UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 24, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE NAVY
NAVAL AIR STATION
PENSACOLA, FLORIDA

Respondent

and Case No. AT-CA-00890

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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DEPARTMENT OF THE NAVY NAVAL AIR STATION PENSACOLA, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1960 Charging Party	Case No. AT-CA-00890

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 24, 2002**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 24, 2002
Washington, DC

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

DEPARTMENT OF THE NAVY NAVAL AIR STATION PENSACOLA, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1960 Charging Party	Case No. AT-CA-00890

Mr. Edward K. Culbreath
Brief: Tracey D. Gallaway
For the Respondent

Ms. Maureen C. Roberts
For the Charging Party

Richard S. Jones, Esquire
Tameka Andrea West, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent repudiated a memorandum of understanding by implementing rotating shifts for police

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

officers and security guards; or, in the alternative, whether Respondent violated §§ 16(a)(5) and (1) by implementing the change in conditions of employment without bargaining.

This case was initiated by a charge filed on September 20, 2000 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued November 30, 2000; alleged violations of § 16(a)(1) and (5); and set the hearing for March 29, 2001 (G.C. Exh. 1(c)), pursuant to which a hearing was duly held on March 29, 2001, in Pensacola, Florida before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which all parties waived. At the conclusion of the hearing, April 30, 2001, was fixed as the date for mailing post-hearing briefs which time subsequently was extended, on motion by Respondent to which the other parties did not object, for good cause shown, to May 25, 2001. General Counsel and Respondent each timely submitted briefs, received on, or before, May 25, 2001, 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 American Federation of Government Employees, Local 1960 (hereinafter, "Union") is the exclusive representative for several units of bargaining unit employees at the Department of Navy, Naval Air Station, Pensacola, Florida (hereinafter, "Respondent") (Tr. 15). Included within the bargaining unit are approximately 65-70 police officers and security guards (Tr. 72). The bargaining unit employees are covered by a multi-unit collective bargaining agreement (Agreement) (G.C. Exh. 2) effective December 18, 1987, and extended thereafter (See for example G.C. Exh. 3).

2. Prior to October 1995, police officers and security guards worked rotating shifts (Tr. 79). This changed pursuant to a June 27, 1995, Memorandum of Understanding (MOU), in which the parties agreed to assign the police officers and security guards to permanent shifts (G.C. Exh. 13). In the MOU, there is no statement regarding duration, nor is there anything on the face of the document that discusses its relationship to the Agreement (G.C. Exh. 13). Permanent shifts were instituted on October 1, 1995 (G.C. Exh. 13; Tr. 63).

3. On June 2, 2000, Respondent's Regional Security Director, Mr. David F. Spiers, issued a memorandum to the Union expressing Respondent's intent, as of August 6, 2000, to discontinue permanent shifts and implement rotating shifts (G.C. Exh. 4.) On June 5, 2000, Union President, Ms. Maureen Roberts, submitted a written request to negotiate, stating, in part,

> "AFGE Local 1960 hereby demands to bargain over your Regional Security Officer's proposal to go to shift rotation.
>
> "I am available, at your earliest convenience to bargain on ground rules and subsequent substantive issues relating to shift rotation. . ." (G.C. Exh. 5)

4. Respondent, on June 28, 2000, requested that the Union submit written proposals by close of business on June 30, 2000, and that the parties meet on July 5, 2000 (G.C. Exh. 6). The Union requested additional time (G.C. Exh. 7); and on July 12, 2000, advised Respondent that it would discuss:

> Health Concerns
> Financial Concerns
> Education
> (G.C. Exh. 9)

The Union never submitted written proposals; and on July 21, 2000, at 10:00 a.m. the parties met (Tr. 26). Mr. David Knight was spokesman for Respondent and Ms. Roberts was the spokesman for the Union (Tr. 26). Ms. Roberts stated,

> ". . . Mr. Knight addressed that we were there for -- to I&I only the rotation of the police officer shifts, that we did not -- we were not there to negotiate, only to I&I the change.
>
> "Q Okay. What did that mean to you?
>
> "A That meant that according to what he was telling me, we didn't have any right to negotiate. But I disagreed with that statement. And during that process, Mr. Rob Harbin brought out an MOU that was signed in 1985 (sic) [1995], saying the change of rotation shifts to fixed permanent shifts. And I was not aware that that MOU existed until Mr. Harbin provided it." (Tr. 27).

Mr. Harbin, in agreement with Ms. Roberts, put it this way,

> ". . . we must have mentioned that, We're here to negotiate; We want to negotiate the change -- the shift change -- the permanent shift change, you know, the change itself. And Mr. Knight . . . he says, Well, we're not here to negotiate the change; The change is going to take -- we're here to negotiate the impact on the employees; The change is going to take place one way or the other.
>
> "And at that point . . . that's when I brought forward this MOU. And I said . . . Do you not understand that this is law and this is in effect right now and that you can't change it without negotiation?. . ." (Tr. 65-66).

Mr. Knight testified, in part, as follows:

> "Q Isn't it -- you did testify that the mediator had expressed the view that the MOU was a binding document. Is that correct?
>
> "A That's true. And we met to negotiate to come to a different arrangement.
>
> "Q And you say you gave your last best offer to the union. In your mind, was your last best offer consistent, or inconsistent with the MOU?
>
> "A Well, you have to recall that we met to bargain on the impact and implementation of the change. The union's position was that we couldn't -- the management couldn't make the change at all. . . .
>
> . . .
>
> "Q . . . So the Agency intended to meet and discuss but not necessarily negotiate? Is that what you're saying?
>
> "A No. We met to meet and discuss during negotiation.
>
> "Q But only impact and implementation?
>
> "A That's correct.
>
> . . .

"A It was clear –

"Q -- as far as substance?

"A -- that there wasn't going to be a substantive discussion." (Tr. 142-144).

5. Ms. Roberts stated in the negotiations that the employees had, ". . . built their lives around their jobs; So they have set their child care, and they have set their education, and they have other jobs, and their spouses work; And because they were on permanent shifts and they knew when they were going to be working . . . ." (Tr. 31). The Union did not want to rotate (Tr. 31).

Mr. Darryl Lumpkin, the Deputy Regional Security Officer, Pensacola since 1997 and from 1995 to 1997 was Chief of Police at NAS/Pensacola (Tr. 106), said the Union discussed its concerns (G.C. Exh. 9) on July 21, 2000, and by "Health Concerns" they said that employees, ". . . on that shift for 90 days and their body wouldn't adjust . . . ." Mr. Lumpkin stated that he would go to 120 days on the rotation rather than 90 days (Tr. 112). By financial, they talked about the loss of premium pay and Mr. Lumpkin said the premium was not a guarantee (Tr. 112) but that he would look at any personal problems (id.). As to "Education", Mr. Lumpkin obviously understood the Union meant the employees' education as he said, ". . . education, that's another reason why I had talked about the 120 days. I believe we was going to try to look at scheduling around the semester hours of the college. . . I will not take anyone out of class; I will continue to let them go to class, and they would move on the next shift rotation. . . ." (id.)

6. There was no agreement, although Mr. Lumpkin said, "I thought I directed the concerns very well for all my people in the department." (Tr. 113), so, ". . . we closed up. And they talked about impasse and we'd go to a mediator. Q So you were at impasse? Is that what you're saying? A That's correct. (id.)

Ms. Roberts said,

". . . The meeting kind of deteriorated . . . it got to be argumentative. And Mr. Knight stated that he wasn't going to be involved with in-fighting in the union. And I stated that there wasn't any in-fighting, because we're in agreement

on what we want at this table, and that is: The status quo. So I invoked impasse to agree to disagree because we were -- the meeting was degenerating . . . I just said that, We agree to disagree; And the meeting is ended; And we go to the mediation. . . .” (Tr. 32).

Ms. Roberts contacted the Federal Mediation and Conciliation Service (FMCS) by letter dated July 24, 2000 (G.C. Exh. 14); Commissioner Michael J. Madden was assigned (Tr. 33); and Commissioner Madden met with the parties on August 7, 2000 (Tr. 34). The parties met separately with Mr. Madden and together. Respondent changed its offer from 90 days to 120 days and agreed to delay rotation until September 10, 2000 (Tr. 34, 41). During the meeting, Mr. Madden said to both parties that the 1995 MOU was a valid and binding agreement (Tr. 35, 139). The Union’s position was that Respondent could not unilaterally terminate the MOU and the Union was adamant that it not be terminated. Respondent’s position was that it had the right unilaterally to terminate the MOU; and that it had done so by giving notice of its intention to rotate shifts. (Tr. 114).

Mr. Harbin said that Commissioner Madden, “. . . decided that we . . . weren’t getting anywhere and we weren’t going to be able to negotiate any more. . . that he advised us that he would try and get back with us in a week or two -- a couple weeks and that -- he didn’t feel that we were going to be able to go to impasse or -- impasse was mentioned, but we hadn’t met enough to -- for them to accept us at impasse panel, that we had only sat one time together except for the mediation.” (Tr. 70).

Ms. Roberts took notes of the August 7 mediation session and I accept those notes, which she transcribed, as Ms. Roberts’ best recollection of the meeting (G.C. Exh. 15). She indicated, as Mr. Harbin had also said, that “Mediator denied impasse at this time do to more investigation into this matter, also that we have not had enough for the Impasse Panel.” (id.)

7. Commissioner Madden called Mr. Knight on August 16, 2000 (Tr. 139), “. . . when he called to release the Agency from mediation and assign a case number, closing the FMCS out of the matter.” (id.; see, also Tr. 145). Mr. Madden told Mr. Knight he would call Maureen (Ms. Roberts) (Tr. 140) and he did so (Tr. 37).

On January 26, 2001, Mr. Edward K. Culbreath sent the following e-mail to Commissioner Madden:

> "I am the Representative for the Agency in a ULP case which stems from the . . . case you were the mediator on concerning 'shift rotations' for Security Personnel located at Naval Air Station, Pensacola Florida.
>
> It is our belief that you closed that case on 16 August 2000, and released the parties to request the services of the Federal Service Impasses Panel.
>
> Could you please relate to me the particulars of this case and where the FMCS now stands concerning it?
>
> . . . ." (Res. Exh. 1, pp 1-2).

Mr. Madden responded by e-mail on February 2, 2001, as follows:

> "Yes, I did close the case last Aug. and released the parties to appeal to the FSIP or FLRA, if they so chose. The confidentiality of the mediation process prevents me from going into any of the details of the mediation session other than to say that there was nothing further that mediation could accomplish since Mgmt. was standing fast on its position that it had the unilateral right to change work shifts. Once we, at FMCS, close the case, we have no further involvement with it unless the FSIP or the FLRA refer it back for further negotiation/mediation, in which case we are happy to reenter the case." (id., p. 1).

8. Ms. Roberts testified that she called Commissioner Madden on March 22, 2001, after she had learned of the e-mail messages set forth in Paragraph 7, above (Tr. 43, 57-58). I do not credit Ms. Roberts' testimony concerning Commissioner Madden's statements to her in his telephone conversation of August 16, 2000, for several reasons. First, Ms. Roberts demonstrated a lack of understanding of what FMCS does. FMCS does not make any recommendation to FSIP. FMCS seeks, through mediation, to resolve negotiation impasses. Here, on August 7, his efforts to resolve the negotiations impasse had been unsuccessful; but he kept the matter open until August 16, 2000, when he called Mr. Knight and Ms. Roberts. When FMCS closes a case, as it did on August 16, it withdraws from the case and, having withdrawn, the parties were free to go to FSIP or FLRA. Because this is what FMCS does, I believe Commissioner Madden on

August 16, 2000, did tell Ms. Roberts that he was closing the case and that the parties were released to appeal to the FSIP or FLRA, if they so chose. Accordingly, I credit Commissioner Madden's e-mail response of February 2, 2001, which is corroborated by Mr. Madden's statement to Mr. Knight on August 16, 2000.

9. On August 23, 2000, Ms. Roberts sent the following letter to Mr. Lumpkin,

> "The MOU dated June 27, 1005 clearly states that all three shifts **shall** be permanent shifts effective October 01, 1995. We will consider those shifts in place and permanent until we open bargaining in 2001 since the membership does not agree with the proposed changes.
>
> "As it stands now we will be requesting to negotiate a new contract, after we have given the required notice, prior to the expiration of the present contract on February 24, 2001.
>
> "Rumors have been going around that the shifts **will** be rotating on September of 2000. However, our position has not changed and any attempt to change the schedule without a signed agreement may result in further action. . .
>
> . . . ." (G.C. Exh. 17) (Underlined emphasis supplied)

10. On September 20, 2000, Mr. Lumpkin sent Ms. Roberts a copy of a letter from Mr. D. Spiers, Regional Security Officer, to Regional Security Personnel, to be sent to employees on September 21, 2000 (Tr. 114). Mr. Spiers' letter to Regional Security personnel stated, in pertinent part, as follows:

> "Subj: SHIFT ROTATION
>
> "1. Commencing with the "A" Shift on 24 September 2000, all GS-083 Police Officers, GS-085 Security Guards and military personnel assigned to the NAS Pensacola Regional Security Department will rotate shifts every four months.
>
> "2. Personnel currently assigned to the "A" Shift will rotate to the "C" Shift, "B" Shift will rotate to the "A" Shift, and the "C" Shift will rotate to the "B" Shift. Current scheduled days off will remain the same for this rotation period.

. . . ." (G.C. Exh. 18).

11. Ms. Roberts filed the charge in ths case on September 20, 2000 (G.C. Exh. 1(a)) and Respondent implemented Shift Rotation four days later on September 24, 2000. (Tr. 115).

CONCLUSIONS

General Counsel has asserted alternative theories concerning Respondent's alleged violations of §§ 16(a)(5) and (1) of the Statute: (1) that Respondent repudiated the 1995 MOU regarding permanent shifts; or, in the alternative, (2) that Respondent violated §§ 16(a)(5) and (1) of the Statute by unilaterally implementing the change without affording the Union appropriate notice and opportunity to seek the assistance of FSIP. For reasons set forth hereinafter, I find each of General Counsel's theories without merit.

A. RESPONDENT DID NOT REPUDIATE THE 1995 MOU

In a repudiation case two factors must be considered: "(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." Federal Aviation Administration, 55 FLRA 1271, 1282 (2000). With regard to the first

element, the Authority has explained that, “. . . where the

meaning of a particular agreement term is unclear, acting in accordance with a reasonable interpretation of that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of the terms of the agreement." Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA 858, 862 (1996) (Air Force); United States Department of the Air Force, Seymour Johnson Air Force Base, 57 FLRA No. 172, Slip Opinion pp. 8-9 (May 15, 2002). Further, if it is determined that there was no clear and patent breach under the first element, it is unnecessary to consider the second element (51 FLRA at 863).

The key to analyzing the first element in this case concerns the expected duration of the 1995 MOU. Respondent argues that because the MOU contains no statement of duration and because it was not a part of the Agreement (Tr. 91), the MOU was terminable at will. General Counsel contends that the MOU was part of the Agreement, and therefore would expire only when the Agreement expired (February 24, 2001). General Counsel asserts Respondent could not make the change to rotating shifts earlier than February 24, 2001, without repudiating the 1995 MOU.

I find that no repudiation occurred because Respondent's interpretation of the MOU as terminable at will was reasonable, and therefore there was not a clear and patent breach of the agreement. Review of the language of the MOU itself (G.C. Exh. 13) reveals two significant facts: 1) the MOU contains no statement regarding its duration; and 2) nothing in the MOU ties it to the Agreement. Further, nothing in the Agreement addresses the relationship of MOUs to the Agreement. Without a link to the Agreement or a statement regarding duration, the guidance for the proper duration of the MOU is common law. See Ellis Tacke, d/b/a Ellis Tacke Co., 229 NLRB 1296, 1302 (1977). Because the 1995 MOU lacks a definite duration, it will be construed as "terminable at will." Id.

Although General Counsel maintained that the MOU became a part of the Agreement upon its execution, no proof of this was shown. General Counsel argued that the MOU became part of the Agreement because it was negotiated pursuant to Section 3.01 of the Agreement which provides,

"ARTICLE 3
"MATTERS APPROPRIATE FOR NEGOTIATION

> "Section 3.01. Matters appropriate for negotiation between the PARTIES are personnel policies, practices, and matters affecting working conditions which are within the discretion of the EMPLOYERS. These matters include, but are not limited to, such maters as . . . work schedules . . . and hours of work." (G.C. Exh. 2, Art. 3, Sec. 3.01)

Section 3.02 and 3.03 of the Agreement provide,

> "Section 3.02. Either PARTY desiring or having a requirement to, negotiate with the other shall, whenever practical, give advance notice to the other PARTY. Such notice will be given in writing at least 10 work days in advance and will include a statement of the subject matter to be discussed.

> "Section 3.03. It is recognized that this Agreement is not all inclusive. The fact that certain working conditions have not been specifically covered in the Agreement does not lessen the responsibility but rather compels either PARTY to meet with the other for discussion and exchange of views in an effort to find mutually satisfactory solutions to matters not covered by this agreement." (id.)

(Note, also Article 8, "BASIC WORKWEEK/HOURS OF WORK" (id.)).

Article 3 authorizes mid-term negotiations (See, Article 39, Section 39.05 of the Agreement (G.C. Exh. 2, Art. 39, Sec. 39.05)) of changes that effect conditions of employment of employees, i.e., negotiation of matters such as "work schedules" for particular employees. Thus, here, the MOU was negotiated in 1995, nearly eight years after the effective date of the Agreement; applied only to the Security Department; was executed only by the Security Officer, Lt. Junior Grade Shirley Carter and the President of the Union, Mr. Lloyd Simoneaux. That the MOU was not, and did not, become part of the Agreement is made abundantly clear by Article 39, Section 39.03 of the Agreement which provides,

> "Section 39.03. No agreement, alteration, understanding, variation, waiver, or modification

> of any terms or conditions contained herein shall be made and executed in writing between both PARTIES and has been ratified by the UNION and approved by the Department of the Navy, Washington, D.C."

Consequently, the MOU, while a valid and lawful agreement, was terminable at will and Respondent gave timely notice on June 2, 2000, of its intention to terminate the MOU and rotate the shifts of Police Officers and Security Guards (G.C. Exh. 4).

B. RESPONDENT TERMINATED THE 1995 MOU PURSUANT TO ITS § 6 (a)(1) RIGHT TO DETERMINE ITS INTERNAL SECURITY PRACTICES

In its June 2, 2000, notice, Respondent made clear that,

> "2. This change is necessary to promote a well-trained security force able to respond to any contingency. Police Officers and Security Guards must be able to efficiently stand duty on any shift when called upon. Presently this capability does not exist."
>
> . . . . (G.C. Exh. 4).

Respondent at the hearing states its reliance, inter alia, on § 6(a)(1) (Tr. 91); Mr. David F. Spiers, Regional Security Director, testified that the reason for rotation of shifts was security to the base (Tr. 103); and Mr. Spiers emphasized that security services had been regionalized and Police Officers who worked at various bases now might be assigned at any place and they were not trained or qualified to do so; that work at each base is inherently different; that the work encountered on each shift is very different. Mr. Spiers explained, for example, that during the day shift there are many visitors to the museum, extensive training is conducted with a great many young students; that on the evening shift there is a great exodus of civilian employees going home and navy personnel on liberty; and on the swing shift navy personnel returning from liberty. Mr. Spiers stated that, ". . . there were some world issues going on as far as terrorism

. . . that was a real concern to the Navy at the time. And

a lot of emphasis was put on that. And a well-trained security force -- a well-trained, experienced security force was real necessary . . . .” (Tr. 94-95); and that, “It was real important especially in the Navy’s eyes that we be able to ramp up in threat conditions . . . that we had to ramp up to meet the requirements of those different threat conditions.” (Tr. 96).

Deputy Regional Security Director, Mr. Darry Lumpkin, states that “. . . different elements of our security department is [sic] not educated in the different facts if they stay on the same shift.” (Tr. 108). He further explained that the day shift gets a large number of visitors to the museum, do more accidents, fender-benders, and do more escorts are traffic control. They do a lot of public-relations in dealing with the flow of visitors, more radar because so many people are on the base; the night shift gets the larcenies, some accidents, a little bit of theft of government property; and the swing shift principally checks doors, gates and handles DUIs (Tr. 109-110). Mr. Lumpkin stated that rotation greatly increased the availability of outside teachers for the training given on the re-instituted Wednesday Training Day, since outside teachers were available only during the day and by rotation every Police Officer or Security Guard could be given this training; that, while in-house trainers could do some training on the various shifts and would stage training exercises on any shift, when operating on permanent shifts outside training experts were available only to those on the day shift. Mr. Lumpkin emphasized that, although class room instruction is important, people are trained by doing the work.

The Authority has stated,

> “The Authority has consistently held that an agency’s right to determine internal security practices includes the right to determine the policies and practices that are necessary to safeguard its operations, personnel and physical property against internal or external risks. See National Association of Government Employees, Local R4-6 and Department of the Army, Fort Eustis, Virginia, 29 FLRA 966 (1987) (Proposals 1 and 2); American Federation of Government Employees, AFL-CIO, Local 987 and Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 24 FLRA 940 (1986). . . We have previously stated that the Authority will not review an agency’s determination that a particular internal security practice is necessary to protect the security of

its installations where a link has been established between an agency's action and its expressed security concern. That determination is a judgment committed to management under section 7106(a)(1) of the Statute. National Federation of Federal Employees, Local 15 and Department of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, 30 FLRA 1046, 1056 (1988), remanded as to other matters sub nom. Department of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois v. FLRA, No. 88-1239 (D.C. Cir. May 25, 1988).

International Federation of Professional and Technical Engineers, Local 25 and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 33 FLRA 304, 306-307 (1988).

See, to like effect, American Federation of Government Employees, Local 987 and U.S. Department of the Air Force, Robins Air Force Base, Georgia, 37 FLRA 197, 200 (1990). Here, Respondent has shown that there is a reasonable link between rotation of shifts of security personnel and the security of its operations.

In United States Department of Agriculture, Federal Grain Inspection Service, and United States Department of Agriculture, Federal Grain Inspection Service, Destrehan and Belle Chasse, Louisiana, 18 FLRA 119 (1985), the Authority held, in relevant part, as follows:

". . . the Authority concludes that the Respondent's unilateral change in the method of assigning weekend overtime did not violate the Statute since it constituted a change from a system which was inconsistent with the rights of management under section 7106(a) of the Statute and therefore outside the duty to bargain. Thus, the A and B system established by the local agreements, under which half of the unit employees were unavailable for assignment on any given weekend unless they volunteered, directly interfered with management's right to assign work under section 7106(a)(2)(B) of the Statute. (footnote omitted) As found by the Judge, the A and B system guaranteed employees every other weekend off. This resulted in an absolute prohibition on management's right to assign overtime work to certain employees, even where such assignments were deemed necessary, which

> right is reserved to management by the Statute. (footnote omitted) The extent to which the A and B system infringed upon management's statutory rights is underscored by record evidence that on occasions when the Respondent was unable to obtain sufficient personnel from volunteers and from the list of employees available for assignment, it was obliged to have employees detailed from other parts of the Agency in order to perform its weekend operations. Therefore, as the Authority concludes that the method of assigning weekend overtime in question did not involve a matter over which management could bargain at its election as set forth in section 7106(b)(1) of the Statute, but rather concerned the reserved right of management to assign work under section 7106(a)(2)(B) of the Statute, the Respondent was at no time under a statutory duty to bargain concerning its decision to change the weekend overtime assignment system. Accordingly, the Authority finds that the Respondent did not violate the Statute . . . ." (at 120-122).

Because rotation of shifts of security personnel was a matter of internal security pursuant to § 6(a)(1) of the Statute, Respondent was at no time under a statutory duty to bargain and neither by its notice of June 2, 2000, to terminate the 1995 MOU nor by its refusal to negotiate the change did Respondent violate § 16(a)(5) or (1) of the Statute.

C. RESPONDENT BARGAINED FULLY WITH UNION AND AFFORDED AMPLE NOTICE AND OPPORTUNITY FOR UNION TO SEEK AID OF FSIP

Respondent met with the Union on July 21, 2000, and at the outset made it clear that it would not negotiate the decision to rotate shifts but was there to negotiate the

impact and implementation of the change. For reasons fully

set forth above, this concerned Respondent's internal security and, pursuant to § 6(a)(1) of the Statute, Respondent was not obligated to bargain its decision to rotate shifts. The Union presented "concerns", which Respondent considered and sought to deal with, including its offer to extend the rotation to four months, rather than three, consider hardship cases, and offered to insure that no employee would be "taken out of school" because of rotation; but the Union made no I & I proposals and was insistent that, because of the 1995 MOU, Respondent could not unilaterally rotate shifts, and, because the position of each party was firm and un-yielding on the decision to rotate shifts, the Union declared "impasse" and requested the services of FMCS. Commissioner Madden was assigned and met with the parties on August 7, 2000. Respondent formally made its offer to make shift rotations four months, to delay implementation until September 10, 2000, and to consider hardship requests. The Union was uninterested in I & I bargaining and insisted that the 1995 MOU prevented Respondent from rotating shifts. Respondent was equally adamant that it could terminate the MOU, and it had done by its notice of June 2, 2000. Obviously, as Commissioner Madden concluded when he adjourned the meeting, the partes were at impasse as the parties were unable to reach agreement notwithstanding their efforts to do so by direct negotiations and by the use of mediation, 5 C.F.R. § 2470.2 (e), although he retained jurisdiction, to do more investigation. On August 16, 2000, Commissioner Madden called Respondent [Mr. Knight] and the Union [Ms. Roberts] and told each that he was releasing them from mediation and closing FMCS out of the matter. As I have found, Commissioner Madden, on August 16, 2000, told Ms. Roberts that he was closing the case and released the parties to appeal to the FSIP or FLRA if they so chose.

On August 23, 2000, Ms. Roberts in a letter to Mr. Lumpkin, repeated the Union's position that the 1995 MOU prevented the proposed change to rotating shifts and acknowledged that "Rumors have been going around that the shifts will be rotating on September of 2000." (G.C. Exh. 17). Of course, it was <u>not</u> a matter of rumor, as Ms. Roberts well knew, Respondent on August 7, 2000, in its last offer had made it clear that the planned date of implement was September 10, 2000.

On September 20, 2000, Respondent notified the Union that

rotation would begin September 24, 2000, and on September 20, 2000, Ms. Roberts filed the charge herein.

The Union knew on August 16, 2000, that it, as well as Respondent, was released from mediation; that FMCS was closing the case; and that it was free to appeal to FSIP or FLRA if it saw fit. The Union also knew on August 16, 2000, that Respondent had proposed to implement rotation on September 10, 2000. Accordingly, the Union with full knowledge of the proposed date of implementation of rotation had ample opportunity after August 16, 2000, to seek the assistance of FSIP but did not. Moreover, on September 20, 2000, Respondent informed the Union that shift rotation would begin on September 24, 2000. With four days before implementation following this notice, the Union did not seek assistance of FSIP. From August 16, 2000, the Union knew Respondent was free to implement shift rotation pursuant to its notice of August 7, 2000, that rotation would begin September 10, 2000. There can be no doubt that the Union had ample opportunity after FMCS released the parties from mediation on August 16, 2000, to invoke the services of FSIP but it did not. When Respondent delayed implementation on September 10, 2000, as it had stated in its notice of August 7, 2000, it issued a notice of the Union on September 20, 2000, that rotation would begin September 24, 2000. With four days from the date of this notice and the date of implementation, the Union again had ample opportunity to seek the assistance of FSIP. U.S. Customs Service, 16 FLRA 198, 200 (1984); U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 288, 294 (1981).

Whether the FSIP would, or would not, have accepted the dispute where there had been such abbreviated negotiations, notwithstanding that the Supreme Court has made it clear that the NLRA, ". . . does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position . . . ." National Labor Relations Board v. American National Insurance Company, 343 U.S. 395, 404 (1952), may never be known because the Union, rather than seek assistance of FSIP, filed an unfair labor practice charge. Not only did the Union make a knowing choice, but its choice foreclosed FSIP assistance inasmuch as FSIP does not accept cases where there is a pending unfair labor practice charge before the Authority.

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, AT-CA-00890 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 24, 2002
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CA-00890, were sent to the following parties in the manner indicated:

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Dated: May 24, 2002

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