UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEFENSE LOGISTICS AGENCY DEFENSE INDUSTRIAL PLANT EQUIPMENT CENTER, MEMPHIS, TENNESSEE Respondent	
and	Case No. 4-CA-00870
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3986 Charging Party	

Philip T. Roberts, Esquire
(Linda J. Norwood, Regional Attorney
On Supplementary Brief)
For the General Counsel

Margaret J. Krueger, Esquire
For the Respondent

Mr. James V. Stinchcomb, Jr.
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

This case presents the novel issue of whether an agency is required to bargain over the decision to terminate a compressed work schedule (CWS) established unilaterally by the agency at a time when its employees were not represented by a union but terminated at a time when they were.

An unfair labor practice complaint alleging that the Respondent (DIPEC, the acronym for Defense Industrial Plant

Equipment Center) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) resulted in a hearing in Memphis, Tennessee, on January 29 and 30, 1991. Counsel for the General Counsel and for DIPEC filed post-hearing briefs. At my request, they filed supplementary briefs (rec. June 24, 1991) on some aspects of the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. §§ 6120-6133 (the Work Schedules Act). I find that the alleged violations occurred.

Findings of Fact

DIPEC, an organizational component of the Department of Defense's Defense Logistics Agency, manages industrial plant equipment (IPE) used by the Department to produce and maintain defense weapons and hardware for all of the armed services. Part of DIPEC'S function is procurement of IPE. Through its operations facilities at various locations, DIPEC repairs and rebuilds used equipment when these are viable alternatives to replacing it with newly purchased equipment. During the 1990-91 Persian Gulf operations, which accelerated DIPEC's operations generally, DIPEC also provided equipment and support for the packaging of meals for troops in the field. Part of DIPEC's function is storage of equipment, including, at least at the time of the hearing, clothing and textile items. It also engages in shipping and installation of equipment.1/ Only DIPEC's headquarters in Memphis, Tennessee, essentially a white-collar operation, is involved in this case.

On December 27, 1989, DIPEC initiated a voluntary "flexitime" and compressed work schedule (CWS) for its headquarters employees, who were then not represented by a union. At the same time, it implemented a CWS program, without flexitime, for its field operations employees.2/ The CWS at headquarters permitted employees, with certain limitations, to work nine instead of ten days during each two-week pay period.

1/ A more complete description of DIPEC's official mission may be found at Ag. Exh. 3.

2/ Apparently, another "flexible work program" was in existence at DIPEC headquarters and field operations sites earlier, including a type of CWS at its Stockton, California, site. Tr. 122-123; Decision and Order on Petition for Certification for Dues Allotment, Case No. 4-DA-80001, FLRA Region IV, March 29, 1989, at 5.

Almost immediately, however, events began to test the efficacy of permitting a CWS at headquarters. A department-wide hiring freeze implemented in January 1990 resulted in some DIPEC headquarters vacancies. The freeze was partially lifted in April to permit "cannibalizing" from other department activities. Despite this partial thaw, headquarters had about 14 vacancies on August 4, 1990, out of a workforce of about 250, or approximately a 5.6 percent vacancy rate. (These figures were not broken down as between employees eligible for union representation under the Statute and management-supervisory or other excluded employees.) Also, throughout the spring and summer of 1990, the Department ordered DIPEC to study the possibility of DIPEC's reorganization. These studies required additional, coordinated staff work involving headquarters employees.

The workforce shortage and the increased need for staff meetings involving employees with specific expertise, superimposed on the widely utilized CWS program, made it difficult for management to schedule necessary meetings on short notice and to ensure the availability of qualified employees at all times for routine assignments. At least as early as June, management began discussing the impact of CWS on DIPEC's ability to get its basic mission accomplished. Subordinate management officials were asked to give top management their assessments and recommendations (Ag. Exh. 7). Lower level officials made various suggestions, but there was a consensus that some change was desirable.

Based on the discussions and memoranda generated in June on this issue, DIPEC Commander (Captain David W.) Hall began considering his decision about what, if anything, to do. He did not act, however, before the first stage of the Persian Gulf operation, known as "Desert Shield," began in early August. Desert Shield added some pressure to DIPEC's situation, but, according to Captain Hall, played only a minor role in the decision he ultimately made. Tr. 175-76. His decision was to discontinue CWS at headquarters, effective September 2. He announced it in a memorandum to employees dated August 17.

Meanwhile, the American Federation of Government Employees, AFL-CIO (AFGE), had filed a petition to represent DIPEC employees. An election was held, and AFGE was certified on August 13 as the exclusive representative of a nationwide unit of DIPEC employees. This unit was included in a consolidated unit certified in an earlier proceeding and represented by AFGE.

James Stinchcomb is a national representative of AFGE. On August 20, a Monday and the first regular business day after Captain Hall issued his August 17 memorandum, Stinchcomb was at DIPEC headquarters to meet with employees and encourage union membership. He had designated employee Cherlyn Conner as acting president and employee Leroy Williams as acting secretary-treasurer of a new AFGE local, Local 3986, to act as AFGE's agent at this facility. Conner showed Stinchcomb the August 17 memorandum and told him that employees were concerned about it but that she did not know what to do. Stinchcomb set up a meeting with management officials for the following day, August 21.

The meeting began with Stinchcomb's introduction of Conner and Williams as the acting officers. Later, Stinchcomb brought up the subject of CWS. Stinchcomb testified credibly that he had set the meeting up with Deputy Commander (Edwin L.) Prince, and had told Prince that he intended to bring up, as a matter of concern, Captain Hall's CWS memorandum. Captain Hall, however, did not remember, at the time of the hearing, that he had been aware that the subject of the memorandum was to be discussed.3/ Thus, he thought the meeting was solely for the purpose of introducing the principals representing the newly certified union to those representing management. To this end, he had brought Mr. Prince to the meeting, as well as Civilian Personnel Director (Eugene) Fayne and Personnel Officer (Ernest L.) Lloyd.

There is a factual dispute as to whether Stinchcomb expressly requested bargaining over the termination of the CWS program. Stinchcomb testified that he said, "The union wants to bargain before you cancel something like this." Conner corroborated this testimony in substance. Stinchcomb gave further details concerning the August 21 meeting. As he remembered it, he had gone on to ask that the August 17 memorandum be rescinded until the union had an opportunity to bargain over the cancellation of CWS. He then suggested that such negotiations be combined with upcoming negotiations for a local supplemental labor agreement. He was informed that management would consider that and get back to him the following week. Stinchcomb warned management, however, that if it implemented the cancellation of CWS without giving the union the opportunity to bargain, the union would file an unfair labor practice (ULP) charge.

3/ Mr. Prince did not testify.

Management witnesses agree only that Stinchcomb demanded that the memorandum be rescinded and threatened to file a ULP charge. Thus, their impression of Stinchcomb's focus was rescission, not bargaining. Personnel Officer Lloyd testified that Prince and Hall "made it very clear that they could not or would not rescind" the memorandum. His recollection was that management would be "getting back" to Stinchcomb only if they changed their position about that. Captain Hall's recollection, arguably at variance with Lloyd's, was that there was some discussion with regard to whether the work schedules were a negotiable issue. He testified, with respect to whether Stinchcomb mentioned bargaining over CWS: "My recollection honestly is not clear on whether or not there was a discussion to [sic]--whether or not we would bargain or offer to bargain. I think there was some discussion with regard to whether or not it was, in fact, a negotiable issue. . . ." Later, however, Hall testified that "we were never formally requested to negotiate the issue."

It is, of course, not realistic for me to expect to be able to reconstruct, even in paraphrase, the words that were spoken at this meeting, given the number of different accounts. Taking at face value, however, Captain Hall's testimony that there was no "formal" request to bargain, it is difficult to consider Stinchcomb's threat of a ULP charge in isolation from the subject of bargaining over the announced termination of CWS. As Captain Hall substantially acknowledged, there was some discussion about negotiability. In the context of that discussion, Stinchcomb "demanded" that the memorandum be rescinded and threatened to file a charge if necessary. That threat was made in the presence of management officials presumably having some experience in or knowledge of labor relations.

I attribute to Stinchcomb enough sophistication that he was unlikely to make a meaningless threat to file a charge solely because management refused to accede to a demand to rescind a memorandum. The threat was meaningful because it was calculated as a means of pursuing the union's position that CWS was a negotiable issue and that management could not terminate it unilaterally. Therefore, whether it was stated in the words of Stinchcomb's testimony or not, the sense of his "threat" was that Respondent would commit an unfair labor practice if it implemented the termination without first giving the union the opportunity to bargain.

At the August 21 meeting, there was also a discussion of the identity of the union representatives with whom

management should communicate. Stinchcomb informed management that, inasmuch as acting local officers Conner and Williams had not been trained, Stinchcomb would remain as the "point of contact" for the present. Lloyd told him he wanted a written designation of the union's representatives. Stinchcomb said he would take care of that.

AFGE National President (John N.) Sturdivant sent Stinchcomb a letter on August 23, delegating AFGE's authority to represent DIPEC's Memphis employees to AFGE's Fifth District. A copy of this letter went to Karen Cavilier at the Defense Logistics Agency and soon found its way to DIPEC headquarters. Three similar letters were addressed to AFGE local presidents at facilities where DIPEC operations employees were located. These letters were also received by DIPEC headquarters. Stinchcomb sent a letter to management designating Cherlyn Conner and Leroy Williams as acting officers. On August 31, Captain Hall wrote to Conner. He acknowledged Stinchcomb's designation of her and Williams as acting officers for DIPEC bargaining unit employees and enclosed copies of Sturdivant's letters to the local presidents at the other DIPEC locations.

Stinchcomb prepared the ULP charge that initiated this proceeding when he did not hear from management and he became convinced that the CWS would be discontinued before there were any further discussions. He signed the charge on August 27, although it was not received by the Authority's Atlanta Regional Office until September 5. During the week of September 2, DIPEC implemented the August 17 memorandum discontinuing CWS at Memphis headquarters.4/

Discussion and Conclusions

A. Negotiability of Termination as a Bargaining Subject

Decisions to institute or terminate compressed work schedules are fully negotiable. National Treasury Employees Union and U.S. Department of the Treasury, Office of Chief Counsel, Internal Revenue Service, 39 FLRA 27, 34 (1991) (NTEU). The negotiability of the substance of CWS decisions is established by the Work Schedules Act, not by the Federal Service Labor-Management Relations Statute. Id. Therefore it is irrelevant that bargaining over this subject conflicts

---

4/ Facts relating primarily to the question of the appropriate remedy for the unfair labor practices found are treated below.

with management's right to assign work under section 7106(a)(2)(B) of the Statute. Id.

Here, the CWS program was instituted at a time when the affected employees were not represented by a union, and (of course) it was not instituted pursuant to a collective bargaining agreement. Whether this affects the negotiability of its termination depends on how certain provisions of the Work Schedules Act are to be construed. All shall be referred to by their 5 U.S.C. section numbers:

> §6130. Application of programs in the case of collective bargaining agreements
>
> (a)(1) In the case of employees in a unit represented by an exclusive representative, any flexible or compressed work schedule, and the establishment and termination of any such schedule, shall be subject to the provisions of this subchapter and the terms of a collective bargaining agreement between the agency and the exclusive representative.
>
> (2) Employees within a unit represented by an exclusive representative shall not be included within any program under this subchapter except to the extent expressly provided under a collective bargaining agreement . . . .
>
> §6131. Criteria and review
>
> [Subsection (a) provides that under certain circumstances the head of an agency may determine (1) not to establish a flexible or compressed schedule or (2) not to continue an established one.]
>
> (c)(1) This subsection shall apply in the case of any schedule covering employees in a unit represented by an exclusive representative.
>
> (3)(A) If an agency and an exclusive representative have entered into a collective bargaining agreement providing for use of a flexible or compressed schedule under this subchapter and the head of the agency determines under subsection (a)(2) to terminate a flexible or compressed schedule, the agency may reopen the agreement to seek termination of the schedule involved.

> (B) If the agency and exclusive representative reach an impasse in collective bargaining with respect to terminating such schedule, the impasse shall be presented to the [Federal Service Impasses] Panel.
>
> (D) Any such schedule may not be terminated until--
>
> (i) the agreement covering such schedule is renegotiated or expires or terminates pursuant to the terms of that agreement; or
>
> (ii) the date of the Panel's final decision, if an impasse arose in the reopening of the agreement under subparagraph (A) of this paragraph.

At first blush this aggregate of provisions seems to suggest that, whenever employees are represented, Congress intended to sanction flexible or compressed schedules only when established through collective bargaining, and that the mandated bargaining procedure for termination applies only to schedules so established. DIPEC essentially adopts this position.

Closer scrutiny, however, puts this interpretation into question. The legislative history of the Work Schedules Act indicates, consistent with the Authority's decision in NTEU, that § 6130(a)(1) is intended not only to make termination of these work schedules "subject to . . . the terms of a collective bargaining agreement," (as 6130(a)(1) expressly provides) but to place termination of such schedules "within the collective bargaining process." S. Rep. No. 97-365, 97th Cong., 2d Sess. 14-15 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News at 565, 576-77, and cited in NTEU, 39 FLRA at 34. Within this broader frame of reference, it may also be that § 6131 does not confine the negotiability of terminations to situations where the work schedules were originally established through collective bargaining. Further analysis of § 6131 is necessary in order to determine whether it does.

Although § 6131, like § 6130, contains several references to collective bargaining agreements, its subsection (c) expressly applies "in the case of any schedule covering employees in a unit represented by an exclusive representative." § 6131(c)(1). Subsection (c)(3)(A) permits the reopening of a collective bargaining agreement to seek termination of a schedule provided for in the agreement. The purpose of this provision is not,

however, to delimit the negotiability of terminations. It is, rather, to afford an agency, in certain circumstances, the opportunity to seek relief from a schedule which has been formalized in an agreement, without waiting for the agreement to expire by its terms. S. Rep. 97-365, supra, at 5, 16, 1982 U.S. Code Cong. & Admin. News at 567, 578.

Section 6131(c)(3)(B) provides that impasses with respect to terminating "such schedule" shall be presented to the Impasses Panel. "Such schedule" may, consistent with § 6131(c)(1), refer to any schedule covering represented employees, not only schedules that are found in collective bargaining agreements. On the other hand, subsection (c)(3)(D), both in its (i) and (ii) parts, addresses the prerequisites to termination only with respect to schedules found in agreements. This suggests that the procedures set forth throughout subsection (c)(3) may apply only to the termination of schedules created by agreement. Adding to the difficulty presented by § 6131(c)(3)(D) is the instruction in § 6130(a)(2) that unit employees shall not be included within a program "under this subchapter" (the Work Schedules Act) except as provided under an agreement.

Neither of the interpretations that suggest themselves is completely satisfactory. I may not ignore, however, the Authority's broad declaration of the negotiability of the termination of compressed work schedules, or the Senate Report that the Authority has treated as authoritative concerning the intended effect of the Work Schedules Act. Thus, I cannot fail to take into account certain portions of the Senate committee's introductory background statement reciting the contemplated role of collective bargaining in decisions about alternative (i.e., flexible or compressed) work schedules under the Act:

> In light of the fact that alternative work schedules under the experimental program were bargainable, the question becomes "Has bargaining over alternative work schedules hindered the effective management of government and thereby reduced service to the public?" The Committee finds the answer to be generally no. The Committee finds that in certain situations alternative work schedules do not and will not work. The remedy for such situations lies in building standards in the law for when a particular schedule is inappropriate, not encroaching into the sphere of negotiation. The Committee reasserts the

> position that the use of alternate work schedules is negotiable. . . .
>
> The Committee expects full negotiation on all aspects of an alternative work schedule. Thus, if an agency feels that a particular schedule will have an adverse impact and reaches an impasse with the exclusive representative over this issue, the issue will be resolved by the Federal Service Impasses Panel.

S. Rep. 97-365, supra, at 5, 1982 U.S. Code Cong. & Admin. News at 567.

Given these indications that the Act embodies a general policy favoring negotiation, I feel more comfortable in resolving the ambiguities in favor of an interpretation of § 6131(c)(3)(B) that makes the negotiation-to-impasse route applicable to all terminations of schedules for represented employees. This interpretation does leave unanswered questions about the intent of Congress in enacting §§ 6130(a)(2) and 6131(c)(3)(D). I can offer only tentative answers to those questions. As to § 6130(a)(2), it could be presumed that the phrase, "shall not be included," refers only to the establishment of a schedule, not to the continuation of one that was established before the employees were represented. As to § 6131(c)(3)(D), I can only surmise that Congress did not find it necessary to pinpoint the event that would exhaust the bargaining obligation in the case of a noncontractual CWS but may have assumed that the usual rules concerning the termination of noncontractual conditions of employment would apply.5/

This is not a neat picture, but it is less problematic than an interpretation that leaves the whole subject of the negotiability of the termination of pre-representation CWS's hanging in limbo between the scheme contemplated by the Work Schedules act and that contemplated by the Statute.

5/ But cf. Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intention- ally and purposely in the disparate inclusion or exclusion."); General Motors Corp. v. United States, 496 U.S. ___, ___, 110 S.Ct. 2528, 2934 (1990).

B. Negotiability of the Termination of This CWS Program

DIPEC asserts that this CWS program was established merely as an experiment. This assertion might suggest that, apart from the abstract question of the negotiability of the termination of CWS programs, this CWS never became a condition of employment or that its termination did not effect a genuine change. Since the negotiability of this termination is to be decided under the Work Schedules Act rather than the Statute, a question arises as to whether the concept of "conditions of employment" has any relevance here. I need not resolve that legal issue, however, because there can be little doubt that the CWS had become a condition of employment by the time it was terminated. When it was formally established, in December 1989, employees were given no indication that it was an experiment or anything but a new policy, fully effective until changed or terminated. See U.S. Department of Labor, Washington, D.C., 38 FLRA 899, 909-10 (1990). It remained in operation for nearly eight months, ample time for its termination to have had a direct effect on the employees' "work situation." See Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235, 237 (1985). This termination, therefore, was a fully negotiable subject.

DIPEC also argues that it is authorized, under another provision of the Work Schedules Act, 5 U.S.C. § 6122(b)(3), unilaterally to exclude the Memphis employees from the CWS program. Section 6122(b)(3) does authorize the head of an agency, in certain circumstances, to "exclude from" a flexible schedule program "any employee or group of employees." A flexible schedule, however, is not the same as a compressed schedule, which this case involves. Section 6122 applies only to flexible schedules. Moreover, what occurred here cannot fairly be described as an exclusion. The CWS program in question applied only to Memphis employees. Captain Hall did not merely exclude some employees from the program. He terminated, or, to use his own word, "discontinue[d]" it. This action was subject to the requirements of §§ 6130 and 6131.6/

6/ I am wary of making a distinction that is more technical than substantive. If DIPEC had set up a single program to cover all of its employees, instead of separate programs for its headquarters and operations employees, and then excluded the Memphis (headquarters) employees, would §6122(b)(3), rather than §§ 6130 and 6131, apply? The facts here, however, cannot be construed to fit that hypothetical question. Its resolution, therefore, is for another day.

C. Bargaining Obligation with Respect to this Union

The decision-making process leading to the termination of this CWS was underway and close to completion when the union was certified as the employees' exclusive representative. Before culminating in that certification, however, AFGE's petition had raised a question concerning representation. This required DIPEC to maintain existing conditions of employment. Department of the Army Headquarters, Washington, D.C., and U.S. Army Field Artillery Center and Fort Sill, Fort Sill, Oklahoma, 29 FLRA 1110, 1125 (1987). DIPEC argues, however, that it was free to implement the termination it announced on August 17, as scheduled on or about September 2, because DIPEC was never given a clear designation of the union representative with whom to deal and because there was no request to bargain.

The first argument rings so hollow as to be puzzling. Despite any confusion under which management may have been suffering as to Conner's role as a representative for field operations employees, or her duties as acting local president, it had no reason to doubt Stinchcomb's status as the then current "point of contact" for matters concerning headquarters employees. Since Conner had no representative status at all but for Stinchcomb's say-so, management is hardly in a position to rely on his designation of Conner but not his reservation of the authority to deal immediately with issues such as the CWS program. Nor, when Stinchcomb raised the CWS issue at the August 21 meeting, did anyone question his authority to represent the union. Finally, nothing in AFGE President Sturdivant's letters raises any reasonable doubt about Stinchcomb's status or authority.

I must also reject the argument that the union failed to request bargaining. As found above, Stinchcomb demanded that the announcement of the termination be rescinded so that bargaining could precede any change. DIPEC has chosen to view this demand as a proposal that management was free to reject. The substance of the demand, however, was not that the memorandum be rescinded so as to retain the CWS as a permanent condition of employment, but that the situation be frozen pending negotiations so that the union would not be faced with a fait accompli. Such a demand is not a mere bargaining proposal. It is an assertion of a statutory right. See Bureau of Land Management, Richfield District Office, Richfield, Utah, 12 FLRA 686, 699 (1983); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). Implicit in that assertion was a request to bargain over the decision to terminate. The demand was sufficient

at least to make it clear that the union was not waiving its right to bargain. In any event, surely this message was conveyed when, on August 28 (several days before the termination was implemented), Stinchcomb mailed to Captain Hall a copy of the union's unfair labor practice charge alleging that the termination, as announced, was in derogation of the union's right to an opportunity to bargain.

D. Requirement to Bargain Before Implementation

DIPEC asserts that, because the CWS was causing "substantial adverse effects on work at the Headquarters office, [which at the same time was] facing an increased workload, change of mission with the onset of Desert Shield, and a shortage of staff, there was an urgent and compelling need to correct this situation." Brief at 14. This assertion might be construed as an argument that termination of the CWS was permissible, in the circumstances presented, in advance of negotiations.

The Work Schedules Act permits the exclusion of employees from flexible work schedules where an organization within the agency that is participating in such a program "is being substantially disrupted in carrying out its functions." That permission is found in § 6122 and, as discussed above, is inapplicable to this case. Section 6131 formulates procedures for agency heads to follow when they find "that a particular flexible or compressed work schedule has had or would have an adverse agency impact." As (also) discussed above, however, those procedures call for bargaining before implementation of a decision not to continue such a schedule.

Nothing in the Work Schedules Act, then, would appear to support a pre-bargaining termination of a CWS. That might be expected to end the matter. In the event, however, that it is determined that this aspect of the case is governed by the Federal Service Labor-Management Relations Statute, a different analysis is required. Normally, under the Statute, an agency is obligated to bargain before implementing a change in the conditions of employment of its represented employees. Department of the Air Force, Scott Air Force Base, 35 FLRA 844, 852 (1990). The only potentially applicable exception is that of an acute need to implement the change before the completion of negotiations, that is, that expedited implementation was required, "consistent with the necessary functioning of the Agency." Social Security Administration, 35 FLRA 296, 302-03 (1990).

This description of the exception derives from a line of cases dealing with the duty to maintain the status quo while a bargaining impasse is before the Federal Service Impasses Panel. As articulated more fully in U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri, 23 FLRA 435, 436 (1986) (HUD), the principle applied in those cases is that "the status quo must be maintained to the maximum extent possible, that is, to the extent consistent with the necessary functioning of the agency."[7/] When an agency chooses to avail itself of this exception and thus to alter the status quo, it must be prepared "to provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency if its actions were subsequently contested in an unfair labor practice proceeding." Id. at 437. The Authority has also indicated that the phrase, "consistent with the necessary functioning of the agency," may be accurately paraphrased as "necessary for the [agency] to perform its mission." Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas, 23 FLRA 90, 90 (1986).

The Authority stated in Social Security, supra, that the agency failed to demonstrate that implementation of the change involved there, "before completion of negotiations, was consistent with the necessary functioning of the Agency." That statement implies, and I conclude, that the Authority now would apply the same status quo standard previously associated with Impasses Panel cases to unilateral change cases generally.[8/] Indeed, it has long used that standard with regard to the duty to maintain existing conditions of employment while a question concerning

---

7/ The Authority has also adopted, without comment, an administrative law judge's characterization of the exception as one involving "an overriding exigency . . . which required immediate implementation." U.S. Department of the Air Force, 832D Combat Support Group, Luke Air Force Base, Arizona, 36 FLRA 289, 300 (1990). See also 22 Combat Support Group (SAC), March Air Force Base, California, 25 FLRA 289, 301 (1987). On the other hand, see Judge Devaney's discussion in HUD, supra, 23 FLRA at 453-54, to the effect that the "maximum extent possible standard is more stringent than the "overriding exigency" standard.

8/ See also Luke Air Force Base, supra, 36 FLRA at 298, 300.

representation is pending. See Department of Justice, Immigration and Naturalization Service, 9 FLRA 253, 255 n.2, 283-86 (1982), rev'd as to other matters sub nom. U.S. Department of Justice v. FLRA, 727 F.2d 481 (5th Cir. 1984)(DOJ, INS).

I find that the evidence presented here does not meet this demanding standard. The regular absence of some employees on each working day, even when combined with the staff shortages and other temporary additional pressures on DIPEC's headquarters operations, may well have made it more difficult or inconvenient for management to perform its function at a high level of efficiency. It does not appear, however, that DIPEC was in acute danger of being unable to perform its function without terminating the CWS. DIPEC operated with the CWS program for eight months, and although Desert Shield may have injected another element of uncertainty, its potential impact was speculative and it concededly played only a minor role in the decision to terminate. Nor was there any other evidence that the problems the program was causing were likely to become more severe after August 17. In fact, the program as implemented in December 1989 contained provisions for preventing the extreme consequences that DIPEC assertedly feared. Judicious application of the following provisions, for example, (found in part III of G.C. Exh. 3, the December 1989 DIPEC HQ Staff Instruction No. 1422.4) should have given management the flexibility to enable it to function, within the program, without a substantial loss of efficiency:

> B. Tour of duty for the DIPEC Staff will be scheduled by the Commander. Command approval is required in order to restrict any positions from participating in the Flexitime/CWS Program.
>
> I. Supervisors have the authority, on a temporary basis, to require employees to work a regular tour of duty (0730-1600) when work or other conditions require their presence. However, as much advance notice as possible should be given to the employee(s) when the requirement exists.
>
> J. An employee's regular off day on the CWS may be scheduled for any Monday through Friday during the pay period. Supervisors will ensure than no more than 25% of the work force has the same scheduled day off. Supervisors

> will schedule and approve each employee's off day, taking into consideration the preferences of the employee.

In fact, Deputy Commander Donald Williams (successor to Mr. Prince) testified that, had the Commander not terminated the program, management probably would have disallowed the use of CWS by many employees. Tr. 212.

In short, the situation here may fairly be described as Judge Oliver did in DOJ, INS, supra, 9 FLRA at 286: "Respondent did not maintain the previously existing conditions to the maximum extent possible . . . . Rather, the record reflects that the reasons for the change were of long-standing origin and were merely desirable, rather than being essential or necessary to the functioning of the agency."

The ultimate findings and conclusions stated in parts A-D, above, lead me to conclude that DIPEC did engage in the alleged unfair labor practices.

The Remedy

Counsel for the General Counsel requests a status quo ante remedy and DIPEC opposes it. Since this case involves a refusal to bargain over the substance of a decision to change a condition of employment, a status quo ante remedy is appropriate in the absence of special circumstances that show the remedy to be unwarranted. U.S. Department of Labor,, Washington, D.C., 38 FLRA 899, 913 (1990); Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA 278, 281 (1986).

An excerpt from DIPEC's brief encapsulates its argument against imposition of such a remedy:

> The evidence is that a return to the status quo ante would seriously disrupt and impair agency operations not only with the present added mission of Desert Shield/Desert Storm but because of the continuing personnel shortage and increased workload. The former CWS schedule contained no flexibility to allow for situations requiring the 5 day presence of employees.

DIPEC did introduce evidence concerning increased demands on its work force after the CWS program was

terminated, as Desert Shield went into full swing and was superseded by Desert Storm. However, I take notice that the main thrust of the entire Persian Gulf operation has been completed for several months, and I infer that the providing of industrial plant equipment is back, more or less, on a normal peacetime footing. This would seem to leave the demands on DIPEC essentially as they were at the time the CWS program was terminated.9/ For the reasons discussed in part D, above, with respect to DIPEC's failure to show that termination of the program before completing negotiations was essential, I conclude that restoration of the status quo ante will not place an unreasonable burden on DIPEC. Such restoration, however, is to be ordered only as to bargaining unit employees at DIPEC's Memphis headquarters. Accordingly, I recommend that the Authority issue the following order.10/

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee shall:

9/ As of January 1, 1991, approximately one month before the hearing, there were more vacancies in a few of the organizational subdivisions of DIPEC headquarters than there were in August 1990. Further, as Captain Hall testified, the loss in numbers does not fully reflect the loss of capacity as experienced hands are replaced by newcomers. Contrary to DIPEC's assertion, however, I find that the CWS program permitted management temporarily to restrict the use of CWS in those subdivisions where an acute hardship would otherwise result. I see no need to reopen the hearing or seek additional submissions to deal with the change of circumstances since the hearing. If my suppositions about the present situation are incorrect, or if the situation changes after the date of this decision, DIPEC may make an appropriate showing before the Authority or, if the Authority so directs, in the compliance stage. See U.S. Department of the Army, Lexington Blue Grass Army Depot, Lexington, Kentucky, 39 FLRA 1472, 1475-76 (1991).

10/ The recommended order is adapted from U.S. Department of the Air Force, 416 CSG, Griffis Air Force Base, Rome, New York, 38 FLRA 1136 (1990).

1. Cease and desist from:

(a) Unilaterally terminating the compressed work schedule program for its Memphis, Tennessee, headquarters employees represented by the American Federation of Government Employees, the exclusive representative of certain of its employees, without affording the exclusive bargaining representative the opportunity to negotiate with respect to any proposed changes.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights assured them 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) Upon request, reestablish the previous compressed work schedule program for such employees and afford the American Federation of Government Employees the opportunity to negotiate with respect to any proposed changes.

(b) Post at its Memphis, Tennessee, headquarters, 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 Commander of the Defense Industrial Plant Equipment Center 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, 1371 Peachtree Street, N.E., Suite 122, Atlanta, GA 30367 in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., August 27, 1991.

Jesse Etelson

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally terminate a compressed work schedule program for our employees represented by the American Federation of Government Employees, the exclusive representative of certain of our employees, without affording the exclusive bargaining representative the opportunity to negotiate with respect to any proposed changes.

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

WE WILL, upon request, reestablish the previous quitting flexitime hours for represented headquarters employees and afford the American Federation of Government Employees, the exclusive representative of certain of our employees, the opportunity to negotiate with respect to any proposed changes.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 1371 Peachtree Street, N.E., Suite 122, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.