Bn90301

Office of Administrative Law Judges

U.S. DEPARTMENT OF VETERANS AFFAIRS
BENEFITS DELIVERY CENTER

PHILADELPHIA, PENNSYLVANIA Case No. BN-CA-90301
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 940, AFL-CIO

Charging Party

Don Taylor, Labor Relations Specialist For the Respondent

Julie C. McCarthy, EsquireRichard D. Zaiger, Esquire For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 940, AFL-CIO (AFGE Local 940/Union), a Complaint and Notice of Hearing was issued on behalf of the General Counsel (GC) of the FLRA by the Regional Director of the Boston Regional Office of the FLRA. The Complaint alleges that the U.S. Department of Veterans Affairs (VA), Benefits Delivery Center, Philadelphia, Pennsylvania (VA Center/Respondent), committed an unfair labor practice in violation of 5 U.S.C. § 7116 (a)(1) and (5) of the Statute, when the VA Center implemented its decision to provide coverage for the Point of Presence Initiative ("POP"), for 24 hours a day, 7 days a week, without providing AFGE, Local 940 an opportunity to bargain to the extent required by law.

VA Center filed an answer denying the substantive allegations of the Complaint. Respondent filed two Motions to Dismiss, both Motions were denied.

A hearing was held in Philadelphia, Pennsylvania, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The GC of the FLRA and the VA Center filed post-hearing briefs which have been fully considered.[(1)]

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

A. Background

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of a nationwide unit of employees appropriate for collective bargaining, including employees at the VA Center in Philadelphia, Pennsylvania. AFGE, Local 940 is the agent of AFGE for representing employees at VA Center. The Union represents approximately 750 employees and computer operators at VA Center. The VA Center serves as VA's computer center and is comprised of three divisions, the Operations Division, Network Systems Division, and the Technical Support Division.

Joseph Malizia serves as the President of the Union, a position he has held since July 1999. Malizia served as the Union's Executive Vice-President for approximately eight years before becoming President. As Vice-President, Malizia handled the majority of local negotiations. Tyrone Perkins served as the AFGE, Local 940 President from June 1, 1989 to May 30, 1999.

B. The Master Collective Bargaining Agreement

The Master Agreement (MA) between the AFGE and the Department of Veterans Affairs was entered into on March 21, 1997.

Article 44 of the contract concerns mid-term bargaining and contains the following language in Section 1:

C. Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded from mid-term bargaining will be identified within each Article.

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

Article 20 of the parties' contract concerns hours of work and overtime and contains the following language in Section 1:

A. A change in the administrative workweek and changes in the regularly scheduled administrative workweek are considered changes in conditions of employment for purposes of the notice requirement of Article 46, Rights and Responsibilities. . . .

Article 46 of the parties' contract, which is referred to in Article 20, concerns notification of changes in conditions of employment and contains the following language in Section 4:

The Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information/material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing to the appropriate Union official, with sufficient information to the Union for the purpose of exercising its full rights to bargain.

Negotiations of the contract began in approximately November 1994. Perkins served as a Union representative on the national negotiations team for twelve to fourteen months. John Gage, President of AFGE, Local 1923, Baltimore, Maryland, whose signature appears on the contract also served on the national negotiations team and was one of the final six union representatives at the time the contract was signed.[(2)]

AFGE proposed the language of the above cited Article 44, Section 1(c), Mid-term Bargaining, to specifically address the Authority's "covered by" doctrine that limited bargaining and the local party's ability to address a subject that was already covered in the existing collective bargaining agreement.[(3)] Gage led the debate for the union on the covered by issue.

Perkins served on the break out team which was responsible for Article 44. While serving as Union President under the previous MA, his attempts to locally negotiate subjects that were already contained in the parties' previous collective bargaining agreement were thwarted because management asserted that there was no duty to bargain because of the covered by doctrine. The intent of Article 44, Section 1(c) was to give local unions the right to negotiate over subjects that were already covered in the MA. During negotiations, AFGE made it clear that if Section 1(c) was not included in the MA, AFGE would specifically add language in every section of the contract to "cover just about every situation that the Union could come up with, thereby creating a massive Master Agreement."

In addition, VA was undergoing a major reorganization, in connection with Vice President Al Gore's reinventing government efforts. Under these circumstances, VA and AFGE wanted to give local unions flexibility to address the reorganization efforts as it effected their particular facility.

In order to address concerns about which, if any, articles could not be bargained mid-term, the parties agreed in the last sentence of Article 44, Section 1(c) of that if there was a subject in the MA on which the parties wanted to prevent further bargaining, there would be language contained in the specific article to exclude bargaining of that particular subject.

C. The Point of Presence Initiative (POP)

On January 15, 1999, the Union received notice from the Director of the VA Center, Thomas Lloyd, that the VA Center intended to implement POP on or about February 15, 1999.

POP is a nationwide computer application, specific to the VA and accessible via the Internet, which allows veterans and doctors to access records of veteran's benefits, medical history, and other files. POP requires monitoring for "crashes" 24 hours a day, 365 days a year.

Lloyd attached a schedule to the notice assigning Computer Operators from the Operations Division to cover POP, 7 days a week, 24 hours a day. The computer operators at the VA Center already worked shifts over a 24 hour period, Monday through Friday. However, they had never been assigned to a regular tour of duty on weekends. The new schedule did not specify which employees would be assigned to work POP.

AFGE, Local 940 and the employees had concerns about how the inclusion of Saturday and Sunday in the regular workweek was going to impact upon the computer operators. There were concerns about general changes to employees' lifestyles and specific issues such as baby-sitting arrangements, visiting elderly relatives, and transportation.

Therefore, on February 3, 1999, AFGE, Local 940 made a formal request to bargain the impact and implementation of Respondent's decision to implement POP under Article 44, of the Mid-Term Bargaining Article of the parties' contract.(4) The parties each designated representatives to negotiate. The parties met and exchanged proposals on three dates, February 10, 11 and 16, 1999. On February 16, 1999, VA Center presented AFGE, Local 940 with another proposal. After caucusing on the issue of Federal holidays, the VA Center's Chief Negotiator, Donald Taylor, stated that negotiations were "done," and he got up and walked out, even though the parties had reached neither an agreement nor impasse. AFGE, Local 940 then requested to resume bargaining with the help of a mediator. VA Center refused, and on February 24, 1999, Taylor sent an e-mail to the Union stating that the VA Center had no duty to bargain because the matter was covered by an agreement.(5) In the e-mail, Taylor announced that the tour of duty change for the computer operators would be effective March 15, 1999.

Two days later, on February 26, 1999, Mazzulla sent an e-mail to all computer operators with a copy to AFGE, Local 940. The e-mail announced that POP was going to be implemented on March 15th, and it named the ten computer operators who had been selected to provide coverage. The schedules of these ten employees were permanently changed from Monday through Friday to either Sunday through Thursday or Tuesday through Saturday.(6) This was the first time that AFGE, Local 940 learned the identity of those who had been assigned to work on Saturdays and Sundays to cover POP.

D. Impact

Under the plan implemented by VA Center, the shift assignments of the ten computer operators selected were permanent. Employees could no longer socialize with family and friends for an entire weekend. Moreover, the impact of the change also extended to a number of practical concerns, such as caring for children or visiting elderly parent, and, at least one employee's ability to observe his religion was significantly curtailed since he was required to work on Sundays.

Discussion and Conclusions of Law

A. VA Center Violated Section 7116(a)(1) and (5) of the Statute On March 15, 1999, By Implementing the POP Initiative Without Providing AFGE, Local 940 An Opportunity to Bargain to the Extent Required By Law

When an agency exercises a management right under the Statute, it still has an obligation to provide notice and an opportunity to bargain over the procedures the agency will observe in exercising its right under the Statute and appropriate arrangements for employees adversely impacted by the change, if the impact of the change on bargaining unit employees is more than *de minimis* (I&I Bargaining). *See U.S. Department of Transportation, Federal Aviation Administration, Washington, DC and Michigan Airway Facilities Sector, Belleville, Michigan,* 44 FLRA 482, 492-93 (1992), and *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403 (1986). In the subject case VA Center changed the conditions of employment of bargaining unit employees when it implemented its decision requiring computer operators to work regular schedules on weekends to cover POP. This change was implemented before the VA Center satisfied its obligation to bargain under the Statute, and the change had more than a *de minimis* impact on bargaining unit employees.

Accordingly, unless the subject matter of the change was covered by Article 20 of the parities' Master Collective Bargaining Agreement, VA Center violated section 7116(a)(1) and (5) of the Statute.

1. The VA Center implemented POP prior to completing negotiations

On February 16, 1999, VA Center ended negotiations over its decision to provide coverage for POP for 24 hours a day, 7 days a week, when Taylor, VA Center's Chief Negotiator, abruptly announced that the VA Center was "done" with negotiations. Almost immediately, AFGE, Local 940 requested to continue negotiations with the aid of a Federal Mediator. Taylor refused, claiming that VA Center had no duty to bargain because the subject matter under discussion was covered by an agreement. Thereafter, on March 15, 1999, VA Center implemented its decision when 10 of the 18 computer operators qualified to perform this work were permanently assigned to a new tour of duty which required them to work on weekends for the first time. Prior to implementing this change computer operators had worked a Monday through Friday schedule and had never been permanently assigned to work on a weekend.

Accordingly, I conclude that the VA Center changed the conditions of employment of bargaining unit employees and that the change was implemented prior to the completion of bargaining.

2. The impact of the change on bargaining unit employees was more than *de minimis*

The impact of the decision requiring computer operators to provide coverage for POP 24 hours a day, 7 days a week, was more than *de minimis*. The lives of bargaining unit employees were substantially altered by the change. First, bargaining unit employees no longer have the time that they once had to socialize with family and friends. The impact of the change extends to practical concerns, such as caring for children or visiting elderly parents. In addition, as in the case of employee Raymond Wallace, time for religious observance was greatly curtailed.

Accordingly, under Authority precedent, the VA Center's conduct constituted a violation of section 7116(a)(1) and (5) of the Statute. *U.S. Customs Service, (Washington, DC); and U.S. Customs Service, Northeast Region (Boston, Massachusetts),* 29 FLRA 891, 898-900 (1987); *OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 821-23 (1996).

B. The VA Center Waived Its Right to Rely on the "Covered By" Doctrine to Defend Its Refusal to Bargain

In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland,* 47 FLRA 1004 (1993)*(SSA),* the FLRA stated that an agency had no duty to bargain where the subject matter of a union's request to bargain is covered by or contained in the parties collective bargaining agreement. In *Sacramento Air Logistics Center, McClellan Air Force Base, California,* 47 FLRA 1161 (1993), the Authority stated that it would apply the "covered by/contained in" analysis it established in *SSA* to cases involving alleged unilateral changes in working conditions where an agency asserts that it has no obligation to bargain over the subject because of the terms of a negotiated agreement. The Authority described this approach as follows:

> [w]e will initially determine whether the matter is expressly contained in the collective bargaining agreement. We also noted that we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. If we determine that the matter in dispute is not expressly contained in the collective bargaining agreement, we will next determine whether the subject matter is inseparably bound up with or commonly considered to be an aspect of the matter set forth in the provision such that the

negotiations will be presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision. If so, we will conclude that the subject matter is covered by the agreement provision. *Id.* at 1165.

The FLRA has held, however, that parties may place contractual limitations on their statutory rights, *Internal Revenue Service, Washington, DC*, 47 FLRA 1091 (1993)(*IRS*), and in *Social Security Administration, Region VII, Kansas City, Missouri*, 55 FLRA No. 95 (1999) and *Social Security Administration*, 55 FLRA No. 62 (1999). The FLRA made it clear that an agency may waive its statutory right to assert "covered by" as a defense in a case involving an alleged unilateral change in working conditions. *See, U.S. Department of Energy, Western Area Power Administration, Golden, Colorado,* 56 FLRA No. 2 (2000).

When parties negotiate limitations or conditions on the exercise of their statutory rights, the Authority has held that the "contract interpretation" test enunciated in *IRS* applies. Thus, the Authority must interpret the meaning of those collective bargaining clauses using the same standards and principles applied by arbitrators in interpreting contracts in both the Federal and private sectors and by the Federal courts under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The Authority in *IRS* emphasized that the meaning of the agreement must ultimately depend on the intent of the contracting parties. The parties' intent must be given controlling weight whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence. *IRS,* 47 FLRA at 1110.[7]

The relevant MA language as well as the bargaining history of those provisions makes it clear that VA Center waived its statutory right to assert "covered by" as a defense to its refusal to bargain.

The language of Article 44, Section 1 of the MA plainly addresses the application of the "covered by" doctrine, and clearly provides AFGE, Local 940 with the right to negotiate at the local level over any and all matters covered in the parties' Master Agreement as long as any matter agreed to is not inconsistent with the Master Agreement.

Gage and Perkins were both heavily involved in the negotiations of Article 44. Their testimony makes it clear that the intent of the parties was to give the Union the right to negotiate at the local level over any and all matters covered in the contract. Gage testified that the ground work for Article 44 "covered by" waiver was set forth in Article 43, in which the Union was given the right to negotiate subjects in their local supplemental agreements, which were already covered by the contract. Gage and Perkins also explained how the parties agreed that local unions should have freedom to negotiate issues covered in the contract because of the expected local changes due to the VA's massive reorganization. The parties agreed that local facilities would benefit from freedom to negotiate at the local level. If a subject in the contract was going to be excluded from local bargaining, it would "be identified within each Article." (Article 44, Section 1). Article 20 contains no such restriction concerning tours of duty.[8] Indeed, to reach any other conclusion would render the parties' language in Article 44 meaningless and nullify the express purpose of Article 44.

VA Center argues that because Article 44, Sections 4A and 4C, dealing with local mid-term bargaining, provide that bargaining should be conducted as "appropriate," it had no obligation to bargain mid-term, about the implementation of POP and the changes in the scheduled workweek. In effect, VA Center argues that this as "appropriate" language in the MA negates the entire waiver of the covered by defense. This interpretation turns the language of the MA on its ear. Nothing in this language of the MA or in the collective bargaining history justifies such a conclusion, and I therefore, reject it.

Accordingly, I conclude that VA Center, in light of Article 44 cannot rely on the "covered by" doctrine to preclude bargaining over management initiated mid-term changes in working conditions. Article 44 is a clear and unmistakable waiver of the covered by defense by VA.

1. Article 20

Further, any doubt that AFGE, Local 940 had the right to negotiate in this case disappears upon review of Article 20. AFGE reserved the right to bargain over changes to the administrative workweek in Article 20, Section 1. Union Representative Raymond Wallace cited this section in his February 1, 1999, e-mail to the Respondent, stating in part that "After careful review of the Master, I was advised that under Article 20, Section 1(a), these schedules constitute a serious change to conditions of employment in our normal work week." Indeed, Article 20, Section 1(a) concerns general matters and states, in pertinent part, as follows:

A change in the administrative workweek and changes in the regularly scheduled administrative

workweek are considered changes in conditions of employment for purposes of the notice

requirement of Article 46, Rights and Responsibilities.

This is an obvious reference to Article 46, Section 4. That section is entitled "Notification of Changes in Conditions of Employment," and it guarantees the Union, at the local level, the right to bargain over proposed changes in working conditions. In addition, at Article 20, Section 3(f) states, in pertinent part, that "Rotation of weekends and holidays will be on a fair and equitable basis within a group and may be a subject for local bargaining." In view of the fact that the change in this case can and will involve a new workweek for bargaining unit employees from their prior schedule and the clear statement that "Rotation of weekends . . . may be a subject for local bargaining," it is patently clear that the VA waived its right to assert a covered by defense regarding the change that is the subject of this case.

In light of the foregoing, I conclude that the VA Center violated section 7116(a)(1) and (5) of the Statute when it unilaterally instituted the POP without affording AFGE, Local 940 an opportunity to bargain concerning the implementation of POP and appropriate arrangements for employees adversely affected by the change.

C. Remedy

1. Status quo remedy is appropriate

In determining the appropriateness of a *status quo ante* remedy, the Authority considers among other things: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. *Federal Correctional Institution*, 8 FLRA 604, 605-06 (1982)(*FCI*).

Applying the criteria set forth by the Authority in *FCI* to the facts of this case, I conclude that a *status quo ante* remedy is appropriate. VA Center's actions constituted a willful failure to bargain. Thus, at the third bargaining session, Taylor abruptly declared "we're done," and thereafter rejected the Union's efforts to enlist the aid of a mediator. While the VA Center based its conduct on its contention that the subject matter of the change was covered by an agreement, the only agreement cited by the Respondent to support its position was a 1995 MOU. Respondent's conduct suggested that VA Center knew this position was specious because, at the hearing in this proceeding, VA Center relied on Article 20 of the parties' current MA and did not mention or introduce into evidence any 1995 MOU.

On the other hand, AFGE, Local 940's approach to the announced intention to provide coverage for POP 24 hours a day, 7 days a week, was responsible. It immediately requested negotiations and when negotiations were not successful, it requested to continue negotiations with the aid of a mediator.

Finally, the impact of the change on bargaining unit employees was immediate and substantial, given the disruption a change of this sort has on the quality of life of a typical employee.

2. A status quo ante remedy will not disrupt or impair the efficiency and effectiveness of the

agency's operations

According to Mazzulla, if the VA Center were ordered to return employees to their old schedules, it would not be able to staff on the weekends as required to do so. However, Mazzulla admitted that there would be nothing to prevent the VA Center from covering weekends by utilizing overtime or volunteers on a rotating basis to provide proper coverage.

Further, the Respondent would not be in any risk of "losing" POP[9] as long as it was staffed. In this regard, the VA Center has a pool of at least 18 computer operators who are qualified to cover POP on weekends and only 10 of these employees have been permanently assigned. Moreover, the record establishes that computer operators have actually been working more overtime on weekends since POP was implemented because of the relatively high years of Federal service and seniority of a number of the computer operators permanently

assigned to work weekends. Accordingly, I conclude that the record does not establish that a *status quo ante* remedy would impair or disrupt POP.

3. Other requested relief

In addition to ordering the VA Center to return to the *status quo*, it is appropriate to order VA Center to cease and desist from engaging in conduct determined to be unlawful and to post an appropriate notice to employees. The notice should be posted at its facility in Philadelphia, Pennsylvania, and signed by the Director of the facility.

Having founded that the VA Center violated section 7116(a)(1) and (5) of the Statute, it is recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Veterans Affairs, Benefits Delivery Center, Philadelphia, Pennsylvania, shall:

1. Cease and desist from:

(a) Implementing a decision to provide coverage for the POP Initiative for 24 hours a day, 7 days a week without bargaining with the Union concerning the impact and implementation of the POP Initiative, including the weekend scheduling of computer operators.

(b) Refusing to bargain with the American Federation of Government Employees, Local 940, over the impact and implementation of any decision to implement POP.

(c) 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 action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the change in the work schedules of Computer Operators that became effective on March 15, 1999, with the implementation of the POP Initiative, and return to the preceding schedule which had been in effect.

(b) Notify, and upon request, bargain with the American Federation of Government Employees, Local 940, concerning the impact and implementation of the POP Initiative including any proposed change in

employees' work schedules.

(c) Post at its Benefits Delivery Center, Philadelphia, Pennsylvania, were bargaining unit employees represented by the American Federation of Government Employees, Local 940 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 Director, Thomas Lloyd, 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 section 2423.43(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston 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 herewith.

Issued, Washington, DC, April 26, 2000.

____

SAMUEL A. CHAITOVITZ

Chief 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 Veterans Affairs, Benefits Delivery Center, Philadelphia, Pennsylvania, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement the Point of Presence Initiative by requiring Computer Operators to work shifts on Saturday and Sundays without first affording the employees' exclusive representative, the American Federation of Government Employees, Local 940, with notice and an opportunity to bargain regarding the procedures to be observed in implementing such changes and appropriate arrangements for employees who

have been adversely affected by the implementation of any proposed change in such policy.

WE WILL NOT change working conditions without providing notice and an opportunity to bargain to the American Federation of Government Employees, Local 940.

WE WILL rescind the Point of Presence Initiative in so far as it required a shift change requiring Computer Operators to work shifts on Saturdays and Sundays.

WE WILL notify, and upon request, bargain with the American Federation of Government Employees, Local 940 concerning the procedures to be observed in implementing the Point of Presence Initiative and appropriate arrangements for employees who have been adversely affected by the implementation of such initiative, including any proposed change in employees' weekend schedules.

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

____

(Respondent/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 Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA, and whose telephone number is:

(617)424-5730.

1. GC of the FLRA filed a Motion to Strike Attachments 1 and 2 to Respondent's brief because they were not introduced at the hearing in this case. Respondent filed an Opposition to the Motion to Strike. The attachments in question are evidentiary in nature and should have been introduced at the hearing.

Accordingly, the GC's Motion to Strike is hereby, GRANTED.

2. The Respondent did not present any witnesses who participated in the negotiations of the contract. The testimony of Perkins and Gage is uncontradicted.

3. The parties laid the ground work for Article 44 during the earlier negotiations over Article 43, Local Supplements, where the local unions were given the right to negotiate subjects in their supplemental agreements, which are already covered by the MA so long as there is no conflict with the MA. Gage testified that "by the time we did the mid-term bargaining, all of the parties understood that we would not - - if a matter could not be bargained mid-term, it would have to be identified within each article."

4. The next day, on February 4, 1999, VA Center Chief of the Operations Division, Eugene Mazzulla, sent his supervisors an e-mail, telling them to poll employees on whether they preferred to work Saturday or Sunday. The Union responded to Mazzulla, informing him that AFGE, Local 940 had submitted bargaining proposals and that he should not be dealing directly with employees on this issue.

5. The e-mail referred to an Memorandum of Understanding (MOU) dated September 1, 1995. Although the VA Center defended its conduct in this case on the grounds that the subject matter of the change in this proceeding was covered by an agreement, the September 1, 1995, MOU was not relied by the VA Center in this proceeding nor was it even placed into evidence or explained. Instead, VA Center has only relied on Article 20 of the parties' current MA to support its defense that it was under no obligation to bargain because the subject matter of the change was covered by the parties' contract.

6. Prior to the change, computer operators worked overtime on Saturday or Sunday between four and six times a year.

7. VA Center argues that, because the case involves contract interpretation, the case should have been submitted to an arbitrator and not to an Administrative Law Judge. This contention is rejected. This case involves a violation of a statutory obligation. The contractual issue is solely whether VA Center had a contractual defense to its statutory obligation. This requires the Administrative Law Judge, as described above, to interpret the MA. Further, even if the alleged unfair labor practice involving a failure to comply with a Statutory obligation also constituted a contract violation, the aggrieved party, in this case the Union, can choose whether to pursue the contractual or the statutory remedy.

8. VA Center presented no evidence to support its contention that the parties intended to foreclose negotiations over these or related matters so long as nothing was agreed to that conflicted with the MA.

9. VA Center indicated it feared that if it did not institute POP, it would lose POP and it would be assigned to a different VA facility.