UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

FEDERAL AVIATION ADMINISTRATION NEW YORK ARTCC RONKONKOMA, NEW YORK Respondent	
and PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS Charging Party	Case No. BN-CA-01-0108

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 **OCTOBER 1, 2001**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: August 30, 2001
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: August 30, 2001

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: FEDERAL AVIATION ADMINISTRATION
NEW YORK ARTCC
RONKONKOMA, NEW YORK

Respondent

and Case No. BN-CA-01-0108

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

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

OALJ

01-56

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION NEW YORK ARTCC RONKONKOMA, NEW YORK Respondent	
and PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS Charging Party	Case No. BN-CA-01-0108

Bruce Petroff
Representative for the Respondent

Michael D. Derby
Counsel for the Charging Party

Gary J. Lieberman
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the Federal Aviation Administration, New York ARTCC, Ronkonkoma, New York (Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by failing to afford the Professional Airways Systems Specialists (PASS or Union) with notice and an opportunity to negotiate to the extent required by law before implementing a policy prohibiting employees from working a 4/10 alternative work schedule (AWS) during the week of a federal holiday.

Respondent's Answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge,

but denied any violation of the Statute. The Respondent alleged that the subject matters and changes at issue are covered by Articles 41, 50, and 51 of the parties' collective bargaining agreement.

For the reasons explained below, I conclude that a preponderance of the evidence supports the alleged violations.

A hearing was held in New York, New York. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings which have been adopted were found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Parties

Respondent, located in Ronkonkoma, New York, is a division of the Federal Aviation Administration (FAA) responsible for the maintenance and repair of the FAA's air traffic control systems. Respondent, a 24 hour/7 day a week operation including holidays, is comprised of several separate units, including NOM/NAS, Communications/Inter-facility Data (COMM/IFD), Environmental Services Unit (ESU), Computer Operators Unit, Radar Data Processing and Flight Data Processing. Since 1995, Theodore Kiladitis has been Respondent's En Route Manager, the highest level management official at Respondent.

Organizationally, Respondent falls under the Airways Facilities Division's Liberty Systems Management Office (SMO). The Liberty SMO, in the FAA's Eastern Region, consists of Respondent, the New York TRACON, along with eight airports in the New York metropolitan area. At all material times in this case, Alan Gershon was the Liberty SMO Manager. Kiladitis reported to Gershon, the Liberty SMO Manager.

PASS is the certified exclusive representative of a nationwide unit of approximately 6000 employees at the Department of Transportation, Federal Aviation Administration, appropriate for collective bargaining. PASS's nationwide unit includes all-nonprofessional employees of the FAA's Regional Airways Facility Division. Included in the Union's bargaining unit are approximately 72

employees at Respondent, dispersed in the various units. At all material times, John Anderson was either the Union's Facility Representative at the Respondent, or the Acting Liberty SMO PASS Representative. The Liberty SMO PASS Representative during all other material times was Henry Brown. Pursuant to Article 69 of the parties' collective bargaining agreement, both Union representatives Anderson and Brown should receive notification of changes in practice and policy at Respondent, in writing, forty-five (45) calendar days in advance of the change.

The Parties Negotiated a Nationwide Collective Bargaining Agreement (Jt. Ex 1)

The parties' current collective bargaining agreement (contract or agreement) was executed on July 2, 2000. Michael Derby, Counsel for PASS, was on the Union's negotiating team, and was the lead spokesperson for the "non-economic" sections of the negotiations. Michael Herlihy, a senior labor relations specialist with the FAA, was the FAA's Chief Negotiator during the contract negotiations. Gershon was also on the FAA's negotiating team, representing Airway Facilities.

The Parties at the National Level Waived the Right to Assert the Second and Third Prong of the Authority's "Covered By" Doctrine

On July 17, 1998, prior to negotiating the substantive matters of the parties' current collective bargaining agreement, the parties agreed to the following language (herein "waiver") to be administered during the term of the collective bargaining agreement:

> The Federal Aviation Administration (FAA) and Professional Airways Systems Specialists (PASS) agree that with respect to the Federal Labor Relations Authority (FLRA) three prong test for determining whether a matter is "covered by" or "contained in" the collective bargaining agreement that the second and third prong of the FLRA's test will not be used as a claim by either party.

The agreement to waive the second and third prong of the "covered by" test was initialed by both representatives of PASS and the FAA, including the FAA's Chief Negotiator

Herlihy.[1] In order to obtain this waiver, the Union was required to make concessions on ongoing FAA realignment negotiations. The waiver was part of a package of other proposals that included language from other articles in the collective bargaining agreement, including Articles 69, Local/Regional Relationships, 70, National Relationship, and 76, Effect of Agreement.

Although the parties opted not to include the actual waiver in the final version of the collective bargaining agreement, it is undisputed that the waiver is effective for the term of the contract, and there is nothing in the parties' final agreement that is inconsistent with the waiver. Article 69, section 1 of the parties' agreement is consistent with the wavier, stating:

> The Parties have negotiated a comprehensive national agreement that constitutes the entire agreement between them. No separate local or regional supplemental agreements are authorized on any subject matter expressly contained in this collective bargaining agreement or any other national agreement of the Parties.

Section 2 of Article 69 provides for procedures for negotiations for changes in working conditions at the regional or lower organizational level not covered by the agreement.

The parties' intention in waiving the second and third prong of the FLRA's "covered by" test was that unless the collective bargaining agreement expressly spoke on an issue, or answered the question at hand, the matter would be appropriate for negotiations at the appropriate level.

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[1] While Respondent admitted in its Answer that the parties did agree to waive the second and third prong of the FLRA's "covered by" test, it maintains that the subject of AWS on a holiday week is expressly covered by Articles 41, 50, and/or 51, of the parties' agreement. Those articles, and other pertinent provisions of the contract, have been attached as Appendix A. Subsequent to the parties' agreement, the Authority clarified the "covered by" test by combining the second and third prong of the test outlined in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA, Baltimore*) into one prong. *U.S. Customs Service, Customs Management Center, Miami, Florida*, 56 FLRA 809 (2000).

The Parties Negotiated Changes to Article 41 (Holidays) Permitting Management to Staff down on a Holiday

During negotiations, the FAA expressed concerns about the holiday costs of paying premium pay, particularly in the FAA's Eastern Region. Employees who work on a holiday, or on an in lieu of day if their regular day off is a holiday, are paid a premium holiday pay, double their normal rate of pay. Article 41 (Holidays) of the parties' contract addresses holidays and in lieu of days. In addition, new language (the italicized last sentence) was added to Article 41, section 3 that did not appear in the parties' previous agreements:

> Section 3. The Employer shall post a list of employees assigned to work an actual holiday thirty (30) days in advance. Employee names shall not be removed from this list unless the employee exercises his/her option under Section 2 above. *The Employer shall determine the number of employees eligible to work an actual holiday based on operational requirements.*

Discussions on the new language in Article 41, section 3 focused on the number of employees who were to work on a holiday. The Employer retained the ability to staff down on a holiday to determine the number of employees eligible to work on a holiday based on operational requirements. In connection with the negotiations of Article 41, section 3, nothing was discussed by the parties about AWS or eliminating AWS on a holiday week in order to staff down. In the final version of Article 41, section 3, there is no mention about eliminating AWS on holidays or changing schedules. In fact, in Article 41 of the agreement the parties at the national level contemplated that employees would be working AWS during the weeks of a holiday by including an in lieu of chart for a 4 day work week (AWS) in Article 41, section 1.

FAA Chief Negotiator Herlihy testified, in his belief, that by agreeing to Article 41, section 3, management would have the absolute right to staff down on a holiday, "and make whatever changes were necessary in order to staff down and meet that requirement for the holiday period." Herlihy participated in portions of the guidance to managers on some of the significant changes to the contract issued subsequent to the execution of the agreement in July 2000. A version of the guidance to managers in the field provided that with regard to Article 41, section 3:

> It (Article 41, section 3) clarifies the employer's authority to determine the number of employees eligible to work a given holiday. Capability to staff down.

Nothing was mentioned in the guidance that the employer could eliminate AWS on the weeks of a holiday or change schedules in order to staff down.

PASS Rejected the FAA's Proposals in Articles 50 and 51 That Would Have Restricted Employees Use of Alternative Work Schedules or Eliminated Such Use.

Article 50 (Watch Schedules and Shift Assignments) of the parties' agreement defines the basic watch schedule as the days of the week, hours of the day, rotation of shifts and changes in regular days off. The basic watch schedule must meet coverage requirements. Article 50 of the CBA contemplates that if there is any change to the basic watch schedule, the Union will be notified at the appropriate level and will negotiate with the Union on the proposed change. Assignments of individual employees to the watch schedule are not considered changes to the basic watch schedule.

Section 2a of Article 50 provides that individual assignments to the watch schedule shall be posted at least 30 days in advance. Article 50, section 2b provides that changes to individual assignments to the watch schedule are undesirable, therefore, the employer agrees to make every reasonable effort to avoid such changes. Prior to making changes to individual employees assignments with less than seven days notice, the contract contemplates various alternatives, including overtime, volunteers and rescheduling of training.

During the negotiations of Article 50, section 2 the FAA proposed the following for inclusion in the collective bargaining agreement:

> However, employees on AWS (alternative work schedule) may be required to change to the regular 8 hour schedule on a temporary basis.

The FAA's proposal to include express language in Article 50, section 2 of the contract that allowed the employer to change employees on AWS to a regular eight hour schedule on a temporary basis was rejected by the Union and was not

included by the parties in the final version of the collective bargaining agreement.[2]

Article 51, section 4 (Working Hours) of the parties' agreement addresses the alternative work schedules available to bargaining unit employees on a voluntary basis to the extent operational requirements permit. Article 51, section 4 does not define "operational requirements." According to Kiladitis, however, operational requirements are the number of individuals required in each area to maintain, operate and run the facility. There is nothing in the contract that prohibits management from exceeding its determined operational requirements.

At hearing, several management witnesses asserted "costs" as an operational requirement, and a basis for Respondent's decision to implement the policy eliminating AWS during a holiday week. The approval of AWS during a holiday week results in a two hour overlapping shift, and an additional two hours of holiday premium pay. However, in the past two generations of contracts, cost was never considered an operational requirement. Moreover, there is language in Article 51 that reveals that the parties consider operational coverage to be separate and distinct from cost (additional premium pay). Article 51, section 2 of the contract provides that flexible starting times may be approved by the employer provided "operational coverage is not affected or additional premium pay incurred."

Included in the AWS option is for employees to work four workdays of ten hours. There is no express language in Article 51 that precludes employees from working an AWS during the week of a holiday, expressly addresses management's right to terminate AWS during the week of a holiday or even discusses AWS during the week of a holiday.

The language of Article 51, section 4 was identical to the language of Article 51 in the parties' previous agreements. In fact, the language has been "the same for three generations of contracts." Towards the end of negotiations for the parties' current contract, FAA Chief Spokesperson Tom Gassert took the position that he wanted to eliminate AWS, or severely limit the use of AWS. In connection with the FAA's proposal to eliminate AWS was a management concern that AWS resulted in higher costs because

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[2] By implementing the policy terminating AWS during a holiday week in October 2000, Respondent implemented a policy that was substantially similar to the express authorization FAA attempted to obtain, but did not achieve, at the national level negotiations.

of overlapping shifts. The parties, however, agreed to retain the identical AWS language in the contract that was in the parties' prior agreement. Guidance issued by management to its supervisors about significant changes in the new contract, including any changes to Article 50 and 51, does not mention anything about the elimination of AWS on holidays.

Article 69 (Local/Regional Relationships) and Article 70 (National Relationship) Address Negotiations at the Local/ Regional Level and at the National Level.

In Article 69 (Local/Regional Relationships), the parties agreed that since a comprehensive national agreement was negotiated, no separate local or regional supplements would be authorized on any subject matter expressly contained in the agreement. This language is consistent with the parties agreement to waive the second and third prong of the "covered by" test. The parties also agreed, in Article 69, section 2, to procedures to negotiate changes to personnel policy, or practice, or matters affecting working conditions that are made at the regional or local level. Article 70 of the parties' agreement addresses policy changes made at the national level. Section 1 of Article 70 provides that the parties would negotiate national level changes at the regional or local level only by express agreement by the parties.3

One of the concerns that the FAA voiced during contract negotiations was the multitude of memoranda of understanding and agreements that the parties at the local or regional level had agreed to over the years during the parties' prior collective bargaining agreement. In that regard, under Article 79 (Effect of the Agreement) the parties agreed to invalidate any written local, regional or national agreements that increased or diminished entitlements as expressly contained within or otherwise conflict with the express provisions of the agreement. Article 79 also established procedures if either of the parties determines that a provision in a local or regional written agreement is in conflict with the express provisions of the collective bargaining agreement.

The Basic Watch Schedule and Alternative Work Schedules at Respondent

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3 Respondent claimed at trial that Article 70 precludes bargaining on the change at issue in this case. Because the issue in this case concerns a change made at the local level, not the national level, Article 70 does not apply.

Each of the units at Respondent has a separate basic watch schedule for the entire calendar year that is negotiated by the parties. Once Respondent establishes the coverage requirements of each shift, the Union proposes a schedule that is negotiated with management. The employees at issue in this case work rotating shifts (i.e., a week of midnight, a week of evenings or several weeks of days). A monthly schedule, drafted by the coordinator in each unit, reflects any changes to the basic watch schedule or reassignments to vacant shifts based on annual leave or training. All the basic watch schedules for the units other than that of the COMM/IFD unit, were based on an eight hour, five day a week schedule.[4]

Employees at Respondent in the various units worked AWS schedules (four days a week, ten hours a day) on a voluntary basis in accordance with the parties' national agreement. AWS request procedures and the availability to work AWS varied in Respondent's units. Prior to October 2000, employees requests to work AWS were denied only if coverage on a shift would be below the coverage requirements established by Respondent.[5] It is undisputed that prior to October 2000 Respondent did not have a policy that prohibited employees from working AWS the week of a federal holiday, and that employees would regularly work AWS the week of a federal holiday and receive holiday premium pay if they worked on the actual holiday, or on their in lieu of day.

In the COMM/IFD unit AWS was part of the basic watch schedule prior to October 2000, and eight of the nine

[4] Kiladitis testified that none of the units, including the COMM/IFD unit had AWS as part of the basic watch schedule. At hearing, Respondent introduced the basic watch schedule for every unit except for the COMM/IFD unit, claiming that the schedule was "not printed." Respondent had the capability to reproduce colorful monthly schedules for all the units, including the COMM/IFD unit, but inexplicably was unable to reproduce the basic watch schedule for the COMM/IFD. An adverse inference is drawn that if the COMM/IFD basic watch schedule were produced, it would reveal that AWS was part of the basic watch schedule.

[5] Respondent introduced into evidence the schedules of all employees in the units from the period of July 30, 2000 to January 13, 2001 in order to demonstrate the frequency of AWS usage. These schedules (R Ex 3) are not a totally accurate reflection of the AWS usage of employees because they include employees not eligible to work AWS and do not account for employees on leave or on training.

employees worked AWS. The COMM/IFD unit employees submitted a schedule in the beginning of the year that included AWS and they were not required to submit weekly, or biweekly requests for AWS. Cedric Johnson, a bargaining unit employee in COMM/IFD, has worked an alternative work schedule for the past four years, except for a few weeks due to training and leave scheduled in the COMM/IFD unit.[6] In September 2000, the month before the AWS policy was implemented in this case, Johnson, and other employees in the unit (Cepeda, Samuel, Delgado and Schoen) worked AWS every single week, including the week of Labor Day. Prior to October 2000, during the weeks of a federal holiday, employees in the COMM/IFD unit continued to work AWS like any other week during the year and received ten hours of holiday premium pay.

Employees in the Environmental Services Unit (ESU) submitted in advance a written request to work AWS for each pay period with the first line supervisor, Ed Yard. Prior to October 2000, Yard would approve the AWS requests in ESU for every pay period, including the week of a federal holiday, as long as coverage requirements were met in light of leave and training schedules. Anthony Cavallaro has been an ESU technician since October 1997. Prior to October 2000, Cavallaro has requested to work AWS every week, including the week of a federal holiday, and those requests would normally be approved depending on leave and training schedules.

In the Computer Operations or Data Unit, five of the seven employees worked AWS when it was available based on operational requirements. Employees requested to work AWS from the unit coordinator, Beverly Faber, once the monthly schedule is posted. Faber has been completing the monthly schedule since 1990. Prior to October 2000, there was never a restriction in this unit on whether employees could work AWS the week of a federal holiday. In addition, all fourteen employees in the NOM/NAS unit work AWS, by submitting a standing request to work AWS when available. The employees in the NOM/NAS unit have worked AWS two weeks out of the seven week rotation at least for the past six years.

Respondent Negotiated with the Union Procedures for Staffing down on Holidays Pursuant to Article 41, Section 3

6 Kiladitis apparently was unaware of the pervasive use of AWS in the COMM/IFD unit and testified that Respondent does not approve AWS for long periods of time, approving AWS only on a pay period by pay period basis.

Following the execution of the parties' collective bargaining agreement in July 2000, facilities in the Liberty

SMO, including Respondent, had the ability to “staff down”

on holidays by determining "the number of employees eligible to work an actual holiday based on operational requirements" pursuant to Article 41, section 3. Gershon, the SMO Manager, agreed with Henry Brown, the Liberty SMO PASS, that they would allow Kiladitis and Anderson to determine a procedure at Respondent on how to implement Article 41, section 3, and it would be adopted for all facilities in the Liberty SMO.

In August 2000, Anderson and Kiladitis discussed the procedures for staffing down at Respondent in accordance with Article 41, section 3 of the parties' nationwide agreement. Anderson and Kiladitis agreed to a procedure that would provide for a fair and equitable distribution of which employees would be able to work on a holiday and receive holiday pay based on the employees' service computation dates. The procedure, as agreed to by the parties and reflected in memos to employees prior to each holiday was as follows:

> When coverage on the actual holiday exceeds operational requirements as determined by management, the employee on the watch schedule with the earliest service computation date (SCD), in a rotating order based on the last holiday worked, will be assigned to work the actual holiday. All others will observe the holiday.
>
> A list will be established of employees in each area by SCD and a record kept of who worked the previous holiday so that holiday work assignments can be distributed as equitably as possible. An employee will be considered to have worked the holiday if they relinquish their turn and elect to observe the holiday, and the next employee in line works in their place.
>
> If a tie exists with SCD, then the tiebreaker will be FAA service time, followed by alphabetical order.

Respondent determined that the operational coverage for holiday period would be one employee per shift.

During the August 2000 discussions between Kiladitis and Anderson on the staffing down procedures, nothing was mentioned or discussed about AWS, the elimination of AWS on the weeks of holidays, or whether staffing down would impact employees' AWS. Kiladitis testified that PASS representative Anderson "had knowledge of the fact that it

(staffing down) involved AWS" since the operational staffing requirement determined by management was one person per eight hour shift, but that the Union did not voice any objections. Kiladitis later testified that he "mentioned" to Anderson that it would impact AWS. The written notification to the employees about the procedures the parties agreed upon about downstaffing on the holiday does not mention anything about AWS, or the elimination of AWS during the holiday week.

After the downstaffing procedures were agreed upon by Anderson and Kiladitis at the Respondent, the procedure was forwarded to the Liberty SMO level where Gershon and Brown agreed that the procedures would be adopted throughout the Liberty SMO. During the discussion of the downstaffing procedures between Gershon and Brown at the Liberty SMO level, nothing was discussed about AWS or the elimination of AWS as part of downstaffing. Respondent is the only facility throughout the entire Liberty SMO, and the country, that has implemented a policy eliminating AWS as part of downstaffing.[7]

Respondent Implemented a Policy Eliminating AWS During the Week of a Federal Holiday and Employees Are Denied AWS Beginning in October 2000.

En Route Manager Kiladitis implemented the policy prohibiting bargaining unit employees from working an AWS during the week of a federal holiday beginning with the Columbus Day Holiday in October 2000. Kiladitis made the decision to implement the policy at Respondent on his own understanding of the contract without consulting the FAA's labor relations staff. He did not participate in contract negotiations and was unaware at the time that he had implemented the policy that the parties at the national level had agreed to waive the second and third prong of the FLRA's "covered by test".[8]

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[7] Liberty SMO Manager Gershon's own understanding of the downstaffing procedures agreed to by Anderson and Kiladitis did not include the elimination of AWS on a holiday week, and the elimination of AWS was not implemented in other facilities in the Liberty SMO.

[8] Kiladitis testified that while he made the decision to implement the policy alone, he consulted with Liberty SMO Manager Gershon before implementing the change. Gershon denied that he was involved in the decision to implement the policy.

Kiladitis acknowledged that prior to October 2000, Respondent had no restrictions with regard to approving AWS during a holiday week. Kiladitis also recognized that the language in Article 51, including section 4, did not change from the parties' prior agreement. According to Kiladitis, the impetus behind the policy eliminating AWS on holiday weeks, and the reason that permitted Respondent to make the change, was the new language in Article 41, section 3 of the parties' agreement concerning staffing down. Kiladitis determined that the operational requirement on a holiday was to have one specialist per area per eight hour shift. In considering "operational requirements," in addition to the number of employees on the watch, Respondent considered the "costs," specifically, the extra two hours of holiday premium pay incurred when an employee on AWS overlaps with an employee on the next shift.[9] Kiladitis maintained that there was no operational requirement to have double coverage for those two hours on a holiday.

Under Article 41, section 3, Respondent had the ability to "determine the number of employees eligible to work an actual holiday based on operational requirements." It is undisputed that if one, or all, of the three employees in a unit worked an alternative work schedule (which would include an overlapping shift(s)), the *same number* of employees (three) would be working on the holiday even if none of the employees worked AWS.

Employees learned of the new policy prohibiting AWS during the week of a holiday in different manners, and at various times. In some of the units employees were prohibited from working AWS for the Columbus Day Holiday in October 2000, and in other units the policy was not implemented until later. After reaching an agreement on the staffing down procedures with the Union, Kiladitis met with employees in the Computer Operators Unit in a unit meeting to discuss the new procedures.[10] During the meeting Kiladitis explained to the employees in the unit the

[9] Inherent in any AWS schedules is some overlap of coverage. When questioned whether Respondent could eliminate AWS on Saturdays, where double coverage would also exist, Kiladitis responded, "Depending on operational requirements and cost." Kiladitis' testimony that operational requirements are separate and distinct from cost is also reflected by the parties in Article 51, section 2, discussing the approval of flexible starting times.

[10] Although Faber testified that the meeting was in July 2000, it must have been in August 2000, after Anderson and Kiladitis met, and agreed to the downstaffing procedures.

procedures Respondent would use to determine who would work on a holiday but did not mention anything about changes to their alternative work schedules, or that AWS would be eliminated the weeks of a holiday. Subsequent to the meeting, when Faber, the unit coordinator, furnished her supervisor the October 2000 schedule for his approval, the supervisor asked her if any employee was scheduled to work AWS the week of the federal holiday. Faber responded no, but asked why. Her supervisor stated that employees on AWS could not work on a holiday, or the in lieu of day. Thereafter, in November 2000, Faber was ordered by her supervisor to put the employees who had been scheduled to work AWS on the two November holidays on an eight-hour day. This had never happened before on a holiday. Similar to the Computer Operators Unit, in the NOM/NAS unit, employees were informed of the staffing down procedures in October 2000, but did not find out about the termination of AWS during the week of a holiday until the November - December 2000 time frame.

In the ESU, on September 22, 2000, employee Cavallaro submitted a request to his supervisor, Ed Yard, to work AWS for pay period 22, which included the Columbus Day Holiday. Cavallaro had worked AWS for the nine weeks preceding the Columbus Day holiday. Yard denied Cavallaro's request to work AWS the first week of pay period 22 which included the Columbus Day holiday, and approved his AWS request for the second week of pay period 22. Supervisor Yard wrote on the bottom of Cavallaro's AWS request form that "AWS on actual holiday would result in additional holiday costs (10 vs. 8 assigned hrs." In Yard's denial, nothing was mentioned to Cavallaro about Respondent's operational requirements. Cavallaro later continued to request AWS the weeks of a holiday and those requests were denied. Yard finally wrote Cavallaro in April 2001, "There is no AWS during the holiday week, period."

In the COMM/IFD unit, in October 2000, employees were taken off of AWS that they had already been scheduled for and placed on a regular eight hour, five day a week schedule.

Respondent Refused to Negotiate after the Union Learned of the Implementation of a New AWS Policy

PASS facility representative John Anderson first learned of the implementation of the policy prohibiting AWS on the weeks of a holiday after employees were taken off of the AWS schedule in October 2000 and placed on a straight

five day, eight-hour schedule.[11] The Union received no prior notification of the AWS policy change. Upon learning of the policy change in October 2000, Anderson called En Route Manager Kiladitis who confirmed that the policy change was not inadvertent. On October 12, 2000, Anderson sent Kiladitis an e-mail informing Respondent that the Union considered the policy prohibiting AWS during a holiday as a change in practice. Anderson demanded that the past practice of permitting AWS on holidays be reinstated. He stated that if Respondent would like to change the practice, that the Union be provided with the appropriate notification pursuant to Article 69 of the parties' agreement and an opportunity to fully negotiate the change in policy. Anderson later clarified that the Union was not intending to undermine Respondent's ability to staff down on the holiday. The Union did not receive a response to these requests.[12]

After Anderson was unsuccessful at the local level with Kiladitis, he raised the issue with Gershon and Don Weiner at the SMO Level on October 23, 2000. Subsequently, in a telephone conversation with Gershon, Anderson learned that Respondent was not going to rescind the policy and that Gershon claimed that Respondent had an operational necessity to be fiscally responsible.[13] Anderson then sent Gershon a letter on November 7, 2000, explaining that the Union was planning on exercising its rights to require management to stop the policy and make whole all affected employees. Nevertheless, Respondent continued with the policy implementation without bargaining and by 2001 all of Respondent's units prohibited employees from working AWS during the week of a federal holiday.

The Impact of the Policy Change on the Working Conditions of Bargaining Unit Employees

[11] In Anderson's first correspondence to management after the policy change, dated October 12, 2000, he wrote, "I have just become aware that AWS is being denied during weeks there is a holiday." Anderson's letter is consistent with his overall testimony of when he first learned of the AWS policy change.

[12] Respondent never claimed in response to the Union's October 12, 2000, request to bargain or in its Answer to the complaint that the subject of AWS on holidays had been raised by Kiladitis during the downstaffing negotiations with the Union in August 2000. It was raised for the first time at the hearing.

[13] At hearing, Gershon testified that the decision to implement the AWS policy was really an economic decision.

It is undisputed that employees in the bargaining unit were impacted by Respondent's decision to eliminate AWS during the weeks of a federal holiday. There are ten (10) federal holidays in a calendar year[14], and the elimination of AWS during the week of a holiday reduced the total number of weeks employees could work AWS during the year by approximately ten percent. Foremost, employees who would have worked AWS during the holiday would have received 2 extra hours of holiday pay. Employees who could have worked AWS and were placed on an eight hour schedule also lost their in lieu of days, which would have amounted to ten hours of premium pay. Furthermore, other employees who were not working AWS also lost holiday pay as a result of the AWS policy implemented by Respondent. An employee who was scheduled to work a regular eight hour schedule, and would have received holiday premium pay, was bumped off the holiday schedule in conjunction with downstaffing, after an employee working AWS was placed on a regular eight hour, five day a week schedule.

Employees who were taken off AWS, or denied AWS during the holiday week, also lost a regular day off. Respondent requires employees to submit leave requests at the beginning of the year, and employees often attempt to optimize their vacation times around their regular days off, including the extra regular day off an employee is afforded by working AWS. In February 2000, employees submitted their leave requests with the knowledge that AWS would be available during the week of the holiday. The policy change prohibiting AWS on a holiday forced one employee to either cancel his vacation plans or take annual leave.

As a result of the new AWS policy some employees who lost a regular day off were required to commute an extra day to Respondent's facility, some 30 to 40 miles away. Employees who had second jobs and child care responsibilities were also impacted by Respondent's change in the AWS policy.

Discussion and Conclusions

The General Counsel and the Union contend that the Respondent violated section 7116(a)(1) and (5) of the Statute when it unilaterally implemented a policy changing the working conditions of employees by prohibiting employees from working an alternative work schedule during the weeks of a federal holiday. They contend that the matter was not

[14] Official notice, Office of Personnel Management web site at www.opm.gov.

expressly covered by the contract under *SSA, Baltimore* and the contract did not permit the action under *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993).

The Respondent defends on the basis that the subject is covered by Articles 41, 50, and 51 and that bargaining on the matter is precluded by an interpretation of Articles 69 and 70. The Respondent takes an expansive view of "subject matter" and argues that the "subject matters" at issue here involve staffing down on holidays, participation in AWS subject to operational requirements, and changes in individual assignments to the watch schedule, which are all "subject matters" expressly covered by Articles 41, 50, and 51. Respondent contends that it exercised a contractual right under its new collective bargaining agreement to staff down on a holiday which included the right to determine how and when that would be done. Second, any changes required in the employee's work schedule were done in accordance with the applicable provisions of the parties' new collective bargaining agreement. Accordingly, the Respondent argues that it had no obligation to bargain and local bargaining was precluded by Article 69.

In *SSA, Baltimore*, the Authority established a three-prong test for determining whether a particular change in conditions of employment is "covered by" an existing collective bargaining agreement between the parties. This assertion is commonly referred to as a "covered-by" defense. The parties in this case waived the second and third prong of the defense. Under the first prong, the Authority looks to the express language of the agreement to determine whether it reasonably encompasses the subject in dispute. *Department of the Treasury, United States Customs Service, El Paso, Texas*, 55 FLRA 43, 46-47 (1998); *Social Security Administration, Region VII, Kansas City, Missouri*, 55 FLRA 536, 538 n.1 (1999).

I conclude that the express language of Articles 41, 50, and 51 does not reasonably encompass the subject in dispute, the prohibition of employees from working an alternative work schedule during the week of a federal holiday.

Article 41, Holidays, Section 3 provides that the employer "shall determine the number of employees eligible to work an actual holiday based on operational requirements." It speaks in terms of the number of employees on the actual holiday. There is no mention of eliminating alternate work schedules *during the week* of a holiday or changing schedules. Moreover, Article 41, Section 1 contemplates that employees could be working

alternate work schedules during the week of a holiday by including a chart for a scheduled 4-day work week showing holidays, scheduled days off, and days to be observed in lieu of the actual holiday.

Article 51, Section 4 (Working Hours) provides that the alternative work schedule (the 5/4-9 Plan; comprising eight 9-hour and one 8-hour days) is one of several plans available on a voluntary basis to the extent "operational requirements" permit. While, consistent with Article 41, management can determine the number of employees eligible to work an actual holiday based on operational requirements, there is no express language providing for the elimination of alternative work schedules during an entire holiday work week. Assuming that 8-hour shifts are required on a holiday, there is no explanation of why the Respondent would not have the discretion to make the holiday the 8-hour day to eliminate any overlapping and still allow employees to meet the 80 hour bi-weekly work week.

Article 50, Watch Schedules and Shift Assignments, Section 2(b) recognizes that changes of individual assignments on the watch schedule are undesirable and enumerates efforts that management will take to avoid changes with less than seven days notice. The express language of this provision pertains to essential changes in individual assignments and does not reasonably encompass the blanket policy change made in this case which prohibited all employees from working alternative work schedules on holiday weeks, ten weeks out of the year.

Article 69, Local/Regional Relationships, Section 1, provides that "No separate local or regional supplemental agreements are authorized on any subject matter expressly contained in this collective bargaining agreement . . . ." The language of Article 69 (and 70 and 79) is consistent with the parties' "covered by" waiver. As found above, I conclude that the subject matter at issue here is the prohibition of employees from working an alternative work schedule during the week of a federal holiday, and the express language of Articles 41, 50, and 51 does not reasonably encompass that subject. Therefore, the Respondent's statutory obligation to bargain in this instance has not already been accomplished and would not be precluded by Article 69 (and 70 and 79) of the agreement.

Duty to Bargain

The Authority has found that the establishment and termination of alternative work schedules are conditions of employment that are fully negotiable within the limits set

by the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Work Schedules Act). 5 U.S.C. § 6120, *et seq.; see Space Systems Division, Los Angeles AFB, Los Angeles, California*, 45 FLRA 899, 902-03 (1992); *U.S. Department of the Air Force, 416 CSG, Griffiss Air Force Base, Rome, New York*, 38 FLRA 1136, 1147 (1990). The duty to bargain over the establishment and termination of AWS programs includes the duty to bargain on matters pertaining to the implementation and administration of those schedules. *See National Association of Government Employees, Local R12-167 and Office of the Adjutant General, State of California*, 27 FLRA 349, 352-54 (1987) *reversed as to other matters sub nom. California National Guard and DoD v. FLRA*, 854 F.2d 1396 (D.C. Cir. 1988); *Air Force Accounting and Finance Center, Denver, Colorado*, 42 FLRA 1196, 1204-07 (1991).

The record clearly establishes that the ability of employees to work an alternate work schedule during a week of a federal holiday at Respondent was an established past practice. For a period of at least ten years, under the parties' previous two collective bargaining agreements, employees were permitted to work AWS on the week of a holiday and receive holiday premium pay.[15] AWS usage, and the procedures to request AWS varied in each of the units. However, Respondent's En Route Manager Kiladitis admitted that prior to October 2000, Respondent did not retain any policy that prohibited employees from working AWS the week of a federal holiday, and that employees would regularly work AWS on the weeks of a federal holiday. Employees were taken off of AWS, or denied a request to work AWS, only for operational requirements (i.e., coverage, such as other employees on leave and training). However, it is undisputed that prior to October 2000, employees had never been prohibited from working AWS in any of Respondent's units simply because it was the week of a holiday. The only operational requirement in Article 51, section 4 considered by Respondent prior to October 2000 was that the coverage of a shift was met.

Respondent Failed to Provide the Union with Adequate Notice of its Decision to Implement the AWS Policy

It is well established that a term and condition of employment established by practice may not be altered by either party in the absence of agreement or impasse following good faith bargaining. *Norfolk Naval Shipyard*, 25

15
An employee who works ten hours on a holiday as part of an alternative work schedule is entitled to a full ten hours of premium pay. 5 USC § 6128(d).

FLRA 277, 286 (1987). This means not only that the union must be notified in advance, but also that the agency must preserve the *status quo* until the negotiations have been concluded. *See U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 902-03 (1999). Additionally, the notice to the union "must be sufficiently specific or definitive regarding the actual change contemplated so as to adequately provide the union with a reasonable opportunity to request bargaining." *Ogden Air Logistics Center, Hill Air Force Base, Utah* and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 41 FLRA 690, 698 (1991); *see, for example, Department of the Army, Harry Diamond Laboratories, Adelphia, Maryland*, 9 FLRA 575, 576 (1982) (holding that a mere passing reference to a change, which is unlikely to put the union on notice of its meaning, does not satisfy this requirement).

The credible evidence in this case revealed that the Union did not receive adequate notice of Respondent's intention to implement the new AWS policy in October 2000. Anderson and Kiladitis had discussions concerning downstaffing in August 2000, and reached an agreement about how the parties would downstaff pursuant to Article 41, section 3 of the parties' recently executed collective bargaining agreement. During those discussions nothing was mentioned by Kiladitis about AWS, or that Respondent planned to eliminate AWS on the weeks of holidays. The Union, while negotiating with Respondent over downstaffing procedures was left in the dark on Respondent's intention to implement the AWS policy in October 2000 and was never notified prior to implementation.

In addition to the consistent, unequivocal testimony of Anderson, other undisputed facts revealed that the Union was never notified of Respondent's decision to implement the AWS policy in October 2000. In August 2000, Kiladitis held a meeting with employees in the Computer Operators Unit to discuss the downstaffing procedures that would take place for the upcoming holidays. It is undisputed that during the meeting, Kiladitis never mentioned that AWS would be eliminated as part of downstaffing. Similarly, notices to employees of who would work the holiday discussed the downstaffing procedures agreed to by the parties, but never referenced AWS, or the elimination of AWS during holiday weeks. In addition, after Anderson and Kiladitis agreed to the downstaffing procedures, this agreement was forwarded to Liberty SMO Manager Gershon for adoption throughout the Liberty SMO. During discussions at the Liberty SMO level, nothing was discussed about eliminating AWS during holiday weeks, and Respondent remains the only facility in the

Liberty SMO, and the country, that has prohibited AWS during the weeks of a federal holiday.

It is undisputed that after the Union requested to negotiate the new policy change in October 2000, Respondent never replied to the Union's bargaining request by contending that Anderson had previously been informed of the AWS policy during the August 2000 discussions with Kiladitis.

Respondent's Decision to Eliminate AWS on Holidays Was Substantively Negotiable and Respondent Violated the Statute When it Failed and Refused to Bargain with the Charging Party

The General Counsel contends, and the Respondent does not dispute (assuming its obligation to bargain), that it had an obligation to bargain the substance of its decision to change the alternative work schedule policy.[16] Respondent's failure to do so violated section 7116(a)(1) and (5) of the Statute, as alleged.

Remedy

The General Counsel requests a *status quo ante* remedy and a make-whole remedy for adversely affected employees who lost holiday pay and regular days off when Respondent eliminated alternate work schedules on the week of a holiday without bargaining with the Union.

The proposed remedy would effectuate the purposes and policies of the Statute. Consistent with established precedent and in the absence of any specific evidence that a *status quo ante* remedy would be disruptive to the efficiency and effectiveness of the Respondent's operations, a *status*

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16 Where, as here, there is an obligation to bargain over the substance of a change, the effect of the change on working conditions is not relevant. *U.S. Department of Labor, Washington, DC*, 44 FLRA 988, 994 (1992). Should it be deemed necessary to determine whether there was more than a *de minimis* impact on bargaining unit employees, and to avoid the necessity of a possible remand, I would conclude that the findings, as set out above, reflect that the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees was more than *de minimis*, thus requiring the Respondent to bargain with the Union on the impact and implementation of its decision. A *status quo ante* remedy would also be appropriate under the factors to be considered under *Federal Correctional Institution*, 8 FLRA 604, 606 (1982).

quo ante remedy is deemed appropriate[17]. *U.S. Department of Justice, Immigration and Naturalization Service, Washington, DC*, 56 FLRA 351, 358-60 (2000); *Department of Veterans Affairs, Veterans Administration Medical Center, Veterans Canteen Service, Lexington, Kentucky*, 44 FLRA 179, 191 (1992).

In addition, make whole relief, consistent with the Back Pay Act, 5 U.S.C. § 5596, is also warranted in this case since any loss of pay and benefits by employees resulted directly from Respondent's unwarranted personnel action, i.e., its refusal to bargain. *See, e.g., U.S. Department of the Interior, Bureau of Indian Affairs, Gallup, New Mexico, 52 FLRA 1442 (1997); Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas,* 39 FLRA 1325 (1991). Here, employees not only lost holiday pay but also lost regular days off when Respondent eliminated AWS on the week of a holiday. The Authority has repeatedly recognized that remedies should be designed to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." *See, e.g., Department of Defense Dependents Schools*, 54 FLRA 259, 269 (1998).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Federal Aviation Administration, New York ARTCC, Ronkonkoma, New York (New York ARTCC) shall:

1. Cease and desist from:

(a) Unilaterally changing the policy of permitting employees to work an alternative work schedule (AWS) during the week of any pay period that includes a federal holiday without notifying the Professional Airways Systems Specialists (PASS), the exclusive representative of certain of its employees, and affording PASS the opportunity to bargain over the change.

[17] As the General Counsel recognizes, *status quo ante* relief would not preclude the Respondent from denying AWS to employees for reasons consistent with the established practice and other than simply because it is the week of a federal holiday.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reinstate the practice of allowing bargaining unit employees to work an alternative work schedule during the week of any pay period that includes a federal holiday.

(b) Notify and, upon request, bargain with the Professional Airways Systems Specialists on any proposed change in the practice of allowing employees to work alternative work schedules during the week of a federal holiday.

(c) Reimburse any bargaining unit employee for the loss of pay and benefits (including loss of regular days off) that he/she suffered as a result of the New York ARTCC's unilateral implementation in October 2000 of the policy prohibiting AWS during the week of a federal holiday. Back pay shall be paid in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, and will include the payment of interest.

(d) Post at its facilities at the New York ARTCC, Ronkonkoma, New York 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 New York ARTCC's En Route Manager, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Boston Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 30, 2001

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Federal Aviation Administration, New York ARTCC, Ronkonkoma, New York violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We Hereby Notify Our Employees That:

WE WILL NOT unilaterally change the policy of permitting employees to work alternative work schedules (AWS) during the week of any pay period that includes a federal holiday without notifying the Professional Airways System Specialists, the exclusive representative of our employees, and affording it the opportunity to bargain over the change.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reinstate the practice of allowing bargaining unit employees to work alternative work schedules during the week of any pay period that includes a federal holiday.

WE WILL notify and, upon request, bargain with the Professional Airways Systems Specialists on any proposed change in the practice of allowing employees to work alternative work schedules during the week of a federal holiday.

WE WILL reimburse any bargaining unit employee for the loss of pay and benefits (including loss of regular days off) that he/she suffered as a result of the Agency's unilateral implementation of the policy prohibiting AWS during the week of a federal holiday beginning in October 2000. Back pay shall be paid in accordance with the Back Pay Act, 5 U.S.C. § 5596, as amended, and will include the payment of interest.

(Activity)

Date: By:
(Signature) (Title)

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

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

APPENDIX A[1/]

ARTICLE 41

HOLIDAYS

Section 1. When a holiday falls on an employee's regular day off, the following days shall be observed in lieu of the actual holidays:

Scheduled 5-Day Work Week

Scheduled Days Off	When Actual Holiday Falls On	Days Observed In Lieu of the Actual Holiday
Saturday-Sunday	Saturday Sunday	Preceding Friday Following Monday
Sunday-Monday	Sunday Monday	Following Tuesday Preceding Saturday
Monday-Tuesday	Monday Tuesday	Following Wednesday Preceding Sunday
Tuesday-Wednesday	Tuesday Wednesday	Following Thursday Preceding Monday
Wednesday-Thursday	Wednesday Thursday	Following Friday Preceding Tuesday
Thursday-Friday	Thursday Friday	Following Saturday Preceding Wednesday
Friday-Saturday	Friday Saturday	Following Sunday Preceding Thursday

1/ Contract articles can also be found in Joint Exhibit 1.

Scheduled 4-Day Work Week

Scheduled Days Off	When Actual Holiday Falls On	Days Observed In Lieu of the Actual Holiday
Sunday	Sunday	Following Wednesday
Monday	Monday	Preceding Saturday
Tuesday	Tuesday	Preceding Saturday
Monday	Monday	Following Thursday
Tuesday	Tuesday	Preceding Sunday
Wednesday	Wednesday	Preceding Sunday
Tuesday	Tuesday	Following Friday
Wednesday	Wednesday	Preceding Monday
Thursday	Thursday	Preceding Monday
Wednesday	Wednesday	Following Saturday
Thursday	Thursday	Preceding Tuesday
Friday	Friday	Preceding Tuesday
Thursday	Thursday	Following Sunday
Friday	Friday	Preceding Wednesday
Saturday	Saturday	Preceding Wednesday
Friday	Friday	Preceding Thursday
Saturday	Saturday	Preceding Thursday
Sunday	Sunday	Following Monday
Saturday	Saturday	Preceding Friday
Sunday	Sunday	Following Tuesday
Monday	Monday	Preceding Friday

Section 2. To the extent that operational requirements permit, employees scheduled to work on actual established legal holidays or days observed in lieu of such holidays shall be given such day off if they so request.

Section 3. The Employer shall post a list of employees assigned to work an actual holiday thirty (30) days in advance. Employee names shall not be removed from this list unless the employee exercises his/her option under Section 2 above. The Employer shall determine the number of employees eligible to work an actual holiday based on operational requirements.

Section 4. Watch schedules on days in lieu of holidays shall not be changed so as to avoid payment of holiday pay. Specifically, employees qualified to work and whose normal schedule calls for them to work will not be placed on holiday leave on a day in lieu of a holiday without the employee's consent.

Section 5. If the legal holiday falls in the middle of the employee's workweek, the Employer, at an employee's request, if operational requirements permit, will change the employee's regular days off to provide three (3) days off in succession, provided the employee makes such request in time for the Employer to meet the requirements of Section 3 of this Article. This provision is subject to the condition that no payment of overtime will result from the change, and does not apply to employees working administrative non-rotating workweeks.

ARTICLE 50

WATCH SCHEDULES AND SHIFT ASSIGNMENTS

Section 1. Basic Watch Schedules

The basic watch schedule is defined as the days of the week, hours of the day, rotation of shifts and change in regular days off. The basic watch schedule must satisfy coverage requirements. Assignments of individual employees to the watch schedule are not considered changes to the basic watch schedule. The basic watch schedule will not be changed except for substantial operational reasons unless specifically requested by the Union. The Employer will notify the Union at the appropriate level in advance of any proposed change to the basic watch schedule and will negotiate with the Union regarding the proposed change. If the Parties can not agree within thirty (30) days and there is compelling need, then management may implement the change as proposed.

Section 2. Shift Assignments

a. Individual assignments to the watch schedule shall be posted at least thirty (30) days in advance and will be consistent with the rotation and pattern of the basic watch schedule to the extent operational requirements permit.

b. The Employer recognizes that changes of individual assignments on the watch schedule are undesirable; therefore, the Employer agrees to make every reasonable effort to avoid such changes. Prior to making changes with less than seven (7) days notice, management shall utilize the following alternatives in any order deemed appropriate by the Employer:

- overtime
- qualified volunteers from the unit
- recall personnel on detail assignment
- compensatory time at the employees request
- qualified relief personnel
- qualified staff
- rescheduling of training

c. It is not the intent of the Parties that assignments to the watch schedule or continuous changes to individual watch assignments be used to substantially alter an employee’s assignment to the intended rotation and pattern of the basic watch schedule for extensive periods unless required by overriding operational requirements.

Section 3. The Employer shall approve the exchange of shifts and/or days off by employees of equal, required qualifications and/or certifications, provided the exchange is consistent with operational requirements, does not result in overtime, an increase in premium pay costs, or a violation of the basic workweek.

Section 4. The basic watch schedule will cover at least a one-year period and will be posted at least ninety (90) days prior to the beginning of the period, unless a shorter notice period is agreed to by the Parties.

Section 5. The Parties recognize that some employees working non-rotating administrative workweeks are subject to short notice changes in their assignments. To the extent circumstances permit, the Employer will attempt to provide seven (7) days notice of a change in assignment.

Section 6. For the purposes of this Article, employees shall be notified of any changes to posted assignments. The Employer agrees to communicate the change to the employee and, when practicable, obtain the employee’s acknowledgment of the change.

ARTICLE 51

WORKING HOURS

Section 1. The normal workday shall consist of eight (8) hours, exclusive of designated meal periods, and the normal workweek shall consist of five (5) consecutive workdays followed by two (2) consecutive days off.

Section 2. Working hours will not normally be scheduled for more than five (5) consecutive days within the administrative workweek. However, the Parties recognize that special conditions exist in unique work situations which may require variations from normal workday and/ or workweek. Flexible starting times for established shifts may be approved by the Employer at the local level provided the Employer is satisfied operational coverage is not affected or additional premium pay incurred. The starting time for an individual employee must be approved in advance and must be the same time each day for at least a one (1) week period unless the Employer agrees to a shorter period to meet local requirements. The Employer retains the prerogative to discontinue flexible starting times.

Section 3. When changing to daylight savings time, employees shall be afforded an
opportunity to remain on duty for their full number of scheduled hours.

Section 4. The Parties agree that the following work hours will be available on a voluntary basis to the extent operational requirements permit for bargaining unit employees:

a. Normal workday consisting of eight (8) hours, exclusive of designated meal periods; normally scheduled for five (5) consecutive days within the administrative workweek.

- 5/4-9 Plan. This is a schedule which, within a biweekly pay period of ten (10) workdays, includes eight (8) workdays of nine (9) hours, one (1) workday of eight (8) hours, and one (1) non-workday, with pre-established fixed hours.

- Four (4) workdays of ten (10) hours per week, and one (1) non-workday per week, with pre-established fixed hours.

Approval will be consistent with the provisions of Article 50, with respect to changes and assignments to the watch schedule.

ARTICLE 69

LOCAL/REGIONAL RELATIONSHIPS

Section 1. The Parties have negotiated a comprehensive national agreement that constitutes the entire agreement between them. No separate local or regional supplemental agreements are authorized on any subject matter expressly contained in this collective bargaining agreement or any other national agreement of the Parties.

Any local or regional agreements authorized under the provisions of this Article or reached under any other process may not increase or diminish entitlements or otherwise conflict with any provisions of this Agreement or any other national agreement of the Parties.

In order to be binding on the Parties, all agreements must be designated as a "Memorandum of Agreement" and contain a specific expiration date or condition for expiration. All agreements must be approved in accordance with 5 U.S.C. 7114(c).

Section 2. In the event the Employer at the regional (or equivalent ANI level) or a lower organizational level proposes to change a personnel policy, practice or matter affecting working conditions not covered by this Agreement, the Employer shall provide forty-five (45) calendar days' advance written notice to the appropriate Union representative, with a copy to the next higher level Union representative in the region as appropriate. The Union shall, within fifteen (15) calendar days of receipt of the notice, submit written proposals to the Employer on those expressed or specific changes proposed by the Employer. However, if the Union desires a meeting to discuss the Employer's proposal prior to submitting its proposals, it may request such a meeting. The Union's proposals will then be submitted within fifteen (15) calendar days of the date of that meeting. If the Union does not file a timely request for a meeting or submit timely proposals on those expressed or specific changes proposed by the Employer, the Employer may implement the change as proposed.

The Employer will not implement the proposed change prior to completing bargaining as required under this Agreement unless required by operational necessity. Operational necessity is defined as; (1) those actions that may be necessary to carry out the Agency's mission during emergencies; or (2) other extraordinary circumstances having a significant impact on safety and
efficiency of the NAS; or (3) matters which the Agency has a compelling need to implement. Operational necessity is not to be invoked as a means to avoid pre-implementation bargaining. Rather it

is the firm intent of the Parties that these provisions will be strictly followed in resolving issues under this Article prior to

implementation. Operational necessity will only be invoked in those cases, which meet the strict definition set forth in this Section. If the Agency believes that it is necessary to implement changes prior to the completion of bargaining due to operational necessity, the Agency will notify the Union at the national level with the reasons for proceeding.

Section 3. In the event the Union submits timely proposals under Section 2 of this Article, the Parties shall arrange to meet within fifteen (15) calendar days of the date of the request to attempt to reach agreement.

Section 4. If after a good faith effort to reach agreement a dispute still exists, the issue shall be referred within seven (7) calendar days to the next appropriate management level. In the case of a dispute concerning a proposed change at the local level, the issue shall be referred to the Employer's regional office. In the case of a dispute concerning a proposed change at the regional office level, the issue shall be referred to the Employer's national headquarters. If a dispute referred to the regional level is not resolved within ten (10) calendar days, it shall be referred to the Employer's national headquarters for final disposition.

Section 5. Any disputes arising under this Article which are not resolved at the regional level or below shall be resolved by the Parties at the national level as expeditiously as possible. If after a good faith effort, agreement cannot be reached, the Parties are free to pursue whatever course of action is available to them under the Federal Service Labor-Management Relations Statute.

Section 6. The Parties agree to exert every effort to make this process an effective and productive part of their relationship.

Section 7. In lieu of the procedures contained in this Article, the Agency may request the Union designate one (1) employee to serve as the Union representative for a work group. The Agency will provide the Union a statement of the qualifications/requirements for participation on the work group. A copy of the scope of the work group will be provided to all members. Such representatives will have full authority to act on behalf of the Union on all matters otherwise subject to negotiations under the LMR Statute and for procuring information otherwise
requested under the LMR Statute. The Agency will identify the management representative with authority to commit on behalf of the Agency for such a work group. Any such agreements reached will be reduced in writing. Either party may terminate any such arrangements with thirty (30) days notice. Shorter notice may be given for time limited work groups. Any unresolved matters otherwise subject to negotiations will be handled under the provisions of Article 69 or 70 as applicable.

ARTICLE 70

NATIONAL RELATIONSHIP

Section 1. In the event the Employer proposes to change a national personnel policy, practice, or other matter affecting working conditions, the Employer shall provide the Union written notice of the proposed change. The Union shall, within thirty (30) calendar days of receipt of the notice, submit written proposals to the Employer on those expressed or specific changes proposed by the Employer. However, if the Union desires a meeting to discuss the Employer's proposal prior to submission of its proposals, it may request such a meeting. The Union's proposals will then be submitted within fifteen (15) calendar days of the date of that meeting. If the Union does not file a timely request for a meeting or submit timely written proposals that concern the expressed or specific change(s) in the written notice, the Employer may implement the change as proposed. Only by expressed agreement of the Parties at the national level may any matters related to the proposed change be negotiated at the designated regional or local level.

Section 2.

a. In the event the Union submits timely written proposals as provided in Section 1 of this Article, the Parties shall arrange to meet within fifteen (15) calendar days of the date of the Union's request to discuss any proposal the Union may have to amend or change the Agency proposal. If after a good faith effort agreement cannot be reached, the Parties are free to pursue whatever course of action is available to them under the Federal Service Labor-Management Relations Statute.

Any national agreements authorized under the provisions of this Article or reached under any other process may not increase or diminish entitlements or otherwise conflict with any provisions of this Agreement. In order to be binding on the Parties, all agreements must be designated as a "Memorandum of Agreement" and contain a specific expiration date or condition for expiration. All agreements must be approved in accordance with 5 U.S.C. 7114(c).

b. The Employer will not implement the proposed change prior to completing bargaining as required under this Agreement unless required by operational necessity. Operational necessity is defined as; (1) those actions that may be necessary to carry out the Agency's

mission during emergencies; or (2) other extraordinary circumstances having a significant impact on safety and efficiency of the NAS; or (3) matters which the Agency has a compelling need to implement.

Operational necessity is not to be invoked as a means to avoid pre-

implementation bargaining. Rather it is the firm intent of the Parties that these provisions will be strictly followed in resolving issues under this Article prior to implementation. Operational necessity will only be invoked in those cases, which meet the strict definition set forth in this Section. If the Agency believes that it is necessary to implement changes prior to the completion of bargaining due to operational necessity, the Agency will notify the Union at the national level with the reasons for proceeding.

Section 3. In lieu of the procedures contained in this Article, the Agency may request the Union designate one (1) employee to serve as the Union representative for a work group. The Agency will provide the Union a statement of the qualifications/requirements for participation on the work group. A copy of the scope of the work group will be provided to all members. Such representatives will have full authority to act on behalf of the Union on all matters otherwise subject to negotiations under the LMR Statute and for procuring information otherwise
requested under the LMR Statute. The Agency will identify the management representative with authority to commit on behalf of the Agency for such a work group. Any such agreements reached will be reduced in writing. Either Party may terminate any such arrangements with thirty (30) days notice. Shorter notice may be given for time limited work groups. Any unresolved matters otherwise subject to negotiations will be handled under the provisions of Article 69 or 70 as applicable.

ARTICLE 79

EFFECT OF AGREEMENT

Section 1. Any provision of this Agreement shall be determined a valid exception to and shall supersede any existing or future Agency rules, regulations, orders and practices which are in conflict with the Agreement.

Section 2. Upon the implementation of this Agreement, any pertinent provisions of any written local, regional or national agreements, understandings or like documents which increases or diminishes entitlements as expressly contained within or otherwise conflict with the express provisions of the Agreement are invalid.

Section 3. The Parties agree that any local or regional written agreement(s) not in conflict with the express terms of this Agreement shall remain in effect, consistent with the provisions of the local and regional written agreement.

Section 4. If either Party at the local or regional level determines that a provision(s) of a local or regional written agreement is in conflict with the express provisions of this Agreement, it will notify the other Party:

a. If the Parties agree that a provision(s) of a local or regional written agreement(s) is in conflict with the express terms of this Agreement, the provision(s) shall be immediately terminated. At the request of either Party they will immediately begin negotiations to replace the terminated provision(s) in accordance with **Article 69** of the Agreement. However, either Party may propose that the matter is adequately covered by this Agreement.

b. If the Parties disagree that a provision(s) of a local or regional written agreement(s) is in conflict with the express terms of this Agreement, the pertinent provision(s) shall remain in effect and the Parties at the appropriate level shall meet and negotiate in good faith to resolve any disagreements.

Section 5. If the Parties at the local or regional level cannot reach an agreement as described in Section 4.b., the Parties shall immediately elevate the disputed provision(s) to the respective Parties at the national level for review. The disputed provision(s) shall remain in effect.

Section 6. The Parties at the national level shall meet as soon as possible to review all written agreements elevated and shall make every effort to complete this process as expeditiously as possible.

Section 7. The Parties at the national level shall adhere to the following as it pertains to elevated provision(s).

a.a If the Parties at the national level agree that a disputed provision(s) of a written agreement does not conflict with this Agreement, the provision shall remain in effect consistent with the internal provisions of the local or regional written agreement.

a.b If the Parties at the national level agree that a provision(s) of a local or regional written agreement does conflict with this Agreement, the provision(s) shall be immediately terminated. The Parties at the national level will refer the issue back to the local or regional level for negotiations, to replace the terminated provision(s) in accordance with **Article 69** of this Agreement. However, either Party may propose that the matter is adequately covered by this Agreement.

Section 8. If the Parties at the national level cannot agree that a conflict exists, the disputed provision(s) will remain in effect and the dispute shall be submitted to expedited arbitration.

a. The Parties at the national level shall select an arbitrator(s) to hear such disputes. The arbitrator shall confine himself/herself to the following issue:

Does the disputed provision of the local or regional written agreement conflict with the Parties' Agreement?

The arbitrator shall have no authority to decide any other issue.

b. If the arbitrator decides that the disputed provision(s) of a local or regional agreement does not conflict with this Agreement, the provision(s) shall remain in effect consistent with the internal provisions of the local or regional agreement.

c. If the arbitrator decides that the disputed provision(s) of a local or regional agreement does conflict with this Agreement, the provision(s) shall be immediately terminated. The issue shall be referred back to the local or regional level for negotiations, to replace the terminated provision(s) in accordance with **Article 69** of this Agreement. However, either Party may propose that the matter is adequately covered by this Agreement.

d. The arbitrator shall issue a bench decision whenever possible. The Parties shall grant the arbitrator an additional seven days to issue a decision if the arbitrator so requests. The Parties agree

that every effort shall be made to conclude this arbitration process as expeditiously as possible.

e. An arbitrator’s decision shall be final and binding.

Section 9. If the Agency alleges that a provision(s) of a local or regional written agreement conflicts with this Agreement because it violates law or applicable government-wide regulations, including alleged violations of 5 U.S.C. 7106(a), management shall notify the Union at the appropriate level. If the Parties agree that a provision(s) of a local or regional written agreement conflicts with this Agreement because it violates law or applicable government-wide regulations, including violations of 5 U.S.C. 7106(a), the pertinent provision(s) shall be immediately terminated. At the request of either Party, negotiations shall immediately begin to replace the pertinent provision(s) in accordance with **Article 69** of this Agreement. However, either Party may propose that the matter is adequately covered by this Agreement.

If the Parties disagree that a local or regional written agreement conflicts with this Agreement because it violates law or applicable government-wide regulations, including alleged violations of 5 U.S.C. 7106(a), the provision(s) remain in effect until the procedures set forth above are concluded. The Parties agree, on local and regional written agreement(s) previously reached involving permissive subjects of bargaining under 5 U.S.C. 7106(b), the Agency shall not raise **Article 4** as a basis of conflict with the Agreement.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. BN-CA-01-0108, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS:**
Gary J. Lieberman, Esq. Federal Labor Relations Authority Boston Region 99 Summer Street, Suite 1500, Boston, MA 02110-1200	7000 1670 0000 1174 9843
Mr. John Anderson, Representative Professional Airways Systems Specialists 7 Sauters Lane Bayport, New York 11705	7000 1670 0000 1174 9836
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Dated: August 30, 2001
Washington, DC