68 FLRA No. 96

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
OXFORD, WISCONSIN
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3495, AFL-CIO
(Charging Party)

CH-CA-12-0403

_____

DECISION AND ORDER

May 18, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (Judge) found, among other things, that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by refusing to bargain with the Charging Party (Union) over compressed work schedules for certain employees whom the Union represents (bargaining-unit employees). The main question before us is whether the Judge erred because the "covered-by" doctrine (described further below) excused the Respondent's refusal to bargain. The answer is no, for the same reasons set forth in the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution Williamsburg, Salters, South Carolina* (*FCI Williamsburg*).[2]

II. Background and Judge's Decision

We summarize the relevant facts only briefly here, as they are set out in more detail in the Judge's decision.

The Union asked the Respondent to negotiate over a compressed work schedule for bargaining-unit employees who work in the Respondent's correctional-services department. The Respondent refused.

The Union then filed a charge, and the FLRA's General Counsel (GC) issued a complaint, alleging that the Respondent violated § 7116(a)(1) and (5) by refusing to bargain, and that, by refusing to do so, the Respondent also repudiated the parties' master agreement. The Respondent filed a motion for summary judgment; the GC filed both a response to the Respondent's summary-judgment motion and a cross-motion for summary judgment; and the Respondent filed a reply to the GC's cross-motion. The Judge determined that summary judgment was appropriate and, thus, did not hold a hearing.

The Judge addressed the terms of Article 18 of the master agreement, which is entitled "Hours of Work."[3] Article 18, Section (b) (Article 18(b)) provides, in pertinent part: "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 U.S.C."[4] Article 18, Section (d) (Article 18(d)) sets forth "procedures" for preparing "quarterly rosters."[5] And Article 18, Section (g) (Article 18(g)) concerns procedures relating to sick and annual relief positions.

The Judge found that, "[c]onsistent with the [Flexible and Compressed Work Schedules] Act,[6] the plain language of Article [18(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."[7] She also determined that "[t]he plain wording of [Article 18(d) and 18(g)] do[es] not limit [Article 18(b)] in any way."[8] In this connection, she stated that Article 18(d) "does not reference [Article 18(b)] or address compressed work schedules."[9] Instead, she found that Article 18(d) "merely provides that, to prepare a quarterly roster for correctional[-]services employees, the [Respondent] shall post a blank roster detailing available assignments and shifts that such employees can bid on, and a roster committee [consisting] of both [Respondent] and Union representatives will formulate roster assignments."[10] And

[1] 5 U.S.C. § 7116(a)(1), (5).
[2] 68 FLRA 580 (2015).
[3] Judge's Decision at 4.
[4] *Id.*
[5] *Id.*; *see also FCI Williamsburg*, 68 FLRA at 580-82.
[6] 5 U.S.C. §§ 6120-6133.
[7] Judge's Decision at 8.
[8] *Id.*
[9] *Id.*
[10] *Id.*

the Judge determined that Article 18(g) "relates to sick and annual positions without any reference to compressed work schedules."[11]

Additionally, the Judge noted the Respondent's reliance on the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Federal BOP v. FLRA*,[12] but she found that reliance "misplaced."[13] Specifically, she found that neither *Federal BOP* "nor the Authority's related decisions addressed bargaining over compressed work schedules under" Article 18(b).[14]

The Judge concluded that the Respondent did not "raise[] a valid 'covered[-]by' defense," and she concluded that the Respondent violated § 7116(a)(1) and (5) by refusing to negotiate with the Union over compressed work schedules for correctional-services employees.[15] Further, the Judge found that the Respondent's refusal to bargain "repudiat[ed]" the master agreement and violated § 7116(a)(1) and (5) in that respect as well.[16] Accordingly, she granted the GC's cross-motion for summary judgment and dismissed the Respondent's motion for summary judgment.

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to the Respondent's exceptions.

III. Analysis and Conclusions

The Respondent argues that the compressed work schedule at issue is "covered by" the master agreement[17] – specifically, Article 18(d) – and that, therefore, the Respondent "did not violate the Statute or the contract when it refused to negotiate."[18] According to the Respondent, when Article 18(b) and Article 18(d) "are read together, [Article 18] provides that negotiations at the local level may occur over compressed work schedules for all bargaining[-]unit employees *except* those employees in work in correctional services."[19] To support its arguments, the Respondent cites[20] *Federal BOP*.[21]

The Judge's finding of an unlawful refusal to bargain, and the Respondent's arguments challenging that finding, are identical in all relevant respects to the Judge's decision and the arguments at issue in *FCI Williamsburg*.[22] For the reasons set forth in the Authority's decision in *FCI Williamsburg*,[23] the Respondent's arguments here also have no merit. Accordingly, we find that the Judge did not err in concluding that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain.[24]

Here, unlike in *FCI Williamsburg*, the Judge found that the Respondent's refusal to bargain also "repudiat[ed]" the master agreement, and constituted an additional violation of § 7116(a)(1) and (5).[25] The Respondent challenges that finding.[26]

Where the Authority has found that a respondent's refusal to bargain violated § 7116(a)(1) and (5) of the Statute, the Authority has found it unnecessary to decide whether the respondent's conduct also constituted a repudiation in violation of § 7116(a)(1) and (5).[27] In this regard, the Authority has stated that a finding of repudiation "would be only cumulative and would not materially affect the remedy."[28] Here, a finding of repudiation would be only cumulative and would not materially affect the remedy. Therefore, we find it unnecessary to decide whether the Respondent's conduct repudiated the master agreement, or whether the Judge erred in so deciding.

[11] *Id.*
[12] 654 F.3d 91 (D.C. Cir. 2011).
[13] Judge's Decision at 9.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 11.
[17] Resp't's Exceptions at 4 (internal quotation marks omitted).
[18] *Id.* at 6.
[19] *Id.* at 7.
[20] *Id.* at 6.
[21] 654 F.3d 91.
[22] 68 FLRA 580.
[23] *Id.* at 582-83.
[24] Member DuBester notes the following: I agree with the decision to find that the Judge did not err in concluding that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain, and that the Judge did not err in concluding that, under Authority precedent, the Respondent did not raise a valid "covered-by" defense. In doing so, I note again my reservations concerning the "covered-by" standard, and that "the Authority's use of the covered-by standard warrants a fresh look." *SSA, Balt., Md.*, 66 FLRA 569, 576 (2012) (Dissenting Opinion of Member DuBester); *accord NTEU, Chapter 160*, 67 FLRA 482, 487 (2014) (Dissenting Opinion of Member DuBester).
[25] Judge's Decision at 11.
[26] Resp't's Exceptions at 7-8.
[27] *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 406, 408 n.1, *recons. denied*, 63 FLRA 600 (2009).
[28] *Id.*

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[29] and § 7118 of the Statute,[30] the Respondent shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate with the Union over compressed work schedules for correctional services employees.

(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) Upon request, negotiate in good faith with the Union over compressed work schedules for correctional services bargaining-unit employees.

(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 FLRA. Upon receipt of such forms, they shall be signed by the warden, Federal Correctional Institution, Oxford, Wisconsin, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted at the Respondent's facilities. 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 email 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 Authority's Regulations,[31] notify the Regional Director, Chicago Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (FLRA) has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Oxford, Wisconsin, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate with the American Federation of Government Employees, Local 3495, AFL-CIO (AFGE) over compressed work schedules for correctional services employees.

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 3495 over compressed work schedules for correctional services employees.

_____
(Respondent)

Dated:_____ By: _____
(Signature) (Title)

This notice must remain posted for sixty 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, Chicago Regional Office, FLRA, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.

[29] 5 C.F.R. § 2423.41(c).
[30] 5 U.S.C. § 7118.
[31] 5 C.F.R. § 2423.41(e).

Member Pizzella, dissenting:

For the reasons that I set forth in my dissent today in *U.S. DOJ, Federal BOP, Federal Correctional Institution Williamsburg, Salters, South Carolina*,[*] I would conclude that compressed work schedules for correctional officers is a matter which is covered by Article 18(d) and that the Bureau has no further obligation to bargain.

Thank you.

[*] 68 FLRA 580, 585 (2015) (Dissenting Opinion of Member Pizzella).

Office of Administrative Law Judges

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
OXFORD, WISCONSIN
Respondent

AND

AMERICAN FEDERTION OF GOVERNMENT EMPLOYEES, LOCAL 3495, AFL-CIO
Charging Party

Case No. CH-CA-12-0403

Susanne S. Matlin
For the General Counsel

Natalie Holick
For the Respondent

David Dauman
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 3495, AFL-CIO (Union), a Complaint and Notice of Hearing was issued by the Regional Director of the Chicago Region of the FLRA. The Complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Oxford, Wisconsin (Respondent/FCI Oxford) violated § 7116(a)(1) and (5) of the Statute by refusing to bargain upon request of the Union over compressed work schedules for bargaining unit employees assigned to the Correctional Services Department. Further, by such conduct, the complaint alleges that the Respondent failed and refused to honor and abide by the provisions of the parties' Master Agreement (MA) and has repudiated the provisions of that Agreement. The Respondent filed a timely Answer denying the allegations of the complaint.

On December 13, 2012, the Respondent filed a Motion for Summary Judgment (MSJ), asserting that there are no genuine issues of material facts in this matter for which a hearing is warranted. The Respondent further argued that it has not violated the Statute as alleged in the complaint and that it had no duty to bargain pursuant to Article 18(d) of the parties' MA and that it has not repudiated the MA by its conduct. In support of its motion, the Respondent set forth a Statement of Undisputed Material Facts. On December 20, 2012, the Respondent filed a Supplement to its MSJ, requesting that certain documents (Respondent's Exhibits 1 - 6) be considered as attachments to its December 13 MSJ. The Respondent also cited a recent Authority decision, *U.S. Dep't of Justice, Fed. BOP, Wash., D.C.*, 67 FLRA 69 (2012) as support for its motion.

On January 7, 2013, the General Counsel (GC) filed its Response to Respondent's MSJ and Cross-Motion for Summary Judgment. The GC agrees that there is no dispute as to the material facts underlying the complaint in this matter. The GC contends that the Respondent concedes that it has refused to negotiate with the Union over a compressed work schedule for correctional services employees and moves that a decision issue finding that the Respondent has violated the Statute as alleged in the complaint and providing for an appropriate remedial order. The GC also submitted four exhibits in support of its motion.

On January 10, 2013, the Respondent filed a Reply to the GC's Cross-Motion for Summary Judgment, denying that it violated section 7116(a)(1) and (5) of the Statute and asserting that its declination to bargain over the compressed work schedule for correctional services employees is covered by the parties' MA. The Respondent also asserts that its conduct in this matter did not repudiate the parties' MA.

By Order dated December 19, 2012, the Chief Administrative Law Judge Indefinitely Postponed the Hearing in this matter.

Having carefully reviewed the pleadings, exhibits, and arguments of the parties, I have determined that this decision is issued without a hearing, 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 request of the Union over compressed work schedules for correctional services employees and that this conduct also repudiated the parties' MA. I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

1. The Union filed the original charge in this proceeding on June 5, 2012, and a copy was served on the Respondent. (G.C. Ex. 1; 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 employees of the Respondent.

   (b) AFGE, Local 3495 (Union) is an agent of AFGE for the purpose of representing unit employees at Respondent's at the Federal Correctional Institution Oxford, Wisconsin (FCI Oxford) (Compl. & Ans.).

4. At all material times, the following individuals held the positions set opposite their names and have been agents of the Respondent acting on its behalf:

Robert Werlinger	Warden
Bart Masters	Associate Warden
Al Broe	Captain

5. FCI Oxford is a medium level security institution and employs 119 correctional officers in its Correctional Services Department. (R. MSJ; Statement of Facts (SOF) #1). All correctional officers in Correctional Services are assigned to work a certain post on a quarterly basis. A post is the officer's location of work, such as control, compound, or housing unit. (R. MSJ; SOF #2).

6. On January 19, 2012, the Union requested that the Respondent negotiate over a compressed work schedule for unit employees assigned to Respondent's correctional services department. Specifically, the request stated that "the Union was invoking its right to negotiate procedures and arrangements for any changes in working conditions concerning the implementation of a compressed work schedule for the correctional services department at the FCI in Oxford, Wisconsin."

7. On March 29, 2012, the Respondent, by memorandum from Associate Warden Masters, rejected the Union's January 19, 2012, negotiation demand and stated that the Respondent had no duty to bargain over a compressed work schedule for Respondent's correctional services unit employees.

8. The Union and the Respondent have previously negotiated compressed work schedules for departments at FCI Oxford outside of custody (also known as correctional services), including Financial Management, Lockshop, Unit Management, and Drug Treatment.

9. AFGE and the Respondent are parties to a 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. 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 U.S.C.

    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

Under § 7116(a)(5) of the Statute, it is an unfair labor practice for an agency to "refuse to consult or negotiate in good faith with a labor organization as required by this chapter." Thus, an agency violates the Statute when it expressly refuses to bargain over a matter within the duty to bargain. *AFGE, Local 1401*, 67 FLRA 34, 36 (2012).

The Authority has repeatedly held that under the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. § 6120-6133 (the Act), matters pertaining to compressed work schedules are fully negotiable and enforceable, subject only to the Act itself or other laws superseding it. *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 60 FLRA 606, 608 (2005).

Here, the Respondent concedes it refused to bargain over compressed work schedules for correctional service employees. Under established Authority precedent, this issue is a mandatory subject of bargaining. Therefore, absent a valid defense, the Respondent's refusal to bargain over compressed work schedules violates § 7106(a)(1) and (5) of the Statute.

As its defense, Respondent raised the management right to assign work argument under § 7106(a) of the Statute and the Authority's covered by doctrine. The GC asserts that Respondent's reliance on the management right to assign work as a defense is misplaced as compressed work schedules are fully negotiable without regard to the management rights under § 7106 of the Statute. *U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 131, 134 (2003) ("proposals concerning an agency's alternative work schedules program are negotiable without regard to whether they are contrary to the various provisions of § 7106 of the Statute.") Respondent's covered by defense fails because the parties' MA specifically provides for local bargaining over compressed work schedules. The Authority will not find a matter covered by an agreement when the agreement specifically contemplates bargaining over the matter. *U.S. Dep't of Energy, WAPA, Golden, Colo.*, 56 FLRA 9, 12 (2000) (*DOE*). Here Article 18, section b of the MA expressly provides for local bargaining over compressed work schedules. The language is broad and does not exclude any portion of the bargaining unit or any organizational components of the Bureau of Prisons (BOP). It plainly requires local bargaining over compressed work schedules for all components, including correctional services. Thus, Respondent's admitted refusal to bargain over compressed work schedules constitutes a violation of § 7116(a)(1) and (5) of the Statute.

The GC further asserts that the Respondent's rejection of its Article 18, section b obligation to negotiate over a compressed work schedule for corrections services employees constitutes an unlawful repudiation. Two elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (*i.e.*, was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (*i.e.*, did the provision go to the heart of the parties' agreement. *Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 861-62 (1996) (*Scott AFB*).

In this case, the Respondent declared that it would no longer negotiate over compressed work schedules for correctional service employees. The GC notes that Article 18, section b provides for local bargaining over compressed work schedules for all unit employees and contains no exclusions or limitations. Thus, Respondent has clearly and patently breached Article 18, section b. *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 355, 357 (2009) (*Davis-Monthan AFB*).

Furthermore, Respondent's breach of Article 18, section b goes to the heart of the agreement. Under the Act, bargaining unit employees may participate in an alternative work schedule program only under the terms provided in a negotiated agreement. 5 U.S.C. § 6130(a)(1) and (2). Thus, without the ability to negotiate over a compressed work schedule, correctional service unit employees are denied the significant opportunities provided by an alternative work schedule. Article 18, section b is vitally important as it provides unit employees with the opportunity to gain greater control over their time and to balance their myriad of work and family responsibilities more easily. Thus, Respondent's clear and patent breach of Article 18, section b goes to the heart of the agreement. *Davis-Monthan AFB*, 64 FLRA at 357-58.

As to a remedy, the GC requests that the Notice to all bargaining unit employees be signed by Respondent's Warden and posted where notices to employees are customarily posted. Also, the GC requests that the Respondent be directed to distribute a copy of the Notice to all bargaining unit employees through Respondent's e-mail system.

Respondent

The Respondent asserts that the agency had no duty to bargain a compressed work schedule for correctional services employees. 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." *Fed. BOP v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011), 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 91, citing *Nat'l Treasury Employees Union v. FLRA*, 452 F.3d 793, 796 (D.C. Cir. 2006) (*NTEU*).

The agency had no duty to bargain the request for a compressed work schedule in correctional services. Pursuant to Article 18, section b of the MA, "requests for flexible and/or compressed work schedules may be negotiated at the local level." However, Article 18, section d, states that "quarterly rosters for correctional services employees will be prepared in accordance with the below listed procedures." Under those procedures BOP employees assigned to the correctional services department are permitted to bid, each quarter, on posts identified on a roster. Specifically, the MA states that "the employer will ensure that a blank roster for the upcoming quarter will be posted . . . for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available . . ." for bid. Since the way in which the employer, or Warden, establishes and fills out quarterly rosters is already covered by Article 18, management has no duty to bargain over compressed work schedules for correctional services posts.

Under the covered by doctrine, once the parties have bargained on a particular topic and have reached agreement, there is no further requirement to bargain again on that topic during the term of the agreement – even if the precise issue or facet of the topic involved in a management action is not directly or explicitly addressed in the negotiated provision. *See NTEU v. FLRA*, 452 F.3d at 796-98. *See also Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48 (D.C. Cir 1992) (once a matter has been the subject of general bargaining, impact bargaining as to that matter is no longer required); *Equal Emp't Opportunity Comm'n, Wash., D.C*, 52 FLRA 459, 471-72 (1996) (if a matter is covered by an agreement, then an agency may act unilaterally without providing notice and the union, as party to the agreement, is presumed to be familiar with the terms of the agreement); *Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 47 FLRA 1249 (1993) (no requirement to negotiate over the method of presenting performance awards during mid-term bargaining because the master labor agreement contained a detailed article concerning employee awards; even though the precise method for presenting awards was not spelled out, the general subject matter was covered by the existing agreement).

The U.S. Court of Appeals for the D. C. Circuit recognized that Article 18 of the MA represents the parties' agreement about how and when management would exercise its right to assign work in correctional services and that the implementation of those procedures, and the resulting impact, do not give rise to a further duty to bargain. *BOP v. FLRA*, 654 F.3d at 91. Accordingly, the court held that Article 18 covers and preempts challenges to all specific outcomes of the assignment process." Likewise, although the MA allows for

negotiations of compressed work schedules, it is evident from the plain language of Article 18, section d, that, for correctional services employees, such challenges to the roster are preempted by the assignment process already established in Article 18.

Further, the Respondent asserts that it did not repudiate the contract by declining to bargain over a compressed work schedule in correctional services. In this case, the GC cannot prove that management's declination to negotiate a compressed work schedule for correctional services was a clear and patent breach of the contract because the MA does not expressly provide for negotiations of such in correctional services. To the contrary, Article 18 explicitly provides that the employer, by submission of the blank roster, will determine the shifts and days off for posts in custody. Accordingly, the Respondent's position, that it has no duty to barging over compressed work schedules for employees in correctional services, is a reasonable interpretation of Article 18, supported by *BOP v. FLRA*, and not a breach of the collective bargaining agreement.

Moreover, the Respondent's position is further supported by the fact that management has entered into compressed work schedule agreements for departments other than correctional services, as the contract provides. Since compressed work schedules exist in other departments at FCI Oxford, it is evident that the Respondent recognizes and abides by the MA provisions where it is applicable. Accordingly, the Respondent has not repudiated the contract.

Because management had no duty to bargain, it did not violate the Statute or the contract by its conduct in this matter. Respondent's motion for summary judgment should, therefore, be granted and the complaint in this matter should be dismissed.

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." *Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009*)* (internal quotation marks & 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 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 *BOP v. FLRA* 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. Dep't of Justice, 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 has violated § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union over compressed work schedules for employees in correctional services. *DOE*, 56 FLRA at 13.

The Authority analyzes an allegation of repudiation using the test established in *Scott AFB*, 51 FLRA at 858; e.*g.*, *U.S. Dep't of Def., Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 747 (2010). That test consists of two elements: "(1) the nature and scope of the alleged breach of an agreement – *i.e.*, was the breach clear and patent?; and (2) the nature of the agreement provision allegedly breached – *i.e.*, did the provision go to the heart of the parties' agreement?" *Id.*; *see also Soc. Sec. Admin., N.Y., N.Y.*, 60 FLRA 301, 304 (2004) (*SSA NY*).

With regard to the first element of the test, the GC contends that the language of Article 18 of the parties' agreement is not unclear or ambiguous and expressly provides for bargaining over compressed work schedules at the local level with no limitations. In contrast, the Respondent claims that its position – that it has no duty to bargain over compressed work schedules for correctional services employees – constitutes a reasonable interpretation of Article 18, is supported by *BOP v. FLRA*, and does not constitute a breach of the parties' agreement. Moreover, the Respondent asserts that, because it has entered into agreements with the Union concerning compressed work schedules for employees in other departments, it has clearly abided by Article 18, section b when appropriate.

The record does not support the Respondent's claim that it acted in accordance with a reasonable interpretation of Article 18. As the GC contends, the wording of Article 18 is clear and unambiguous. The plain language of Article 18, section b, as discussed above, 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. Moreover, the plain wording of section d does not limit section b in any way. Section d does not reference section b or address compressed work schedules, but, rather, merely provides, among other things, that the Agency shall post quarterly rosters for employees in correctional services. The Respondent admits that it has bargained over compressed work schedules for employees in departments other than correctional services in accordance with that provision. Thus, I find that the Respondent's refusal to bargain over compressed work schedules for employees in correctional services constitutes a clear and patent breach of Article 18, section b. *See SSA NY*, 60 FLRA at 305 (finding that the agency committed a clear and patent breach of the agreement when the provisions of the agreement that the arbitrator addressed were not "sufficiently ambiguous so as to give room for a reasonable differing interpretation"); *Dep't of Transp., FAA., Fort Worth, Tex.*, 55 FLRA 951, 956, 961-62 (1999) (upholding the judge's determination that the respondent committed a clear and patent breach of a memorandum of understanding (MOU) by refusing to allow a union member to serve on a panel in a representative capacity when the record did not support the respondent's contention that the terms of the MOU were unclear or that the respondent acted in accordance with a reasonable interpretation of such terms based on the parties' prior practice).

With regard to the second element of the test, the GC asserts that Article 18, section b goes to the heart of the parties' agreement. According to the GC, a compressed work schedule provides employees with tremendous benefits, such as giving employees more control over their time so that they can balance work and family responsibilities. Moreover, the GC contends that, under the Act, an employee "may participate in an alternative work schedule program only under the terms provided in the parties' agreement". The Respondent does not contest the General Counsel's contentions.

Here, Article 18, section b, which concerns local bargaining over compressed work schedules, is contained in the parties' master agreement. In cases where the Authority has held that a provision went to the heart of an agreement, a supplemental, or other similar agreement, was typically at issue, and the provision was a focal point of that agreement. *See, e.g., Davis-Monthan AFB*, 64 FLRA at 358 (finding that section which dealt solely with the drug rehabilitation process, went to the heart of a local drug agreement); *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 52 FLRA 225, 231-32 (1996) (holding that a provision concerning indoor smoking went to the heart of a smoking policy agreement); *Dep't of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1219-20 (1991) (*Warner Robins II)*

(determining that a provision requiring that union negotiators would be placed on the day shift during negotiations went to the heart of a ground rules agreement setting the rules that the parties agreed to follow in meeting and bargaining over a local supplement to the master agreement). However, in cases where the Authority has found that a provision went to the heart of the parties' master agreement, the provision generally was closely linked to the parties' collective bargaining relationship. *See, e.g.*, *24th Combat Support Grp., Howard AFB, Republic of Pan.*, 55 FLRA 273, 282 (1999) (finding that provisions relating to the availability of the negotiated grievance procedure went to the heart of the parties' master agreement); *U.S. DOI, Bureau of Reclamation, Wash., D.C.*, 46 FLRA 9, 28 (1992) (Member Talkin dissenting) (determining that a provision concerning the positions that were included in the bargaining unit went to the heart of the parties' master agreement); *Pan. Canal Comm'n, Balboa Republic of Pan.*, 43 FLRA 1483, 1508 (1992) (concluding that provisions concerning the availability of appealing adverse actions through the administrative grievance procedure went to the heart of the parties' master agreement).

I find that the wording of Article 18, section b is clear and unambiguous. The plain language expressly allows local negotiations over compressed work schedules for bargaining unit employees, including correctional services employees. This provision is closely linked to the parties' collective bargaining relationship and goes to the heart of the agreement. Respondent has repeatedly stated – in essence – that Article 18, section b does not apply to mission critical/custody and corrections employees; they may not have compressed work schedules; and no bargaining will take place. This steadfast refusal to acknowledge the validity of Article 18, section b is based solely on the unreasonable interpretation of the D.C. Circuit decision. The nature and scope of the breach here "manifested an intent not to honor similar requests by the Union." *Warner Robins II*, 40 FLRA at 1219.

Therefore, I find that Respondent's breach of Article 18, section b goes to the heart of the agreement and that the Respondent violated § 7116(a)(1) and (5) of the Statute by repudiating the parties' Master Agreement. Having found that the Respondent has violated the Statute as alleged in the complaint, I hereby dismiss Respondent's Motion for Summary Judgment, and grant the General Counsel's Motion for Summary Judgment.

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. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

ORDER

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, Oxford, Wisconsin, shall:

1. Cease and desist from:

   (a) Failing and refusing to negotiate with the American Federation of Government Employees, Local 3495, AFL-CIO (the Union) over compressed work schedules for Correctional Services employees.

   (b) Failing and refusing to abide by and honor Article 18, section b of the parties' Master Agreement.

   (c) 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) Upon request, negotiate in good faith with the Union over compressed work schedules for Correctional Services unit employees.

   (b) Comply with Article 18, Section b of the parties' Master Agreement.

   (c) 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, Oxford, Wisconsin, 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. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) 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.

(e) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Chicago 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., December 19, 2014

_____

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, Oxford, Wisconsin, 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, Local 3495, AFL-CIO (AFGE) over compressed work schedules for Correctional Services employees.

WE WILL NOT fail or refuse to abide by Article 18, section b of the Master Agreement between the Federal Bureau of Prisons and the AFGE, Council of Prison Locals.

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 3495 over compressed work schedules for Correctional Services employees.

WE WILL abide by Article 18, section b of the parties' Master Agreement.

_____
(Agency/Activity)

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, Chicago Regional Office, Federal Labor Relations Authority, and whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.