JUDGMENT

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA), Part 2423.

Based upon unfair labor practice (ULP) charges filed by the American Federation of Government Employees, Local 525 (Union), a Complaint and Notice of Hearing was issued by the Regional Director of the Atlanta Region of the FLRA. The Complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Williamsburg, Salters, South Carolina (Respondent/FCI Williamsburg) violated

§ 7116(a)(1) and (5) of the Statute by refusing to bargain upon the request of the Union over compressed work schedules for Morning Watch housing unit officers. The Respondent filed a timely Answer denying the allegations of the complaint.

On February 29, 2012, the Respondent filed a Motion for Summary Judgment (MSJ), asserting that there are no genuine issues of material facts in this matter and that it had no duty to bargain pursuant to Article 18, section d of the parties' Master Agreement (MA). The Respondent requested that the case be decided based upon its MSJ and its attachments, and any subsequent response by the General Counsel, in lieu of a hearing. On March 2, 2012, the General Counsel (GC) filed its Response to the Respondent's MSJ and Cross-Motion for Summary Judgment. The GC contends that Respondent had an obligation to bargain and requested that its MSJ be granted. The GC agreed with the Statement of Facts presented by the Respondent in its MSJ and also attached five exhibits in support of its requested remedy. By Order of the Chief Administrative Law Judge, the hearing in this matter was indefinitely postponed on March 7, 2012.

Having carefully reviewed the pleadings, exhibits, and arguments of the parties, I have determined that this matter can be decided on the motions for summary judgment and therefore, a hearing is not necessary pursuant to 5 C.F.R. § 2423.27. The Authority has held that motions for summary judgment filed under that section serve the same purpose and are governed by the same principles as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedures. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no "genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. Based on the record, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to negotiate, upon the request of the Union, over compressed work schedules for Morning Watch housing unit officers. I make the following findings of fact, conclusions and recommendations in support of that determination.

## FINDINGS OF FACT

1. The Union filed the original charge in this proceeding on August 8, 2011, and a copy was served on the Respondent. (Compl. & Ans.)

2. The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (Compl. & Ans.)

3. (a) The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of Respondent's employees. (Compl. & Ans.)

   (b) AFGE, Local 525 (Union) is an agent of AFGE for the purpose of representing unit employees at Respondent's Federal Correctional Institution Williamsburg, Salters, South Carolina (FCI Williamsburg). (Compl. & Ans.)

4. At all material times, Steven Langford occupied the position of Labor Management Relations Chairperson and was a supervisor and/or management official within the meaning of § 7103(a)(10) and (11) of the Statute and was acting on behalf of the Respondent. (Compl. & Ans.)

5. On July 26, 2011, the Union submitted a request from Thomas Peavy, President, to Warden John R. Owen to negotiate a compressed work schedule (CWS) for Morning Watch correctional services officers working in the housing units. (R. Ex. 1)

6. On July 29, 2011, the Respondent, by letter from Steven Langford to Peavy, responded and stated as follows: The Agency has already fulfilled its duty to bargain in good faith regarding the Morning Watch Housing Unit positions. The Master Agreement, Article 18, covers and preempts all disputes about particular rosters issued pursuant to and in compliance with the procedures in Article 18(d). The procedures prescribed in Article 18 cover the substance of all decisions reached by following those procedures. Article 18, specifically in sections d and g, reflects the parties' earlier bargaining over the impact and implementation of the Agency's statutory right to assign work. The Agency's statutory right to assign work includes determining the numbers, types, and positions assigned to any work project or tour of duty. Specifically, these provisions represent the agreement of the parties about the procedures by which a Warden formulates a roster, assigns officers to posts, and designates officers for the relief shift. The parties' prior collective bargaining reflected in Article 18, reserved the discretion to the Warden to formulate the rosters. Therefore, the Agency has no further duty to engage in additional bargaining regarding the work schedules of the Morning Watch Housing Unit positions. (Agency Ex. 2)

7. On July 31, 2011, the Union responded to the Respondent's July 29 memorandum. The Union quoted Article 18(b): "The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 USC." Peavy also pointed out that the agency had negotiated and approved compressed work schedules within Food Services, Recreation and Unit Management. "These departments, staffed by bargaining unit employees are also subject to Article 18, Hours of Work, of our Master Agreement. The Union has not and will not waive any rights afforded by the agreement. Pursuant to 5 USC and Article 18, section b 1, 2, and 3, the Union reiterates its' intent to negotiate a compressed work schedule for the morning watch housing units. It is clear in section b that the parties agreed to negotiate compressed work schedules at the local level, outside the provisions you indicated in your response." (Agency Ex. 3)

8. On August 5, 2011, the Respondent replied, expounding on its reasoning that it had no duty to bargain pursuant to Article 18(d) and (g). Specifically, the Respondent stated Article 18, sections d and g reserved the discretion to the Warden to formulate the rosters for correctional services department. Additionally, the Respondent stated that Article 18, section b did not create a new duty to bargain the schedules of positions located in the correctional services department. With regard to the compressed work schedules agreements for employees in Food Service, Recreation and Unit Management, the Agency points out that the schedules in those departments are not covered by Article 18, sections d and g like the schedules for employees in correctional services. (Agency Ex. 4).

9. AFGE and the Respondent are parties to a Master Agreement (MA) covering employees in the bargaining unit described in paragraph 3(a) and (b), which has been effective since March 9, 1998.

10. Article 18 of the parties' MA is entitled Hours of Work (Agency Ex. 5). Section b addresses compressed work schedules and provides:

> The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 USC.
>
> 1. any agreement reached by the local parties will be forwarded to the Office of General Counsel in the Central Office who will coordinate a technical and legal review. A copy of this agreement will also be forwarded to the President of the Council of Prison Locals for review. These reviews will be completed within thirty (30) calendar days from the date the agreement is signed;
>
> 2. if the review at the national level reveals that the agreement is insufficient from a technical and/or legal standpoint, the Agency will provide a written response to the parties involved, explaining the adverse impact the schedule had or would have upon the Agency. The parties at the local level may elect to renegotiate the schedule and/or exercise their statutory appeal rights; and
>
> 3. any agreement that is renegotiated will be reviewed in accordance with the procedures outlined in this section.

Section d states that quarterly rosters for correctional services employees will be prepared in accordance with the procedures set forth. Section 2 states "seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those

employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests." Section g concerns procedures relating to sick and annual relief positions.

## POSITIONS OF THE PARTIES

### General Counsel

The GC asserts that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain over compressed work schedules for Morning Watch housing unit officers. Under § 7116(a)(5) of the Statute, it is an unfair labor (ULP) practice for an agency to refuse to bargain in good faith. The duty to bargain in good faith requires an agency to negotiate during the term of a collective bargaining agreement on union-initiated proposals that are not "covered by" the agreement. *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1013 (1993). A proposal is "covered by" the parties' agreement if the matter is expressly contained in the agreement or if the matter is inseparably bound up with, and thus plainly an aspect of, a subject "covered by" the agreement. *Dep't of the Treasury, IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 57 FLRA 126, 128-29 (2001).

Relying on a recent D.C. Circuit Court decision, the Agency asserts that the issue of compressed work schedules for housing unit officers is "covered by" Articles 18, sections d and g. *See Fed. BOP v. FLRA*, 654 F.3d 91 (2011) (*BOP v. FLRA*). The court held that BOP did not have an obligation to bargain over its decision to fill only "mission critical" positions on the quarterly rosters. *Id.* at 92. The court reasoned that Article 18, section d was the result of impact and implementation bargaining over the Agency's right to assign work, which includes the right to determine how many positions will be available on the quarterly roster. *Id.* at 95. Thus, the procedures in Article 18, section d for filling and posting the quarterly rosters covered the issue of which positions would be available on the roster.

The Court's decision in *BOP v. FLRA* stands in sharp contrast to this case because the D.C. Circuit Court was not faced with a specific provision that gave AFGE the right to bargain over the number of positions on the quarterly roster. There is no such provision in Article 18. Here, Article 18, section b specifically gives the Union the right to bargain over compressed work schedules. The Respondent argues that it does not have an obligation to bargain over compressed work schedules for correctional officers, but nothing in Article 18, section b indicates that any positions were exempt from this broad bargaining obligation. *See Level 3 Commc'ns LLC v. Liebert Corp.*, 535 F.3d 1146, 1154 (10th Cir. 2008) (specific contract provisions control the effect of general provisions); *Restatement (First) of Contracts 236(c)* (1932) (where there is inconsistency between general and specific contract provisions, specific provisions generally qualify the meaning of general provisions). Additionally, Article 18, sections d and g do not mention compressed work schedules. If the parties had intended Article 18, sections d and g to foreclose bargaining over compressed work schedules for correctional officers, surely they would have included language to that effect in the agreement.

In addition to the express language in Article 18, section b that gives the Union the right to bargain compressed work schedules, the Flexible and Alternative Work Schedules Act also requires the agency to bargain in this situation. 5 U.S.C. §§ 6120-6133. Under the Work Schedules Act, proposals seeking to negotiate alternative work schedules are fully negotiable, subject only to the Act itself. *NFFE, Local 1998, IAMAW, Fed. Dist. 1*, 60 FLRA 141, 143 (2004). Such proposals are within the duty to bargain and are enforceable under the Statute. *Id.* Alterative work schedule proposals are negotiable even if they conflict with the management rights clause in the Statute, 5 U.S.C § 7106, further illustrating that the logic of *BOP v. FLRA* does not apply in this case. *See U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 131, 135 (2003) (*DOL*). The D.C. Circuit Court reasoned that Article 18, sections d and g were the result of impact and implementation over *BOP*'s right to assign work and determine the number of employees assigned to particular positions. But the Union's right to negotiate compressed work schedules is broader than AFGE's right in *BOP v. FLRA* because of the existence of the Work Schedules Act.

Given the broad bargaining mandate in the Work Schedules Act, there would need to be specific language in the bargaining agreement waiving AFGE's right to negotiate compressed work schedules for correctional officers if that is what the parties intended. *See U.S. FDA, U.S. FDA, Region VII, Kan. City, Mo.*, 19 FLRA 555, 557 (1985) (union's waiver of a statutory right must be clear and unmistakable). There is no such language in Article 18 or anywhere else in the bargaining agreement.

Based on the Work Schedules Act and the clear language in Article 18, section b, the Union's request to bargain compressed work schedules for Morning Watch housing unit officers is not "covered by" Article 18, sections d and g. Accordingly, the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union.

The General Counsel also argued that the appropriate remedy in this matter should include a bargaining order to be posted on bulletin boards and e-mailed to bargaining unit employees.

**Respondent**

The Respondent asserts that the agency had no duty to bargain a compressed work schedule for correctional service department staff working the morning watch post in the housing unit. If a collective bargaining agreement covers a particular subject, then the parties to that agreement "are absolved of any further duty to bargain about that matter during the term of the agreement." *BOP v. FLRA*, 654 F.3d at 91, citing *Dep't of the Navy v. FLRA*, 92 F.2d 48 (D.C. Cir. 1992). For a subject to be deemed covered by, there need not be an "exact congruence" between the matter in dispute and a provision of the agreement, so long as the agreement expressly or implicitly indicates the parties reached a negotiated agreement on the subject. *BOP v. FLRA*, 654 F.3d at 91, citing *NTEU v. FLRA*, 452 F.3d 793, 796 (D.C. Cir. 2006).

According to the Respondent, Article 18 of the MA covers the hours of work and section d of Article 18 covers any issue regarding the correctional services roster and therefore preempts any dispute. Specifically, Article 18 d delineates how the quarterly rosters for the correctional services department will be prepared. (R. Ex. 3). As part of the procedures under Article 18, section d, work assignments are determined on a quarterly basis through a bidding process. Seven weeks prior to the end of the quarter, a roster will be posted listing the positions that will be available to the officers for the next quarter. Once a roster is posted, officers will bid for posts and shifts, and assignments are made according to seniority. Once the assignments are made the roster will be forwarded to the Warden for final approval. The completed roster will then be posted three weeks prior to the effective date of the quarter change. (R. Ex. 3)

Section 7106(a) gives an agency an exclusive, non-negotiable right to assign work, but under § 7106(b), it may bargain with the representative of its employees over the procedures it will use when it exercises that authority and the appropriate arrangements it will make for any employee adversely affected by a particular action. Article 18, sections d and g reflect the parties' earlier bargaining over the impact and implementation of the Agency's statutory right to assign work. These provisions represent the agreement of the parties about the procedures by which a Warden formulates a roster, assigns officers to posts, and designates officers for relief shift. As part of this agreement, through Article 18, the union secured from the agency procedural checks of the Agency's authority to assign work, including the advance publication of available posts, solicitation of bids, and a limited right to appeal an assignment. As such Article 18 is a compromise about how and when management would exercise its right to assign work, the implementation of those procedures and the resulting impact. Therefore, Article 18 covers and preempts challenges to all specific outcomes of the assignment process and does not give rise to a further duty to bargain. *BOP v. FLRA*, 654 F.3d at 91 (Agency's decision to implement a "mission critical roster" was "covered by" Article 18 of the collective bargaining agreement).

Further, the provisions of Article 18, section b do not change the agency's duty as it relates to bargaining the available posts for the correctional services department. Article 18, section b merely conveys the parties' agreement to negotiate compressed work schedules at the local level. However, it is clear form Article 18, sections d and g, the decision regarding the schedules, posts, etc., as it relates to the correctional services department has already been negotiated. As such, Article 18 reserved the discretion to the Warden to formulate the rosters for the respective institution and there is no further duty to bargain. Therefore, the agency properly refused to bargain over the issue of a compressed work schedule for Morning Watch correctional service housing unit officers. Since the agency had no duty to bargain a request for a compressed work schedule for the Morning Watch correctional services officers working a housing unit post, the complaint should be dismissed and the agency's motion for summary judgment should be granted.

## ANALYSIS AND CONCLUSIONS

The "covered by" doctrine is "available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue." *See Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009) (internal quotation marks and citations omitted). The "covered by" defense has two prongs. *Id.* Under the first prong of that defense, "a party properly may refuse to bargain over a matter that is expressly addressed in the parties' agreement." *Id.* Also, under the second prong, "a party properly may refuse to bargain if a matter is inseparably bound up with, and[,] thus[,] an aspect of," a subject "covered by" the agreement. *Id.*

Here, the Respondent contends that it has no duty to bargain over compressed work schedules for employees in correctional services because the way in which quarterly rosters are established and filled out for such employees is "covered by" Article 18 of the parties' agreement. The Respondent implicitly argues that, when sections b and d of Article 18 are read together, that article provides that negotiations at the local level may occur over compressed work schedules for all bargaining unit employees except those employees who work in correctional services.

In this matter, I find that the Respondent's contentions are without merit. Consistent with the Act, the plain language of Article 18, section b expressly recognizes that local negotiations over compressed work schedules at the local level may take place and does not prohibit such negotiation on behalf of employees in any department, including correctional services. *See* Agency Exhibt 5 (providing that "[t]he parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level"); *see also DOL*, 59 FLRA at 134 (Chairman Cabaniss concurring) (indicating that the Authority has consistently "held that the implementation and administration of alternative work schedules is fully negotiable, subject only to the [Act] or other laws superseding the Act, and without regard to management rights under the Statute"). The plain wording of sections d and g also do not limit section b in any way. Specifically, Article 18, section d does not reference section b or address compressed work schedules. Rather, section d merely provides that, to prepare a quarterly roster for correctional services employees, the Agency shall post a blank roster detailing available assignments and shifts that such employees can bid on, and a roster committee comprised of both Agency and Union representatives will formulate roster assignments. Section g relates to sick and annual positions without any reference to compressed work schedules.

Further, the Respondent's reliance on *BOP v. FLRA* is misplaced. In that case, BOP issued a memorandum providing that "the quarterly roster for each institution should include only those posts deemed 'critical' to the mission of that institution," and *BOP* denied the union's request to bargain over the implementation of its mission critical standard. BOP *v. FLRA*, 654 F.3d at 93. The D.C. Circuit held that Article 18, section d covered all disputes concerning rosters issued pursuant to that provision and that BOP was not required

to bargain over its mission critical standard because rosters implementing that standard were "covered by" Article 18 of the parties' agreement. *Id.* at 95-97. However, neither *BOP v. FLRA* nor the Authority's related decisions addressed bargaining over compressed work schedules under Article 18, Section b of the parties' agreement. Thus, I find that *BOP v. FLRA* is inapposite.

Consequently, I find that the Respondent has not raised a valid "covered by" defense. *See U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011) (indicating that "the Authority has declined to find a matter 'covered by' an agreement [when] the agreement specifically contemplates bargaining"); *DOE*, 56 FLRA at 12-13 (finding that, based on the wording of bargaining provisions and "the parties' practices pursuant to their agreement," the respondent failed to raise a valid "covered by" defense); *cf. U.S. DOJ, Fed. BOP, FCI, Fairton, N.J.*, 62 FLRA 187, 189-90 (2007) (determining that the respondent established a "covered by" defense because the plain language of a particular article allowed the respondent "to change work assignments on the same shift without notice," and another article, which required the employer, in assigning work, to comply with Authority precedent, did not alter such language). Accordingly, I conclude that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union over compressed work schedules for Morning Watch housing unit employees in correctional services. *DOE*, 56 FLRA at 13.

## REMEDY

As requested by the General Counsel, I will order an appropriate cease and desist order to be signed by the Warden. In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, such postings are ordered. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

## ORDER

Having found that the Respondent violated the Statute as alleged in the complaint, I hereby dismiss the Respondent's Motion for Summary Judgment and grant the General Counsel's Motion for Summary Judgment.

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Williamsburg, Salters, South Carolina, shall:

1. Cease and desist from:

(a) Failing and refusing to meet and negotiate with the American Federation of Government Employees, Local 525 (Union) over compressed work schedules for Morning Watch housing unit officers.

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

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

(a) Negotiate in good faith with the Union over compressed work schedules for the Morning Watch housing unit officers.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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, FCI Williamsburg, Salters, South Carolina, 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 at Respondent's facilities nationwide. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Disseminate a copy of the Notice signed by the Warden through the Respondent's e-mail system to all bargaining unit employees. This Notice will be sent on the same day that the Notice is physically posted.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 25, 2014

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF**

**THE FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Williamsburg, Salters, South Carolina, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** fail and refuse to negotiate with the American Federation of Government Employees (AFGE), Local 525 over compressed work schedules for the Morning Watch housing unit officers.

**WE WILL NOT**, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

**WE WILL**, upon request, meet and negotiate with AFGE, Local 525 over compressed work schedules for the Morning Watch housing unit officers.

_____
(Agency/Respondent)

Dated: _____ 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 its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.