

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

DEPARTMENT OF VETERANS AFFAIRS CONSOLIDATED MAIL OUTPATIENT PHARMACY LEAVENWORTH, KANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 85 Charging Party	Case No. DE-CA-02-0321

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been considered by an 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 **MAY 19, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

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Judge

ELI NASH
Chief Administrative Law

Dated: April 19, 2004
Washington, DC

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

MEMORANDUM

DATE: April 19, 2004

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
CONSOLIDATED MAIL OUTPATIENT PHARMACY
LEAVENWORTH, KANSAS

Respondent

and

Case No. DE-

CA-02-0321

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 85

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 transmittal form sent to the parties, and the service sheet. Also enclosed are the pleadings, motions, exhibits and briefs filed by the parties.

Enclosures

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

DEPARTMENT OF VETERANS AFFAIRS CONSOLIDATED MAIL OUTPATIENT PHARMACY LEAVENWORTH, KANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 85 Charging Party	Case No. DE-CA-02-0321

Michael Anfang, Esquire
For the Respondent

Steven B. Thoren, Esquire
Ayodele Labode, Esquire
For the General Counsel

Mr. Robert L. Lewis
For the Charging Party

Before: ELI NASH
Chief 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., and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns whether Respondent repudiated the

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The Administrative Law Judge who conducted the hearing subsequently became unavailable to issue a decision. The parties were advised of this fact and were offered the opportunity to request a new hearing. Each party has waived the right to a new hearing, and I have made my decision herein based on the complete record.

Memorandum of Understanding (MOU) of October 16, 2000, and/or the MOU of November 3, 2000, by implementing a six-day workweek that included Saturday as part of the regular tour of duty.

This case was initiated by a charge filed on March 13, 2002, which alleged violation of Section 7116(a)(1), (7) and (8) of the Statute; a First Amended charge filed on September 28, 2002, which also alleged violation of Section 7116(a)(1), (7) and (8) of the Statute; the Complaint and Notice of Hearing issued September 30, 2002, alleged violation only of Section 7116(a)(5) and (1) of the Statute; and set the hearing for February 25, 2003, at a place to be determined in Kansas City, Kansas.

A hearing was held in Leavenworth, Kansas. 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 each party waived. Respondent and General Counsel each timely filed an excellent brief, which have been carefully considered.

On the basis of the entire record, I make the following findings and conclusions:

FINDINGS OF FACT

1. The American Federation of Government Employees, AFL-CIO, National Veterans Affairs Council of Locals (hereinafter, "AFGE") is the exclusive representative of a nationwide bargaining unit of employees of the Department of Veterans Affairs.

2. The American Federation of Government Employees, AFL-CIO, Local 85 (hereinafter, "Union") is an agent of AFGE for the purpose of representing employees at the Consolidated Mail Outpatient Pharmacy, Leavenworth, Kansas (hereinafter, "Respondent").

3. The Department of Veterans Affairs and AFGE are parties to a Master Agreement, effective March 21, 1997, for a period of three years (Jt. Exh. 9) (hereinafter, "Agreement"). Pursuant to the Agreement, it was automatically renewed in March 2000, in March 2001, and currently the parties are in the process of renegotiating the Agreement at the national level (Tr. 41).

4. Respondent provides pharmaceutical care, including pharmaceuticals such as capsules, tablets, liquid medicines and products used in providing healthcare to veterans in the

Midwest and Northwest (Tr. 173). Respondent is one of seven Consolidated Mail Outpatient Pharmacies (hereinafter, CMOP) located throughout the country. Each CMOP is, essentially, a large factory that fills prescriptions written for veterans at VA Clinics and Medical Centers. Pharmaceuticals are delivered directly to the veteran's home (Tr. 47, 78). On a daily basis, prescriptions written at Veteran Affairs Medical Centers and clinics are electronically transferred to the CMOP to be filled (Tr. 49). Most of the prescriptions sent to CMOPs are refills for the ninety-day supply of medicine (Tr. 49, 64, 174). Each CMOP has the goal of filling approximately 80% of all medications prescribed at VA medical facilities in the geographic area it serves (Tr. 64, 175). Currently, Respondent fills more than 73% of prescriptions written by the VA facilities in the area it serves. (Tr. 175).

5. The Union represents about 53 pharmacy technicians and housekeepers (Tr. 40). Pharmacy technicians are responsible for operating machinery that dispense pills into prescription bottles, and fill bottles of medicine, maintain inventories of pills and bottles, adhere labels to prescriptions, mail prescriptions, etc., (Tr. 78) and the housekeepers work in the bulk area (Tr. 79). There are packagers who are contract laborers represented by the Teamsters (id.) and professional employees, such as Pharmacists, are represented by NFFE (id.).

6. Respondent has a goal of a forty-eight hour turnaround time, i.e., a prescription should be filled and sent to the veteran within forty-eight hours of receipt of the prescription (Tr. 63, 64, 189). The number of prescriptions in the system waiting to be filled is called the queue (Tr. 25, 187). The queue is used by management to determine how many prescriptions the CMOP has in its system to be filled and to determine the hours the CMOP must operate to meet the demand (Tr. 188, 189).

7. Before November 2000, Respondent operated Monday through Saturday from either 6:00 a.m. to 6:30 p.m. or 7:00 a.m. to 6:00 p.m., with start times at either 6:30 a.m. or 9:30 a.m. (Tr. 20, 132). The schedule was considered one shift with two tours of duty (Tr. 132, 159, 160). Employees were scheduled to work a forty-hour workweek Monday through Saturday and were scheduled to work every other Saturday (Tr. 19).

8. In 2000 Respondent sought to add a second shift because Respondent was assuming responsibility from additional VA facilities, specifically incorporating Veterans Integrative Service Networks (the level of

bureaucracy above the Medical Centers) (VISN), i.e., a number of VA Medical Centers make up a VISN (Tr. 173, 179, 180). The Union was told that if there were a second shift, the queue, “. . . would no longer matter because anything that we had in house would be covered by a second shift.” (Tr. 80). Respondent gave the Union assurances that if the second shift were added, Saturdays could be eliminated as a regular work day and Respondent agreed to add a paragraph to the agreement eliminating Saturday hours as the regular tour of duty. The MOU was argued on October 16, 2000, and its effective date was November 5, 2000. The October 16, 2000 MOU provided as follows:

MEMORANDUM OF UNDERSTANDING

**AFGE Local 85 and Consolidating Mail Outpatient Pharmacy
(CMOP)**

October 16, 2000

1. Effective November 5, 2000, CMOP will begin a second shift at the Leavenworth facility. AFGE and Management recognize that the division of the two shifts depends upon the validation of the software, hardware, and workload. AFGE and Sheila Volski will meet within two weeks of the beginning of the tour of duty to discuss how things are proceeding, to include software, hardware, and workload. Mr. Boneberg will be invited to attend.
2. The second shift will operate from 3:30pm to midnight.
3. The first shift will operate from 6:30am to 3:00pm.
 - a. AFGE bargaining unit employees adversely impacted by the change in the first shift may be allowed to work 7:00am to 3:30pm. Management will give every consideration to individual requests.
 - b. Adverse impact refers to family care responsibilities.
 - c. If there are more employees requesting 7:00am to 3:30pm tours of duty than management can accommodate those with the greatest Service Computation Date (SCD) will receive priority.
4. A 4-week training tour of duty will operate from 10:30am to 7:00am.
 - a. Lead Technicians will be required to participate in the training tour of duty; a split tour can be available.

- b. Twelve (12) trainers per week will be needed.
 - c. Technician volunteers will be requested from existing staff to participate in the training tour of duty.
 - d. Technician volunteers must volunteer for at least one consecutive week of training.
 - e. If there are more volunteers than needed those with the greatest SCD will be assigned.
 - f. Management will make every effort to be flexible with the training tour of duty in order to accommodate individual needs.
 - g. The Supervisory Pharmacy Technician will recommend equitable time-off awards for volunteers no later than one week after completion of the training tour of duty.
5. CMOP staff will be afforded the first opportunity to staff the second shift.
6. Vacancies on day or evening shifts will continue to be posted and filled according to past practice.
7. After implementation of the two separate shifts, Saturday will be eliminated from the regular tour of duty.
8. This MOU covers all AFGE Bargaining Unit Pharmacy Technicians.
(Jt. Exh. 2) (Emphasis supplied).

The October 16, 2000, MOU was signed by the parties but, does not contain an expiration date and makes no reference to the Agreement.

9. Before the effective date of the October 16, 2000, MOU, the parties negotiated a further MOU which addressed weekend work (overtime). The November 3, 2000, MOU provided as follows:

**MEMORANDUM OF UNDERSTANDING
AFGE AND CMOP
WEEKEND WORK
11-3-00**

In the spirit of cooperative Labor-Management relations, the American Federation of Government Employees, Local 85 (Union) and the Consolidated Mail Outpatient Pharmacy (Management) agree to the

following regarding weekend work (overtime) for Pharmacy Technicians and Material Handlers/ Housekeepers.

1. This MOU supercedes any and all previous written/verbal agreements concerning the scheduling of bargaining unit employees on Weekend work or Sunday work.
2. In the case of an emergency that has significant adverse effect on CMOP-Leavenworth, Management will meet with the union, prior to making a decision. Management will fully inform the union of the need for weekend work and discuss possible solutions. Management and the Union will normally meet at 8:00am Wednesday.
3. If the only solution is to work Saturday or Sunday, volunteers will be requested.
 - a. If there are more volunteers than needed the employees with the highest SCD will be selected first.
 - b. If there are not sufficient volunteers, one shift or the other will be assigned.
 - c. Saturday or Sunday work will be rotated between the day and evening shift.
4. Employees who volunteer must volunteer for the entire shift.
5. Management will be flexible in allowing employees to switch Saturday or Sunday work with another employee. The employee is responsible for ensuring that the shift they were assigned or volunteered for is covered.
(Jt. Exh. 3).

The November 3, 2000, MOU was signed by the parties but, like the October 16, 2000, MOU, contains no expiration date and makes no reference to the Agreement.

10. Article 20, Section 3 - Tours of Duty/Scheduling, Paragraph I. of the Agreement provides, in material part, as follows:

Section 3 - Tours of Duty/Scheduling

. . .

I. Excessive use of overtime in any area will be evaluated by the Union and Management to review staffing options. . . . (Jt. Exh. 9, Art. 20, Sec. 3, Par. I., p. 66)

Article 44 of the Agreement - Mid-Term Bargaining - Section 1 - General and Section 4 - Local, provides in relevant part as follows:

ARTICLE 44--MID-TERM BARGAINING

Section 1 - General

A. The purpose of this Article is to establish a complete and orderly process to govern midterm negotiations at all levels. The parties are encouraged to use an interest-based bargaining approach in all midterm negotiations and will ensure that negotiators are trained in this approach prior to the inception of bargaining.

B. In accordance with Executive Order 12871, the Department will bargain on the numbers, types, grades of employees, and positions assigned to any organizational subdivision, work project, tour of duty, and the technology, methods, and means of performing work. Further, Management will not use 5 U.S.C. Section 7106(a) as a means of circumventing its 5 U.S.C. Section 7106(b) (1) bargaining obligations under this Agreement. In the event Executive Order 12871 is rescinded and the Department chooses not to bargain 5 U.S.C. Section 7106(b), either party may reopen this Article to address the 7106(b) issues. However, agreements reached during the effective term of this Master Agreement will remain in effect unless changes are negotiated. Both parties continue to retain their statutory rights. (Emphasis supplied).

. . .

D. As appropriate, the Union may initiate midterm bargaining at all levels on matters affecting the working conditions of bargaining unit employees.

. . .

Section 4 - Local

A. On all policies and directives or other changes for which the Department meets its bargaining obligation at the national level, appropriate local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated

national policy and agreements. Upon request, the Union will be briefed on the proposed subject prior to the demand to bargain.

B. Proposed changes in personnel policies, practices, or working conditions affecting the interests on one local Union shall require notice to the President of that local. . . .

C. Upon request, the parties will negotiate as appropriate. . . . (Jt. Exh. 9, Art. 44, Section 1 A, B and D; Section 4 A, B and C, pp. 172-173).

11. As the parties anticipated in Article 44, Section B of the Agreement, supra, Executive Order 12871 (Oct. 1, 1993) was, indeed, revoked by Executive Order 13203 (Feb. 17, 2001); however, Sec. 4 of E.O. 13203 specifically provides,

Sec. 4. Nothing in this order shall abrogate any collective bargaining agreements in effect on the date of this order [February 17, 2000] (E.O. 13203, Sec. 4).

12. The November 3, 2000, MOU (Jt. Exh. 3), was required to address how Saturday and Sunday work, if necessary, would be handled because, pursuant to the October 16, 2000, MOU (Jt. Exh. 2), Saturday was no longer part of the regular tour of duty (Tr. 26). Plainly, the November 3, 2000, MOU did not supercede the October 16, 2000, MOU (Tr. 85, 169) but, rather, supplemented the October 16, 2000, MOU by providing for overtime weekend workers if Saturday or Sunday work were required.

13. After the October 16 and November 3, 2000, MOUs were fully implemented, Respondent began operating the two shifts: the first shift 6:30 a.m. to 3:00 p.m.; and the second shift 3:00 p.m. to midnight, with the normal tour of duty Monday through Friday. Beginning in February 2001, Respondent determined it was necessary to operate on Saturday because of the growing queue (Tr. 193-194). In accordance with the November 3, 2000, MOU (Jt. Exh. 3), Respondent would seek volunteers for the weekend but when there were insufficient volunteers, Respondent would mandate weekend work (Tr. 28, 87, 137). Saturday was overtime work for which employees were paid time-and-a-half. During the year 2001, Respondent made 44 overtime weekend requests, 10 of which were mandated, *i.e.*, insufficient volunteers were available (Tr. 42). At times, Respondent required both shifts to work on the weekend and, while the Union contended

that this practice violated the November 3, 2000, MOU (Jt. Exh. 2), the Union did not protest the practice (Tr. 31, 32, 44). The Union expressed the employees' concerns about the increasing amount of overtime (Tr. 31-32).

14. On January 24, 2002, Ms. Sheila Volski, Supervisory Technician, sent the President of the Union, Debra McDougal, a memorandum stating as follows:

The workload at CMOP has continued to increase in the past six months. Recent projections from the CMOP-National Director's Office indicate that the workload will continue to increase throughout the CMOPs.

The existing schedule has not met the needs and increasing demands of the current work requirements. In order to expedite the medications to our veterans in a timely manner, we continue to schedule Saturday production, on an overtime basis. We have met with the union representative weekly to discuss any possible alternatives. The alternatives have been very limited and unable to meet the continuing demands. Therefore, we intend to return to the six-day workweek schedule, to include holiday scheduling on a fair and equitable basis.

We will have an informational meeting on Friday morning, January 25, 2002, at 11:00 a.m. in the CMOP conference room, and we encourage you to attend so we can hear and respond to your questions and concerns. In accordance with the Master Agreement, if you believe there are matters that you wish to negotiate prior to implementation of this decision, you may request to negotiate in accordance with the Labor Agreement. If no such request is received, the proposal will be implemented. If negotiations are requested, we want to schedule them as soon as possible. (Jt. Exh. 4).

15. The Union, by Ms. McDougal, responded the same day, January 24, 2002, and stated, in part, as follows:

This is in reference to your memo dated 1-24-02 regarding renegotiating the Saturday and Holiday tour of duty at CMOP, 5000 Leavenworth. Local 85 has no intentions [sic] of reopening these negotiations. We have a signed MOU which does not have a reopening clause.

. . .

At the time of the original negotiation you were insistent that the queue was not a concern. You included in the original MOU that Saturdays would no longer be a scheduled work day. CMOP 5000 intentionally mislead the Union and bargaining unit to obtain what you wanted. CMOP 5000 is now trying to force the bargaining unit back to the original old work schedule, plus a second shift. Local 85 demands that you cancel the meeting scheduled for Friday the 25th of January. Cease and desist the implementation of the proposed tour change. (Jt. Exh. 5).

16. Ms. Volski by memorandum dated March 5, 2002, notified Ms. McDougal as follows:

As of the week of March 24, 2002, CMOP will return to a six-day, 40 hour work week schedule. This is in reference to the information given to AFGE on January 24th and 25th.

Through our previous MOU, the holiday scheduling was moved from the holiday to the weekend after the holiday (post-scheduling). With the implementation of Saturday scheduling, Saturday will no longer be an option in the post-scheduling. Therefore, we plan to move the scheduling of the holiday work back to the actual holiday. If you plan to negotiate prior to implementation of this scheduling, please notify me as to your availability. If negotiations are requested, we want to schedule them as soon as possible. (Jt. Exh. 6).

17. Ms. McDougal responded by memorandum dated March 6, 2002, and stated as follows:

This is in reference to your memo dated March 5, 2002. The subject matter concerned the scheduling of Saturdays and Holidays at CMOP 5000.

In the union's memo dated January 24, 2002 Local 85 stated there are no reopening clauses in any of the affected MOUS and, the union was not reopening the negotiations over these issues. Local 85 stands firm with that decision. We will be willing to meet with Agency and discuss any alternate solutions to control the number of outstanding prescriptions at CMOP 5000.

At this time we are once again denying your request to reopen these negotiations, and are demanding you cease and desist the implementation of your proposed scheduling changes.

The Saturday and Holiday scheduling is covered by following agreed upon and signed MOUS, (Holiday Work 11-19-00), (Weekend Work 11-3-00), and (2nd Shift 10-16-00).

The 2nd Shift October 16,2000 MOU states Saturdays will be eliminated from the regular tour of duty.

The Weekend Work November 3,2000 MOU states Saturday to be volunteers, if mandated the day or evening shift will be scheduled.

The Holiday Work November 9, 2000 states if post holiday workload is such that it is necessary to work extra hours, it will be scheduled for the Saturday following the holiday and will be rotated between day and evening shift.

These MOUS are very clear in their intent and Agency agreed and gave them their blessings when they signed them. Agency received their second shift and Labor received their Saturdays off.

If Agency persist[s] in implementing these scheduling changes, they will be guilty of repudiating all (3) three MOUs. The perception of this action can only be that Agency bargained in bad faith and have had no intention of honoring these MOUS. (Jt. Exh. 7).

18. By memorandum dated March 12, 2002, Mr. Jerel Devor, Labor Relations Specialist, advised the President of the Union, Ms. McDougal, as follows:

1. This is in response to your memorandum received on March 8, 2002 [Ms. McDougal's memorandum of March 6, 2002 (Jt. Exh. 7)], declaring that AFGE Local 85 'stands firm' on its decision to not negotiate CMOP management's proposal to return to a 6-day workweek schedule. Your memorandum clearly indicates that you believe previously negotiated MOUs should remain in force and that management does not have the right to

present new proposals without approval of AFGE Local 85.

2. Management asserts that determination of the operational workweek is its protected right under the Labor Statute. It is an inherent part of determining the mission and number of employees necessary to accomplish the mission. This includes making changes from established workweek schedules when the mission requires, and the MOUs currently in effect do not restrict management from making such changes. Management has not and will not 'bargain away' that right. At the same time, management recognizes its obligation to provide opportunity to AFGE Local 85 to bargain over the procedures and arrangements/impact and implementation of work schedules. CMOP management has consistently provided that opportunity whenever it has identified the need for a change in work schedules, as evidenced by the MOUs currently in effect. You received notice on January 24, 2002, that CMOP was proposing to return to the 6-day workweek schedule, and you were given the opportunity to bargain. You responded in writing on January 24, 2002, and again on March 8, 2002, that you would not negotiate.

3. Management believes that it has met its obligation under the Labor Statute to provide opportunity to negotiate. Therefore, the proposed 6-day workweek schedule will be implemented. (Jt. Exh. 8)

19. Whether the January 25 meeting took place is disputed. While a meeting might have been held on that date with other unions (Tr. 145) (Teamsters and/or NFFE) I credit Mr. Lewis' testimony that he did not attend any meeting on January 25, 2002, nor did anyone else on behalf of the Union (Tr. 88, 204).

20. On March 24, 2002, Respondent implemented the six-day workweek schedule. Thereafter, employees were scheduled to work every other Saturday. Every two weeks, they would have two consecutive days off on Saturday and Sunday. In the six-day workweek, employees work 40 hours but because Saturday is a regular part of the workweek, employees no longer receive time-and-a-half for Saturday work (Tr. 98-101).

CONCLUSIONS

The standard for determining whether a repudiation violation has occurred is well settled. *Department of the Air Force, 375 Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858 (1996) (Scott AFB); *Department of Defense Dependent Schools*, 50 FLRA 424 (1995). In analyzing a repudiation issue the Authority looks to two elements: (1) the nature and scope of the alleged breach; and (2) the nature of the agreement provision allegedly breached. Examination of either element may involve an inquiry into the meaning of the agreement provision allegedly breached. In order to establish the first element it must be shown that the respondent's action constitutes "a clear and patent breach of the terms of the agreement. (Scott AFB) The second element is satisfied when it is shown that the nature of the clear and patent breach goes to the heart of the agreement. In evaluating the second element, the focus of the analysis is on the importance of the particular provision allegedly to be breached relative to the agreement in which it is contained. *Department of Justice, Federal Bureau of Prisons, Metropolitan Correction Center, Chicago, Illinois*, CH-CA-01-0127, ALJ Decision 02-53 (August 1, 2002).

A. The alleged breach.

Paragraph seven of the October 16, 2000 MOU states that after implementation of two separate shifts, Saturday will be eliminated from the regular tour of duty. Prior to entering this MOU, employees at the CMOP worked a six-day workweek that included Saturdays. In exchange for adding the second shift at the CMOP Respondent agreed to eliminate Saturday from the regular tour of duty-which was the *quid pro quo* for the agreement. Thereafter, the parties abided by the MOU for over a year demonstrating that the terms of the MOU were understood by both sides. On March 24, 2002, however, Respondent implemented a six-day workweek requiring employees to work on Saturdays despite having agreed in the October 16 MOU that Saturday would be eliminated as a regular tour of duty. This implementation, in my view, constituted a clear and patent breach of the October 16 MOU. Thus, the initial element in Scott AFB has been satisfied.

The November 3, 2000 MOU concerned procedures to be followed when the CMOP determined that it must operate on the weekend. Where management determined that the CMOP had to operate on the weekend, the MOU provided a procedure to request and select volunteers to work that weekend. Paragraph three of the MOU provided that in the event CMOP must be operated on Saturday or Sunday and where there were

insufficient volunteers, management could mandate either day or evening shifts to work on the weekend.

The record reveals that prior to the two MOUs involved herein, CMOP employees worked a six-day week that included Saturdays as a regular tour of duty. In accordance with the October 16 MOU, a second shift was added and fully trained and that shift worked a forty-hour week, Monday through Friday. Sometime in February 2001, management determined that it might be necessary to operate on Saturday or Sunday. Respondent did meet with the Union prior to making a decision to operate. However, when it could not get sufficient volunteers Respondent mandated employees to work and paid them overtime.

After March 24, 2002, when Respondent implemented a six-day workweek, Saturday again became a part of employees' regular tour of duty. Respondent thus ceased meeting with the Union prior to determining that the CMOP would operate on Saturday and no longer sought volunteers to work on the weekend. These actions are clearly inconsistent with the November 3, 2000 MOU and constitute, in my opinion, a clear and patent breach of that agreement.

B. The nature of the breach.

With regard to the second element found in Scott AFB, that the clear and patent breach goes to the heart of the agreement, it appears that this element has been satisfied as well. The record reveals that the elimination of Saturdays from the regular tour of duty, from the Union's point of view, was the core of the October 16, 2000 agreement. The record fully supports a finding that the Union and the employees viewed the elimination of Saturdays from the regular tour of duty as the essential ingredient of the agreement. Since the heart of an agreement is determined by the "paramount concern to the employees," it is concluded that the second element of Scott AFB is satisfied with respect to the October 16, 2000 MOU.

The record also shows that the MOU of November 3, 2000 was concerned solely with weekend work; the process of determining if the CMOP would operate on the weekend and the selection of volunteers to work the weekend. The November 3 MOU addressed how volunteers would be selected to work the weekend and the procedure to be followed in the event an insufficient number of employees volunteered to work. The record shows how employees would be selected to work on the weekend and procedures to be followed indeed were of "paramount concern to employees." It is therefore, found that the action of Respondent in implementing the six-day

workweek which included Saturdays, and its failure to seek volunteers to work weekends, goes to the heart of the agreement and, thereby, constituted a violation of section 7116(a) (1) and (5) of the Statute.

C. Were the October 16, 2000 and November 3, 2000 MOUs terminable at will?

At the hearing the ALJ raised an issue as to whether the MOUs were terminable at will. In this regard, the ALJ raised the applicability of *Department of the Navy, Naval Air Station, Pensacola, Florida and American Federation of Government Employees, Local 1960, (NAS Pensacola), Case No. AT-CA-00890, OALJ 02-42 (May 24, 2002), ALJ Dec. Rep. No. 169 (August 21, 2002)*, in that case the ALJ held that,

. . . Review of the language of the MOU itself . . . 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.* (Slip opinion, p. 10).

While acknowledging the correctness of this holding, I nonetheless agree with the General Counsel that this case can be distinguished. Unlike NAS Pensacola, the MOUs herein are tied to the Agreement and they remain in effect during the effective term of the Agreement unless changes are negotiated. The MOUs of October 16 and November 3, 2000 (Jt. Exhs. 2 and 3) were negotiated pursuant to Article 44 of the Agreement (Jt. Exh. 9), ". . . process to govern midterm negotiations at all levels." (Section 1-A); "As appropriate, the Union may initiate midterm bargaining at all levels on matters affecting the working conditions of bargaining unit employees." (Section 1 D); ". . . appropriate local bargaining shall take place at individual facilities and may include substantive bargaining that does not conflict with negotiated national policy and agreements. . . ." (Section 4 A). Further, the October 16, 2000, MOU (Jt. Exh. 2) was negotiated in accordance with E.O. 12871 as provided in Article 44, Section 1 B, which provision states that if E.O. 12871 is rescinded, nevertheless, ". . . agreements reached during the effective term of this Master Agreement will remain in effect unless

changes are negotiated. . . ." (Jt. Exh. 9, Art. 44, Section 1 B). This language, I interpret to mean, that agreements reached (i.e. MOUs) during the effective term of the Agreement, remain in effect for the duration of the Agreement unless changes are negotiated. The Term of the Agreement was automatically renewed in March 2000, and in March 2001, i.e. at least to March 21, 2002, and because renegotiation of the Agreement is in progress (Tr. 41), the Agreement will automatically extend until a new agreement is negotiated (Jt. Exh. 9, Article 61 - Duration of Agreement, Section 2, p. 197). Although, E.O. 12871 was revoked by E.O. 13203 on February 17, 2001, E.O. 13203 provides that,

Sec. 4. Nothing in this order shall abrogate any collective bargaining agreements in effect on the date of this order (E.O. 13203, Sec. 4).

Furthermore, each MOU herein was in effect on the date of E.O. 13203; and each was a negotiated collective bargaining agreement. Accordingly, by the terms of Article 44, Section 1 B, of the Agreement, both the MOU of October 16, 2000, and the MOU of November 3, 2000, remained in effect for the term of the Agreement unless changes are negotiated, and, according to E.O. 13203, nothing therein shall abrogate any collective bargaining agreement in effect on the date of E.O. 13203 [February 17, 2001].

When the workload showed evidence of a problem, in late 2001, Respondent could have terminated the Agreement. Respondent did not and the Agreement thus automatically renewed itself with the renegotiation of the Agreement. Article 44 Section 1 B of the Agreement gave the MOUs a duration, namely, for the term of the Agreement, unless changes are negotiated. Neither MOU has any reopening provision and when Respondent on January 24, 2002, proposed to return to the six-day workweek schedule, the Union emphatically refused to renegotiate the MOUs (Jt. Exh. 5), a position it reaffirmed on March 6, 2002 (Jt. Exh. 7). The Union was under no obligation to negotiate changes in the MOU because those agreements remained in effect for the term of the Agreement. On March 6, 2002, the Union stated,

We will be willing to meet with Agency and discuss any alternate solutions to control the number of outstanding prescriptions. . . . (Jt. Exh. 7),

but, Respondent refused the Union's offer and on March 24, 2002, implemented the six-day workweek schedule.

Based on the foregoing, it is found that Respondent repudiated each MOU and, thereby, violated section 7116(a) (5) and (1) of the Statute.

I also agree with the relief sought by General Counsel, namely, requiring Respondent to comply with the October 16, 2000, and November 3, 2000, MOUs; return to a Monday through Friday tour of duty; and eliminate Saturday from the workweek.

Having found that Respondent violated section 7116(a) (5) and (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and § 18 of the Federal Service Labor- Management Relations Statute, 5 U.S.C. § 7118, the Department of Veterans Affairs, Consolidated Mail Outpatient Pharmacy, Leavenworth, Kansas, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the October 16, 2000, and November 3, 2000, Memoranda of Understanding with the American Federation of Government Employees, Local 85, the exclusive representative of certain of its employees, with respect to the elimination of Saturday from the regular tour of duty.

(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) Comply with the October 16, 2000, and November 3, 2000, Memoranda of Understanding with the American Federation of Government Employees, Local 85, the exclusive representative of certain of its employees by eliminating Saturday from the regular tour of duty as required by the Memoranda of Understanding.

(b) Upon request of American Federation of Government Employees, Local 85, reinstate the shift

scheduling procedures as they had been established under agreements dated October 16 and November 3, 2000.

(c) Post at its facilities at the Department of Veterans Affairs, Consolidated Mail Outpatient Pharmacy, Leavenworth, Kansas, 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 Director, Consolidated Mail Outpatient Pharmacy, Leavenworth, Kansas, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e) notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, in writing within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, April 19, 2004, Washington, DC

—

Judge

ELI NASH
Chief Administrative Law

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Consolidated Mail Outpatient Pharmacy, Leavenworth, Kansas, 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 fail and refuse to comply with the Memorandum of Agreements entered into by the Consolidated Mail Outpatient Pharmacy and the American Federation of Government Employees, Local 85, the employees' exclusive representative on October 16 and November 3, 2000, by scheduling employees to work on Saturdays, contrary to the terms of those Agreements.

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

WE WILL comply with the October 16 and November 3, 2000, Memoranda of Understanding with the American Federation of Government Employees, Local 85, the exclusive representative of certain of our employees by eliminating Saturday from the regular tour of duty as required by the Memoranda of Understanding.

WE WILL return to a Monday through Friday tour of duty.

WE WILL, upon request of American Federation of Government Employees, Local 85, reinstate the shift scheduling procedures as they had been established under agreements dated October 16 and November 3, 2000.

(Agency)

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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: 303-844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. DE-CA-02-0321, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Steven B. Thoren, Esquire

7000 1670 0000 1175

3529

Ayodele Labode, Esquire
Federal Labor Relations Authority
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VA, Office of Regional Counsel
Kansas City Area Office
1201 Walnut Street, Street 800
Kansas City, MO 64106

Robert L. Lewis

7000 1670 0000 1175 3543

Vice President and Chief Steward
AFGE, Local 85
4915 10th Avenue
Leavenworth, KS 66048

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: April 19, 2004
Washington, DC