68 FLRA No. 97

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
LITTLETON, COLORADO
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 709, AFL-CIO
(Charging Party)

DE-CA-14-0338

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DECISION AND ORDER

May 18, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (Judge) found that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by refusing to bargain with the Charging Party (Union) over compressed work schedules for certain employees whom the Union represents (bargaining-unit employees). The main question before us is whether the Judge erred because the "covered-by" doctrine (described further below) excused the Respondent's refusal to bargain. The answer is no, for the same reasons set forth in the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution Williamsburg, Salters, South Carolina* (*FCI Williamsburg*).[2]

II. Background and Judge's Decision

We summarize the relevant facts only briefly here, as they are set out in more detail in the Judge's decision.

The Union asked the Respondent to negotiate over compressed work schedules for bargaining-unit employees who work at certain posts in the Respondent's correctional-services department. The Respondent refused.

The Union then filed a charge, and the FLRA's General Counsel (GC) issued a complaint, alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain. Both the Respondent and the GC filed motions for summary judgment. The Judge determined that summary judgment was appropriate and, thus, did not hold a hearing.

The Judge addressed the terms of Article 18 of the master agreement, which is entitled "Hours of Work."[3] Article 18, Section (b) (Article 18(b)) provides, in pertinent part: "The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 [U.S.C.]."[4] Article 18, Section (d) (Article 18(d)) "concerns the preparation of quarterly rosters for [c]orrectional [s]ervices employees."[5] And Article 18, Section (g) (Article 18(g)) concerns "sick and annual positions."[6]

The Judge found that, "[c]onsistent with the [Flexible and Compressed Work Schedules] Act,[7] the plain language of Article [18(b)] expressly recognizes that local negotiations over compressed work schedules at the local level may take place and does not prohibit such negotiation on behalf of employees in any department, including correctional services."[8] Further, she determined that "[t]he plain wording of [Article 18(d) and 18(g)] also do[es] not limit [Article 18(b)] in any way."[9] In this connection, she stated that Article 18(d) "does not reference [Article 18(b)] or address compressed work schedules."[10] Instead, she found that Article 18(d) "merely provides that, to prepare a quarterly roster for correctional[-]services employees, the [Respondent] shall post a blank roster detailing available assignments and shifts that such employees can bid on, and a roster committee [consisting] of both [Respondent] and Union representatives will formulate roster assignments."[11] And the Judge determined that Article 18(g) "relates to sick and annual positions without any reference to compressed work schedules."[12]

[1] 5 U.S.C. § 7116(a)(1), (5).
[2] 68 FLRA 580 (2015).
[3] Judge's Decision at 3.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 8.
[7] 5 U.S.C. §§ 6120-6133.
[8] Judge's Decision at 8.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

Additionally, the Judge noted the Respondent's reliance on the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Federal BOP v. FLRA*,[13] but she found that reliance "misplaced."[14] Specifically, she found that neither *Federal BOP* "nor the Authority's related decisions addressed bargaining over compressed work schedules under" Article 18(b).[15]

The Judge concluded that the Respondent did not "raise[] a valid 'covered[-]by' defense," and she concluded that the Respondent violated § 7116(a)(1) and (5) by refusing to negotiate with the Union over compressed work schedules for correctional-services employees.[16] Accordingly, she granted the GC's summary-judgment motion and dismissed the Respondent's summary-judgment motion.

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to the Respondent's exceptions.

III. Analysis and Conclusions

The Respondent argues that the compressed work schedule at issue is "covered by" the master agreement[17] – specifically, Article 18(d) – and that, therefore, the Respondent "did not violate the Statute or the contract when it refused to negotiate."[18] According to the Respondent, when Article 18(b) and Article 18(d) "are read together, [Article 18] provides that negotiations at the local level may occur over compressed work schedules for all bargaining[-]unit employees *except* those employees in work in correctional services."[19] To support its arguments, the Respondent cites[20] *Federal BOP*.[21]

The Judge's finding of an unlawful refusal to bargain, and the Respondent's arguments challenging that finding, are identical in all relevant respects to the Judge's decisions and the arguments at issue in *FCI Williamsburg*.[22] For the reasons set forth in the Authority's decision in *FCI Williamsburg*,[23] the Respondent's arguments here also have no merit. Accordingly, we find that the Judge did not err in concluding that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain.[24]

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[25] and § 7118 of the Statute,[26] the Respondent shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate with the Union over compressed work schedules for correctional services department employees at the Englewood Federal Correctional Institution (FCI).

(b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit 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) Upon request, negotiate in good faith with the Union over compressed work schedules for correctional services department employees at the Englewood FCI.

(b) Post at its facilities where bargaining-unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the warden, Englewood FCI, Littleton, Colorado, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted at the Respondent's facilities nationwide. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

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[13] 654 F.3d 91 (D.C. Cir. 2011).
[14] Judge's Decision at 8.
[15] *Id.*
[16] *Id.*
[17] Resp't's Exceptions at 4 (internal quotation marks omitted).
[18] *Id.* at 6.
[19] *Id.* at 7.
[20] *Id.* at 6-7.
[21] 654 F.3d 91.
[22] 68 FLRA 580.
[23] *Id.* at 582-83; *see also U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Oxford, Wis.*, 68 FLRA 593, 594 (2015) (relying on reasoning of *FCI Williamsburg* to reject similar arguments).
[24] Member DuBester notes the following: I agree with the decision to find that the Judge did not err in concluding that the Respondent violated § 7116(a)(1) and (5) of the Statute by refusing to bargain, and that the Judge did not err in concluding that, under Authority precedent, the Respondent did not raise a valid "covered-by" defense. In doing so, I note again my reservations concerning the "covered-by" standard, and that "the Authority's use of the covered-by standard warrants a fresh look." *SSA, Balt., Md.*, 66 FLRA 569, 576 (2012) (Dissenting Opinion of Member DuBester); *accord NTEU, Chapter 160*, 67 FLRA 482, 487 (2014) (Dissenting Opinion of Member DuBester).
[25] 5 C.F.R. § 2423.41(c).
[26] 5 U.S.C. § 7118.

(c) Disseminate a copy of the notice signed by the warden through the Respondent's email system to all bargaining-unit employees. This notice will be sent on the same day that the notice is physically posted.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations,[27] notify the Acting Regional Director, Denver Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (FLRA) has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Littleton, Colorado, 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 fail and refuse to negotiate with the American Federation of Government Employees, Council of Prison Locals, Local 709, AFL-CIO (AFGE), over compressed work schedules for correctional services department employees at the Englewood Federal Correctional Institution (FCI).

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

WE WILL, upon request, meet and negotiate with AFGE, Local 709 over compressed work schedules for correctional services department employees at the Englewood FCI.

_____
(Respondent)

Dated: _____ By: _____
(Signature) (Title)

This notice must remain posted for sixty 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 its provisions, they may communicate directly with the Acting Regional Director, Denver Regional Office, FLRA, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80204, and whose telephone number is: (303) 844-5224.

[27] 5 C.F.R. § 2423.41(e).

Member Pizzella, dissenting:

For the reasons that I set forth in my dissent today in *U.S. DOJ, Federal BOP, Federal Correctional Institution Williamsburg, Salters, South Carolina*,[*] I would conclude that compressed work schedules for correctional officers is a matter which is covered by Article 18(d) and that the Bureau has no further obligation to bargain.

Thank you.

[*] 68 FLRA 580, 585 (2015) (Dissenting Opinion of Member Pizzella).

Office of Administrative Law Judges

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
LITTLETON, COLORADO
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, LOCAL 709, AFL-CIO
Charging Party

Case No. DE-CA-14-0338

Paige A. Swenson
For the General Counsel

Stuart Bauch
For the Respondent

Jason Rusovick
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA), Part 2423.

Based upon unfair labor practice (ULP) charges filed by the American Federation of Government Employees, Council of Prison Locals, Local 709, AFL-CIO (Union), a Complaint and Notice of Hearing was issued by the Regional Director of the Denver Region of the FLRA. The complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Littleton, Colorado (Respondent) violated § 7116(a)(1) and (5) of the Statute by refusing to negotiate over a compressed work schedule for Correctional Services Department employees. The Respondent filed a timely answer denying the allegations of the complaint.

On October 3, 2014, the General Counsel filed a Motion for Summary Judgment (MSJ), asserting that "there is no genuine issue of material facts" and the General Counsel is "entitled to a judgment as a matter of law." 5 C.F.R. § 2423.27(a). In support thereof, the General Counsel filed a brief with Exhibits 1 through 8 and the affidavit of Jason Rusovick, Union vice president and a Correctional Officer.

On October 3, 2014, the Respondent also filed a Motion for Summary Judgment. In support of its MSJ, the Respondent set forth a Statement of Undisputed Material Facts and attached Exhibits 1 through 5. (R. Exs. 1-5). The Respondent denied that its actions violated the Statute as alleged in the complaint and asserts that it acted in accordance with Article 18, section b of the Master Agreement (MA).

By Order dated October 6, 2014, the hearing in this matter was indefinitely postponed.

Having carefully reviewed the pleadings, exhibits, and briefs submitted by the parties, I have determined that this decision is issued without a hearing, pursuant to 5 C.F.R. § 2423.27. The Authority has held that motions for summary judgment filed under that section serve the same purpose and are governed by the same principles as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedures. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no "genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. Based on the record, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to negotiate with the Union over a compressed work schedule for correctional services department employees. Based on the above, I make the following findings of fact, conclusions, and recommendations in support of that determination.

FINDINGS OF FACT

1. On or about March 20, 2014, the Union filed an unfair labor practice charge alleging that the Respondent violated 5 U.S.C. § 7116(a)(1) and (5) by refusing to negotiate a compressed work schedule for correctional services department employees. (G.C. Ex. 1).

2. The U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI), Littleton, Colorado[1] is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Exs. 2, 4).

3. The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (AFGE/Union) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of Respondent's employees. (G.C. Exs. 2, 4).

4. The Union is an agent of AFGE for the purpose of representing bargaining unit employees at the Respondent's Englewood FCI. (G.C. Exs. 2, 4).

5. At all material times, Michael R. Connel held the position of Associate Warden and has been a supervisor and/or management official within meaning of § 7103(a)(10) and (11) of the Statute and an agent of the Respondent acting upon its behalf. (G.C. Exs. 2, 4).

6. At all material times, AFGE and the Respondent were parties to a master collective bargaining agreement (MA) covering employees in the bargaining unit described above which has been effective since March 9, 1998. (G.C. Ex. 9).

7. Article 18 of the parties' MA is entitled Hours of Work. Section b addresses compressed work schedules and provides: The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 U.S.C.

1. any agreement reached by the local parties will be forwarded to the Office of General Counsel in the Central Office who will coordinate a technical and legal review. A copy of this agreement will also be forwarded to the President of the Council of Prison Locals for review. These reviews will be completed within thirty (30) calendar days from the date the agreement is signed;
2. if the review at the national level reveals that the agreement is insufficient from a technical and/or legal standpoint, the Agency will provide a written response to the parties involved, explaining the adverse impact the schedule had or would have upon the Agency. The parties at the local level may elect to renegotiate the schedule and/or exercise their statutory appeal rights; and
3. any agreement that is renegotiated will be reviewed in accordance with the procedures outlined in this section.

Section d concerns the preparation of quarterly rosters for Correctional Services employees. The rosters list the assignments, days off, and shifts that are available for bidding by Correctional Services employees. The bids are resolved by seniority. (R. Ex. 1; G.C. Ex. 2).

8. The Englewood FCI is a medium level security institution and employs 108 correctional officers in its correctional services department.

9. All correctional officers in correctional services are assigned to work a certain post on a quarterly basis. A "post" is the officer's location of work, such as but not limited to, control, compound, housing unit, front lobby or visiting room.

10. Prior to the issuance of the quarterly assignments, and in accordance with the parties' MA, the Warden submits a blank roster containing the posts, shifts (hours of work), and days off available for the upcoming quarter. The officers

[1] The prison facility at issue in this case is named Englewood Federal Correctional Institution and is located in Littleton, Colorado. The parties use both Englewood and Littleton to reference the facility. For the purposes of this decision, I am using Englewood FCI to identify the prison facility.

are given seven weeks in which to preview this roster before submitting bids. Each officer then submits a bid for his or her preferred posts and posts are assigned by seniority. (R. Ex. 1).

11. By an e-mail dated January 25, 2013, the Union submitted its proposal for a Compressed Work Schedule (CWS) for visiting/lobby posts in correctional services. (R. Ex. 2).

12. On or about November 15, 2013, Becky Rae, acting on behalf of the Union, submitted a written request to Respondent for a CWS for visiting room correctional posts located at Englewood FCI. (R. Ex. 3 at p. 2).

13. On December 18, 2013, Associate Warden Michael R. Connel, on behalf of Respondent, responded in writing to Todd Bull, President of Local 709, and informed him that the Agency has disapproved his request to negotiate as the Agency has no duty to engage in further bargaining regarding work schedules for the correctional services department. (R. Ex. 4; G.C. Exs. 6, 7 & 8).

14. The Union and Respondent have previously negotiated compressed work schedules for departments at Englewood FCI outside of the correctional services department, including: financial management and education. (R. Ex. 5).

15. Since on or about December 18, 2013, the Respondent has failed and refused to negotiate with the Union over a CWS for employees in the Respondent's correctional services department. (G.C. Exs. 2, 4 & 8).

POSITIONS OF THE PARTIES

General Counsel

Under § 7116(a)(5) of the Statute, it is an unfair labor practice for an agency to "refuse to consult or negotiate in good faith with a labor organization as required by this chapter." Thus, an agency violates the Statute when it expressly refuses to bargain over a matter within the duty to bargain. *AFGE, Local 1401*, 67 FLRA 34, 36 (2012).

The Authority has repeatedly held that under the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. § 6120-6133 (the Act), matters pertaining to compressed work schedules are fully negotiable and enforceable, subject only to the Act itself or other laws superseding it. *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 60 FLRA 606, 608 (2005).

Here, the Respondent concedes it refused to bargain over compressed work schedules for correctional service employees. Under established Authority precedent, this issue is a mandatory subject of bargaining. Therefore, absent a valid defense, the Respondent's refusal to bargain over compressed work schedules violated § 7106(a)(1) and (5) of the Statute.

As its defense, the Respondent raised the management right to assign work argument under § 7106(a) of the Statute and the Authority's covered by doctrine. The General Counsel (GC) asserts that Respondent's reliance on the management right to assign work as a defense is misplaced as compressed work schedules are fully negotiable without regard to the management rights under § 7106 of the Statute. *U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 131, 134 (2003) (DOL) ("proposals concerning an agency's alternative work schedules program are negotiable without regard to whether they are contrary to the various provisions of 7106 of the Statute.") As discussed below, Respondent's covered by defense fails because the parties' MA specifically provides for local bargaining over compressed work schedules. The Authority will not find a matter covered by an agreement when the agreement specifically contemplates bargaining over the matter. *U.S. Dep't of Energy, WAPA, Golden, Colo.*, 56 FLRA 9, 12 (2000) (*DOE*). Here Article 18, section b of the MA expressly provides for local bargaining over compressed work schedules. The language is broad and does not exclude any portion of the bargaining unit or any organizational components of the BOP. It plainly requires local bargaining over compressed work schedules for all components, including correctional services.

Further, Respondent's reliance on *Fed. BOP v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011), *reh'g en banc denied* (D.C. Cir 2011) (*BOP v. FLRA*) is misplaced, since that decision had nothing to do with bargaining over compressed work schedules. In *BOP v. FLRA*, the court reviewed an arbitration award that found that BOP had a duty to bargain with AFGE over the impact and implementation of its critical-roster program. 654 F.3d at 93-94. The court found that the roster preparation procedures contained in Article 18, section d and g covered the impact and implementation of the critical-roster program and vacated the award. *Id.* at 95. Bargaining over compressed work schedules was not

before the court in *BOP v. FLRA* and is not mentioned anywhere in the court's opinion or the related Authority decision in 64 FLRA 559 (2010) and 67 FLRA 69 (2012). Thus, the GC argues that Respondent's admitted refusal to bargain over compressed work schedules constitutes a violation of § 7116(a)(1) and (5) of the Statute.

As to a remedy, the GC requests that the Notice to all bargaining unit employees be signed by Respondent's Warden and posted where notices to employees are customarily posted. Also, the GC requests that the Respondent be directed to distribute a copy of the Notice to all bargaining unit employees through Respondent's e-mail system.

Respondent

The Respondent denies that it violated the Statute by declining to bargain over the Union's request to negotiate a compressed work schedule because the assignment of work in correctional services is the exclusive right of the employer and any procedures and arrangements regarding the assignment of posts are covered by Article 18 of the Master Agreement.[2]

The Respondent asserts that the agency had no duty to bargain a compressed work schedule for correctional services employees. If a collective bargaining agreement covers a particular subject, then the parties to that agreement "are absolved of any further duty to bargain about that matter during the term of the agreement." *BOP v. FLRA*, citing *Dep't of the Navy v. FLRA*, 92 F.2d 48 (D.C. Cir. 1992). For a subject to be deemed covered by, there need not be an "exact congruence" between the matter in dispute and a provision of the agreement, so long as the agreement expressly or implicitly indicates the parties reached a negotiated agreement on the subject. *BOP v. FLRA*, citing *Nat'l Treasury Employees Union v. FLRA,* 452 F.3d 793, 796 (D.C. Cir. 2006) (*NTEU*).

The agency had no duty to bargain over the request for a compressed work schedule in correctional services. Pursuant to the MA, "requests for flexible and/or compressed work schedules may be negotiated at the local level." Article 18, section b. However, Article 18, section d, states that "quarterly rosters for correctional services employees will be prepared in accordance with the below listed procedures." Those procedures set forth that BOP employees assigned to the correctional services department are permitted to bid, each quarter, on posts identified on a roster. Specifically, the MA states that "the employer will ensure that a blank roster for the upcoming quarter will be posted . . . for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for bid." Since the way in which the employer, or Warden, establishes and fills out quarterly rosters is already covered by Article 18, management has no duty to bargain over compressed work schedules for correctional services posts.

Under the covered by doctrine, once the parties have bargained on a particular topic and have reached agreement, there is no further requirement to bargain again on that topic during the term of the agreement – even if the precise issue or facet of the topic involved in a management action is not directly or explicitly addressed in the negotiated provision. *See NTEU v. FLRA*, 452 F.3d at 796-98. *See also Dep't of the Navy, Marine Corps Logistics Base, Barstow v. FLRA*, 962 F.2d 48 (D.C. Cir 1992) (once a matter has been the subject of general bargaining, impact bargaining as to that matter is no longer required); *EEOC, Wash., D.C*, 52 FLRA 459, 471-72 (1996) (if a matter is covered by an agreement, then an agency may act unilaterally without providing notice and the union, as party to the agreement, is presumed to be familiar with the terms of the agreement); *Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 47 FLRA 1249 (1993) (no requirement to negotiate over the method of presenting performance awards during mid-term bargaining because the master labor agreement contained a detailed article concerning employee awards; even though the precise method for presenting awards was not spelled out, the general subject matter was covered by the existing agreement).

In *BOP v. FLRA*, the U.S. Court of Appeals for the D.C. Circuit recognized that Article 18 of the MA represents the parties' agreement about how and when management would exercise its right to assign work in correctional services and that the implementation of those procedures, and the resulting impact, do not give rise to a further duty to bargain. 654 F.3d 91. Accordingly, the court held that Article 18 covers and preempts challenges to all specific outcomes of the assignment process. Likewise, although the MA allows for negotiations of compressed work schedules, it is evident from the plain language of Article 18, section d, that, for correctional services employees, such challenges to the roster are preempted by the assignment process already established in Article 18.

Because management had no duty to bargain, it did not violate the Statute or the contract by its conduct in this matter. Respondent's motion for summary judgment

[2] The Respondent also asserted that its conduct did not amount to a repudiation of the Article 18 of the MA and a violation of § 7116(a)(1) and (5) of the Statute. Since the complaint did not contain such an allegation and the GC did not pursue a repudiation allegation in its motion for summary judgment, this issue is not before me and I make no determination on this matter.

should, therefore, be granted and the complaint in this matter should be dismissed.

ANALYSIS AND CONCLUSIONS

The "covered by" doctrine is "available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue." *Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009) (internal quotation marks and citations omitted). The "covered by" defense has two prongs. *Id.* Under the first prong of that defense, "a party properly may refuse to bargain over a matter that is expressly addressed in the parties' agreement." *Id.* Also, under the second prong, "a party properly may refuse to bargain if a matter is inseparably bound up with, and[,] thus[,] an aspect of," a subject "covered by" the agreement. *Id.*

Here, the Respondent contends that it has no duty to bargain over compressed work schedules for employees in correctional services because the way in which quarterly rosters are established and filled out for such employees is "covered by" Article 18 of the parties' agreement. The Respondent implicitly argues that, when sections b and d of Article 18 are read together, that article provides that negotiations at the local level may occur over compressed work schedules for all bargaining unit employees except those employees who work in correctional services.

In this matter, I find that the Respondent's contentions are without merit. Consistent with the Act, the plain language of Article 18, section b expressly recognizes that local negotiations over compressed work schedules at the local level may take place and does not prohibit such negotiation on behalf of employees in any department, including correctional services. *See DOL*, 59 FLRA at 134 (Chairman Cabaniss concurring) (indicating that the Authority has consistently "held that the implementation and administration of alternative work schedules is fully negotiable, subject only to the [Act] or other laws superseding the Act, and without regard to management rights under the Statute."). The plain wording of section d and g also do not limit section b in any way. Specifically, Article 18, section d does not reference section b or address compressed work schedules. Rather, section d merely provides that, to prepare a quarterly roster for correctional services employees, the Agency shall post a blank roster detailing available assignments and shifts that such employees can bid on, and a roster committee comprised of both Agency and Union representatives will formulate roster assignments. Section g relates to sick and annual positions without any reference to compressed work schedules.

Further, the Respondent's reliance on *BOP v. FLRA* is misplaced. In that case, BOP issued a memorandum providing that "the quarterly roster for each institution should include only those posts deemed 'critical' to the mission of that institution," and BOP denied the union's request to bargain over the implementation of its mission critical standard. *BOP v. FLRA*, 654 F.3d at 93. The D.C. Circuit held that Article 18, section d covered all disputes concerning rosters issued pursuant to that provision and that BOP was not required to bargain over its mission critical standard because rosters implementing that standard were "covered by" Article 18 of the parties' agreement. *Id.* at 95-97. However, neither *BOP v. FLRA* nor the Authority's related decisions addressed bargaining over compressed work schedules under Article 18, section b of the parties' agreement. Thus, I find that *BOP v. FLRA* is inapposite.

Consequently, I find that the Respondent has not raised a valid "covered by" defense. *See U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011) (indicating that "the Authority has declined to find a matter 'covered by' an agreement [when] the agreement specifically contemplates bargaining"); *DOE*, 56 FLRA at 12-13 (finding that, based on the wording of bargaining provisions and "the parties' practices pursuant to their agreement," the respondent failed to raise a valid "covered by" defense); *cf. U.S. Dep't of Justice, Fed. BOP, FCI, Fairton, N.J.*, 62 FLRA 187, 189-90 (2007) (determining that the respondent established a "covered by" defense because the plain language of a particular article allowed the respondent "to change work assignments on the same shift without notice[,]" and another article, which required the employer, in assigning work, to comply with Authority precedent, did not alter such language). Accordingly, I conclude that the Respondent has violated § 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union over compressed work schedules for employees in correctional services. *DOE*, 56 FLRA at 13.

Having found that the Respondent violated the Statute as alleged in the complaint, I hereby dismiss the Respondent's Motion for Summary Judgment and grant the General Counsel's Motion for Summary Judgment.

REMEDY

As requested by the General Counsel, I will order an appropriate cease and desist order to be signed by the Warden. In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, such postings are ordered. *See U.S. Dep't of Justice,*

Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla., 67 FLRA 221 (2014).

ORDER

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

1. Cease and desist from:

(a) Failing and refusing to negotiate with the American Federation of Government Employees, Council of Prison Locals, Local 709, AFL-CIO (Union) over compressed work schedules for Correctional Services Department employees at the Englewood Federal Correctional Institution (FCI).

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit 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) Upon request, negotiate in good faith with the Union over compressed work schedules for Correctional Services Department employees at the Englewood FCI.

(b) Post at its facilities where bargaining unit employees represented by the Union 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, Englewood FCI, Littleton, Colorado, 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 at Respondent's facilities nationwide. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Disseminate a copy of the Notice signed by the Warden through the Respondent's e-mail system to all bargaining unit employees. This Notice will be sent on the same day that the Notice is physically posted.

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

Issued, Washington, D.C., January 9, 2015

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SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Littleton, Colorado, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate with the American Federation of Government Employees, Council of Prison Locals, Local 709, AFL-CIO (AFGE), over compressed work schedules for Correctional Services Department employees at the Englewood Federal Correctional Institution (FCI).

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

WE WILL, upon request, meet and negotiate with AFGE, Local 709 over compressed work schedules for Correctional Services Department employees at the Englewood FCI.

_____
(Agency/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 its provisions, they may communicate directly with the Acting Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80804, and whose telephone number is: 303-844-5224.