FEDERAL LABOR RELATIONS AUTHORITY OALJ 13-14
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FAIRTON, NEW JERSEY RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3975, AFL-CIO CHARGING PARTY	Case No. BN-CA-10-0041

Kenneth Woodberry
For the General Counsel

Colleen J. Berry
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For the Respondent

David Gonzalez
Claude L. Rucker
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

In literature and film, a common scenario is: Boy Meets Girl, Boy Loses Girl, Boy and Girl Reunite. In labor relations, an equally familiar pattern is: Agency and Union Agree on a Contract, Parties Drift Away from the Terms of the Contract, Supervisor Insists on Resuming Compliance with the Contract, Union Claims "Past Practice." The latter scenario may not be as rich in its literary and dramatic possibilities as the former, but it offers a similar framework for variations on a familiar theme. While the workplace drama sometimes has a happy ending, at other times the protagonists find that time has altered them irrevocably, and they can't go back to the way they were -- at least not without negotiating.

On August 4, 2009, Associate Warden Karl Belfonti sent a memorandum (the Belfonti Memo) to Union President David Gonzalez, stating that the compressed work schedules of bargaining unit employees did not comply with the parties' negotiated agreement on this subject. To correct this situation, the memo stated that, beginning with the next quarter, employees would schedule their tours of duty in accordance with a document that he attached. The Union objected to what it perceived to be a unilateral change in the existing scheduling practices, but the Agency insisted it was simply returning to the policies mandated in an agreement negotiated by the parties in 2000, and it refused to bargain.

Although Mr. Belfonti and Agency management may have simply wanted to follow the scheduling rules that had been agreed upon mutually by the parties in 2000, by 2009 both employees and their supervisors had adopted scheduling practices that differed in several respects from management's understanding of the 2000 agreement. The Agency could not simply nullify the practices that had become established through mutual custom over several years, even if it relied on a document signed by the Union. The unwritten practices that had been adopted by the parties had become conditions of employment, which could not be changed without notice to the Union and bargaining. The Agency's refusal to bargain before implementing the Belfonti Memo was therefore an unfair labor practice.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On October 14, 2009, the American Federation of Government Employees, Local 3975, AFL-CIO (the Union or the Charging Party) filed with the Boston Region of the Authority an unfair labor practice charge against the U.S. Department of Justice, Federal Bureau of Prisons (the Bureau), Federal Correctional Institution, Fairton, New Jersey (the Agency, Respondent, or FCI Fairton), and the charge was transferred to the Chicago Region of the Authority on the same date. After investigating the charge, the Chicago Regional Director issued a Complaint and Notice of Hearing on October 29, 2010, alleging that the Agency changed the conditions of employment of bargaining unit employees without providing the Union an opportunity to bargain to the extent required by law, in violation of § 7116(a)(1) and (5) of the Statute. The Respondent filed a Motion to Compel a More Definite Statement, to which the General Counsel (GC) filed an Opposition; the Respondent's motion was denied on November 23, 2010. The Respondent then filed its Answer to the Complaint, denying that it committed an unfair labor practice and alternatively setting forth defenses. The GC and Respondent both moved for summary judgment and filed an opposition to the other's motion. Both summary judgment motions were denied.

A hearing was held in this matter on January 5 and 6, 2011, in Cherry Hill, New Jersey. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

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

Background

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Exs. 1(b), 1(c)). The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (the Council) is a labor organization within the meaning of § 7103(a)(4) of the Statute, and it is the exclusive representative of a nationwide unit of employees that is appropriate for collective bargaining at the Bureau. GC Exs. 1(b), 1(c). The Bureau and the Council are parties to a national collective bargaining agreement (the Master Agreement), which authorizes local bargaining on certain topics, including compressed work schedules (CWS). Tr. 21-22, 54-55; Jt. Ex. 1 at 22-25 (Master Agreement Art. 9, authorizing local supplemental agreements) and at 42-43 (Master Agreement Art. 18, § b, authorizing local negotiations on compressed work schedules specifically). The Charging Party is the agent of the Council for the purpose of representing bargaining unit employees at FCI Fairton. GC Exs. 1(b), 1(c).

The Union and FCI Fairton entered into an agreement in January 2000 (the January 2000 Agreement) to establish an optional system of "4/10" compressed work schedules (i.e., working four days per week, ten hours per day). The January 2000 Agreement covered case managers[1] and correctional counselors in the Agency's Unit Management division.[2] Tr. 19, 63-65; GC Exs. 2(a)-(g)[3]; Resp. Ex. 4. The Unit Management employees covered by the January 2000 Agreement work in four components of the facility -- A Unit, B Unit, C Unit, and D Unit. GC Ex. 2(a); Tr. 373-74. In August 2000, the Union and FCI Fairton entered into another agreement (the August 2000 Agreement),[4] which extended the opportunity to work CWS to employees in the Satellite Camp and Sierra Unit and to three unit secretaries. Resp. Ex. 1. The current dispute involves the CWS schedules available to bargaining unit employees under these two Memoranda of Understanding (the 2000 Agreements).

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[1] A witness indicated that the official title for this position is "correctional treatment specialist" (Tr. 305), but I follow the parties' convention in referring to these employees as "case managers."

[2] Most employees in the Unit Management division are not "management officials," as that term is used in § 7103(a)(11) of the Statute. Unit Management employees are mostly rank and file members of the bargaining unit. (Tr. 15).

[3] As discussed further in the next section, there is a dispute between the parties as to whether the document identified as GC Ex. 2(b) was part of the January 2000 Agreement. The Respondent's witnesses testified that GC Ex. 2(b) was part of the January 2000 Agreement (Tr. 398-401), and the Union witnesses testified to the contrary (Tr. 26, 49-50).

[4] The Bureau's Office of General Counsel, Labor Law Branch did not formally approve this agreement until October 2000, but affected employees signed forms acknowledging that they had reviewed it in August of that year. Resp. Ex. 1 at 1, 7, 8.

Compressed Work Schedules Prior to the Belfonti Memo

In January and again in August of 2000, the parties signed single-page documents – each of which was entitled "Memorandum of Understanding"[5] - - that made compressed work schedules available to certain bargaining unit employees.[6] (G.C. Ex. 2(a)); Resp. Ex. 1 at 4). However, neither of those signed documents actually specified the tours of duty available to employees working a 4/10 schedule. Tr. 57; *see also* GC Ex. 2(a); Resp. Ex. 1 at 4. Notwithstanding the lack of specificity in the MOUs themselves, the parties agree that case managers and correctional counselors on a 4/10 schedule must work at least one late shift per week.[7] Tr. 90, 400. The parties also agree that the "sample" schedules for A, B, C, and D Units (GC Exs. 2(d), 2(e), 2(f), 2(g)), which were attached to the January 2000 MOU, constitute part of the January 2000 Agreement.[8] Tr. at 33, 400. But the parties pointedly disagree as to the remaining details of the standard tours of duty established by the 2000 Agreements.

According to the Agency, the standard tours of duty for case managers and counselors are set forth in a proposal (GC Ex. 2(b)) that the Union submitted to the Agency during negotiations for the January 2000 MOU. Tr. 398-401. Clause 9 of that proposal states, "At a minimum, every Counselor and Case Manager is working one 10:30 a.m. - 9:00 p.m. and one 6:00 a.m. - 4:30 p.m. shift per week. The remaining shift is 7:30 a.m. - [6]:00 p.m."[9] GC Ex. 2(b). From the Agency's perspective, the parties incorporated the entirety of that proposal into the January 2000 Agreement, and so the proposal document constitutes an integral component of the 2000 Agreements. Tr. 398-401. But the Union contends that its proposal was nothing more than that -- a *proposal* -- and that GC Ex. 2(b) was not

[5] Neither MOU is actually dated. However, employees in A, B, C, and D Units signed a form in January 2000 acknowledging that they had reviewed the first MOU (GC Ex. 2(c)), and employees covered by the second MOU signed forms in August 2000 acknowledging that they had reviewed it. Resp. Ex. 1 at 5, 7, 8.

[6] I refer to these signed, single-page documents -- without any attachments or supplementary documentation -- as the "January 2000 MOU" and the "August 2000 MOU," respectively. GC Ex. 2(a) (January 2000 MOU); Resp. Ex. 1 at 4 (August 2000 MOU). However, as discussed further in this section, what I refer to as the January and August 2000 *Agreements* encompass more than the single-page MOUs.

[7] Due to his union responsibilities, Union President David Gonzalez is exempt from the late-shift requirement. Tr. 90. Moreover, unit secretaries do not work late shifts. Tr. 86-87. *See also* Resp. Ex. 1 at 5 ("Secretary Staff Schedule" showing all shifts completed by 6:00 p.m.).

[8] While the parties agree that the sample schedules are part of the January 2000 Agreement, they interpret the sample schedules differently. *Compare* Tr. 130-31 (legend of early, day-watch, and late shift times on the sample schedules merely shows the most common times, not the required shift times), *with* Tr. 361-62 (legend of shift times indicates an expectation that staff will generally work at least one of each of those shifts weekly, and that they will start and finish shifts at the particular times specified in the legend).

[9] Although the final shift listed in the proposal is "7:30 a.m. - 9:00 p.m.," there was broad agreement that the "9" was a typo, and that it should have been a "6." Tr. 75-76, 111, 192, 398-99. On its face, a 13-hour shift of 7:30 a.m. - 9:00 p.m. would be improper.

incorporated into the finalized 2000 Agreements. Tr. 26, 49-50, 190-91. According to the Union, the parties negotiated a set of "core hours" (specifically, 6:00 a.m. to 6:00 p.m.) within which an employee could request – and reliably expect supervisory approval for -- any 10-hour shift that did not create a staff coverage deficiency.[10] *See* Tr. 83-85, 90, 103, 113, 199, 206, 268-70. Thus, from the Union's perspective, the 2000 Agreements authorized a wide variety of different shifts and tours of duty. Tr. 63, 84, 268-71.

The parties also dispute the number of different shifts that the 2000 Agreements required employees to work each week. More specifically, they disagree about whether the 2000 Agreements required that 4/10 schedules include a particular combination of early, day-watch, and late shifts. In fact, the testimony on this point differed even among witnesses for the same party. Union President Gonzalez, who was on the bargaining team for the 2000 Agreements, testified that "from the very beginning" (Tr. 91-92), as long as an employee worked at least one late shift (10:30 a.m. - 9:00 p.m.) each week, the remainder of the employee's week could include any combination of within-the-core-hours shifts, or even an additional late shift (Tr. 89-95, 103).[11] However, Chief Steward Alfred Lamar -- who was also on the Union bargaining team for the 2000 Agreements, testified that when the 2000 Agreements first went into effect, there was a general expectation that an employee working CWS would work at least three different shifts each week (i.e., at least one early shift, one day-watch shift, and one late shift). Tr. 201-04.

Joseph Pecoraio, who testified for the Respondent, had been a case manager at FCI Fairton in 2000, and he later became a supervisor there. (Tr. 348). Mr. Pecoraio testified that the 2000 Agreements required CWS employees to work at least three different shifts per week (including the required late shift), and that the fourth shift could be either an additional 7:30 a.m. - 6:00 p.m. shift, or an additional 6:00 a.m. - 4:30 p.m. shift. (Tr. 362). Associate Warden Belfonti, whose August 4, 2009 memo insisted on closer adherence to the 2000 Agreements, agreed with Lamar and Pecoraio that the 2000 Agreements required CWS employees to work each of the three primary shifts every week, but he further insisted that their fourth shift was required to be 7:30 a.m. - 6:00 p.m. (thus every CWS employee would work two 7:30 - 6:00 shifts, one 6:00 - 4:30 shift and one 10:30 - 9:00 shift every week). Tr. 378, 388, 400-02. In short, the testimony revealed nothing but confusion about the particular mix of shifts required under the 2000 Agreements -- confusion that was borne out by the scheduling practices that developed in the ensuing years.

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[10] Nevertheless, the Union could not produce any documentation confirming that the parties agreed on a range of core hours in connection with the 2000 Agreements. Gonzalez testified, "the reason I say that core hours was negotiated and agreed to was because I happened to be in the room when that was agreed to. But . . . I could not find the document . . . binding us to that agreement." Tr. 87, *see also* Tr. 269. Neither MOU refers to "core hours," but Gonzalez testified that this was implicit in the provision setting night differential pay for hours worked between 6:00 p.m. and 6:00 a.m. Tr. 87.

[11] Gonzales testified that even the within-the-core-hours requirement could be waived for a sufficiently good reason. Thus, in order to accommodate his night school classes, Mr. Lamar was permitted to start his shifts at 8:30 a.m., thereby extending Lamar's shifts beyond the core hours (i.e., until 7:00 p.m.). Tr. 103, 172, 271-72.

Despite the level of disagreement as to the contours of the 2000 Agreements, witnesses consistently testified that prior to August 4, 2009, employees experienced very few, if any, difficulties in getting supervisory approval for their shift requests. Tr. 66, 104, 195, 204-05, 324, 353, 356-60. The GC's witnesses and Mr. Pecoraio described an informal scheduling process, whereby employees on each staff would discuss with their supervisor and colleagues which shifts they wanted to work each quarter, and then the staff would agree among themselves as to the quarterly roster, with the unit supervisor exercising approval authority to ensure adequate coverage. Tr. 66, 104, 195, 353. The employee witnesses stated that they could not recall any disagreements among staff members about which employee should get to work a particular shift or have a particular day off because, under the Master Agreement, seniority determined the order in which employees made such choices. Tr. 166, 196. Indeed, none of the witnesses could recall a single employee whose scheduling request was denied between January 2000 and August 2009, with the exception of employees in training.[12] Tr. 153, 162, 195, 199, 370, 374. Moreover, the witnesses testified that prior to August 2009, their scheduled shifts often deviated from the three "standard" shift times specified in clause 9 of the Union's proposal document (GC Ex. 2(b)), and such deviations did not require them to submit a formal memo or to elevate their scheduling requests beyond their unit supervisor. Tr. 63, 232, 238, 271-72, 292, 307, 324, 356, 367-68. In fact, deviations from the standard shift times were "routine." Tr. 194, 307, 324. Indeed, Pecoraio's testimony regarding his practice as a supervisor corroborates the employees' description. Tr. 353-60.

Adding context to this testimony, the GC introduced many of the actual quarterly rosters approved between June 2007 and September 2009. Tr. 81; GC Ex. 3.[13] These rosters substantiate the observations of bargaining unit witnesses that for at least two years leading up to the Belfonti Memo, deviations from the three standard shifts listed in clause 9 of GC Exhibit 2(b) were not simply common, but "routine." Of the schedules reflected in the cumulative 21 pre-Belfonti-Memo rosters in the record,[14] virtually every CWS employee's

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[12] Both MOUs explicitly require that employees scheduled for training "assume" a Monday to Friday schedule. GC Ex. 2(a) (January 2000 MOU, cl. 6); Resp. Ex. 1 at 4 (August 2000 MOU, cl. 2).

[13] Quite a few of the rosters in GC Exhibit 3 are duplicates of earlier pages of the exhibit. *See* GC Ex. 3 at 2, 10, 17, 20, 27, 29, 31, 33-34, 36, 41 (duplicating immediately preceding pages). But combining the unique rosters in that exhibit with the rosters in Respondent's Exhibit 3 produces the following set of documents:

- For A Unit, there is the June 21 - September 19, 2009 quarterly roster. GC Ex. 3 at 1.
- For B Unit, of the nine quarterly rosters that would have been created between June 24, 2007, and September 9, 2009, eight are in the record; the roster for September 30 - December 22, 2007 is not. *See* GC Ex. 3 at 4-9, 11; Resp. Ex. 3 at 1.
- For C Unit, all six of the quarterly rosters from March 23, 2008, through September 26, 2009, are in the record. *See* GC Ex. 3 at 13-16, 18-19.
- For D Unit, all six of the quarterly rosters from March 16, 2008, through September 19, 2009, are in the record. *See* GC Ex. 3 at 24-26, 28, 30, 32.

[14] The record does not contain a sufficient number of pre-Belfonti-Memo rosters for employees covered by the August 2000 MOU to meaningfully compare them with post-Belfonti-Memo rosters for those same employees. Thus, all of the rosters included in the analysis in note 13 above are for employees covered by the January 2000 MOU.

schedule on every roster deviates from clause 9 of GC Exhibit 2(b), as management interpreted it in August 2009 - - in one or both of the following ways:

1. The employee does not work three different shifts over the course of a week.

2. The starting and ending times for one or more of the employee's shifts differ from the shift times listed in clause 9.

Compressed Work Schedules After the Belfonti Memo

Mr. Belfonti testified that when he became Associate Warden for Programs in April 2009, he noticed that the actual schedules being worked by Unit Management employees were not in compliance with the 2000 Agreements. Tr. 378. He tried to find out why this was so, but he couldn't get a satisfactory answer. *Id.* He saw that many employees on CWS were working shifts other than the three specified in GC Exhibit 2(b) -- with the result that some employees worked shifts starting 6:30, 7:00, 8:00, and 8:30 a.m. -- and he wanted to reduce the frequency of these "odd" shifts. Tr. 397-98; GC Ex. 3. Therefore, he "let the staff know that we were going back to what was originally negotiated." Tr. 378, 389, 394. He did this by sending the following memo to the Union on August 4, 2009:

> Upon reviewing the negotiated and approved compressed work schedules for the Unit Management Staff at FCI Fairton, it has been brought to managements [sic] attention that the unit schedules are not in compliance in what was originally negotiated and approved. So effective with the next quarter change, the attached Unit Management Schedule for Case Managers, Counselors, and Secretaries will go into effect.

GC Ex. 4. Union President Gonzalez testified that when he received the Belfonti Memo, the Union's proposal document from the 2000 negotiations (GC Ex. 2(b)) was attached to it. Tr. 96-97. Subsequently, Belfonti discussed the memo with Union officials, but he would not negotiate regarding it, because he felt the parties had already negotiated it in 2000. Tr. 96-99, 139, 275-76, 394-95. At the hearing, Belfonti testified that his purpose in issuing the memo was to prevent potentially inadequate staff coverage, particularly at the morning and evening meals (Tr. 382-85, 395), but he did not cite this concern in his memo or in meetings with employees. Tr. 232, 275, 282. Gonzalez testified that he asked the Agency for a "work-related reason why[ ]" the schedules being worked in August 2009 could not continue, but the Agency never offered any such reasons or cited a concern about inadequate staff coverage. Tr. 105, 116-17, 282, 414.

After the Belfonti Memo was issued, meetings were held with employees to discuss the parameters for their future schedules. Tr. 294-95, 330, 373, 393. Following those meetings, many employees were told that their existing compressed work schedules would not be approved again, if they violated these parameters. Tr. 151, 195, 213, 223, 327-28. Belfonti's response to complaints about discontinuing long-standing schedules was that if

employees did not want to comply with the terms of the 2000 Agreements, as Belfonti understood them, then they should switch back to a five-day schedule. Tr. 328, 380. In addition, several employees testified that their scheduling requests, which only their unit managers had reviewed in detail in the past, were now being closely scrutinized by Belfonti himself. Tr. 221, 291, 324-28, 397. Any request for a deviation from Belfonti's understanding of the terms of the 2000 Agreements had to be submitted in a formal memo, even though 4/10 schedule requests had never required such memos before. Tr. 272, 291-92, 332-33. Several employees whose long-standing schedules were to be discontinued under the Belfonti Memo had to appeal to the Warden in order to keep them (Tr. 219, 327-30, 332-35), something that had never previously been required. Tr. 338. And of those employees whose appeals the Warden granted, at least one was told by Belfonti not to expect approval for any further requests. Tr. 291, 294. Prior to the Belfonti Memo, no one could recall higher-level management intervening to deny a scheduling request that was agreeable to everyone on the affected staff, including the unit supervisor. However, the Belfonti Memo made such denials increasingly frequent. Tr. 120, 125-26, 301, 327-28.

Several employees testified as to how the implementation of the Belfonti Memo affected them. Counselor Clinton Freeman had worked a 4/10 schedule for approximately three years. During that time, his schedule included three 6:00 a.m. - 4:30 p.m. shifts and one late shift. Tr. 289-91. Since August of 2009, Freeman has been required to work at least one 7:30 a.m. - 6:00 p.m. shift each week, which prevents him from being home when his children return from school. In order to fulfill his parenting responsibilities, Mr. Freeman decided to return to a five-day schedule. Tr. 290, 293-94. Since 2004, case manager Daniel Lukomski had worked three 7:30 a.m. - 6:00 p.m. shifts per week and one late shift. Tr. 305-07, 313. He had never been required to demonstrate special circumstances in order to receive supervisory approval for that schedule. Tr. 307. After the Belfonti Memo was implemented, Lukomski's supervisor told him that he would have to change his work schedule to include one 6:00 a.m. - 4:30 p.m. shift every week. Tr. 306, 313-15. Beginning in 2003 or 2004, counselor Deborah Kuhn had worked a 4/10 schedule that consistently included the same shift three days per week, as well as one late shift. In some quarters, she worked three shifts starting at 7:00 a.m., and in other quarters, she worked three shifts starting at 6:00 or 6:30 a.m. Tr. 321-22, 329-30. After the Belfonti Memo, she was told that she had to include one 7:30 a.m. - 6:00 p.m. shift in her schedule each week, and when she requested an exception, Belfonti personally denied it. Tr. 339. Ms. Kuhn appealed the denial to the Warden. Tr. 333-34. But in the meantime, she lost the money that she had paid for a program in which she had enrolled her daughter because, without knowing whether she would have to work until 6:00 p.m. one night every week, Kuhn could not be certain that she could get to the program in time to participate each weekday. Tr. 331-32. Eventually, the Warden granted her appeal, but when the Warden left the institution, Kuhn -- knowing that Belfonti had denied her earlier schedule requests -- added a 7:30 a.m. - 6:00 p.m. shift to her schedule each week. Tr. 346-47.

Belfonti fully intended his memo to change employee scheduling practices in these ways. In that regard, unit manager Pecoraio testified that Belfonti said he wanted to decrease the frequency of shifts deviating from those specified in GC Exhibit 2(b), and Belfonti confirmed in his own testimony that he drafted his memo with this objective in mind. Tr. 369, 398. Additionally, Belfonti advised his unit managers that they no longer had the authority to grant exceptions to the parameters of clause 9 of GC Exhibit 2(b) (as Belfonti understood those parameters), despite the years-long practice of unit managers routinely approving such deviations. Tr. 368-69, 372 (the memo "ma[d]e unit managers aware that we did not have . . . flexibility with everyone's schedule."). In other words, Belfonti knew that his memo would change the CWS regime at FCI Fairton as it existed on August 4, 2009. Tr. 394. He nevertheless felt that the law did not require bargaining over such changes because, in his mind, he was restoring compliance with the 2000 Agreements. Tr. 394-96.

A comparison of the quarterly rosters drafted before and after August 2009 reveals a system-wide restructuring of employees' compressed work schedules.[15] As mentioned earlier, before the Belfonti Memo, virtually every 4/10 schedule listed on the rosters for A, B, C, and D Units deviated from the terms of the 2000 Agreements (as Belfonti interpreted them in August 2009). By contrast, among all of the post-Belfonti-Memo rosters in evidence for A, B, C, and D Units,[16] only three deviations from the shift schedules permitted under the Memo were approved:

1. Kuhn's schedule during the quarters for which the Warden overruled Belfonti's denial of a scheduling exception for her. Tr. 342-45; Resp. Ex. 3 at 3-5.

2. Lamar's scheduling exception to accommodate his schooling.[17]

3. A single quarter during which M. Coard of D Unit worked the same shift three times per week. GC Ex. 3 at 38.

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[15] For A Unit, a single quarterly roster was submitted in evidence. GC Ex. 3 at 3. For B Unit, there are four rosters spanning December 20, 2009 to December 18, 2010. Resp. Ex. 3 at 3-5; GC Ex. 3 at 13. For C Unit, there are three rosters spanning October 4, 2009 to December 18, 2010. GC Ex. 3 at 21-23. For D Unit, there are three rosters: September 20 - December 19, 2009; December 20, 2009 - March 20, 2010; and December 19, 2010 - March 19, 2011. GC Ex. 3 at 35, 37, 38.

[16] *See supra* note 14 regarding rosters for other units.

[17] This is not to suggest that Lamar was unaffected by the Belfonti Memo. Whereas he had been permitted to work three shifts each week beginning at 8:30 a.m. due to his schooling, after August 2009 Lamar was granted only two 8:30 a.m. shifts per week. Tr. 217-18; GC Ex. 3 at 21-23.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel argues that the Agency unilaterally terminated several compressed work schedules available to Unit Management staff without first negotiating with the Union, in violation of its duty to bargain in good faith under § 7116(a)(1) and (5). The GC asserts that the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (the Act), 5 U.S.C. §§ 6120-6133, requires an agency to follow specific procedures, including negotiation with the employees' exclusive representative, before terminating a compressed work schedule, and that by failing to follow those procedures here, the Agency committed an unfair labor practice under the Statute.

Specifically, the GC alleges that the Belfonti Memo resulted in the following changes to conditions of employment that existed in August 2009: (1) employees were largely restricted to the schedules found in the sample quarterly rosters attached to the January 2000 MOU (GC Ex. 2(d)-2(g)), thereby terminating many shifts and tours of duty that had previously been routinely approved; (2) CWS employees were required to work all three of the shifts listed in GC Exhibit 2(b); and (3) any deviations from the terms of the 2000 Agreements (as Belfonti interpreted them) required a showing of special need and a written memo.

According to the GC, the number and variety of tours of duty available to bargaining unit employees on 4/10 schedules multiplied in the years following the execution of the 2000 Agreements. The GC asserts that prior to the Belfonti Memo, as long as a shift began during the core hours of 6:00 a.m. to 6:00 p.m., it was routinely approved by management without requiring a showing of special circumstances. The GC emphasizes the testimony of Gonzales, Lamar, and Pecoraio to the effect that except for employees in training, not a single CWS request was disapproved in the eight years following the negotiation of the 2000 agreements, even though many of the requested schedules deviated from those shown in the sample schedules attached to the January 2000 MOU. Because supervisors routinely approved these various schedules over the course of several years, the GC argues that a past practice became established, so that these schedules became a part of the parties' negotiated agreement. *See U.S. DOJ, Executive Office for Immigration Review, Bd. of Immigration Appeals*, 55 FLRA 454, 456 (1999). In this regard, the GC notes that the Authority has previously held that compressed work schedules may become established by past practice, and that they are thereby incorporated into the parties' collective bargaining agreement and become subject to the Act. *AFGE, Local 2128*, 58 FLRA 519, 523 (2003). The GC adds that the negotiability of compressed work schedules, including the termination of those schedules, is subject only to the terms of the Act and laws superseding it, without regard to management rights under the Statute. *U.S. DOL, Wash., D.C.*, 59 FLRA 131, 134-35 (2003) (*DOL*).

The Respondent concedes that it did not negotiate prior to implementing the Belfonti Memo. The GC contends that by unilaterally eliminating some of the compressed work schedules available to employees, the Agency disregarded the bargaining obligations under section 6131(c)(3) of the Act, thereby violating § 7116(a)(1) and (5) of the Statute. *NFFE, Local 1998*, 60 FLRA 141 (2004) (*NFFE, Local 1998*); *U.S. DOJ, INS, L.A., Cal.*, 59 FLRA 387, 388 (2003) (*INS, L.A.*); *Def. Logistics Agency, Def. Indus. Plant Equip. Ctr., Memphis, Tenn.*, 44 FLRA 599 (1992). Seeking to rebut one of the Respondent's defenses, the GC argues that even though the Agency continued to allow employees to request deviations from the sample schedules attached to the January 2000 MOU, that does not excuse the Agency from bargaining over its decision to make all such requests dependent on special circumstances for approval, when no such requirement existed before. Moreover, the GC contends that the ability of employees to request exceptions to the Belfonti Memo does not excuse the Agency's discontinuation of compressed work schedules that employees had been working for years without incident.

As a remedy for these unfair labor practices, the General Counsel seeks status quo ante and make-whole relief for the unilateral changes implemented by the Respondent. The GC also requests that a cease-and-desist order be issued, as well as a notice to employees, signed by the Warden of FCI Fairton. The GC contends that its remedial requests are consistent with the relief granted in *INS, L.A.*, 59 FLRA at 390, which also involved the unilateral termination of 4/10 schedules. In addition, the GC argues that the Respondent has not met its burden of demonstrating the existence of special circumstances that might warrant a denial of status quo ante relief as required. (*Id.* at 388-89).

Respondent

The Respondent denies that it made unilateral changes to employees' compressed work schedules, and it further denies that it repudiated the parties' CWS agreements.[18] To the extent that the Belfonti Memo changed employees' conditions of employment, Respondent asserts that its effects were de minimis. The Respondent emphasizes the continuity in its CWS policy at FCI Fairton, before and after the Belfonti Memo, in these respects: (1) most employees on 4/10 schedules worked the shifts identified in the January 2000 MOU (Tr. 130-31);[19] (2) employees were expected to work at least one early shift, one day-watch shift, and one late shift each week; and (3) employees could request deviations from the tours of duty outlined in the January 2000 MOU, and management approved or denied those requests. This continuity belies any change in conditions of employment.

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[18] Although the unfair labor practice charge filed by the Union alleged repudiation, the GC did not allege this in its complaint. *Compare* G.C. Exs. 1(a) and 1(b). Since the issues in the case before me are framed by the complaint, not the charge, I do not address the issue of repudiation further.

[19] The Respondent considers the Union's proposal document (G.C. Ex. 2(b)) as part of the January 2000 MOU. (Resp. Br. at 3 & n.2).

According to the Respondent, the Belfonti Memo merely announced management's intention to adhere to the terms of the January 2000 MOU. In particular, the memo sought to decrease the number of scheduling deviations in order to comply with management's contractual obligations and to address concerns about the adequacy of staff coverage in the mornings and evenings. Tr. 398; Resp. Br. at 5. In this regard, no consistent practice existed, or evolved, between 2000 and August 2009, that would have modified the January 2000 MOU; therefore, enforcing the MOU's terms did not change conditions of employment. Although the GC introduced quarterly rosters in an attempt to establish the existence of a past practice, the GC admitted that the rosters were merely a sampling, which is insufficient to demonstrate the consistency necessary for a binding past practice.

With regard to employees who testified that their schedules changed as a result of the Belfonti Memo, the Respondent noted: (1) Lukomski failed to raise to management any concerns regarding his post-August 2009 schedule; (2) Lamar continued to receive approval to start two of his shifts at 8:30 a.m. each week, which shows that exceptions continued to be granted after the Belfonti memo; (3) Freeman had the opportunity to request a continuation of the 4/10 schedule he had been working, but he elected to return to a five-day schedule instead; and (4) Kuhn received the scheduling accommodations she desired for as long as she requested them.

The Respondent further argues that Gonzalez's testimony -- that the parties agreed to a set of core hours in conjunction with the 2000 agreement -- is unbelievable, given his inability to recall most details from the 2000 negotiations. Resp. Br. at 8 & n.5. Indeed, the concept of core hours is wholly absent from the January 2000 MOU. Allowing employees to work any shift within the core hours, as Gonzalez and Lamar asserted was the practice, would violate management's right to assign work under § 7106(a)(2)(B), which includes the right to determine employees' starting and quitting times. *Int'l Ass'n of Fire Fighters*, 59 FLRA 832, 834 (2004).

Even if the Belfonti Memo changed conditions of employment, Respondent insists that those changes were de minimis. The impact on employees, according to the GC witnesses, was never clearly identified, or it was extremely minor in nature. For the most part, employees were able to request and obtain approval for a variety of work schedules prior to 2009, and this remained true thereafter. Thus, the refusal to bargain cannot constitute an unfair labor practice. A finding to the contrary would divest the Respondent of its reserved management right to assign work.

Analysis

Prior to implementing a change in conditions of employment, an agency is required by § 7116(a)(5) of the Statute to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a de minimis effect on conditions of employment. *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr. Detachment 12,*

Kirtland AFB, N.M., 64 FLRA 166, 173 (2009) (*Kirtland AFB*). Throughout its history, the Authority has recognized that "parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining." *Dep't of the Navy, Naval Underwater Sys. Ctr., Newport Naval Base,* 3 FLRA 413, 414 (1980) (citing "well established" precedent under Executive Order 11491). An agency may not unilaterally change a condition of employment established through past practice even if the condition established by the practice differs from the express terms of the parties' collective bargaining agreement. *NTEU, Chapter 207*, 60 FLRA 731, 734 (2005); *Letterkenny Army Depot*, 34 FLRA 606, 610-12 (1990). Where a binding past practice has been established that differs from a prior written agreement, strict adherence to that prior written agreement may constitute a unilateral change in conditions of employment. *U.S. Patent & Trademark Office*, 39 FLRA 1477, 1482-83 (1991) (*PTO*); *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.*, 36 FLRA 567, 570 (1990) (*Avionics Ctr.*).

In addition, the Authority has repeatedly held that, under the Work Schedules Act, matters pertaining to compressed work schedules are fully negotiable and enforceable, subject only to the Act itself or other laws superseding it. *See, e.g., U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 60 FLRA 606, 608 (2005) (*IRS Austin*). This means that agency arguments based on its management rights under § 7106 of the Statute are not applicable to flexible and compressed work schedules. *NFFE, Local 642*, 27 FLRA 862, 867 (1987), *enf'd sub nom. BLM, Lakeview Dist. Office, Lakeview, Or.*, 864 F.2d 89, 91-92 (9th Cir. 1988). The duty to bargain over the establishment and termination of compressed work schedules includes the duty to bargain over the implementation and administration of those schedules. *See Air Force Accounting & Finance Ctr., Denver, Colo.*, 42 FLRA 1196, 1204-07 (1991). Further, where an agency seeks to terminate a compressed work schedule, the procedures of § 6131(c)(3) of the Act must be followed. *NFFE, Local 1998*, 60 FLRA at 143-44.

With this legal framework as a background, I start from the premise that matters relating to the work schedules, shifts and tours of duty available to the Unit Management employees at FCI Fairton are conditions of employment, which are fully and substantively negotiable, without regard to the Agency's § 7106 management rights. The Respondent has conceded that it did not negotiate before the Belfonti Memo was implemented. Therefore, if the Belfonti Memo changed the practices or policies relating to those work schedules in a manner that is more than de minimis, it committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute. In order to determine whether the Agency changed those practices, we need to compare the practices and policies that existed immediately before and after the Belfonti Memo issued. *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995). In this regard, the terms and the meaning of the 2000 Agreements are irrelevant if contrary practices or policies developed that conflict with the 2000 Agreements.

1. Binding Past Practices Existed When the Belfonti Memo Issued

Resolution of this case depends on whether the actions and practices of the employees and supervisors in the Unit Management division had changed the scheduling policies at FCI Fairton by August 2009, or whether the policy embodied in the 2000 Agreements was still in effect. If the 2000 Agreements were still the effective scheduling policy for employees in 2009, then the Belfonti Memo didn't change anything, but merely reminded employees of the ongoing policy. If, however, the 2000 Agreements had been superseded by unwritten practices adopted by the parties informally, then the Belfonti Memo represented a real change in the employees' conditions of employment.

In order for a condition of employment to become established through past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 48 (2012); *U.S. DOL, Wash., D.C.*, 38 FLRA 899, 909 (1990). The Authority has previously held that compressed work schedules may be established by past practice, and that once established, such schedules are subject to the Act. *AFGE, Local 2128*, 58 FLRA at 523.

The most reliable indicators of the compressed work schedules prior to the Belfonti memo are the rosters introduced in GC Exhibit 3 and Respondent Exhibit 3. Although the Respondent criticizes these rosters as incomplete, the documents provide fairly thorough coverage of the schedules worked by employees and approved by management between March 2008 and August 2009. *See supra* note 13. The rosters offered into evidence by Respondent (Resp. Ex. 3) do not refute the General Counsel's premise that the 2000 Agreements had become obsolete over the years; indeed, they generally corroborate that point. Considering that the Authority has found six months to be a significant period of time for purposes of a past practice -- *Avionics Ctr.*, 36 FLRA at 572 -- the rosters detailing six successive quarters between March 2008 and August 2009 are sufficiently comprehensive to support a past practice finding, especially since the rosters are corroborated by the testimony of employee and management witnesses, as described earlier.

The GC's witnesses testified that they participated in the development of their schedules for every quarterly roster; thus, any pattern discernible from the rosters between March 2008 and August 2009 would indicate a consistent practice followed by the Union and its members. Because all of the schedules received the approval of the employees' supervisors, any pattern discernible from these rosters would also indicate a consistent practice followed equally by the Respondent and its agents. I find that the following patterns emerge from the rosters:

1. Every employee on a 4/10 schedule, except the Union President and secretaries, had to work at least one late shift (10:30 a.m. - 9:00 p.m.) per week.

2. Employees were required to work at least two different shifts per week. They were not required to work three different shifts per week, although doing so was an option.

3. Employees could begin their non-late shifts at any time between 6:00 and 7:30 a.m.[20]

These three conditions defined FCI Fairton's CWS regime in the years immediately preceding the Belfonti Memo. Regardless of what the 2000 Agreements originally required, the parties established these conditions as binding past practices, through the consistent exercise of 4/10 scheduling that conformed to the three conditions between January 2000 and August 2009.

Moreover, testimony indicates that additional scheduling practices had been standardized by August 2009, although these features were not part of a written plan. First, consistent with the undisputed testimony of Daniel Lukomski, I find that employees were not required to demonstrate special circumstances in order to work only two different shifts per week, or to schedule shift times that differed from those listed on GC Exhibit 2(b). Tr. 305-07, 313. Second, I find that employees were only required to submit their scheduling requests to their unit supervisors, and they could do this orally. Tr. 356. In this regard, formal written memos were not a requirement for obtaining a particular schedule, even when the requested shift times deviated from those outlined in GC Exhibit 2(b). Tr. 272, 291-92, 332-33. Third, consistent with Pecoraio's testimony, I find that unit supervisors possessed the discretion to approve any 4/10 schedule that, in the judgment of the supervisor, provided adequate staff coverage throughout the day (Tr. 367), and higher-level management did not intervene to reject schedules that were acceptable to unit supervisors. Tr. 232-34, 238, 271-72, 291-92. Witness testimony indicates that these were regular scheduling policies since at least 2004, which is a sufficiently lengthy period of consistent exercise to establish them as binding past practices, and consequently, I find that they constituted the Agency's scheduling policy immediately prior to August 2009. They were, therefore, the conditions of employment to which the Belfonti Memo must be compared, in order to determine whether the Agency changed conditions of employment.

2. The Belfonti Memo Unilaterally Changed Conditions of Employment

In arguing that the Belfonti Memo did not change conditions of employment, the Respondent emphasizes that it was merely adhering to the terms of the 2000 Agreements. Given that the Respondent's own witnesses disagreed as to the terms of the 2000 Agreements, and that Mr. Belfonti himself provided different interpretations of their terms at different times, this assertion is problematic in its own right. Since the two GC witnesses who were members of the Union team negotiating the 2000 Agreements also had conflicting understandings of the 2000 Agreements, and the documents themselves are far from self-evident in many respects, it can safely be stated that the "true" meaning of the 2000 Agreements has been lost to time. More importantly, however, the "true" meaning of those

[20] The only exceptions to this pattern were Lamar, who regularly started his shifts at 8:30 a.m. (as noted previously), and one instance of D. Gindville starting his shifts at 8:00 a.m. GC Ex. 3 at 32. It is significant that even in these "exceptional" cases, the actual practice did not conform to Belfonti's insistence that the 2000 Agreements permitted only shifts starting at 6:00, 7:30, and 10:30 a.m.

agreements is irrelevant to the current case, because by the time the Belfonti Memo issued, the 2000 Agreements had been supplanted by the past practices described above. *See PTO*, 39 FLRA at 1482-83; *Avionics Ctr.*, 36 FLRA at 570. The relevant question is not what the 2000 Agreements required, but whether the scheduling policies existing at the start of August 2009 were meaningfully changed by the Belfonti Memo. I think it is clear to everyone, and most particularly to Mr. Belfonti himself, that his memo did make meaningful changes in then-existing policies. It was precisely because Belfonti wanted to tighten the loose scheduling rules then being practiced that he issued his memo. *See* GC Ex. 4; Tr. 378, 389, 394, 398.

As such, the memo resulted in the following changes in the CWS scheduling policy:

1. Employees had to work three different shifts per week or seek an exception.

2. Any shift time that was not listed on GC Exhibit 2(b) required a request for an exception.

3. All requests for exceptions had to be routed through Belfonti by means of a formal memo.

4. Scheduling exceptions were granted based on a showing of special circumstances only – that is, neither the employee's personal preference nor his supervisor's approval was a sufficient justification.

As a direct result of these changes, the number of approved schedules that deviated from Belfonti's interpretation of the 2000 Agreements plummeted after August 2009. In the context of the Act, the memo terminated or restricted the availability of several compressed work schedules that had previously been permitted.

The Respondent contends that there was no change to its practice of permitting employees to request exceptions to the scheduling rules, and that such requests were granted or denied on an individual basis. But this overlooks the fact that the level of scrutiny applied to these requests increased significantly after the Belfonti Memo. This case is analogous to *Warner Robins Air Logistics Ctr. (AFLC), Robins AFB, Ga.*, 21 FLRA 1015 (1986), involving an agency's change to the review guidelines for employees' travel expense claims. In that case, the Authority held that an increase in the disallowance of claims, where previously no claims had been disallowed, supported a finding that the agency had subjected employees' claims to stricter scrutiny than before. Moreover, the Authority found that subjecting claims to increased scrutiny constituted a change in conditions of employment. *Id.* at 1017-18. None of the witnesses in this case could recall scheduling requests being

denied prior to the Belfonti memo, except for employees in training. Tr. 153, 162, 195, 199, 370, 374. But Gonzalez, Kuhn,[21] and Lamar all testified to having scheduling requests denied after the Belfonti Memo. The memo thus changed the process for requesting and obtaining approval of schedules, and this was a change in conditions of employment.

Citing the legislative history of the Act, the Authority has emphasized that Congress intended to include within the bargaining process matters relating to "the institution, implementation, administration and termination" of compressed and alternative work schedules. *NTEU*, 52 FLRA 1265, 1293 (1997) (*citing* S.Rep. No. 365, 97th Cong., 2d Sess. 14-15 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 565, 576-77). The Authority further explained that because the provision in dispute in the *NTEU* case "establishes limitations on the use of flexitime and compressed work schedules, it concerns the implementation and administration of" those schedules and is therefore fully negotiable. *Id.* at 1293. Similarly, the Belfonti Memo's elimination or curtailment of various shifts, and the imposition of other related requirements, constituted changes that were fully negotiable. *See also DOL*, 59 FLRA at 134-35. By limiting employees to only those shifts listed in GC Exhibit 2(b) (shifts starting at 6:00, 7:30, and 10:30 a.m.), the memo eliminated shifts starting at 6:30, 7:00, 8:00, and 8:30 a.m., all of which had previously been worked by Unit Management employees, and in other respects curtailed employees' selection of compressed schedules.

As an alternative defense of the memo, the Respondent asserts that Belfonti was addressing staff coverage deficiencies. The Respondent reasons that because witnesses agreed that supervisors had always been responsible for ensuring adequate staff coverage, Belfonti's actions could not be considered changes to conditions of employment. However, even if concerns about coverage had motivated the memo, that does not alter the fact that the memo changed the Agency policy and working conditions, nor does it excuse the Agency from bargaining over the change. The Act, at 5 U.S.C. § 6131(c)(3), mandates that an agency wishing to discontinue compressed schedules, or to change the administration of such schedules, must negotiate with the union representing those employees, and the Agency did not comply with this mandate.

3. The Changes Were More than De Minimis

As mentioned before, an agency that changes conditions of employment must provide notice and an opportunity to bargain over those changes that have more than a de minimis effect on conditions of employment. *Kirtland AFB*, 64 FLRA at 173. The appropriate inquiry involves an analysis of the reasonably foreseeable effects of the change based on what the Respondent knew, or should have known, at the time of the change. *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574, 575 (1992). Changes in employees' tours of duty, with respect either to the hours of the day or the days of the week, are typically

[21] Although the Respondent challenges Ms. Kuhn's testimony as unreliable, there is no dispute that her scheduling requests were rejected by Belfonti, and that she had to appeal to the Warden to have Belfonti's denials overturned.

considered to be more than de minimis and to give rise to an obligation to bargain. *Dep't of the Treasury, IRS, Kansas City Serv. Ctr., Kan. City, Mo.*, 57 FLRA 126, 140 (2001) (citing *VAMC, Phoenix, Ariz.*, 47 FLRA 419, 422-24 (1993)).

In addition to the general presumption that changes in employees' tours of duty are more than de minimis, witness testimony supports such a conclusion. Belfonti testified that he drafted his memo with the objective of decreasing the frequency of certain shifts and ending certain scheduling practices altogether. Tr. 397-98. Further, Belfonti's description of the changes he intended - - "I let the staff know we were *going to go back* to what was originally negotiated." (Tr. 398) (emphasis added) -- indicates that he knew that enforcing his interpretation of the 2000 Agreements would require rolling back existing scheduling practices. Moreover, several witnesses testified that schedules that they had worked for years were discontinued after the Belfonti Memo issued, disrupting their personal and work lives in a variety of ways. *See, e.g.*, Tr. 217. These disruptions were entirely foreseeable in advance, regardless of Belfonti's subjective intent. Therefore, I conclude that the effects of the changes from the Belfonti Memo were more than de minimis, and that section 6131(c)(3) of the Act obligated the Respondent to bargain with the Union before making them. By refusing to bargain with the Union over these matters, as required under the Act, Respondent also violated its duty under the Statute to negotiate with the Union in good faith, and it thereby committed an unfair labor practice under section 7116(a)(1) and (5) of the Statute.

Remedy

The Respondent argues that any remedy in this case would divest it of its reserved management right to assign work. However, I have already explained that the negotiability and enforceability of matters pertaining to alternative work schedules are not limited by the management rights provisions of the Statute. *See, e.g.*, *IRS*, 60 FLRA at 608. Therefore, management rights are not a relevant consideration in determining the appropriate remedy in this case.

When an agency has an obligation to bargain over the substance of a matter, and fails to meet that obligation, the Authority will grant a status quo ante remedy in the absence of special circumstances. *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 53 FLRA 1664, 1671 (1998). Except for the management rights claim rejected above, the Respondent does not cite any special circumstances that would support the denial of status quo ante relief, nor does the record otherwise reveal any special circumstances. Thus, consistent with *INS, L.A.*, 59 FLRA at 390, I will grant the General Counsel's requested remedies.[22] Among other things, I will require the Agency to cease its implementation of the memo of August 4, 2009, and any related restrictions on compressed

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[22] I have changed the wording in the GC's proposed Order to refer to "case managers and correctional counselors," rather than "bargaining unit employees" generally, because none of the testimony or evidence indicated a unilateral change to the 4/10 compressed work schedules of employees in any other positions, such as secretaries.

work schedules without first bargaining with the Union; to restore the CWS options and practices that were in effect prior to August 4, 2009; and to restore any annual or sick leave that affected employees may have used for time that they would have been off work, if their CWS options had not been changed.

Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Fairton, New Jersey, shall:

1. Cease and desist from:

(a) Changing or terminating the 4/10 Compressed Work Schedule (CWS) options and practices for case managers and correctional counselors without first completing bargaining with the American Federation of Government Employees, Local 3975, AFL-CIO, the exclusive representative of its bargaining unit employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Restore the 4/10 CWS options and practices that were in effect for case managers and correctional counselors prior to August 4, 2009.

(b) Restore to case managers and correctional counselors in the bargaining unit any annual or sick leave that they took for time during which they would have been off work if the 4/10 CWS options had not been changed or terminated on August 4, 2009.

(c) Post at its Fairton, New Jersey facility where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, 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.

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

Issued Washington, D.C., April 22, 2013

RICHARD A. PEARSON
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 U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Fairton, New Jersey, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT change or terminate the 4/10 Compressed Work Schedule (CWS) options and practices for case managers and correctional counselors without first completing bargaining with the American Federation of Government Employees, Local 3975, AFL-CIO, the exclusive representative of our bargaining unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL restore the 4/10 CWS options and practices that were in effect for case managers and correctional counselors prior to August 4, 2009.

WE WILL restore to case managers and correctional counselors in the bargaining unit any annual or sick leave that they took for time during which they would have been off work if the 4/10 CWS options had not been changed or terminated on August 4, 2009.

____
(Agency/Activity)

Dated: ________________ By: ______________________________
(Signature) (Warden)

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