DEPARTMENT OF THE ARMY HEADQUARTERS XVIII AIRBORNE CORPS AND FORT BRAGG, FORT BRAGG, NORTH CAROLINA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1770 Charging Party	Case No. AT-CA-40818

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **AUGUST 28, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 27, 1995
Washington, DC

MEMORANDUM DATE: July 27, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE ARMY
HEADQUARTERS XVIII AIRBORNE
CORPS AND FORT BRAGG,
FORT BRAGG, NORTH CAROLINA

Respondent

and Case No. AT-CA-40818

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1770

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE ARMY HEADQUARTERS XVIII AIRBORNE CORPS AND FORT BRAGG, FORT BRAGG, NORTH CAROLINA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1770 Charging Party	Case No. AT-CA-40818

Michael T. Rudisill, Esquire
For the Respondent

Mr. Ronald Ray Katt
For the Charging Party

Sherrod G. Patterson, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether, after reaching impasse in negotiations, Respondent violated § 16(a)(5) and (1) by terminating a compressed workweek without presenting the impasse to the Federal Service Impasses Panel (hereinafter,

1
For convenience of reference, sections of the Statute hereinafter, are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "16(a)(5)".

"Panel" or "FSIP"). Respondent asserts, in effect, that it presented the Union with requested data showing "adverse agency impact", i.e., specifically, increase in the cost of agency operations (5 U.S.C. § 6131(b)(3)), and, if it disagreed, the Union was obligated to present the matter to the Panel; the Union did nothing and, accordingly, the discontinuance of the compressed workweek was proper. For reasons fully set forth hereinafter, I disagree. Discontinuance of an established compressed workweek, when negotiations have reached an impasse, without submission of the matter to the Panel is a violation of the Statute even if the Union has not bargained in good faith.

This case was initiated by a charge filed on July 14, 1994 (G.C. Exh. 1(a)) and the Complaint and Notice of Hearing issued on March 9, 1995, setting the hearing for May 23, 1995 (G.C. Exh. 1(c)), pursuant to which a hearing was duly held on May 23, 1995, in Fayetteville, North Carolina, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which all parties waived. At the conclusion of the hearing, June 23, 1995, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed a brief, received on, or before June 28, 1995, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees, Local 1770, AFL-CIO (hereinafter, "Union"), is the exclusive representative of an appropriate unit of employees of Respondent and the parties have entered into a multi-unit Agreement (Joint Exh. 1), a Ground Rules Agreement for I&I bargaining (signed April 11, 1991) and Addendum thereto (signed September 11, 1992) (Joint Exh. 2, Attachments).

2. The Resource Management Division, Directorate of Personnel and Community Activities, has about twelve to fifteen employees, two of whom are supervisors (Tr. 17, 24). On, or about, October 23, 1992, all but four or five Resource Management employees, including the two supervisors, went on a compressed workweek, whereby they worked four, ten-hour days per week (Tr. 20-21). The compressed workweek schedule remained in continuous effect until April 18, 1994 (Joint Exh. 9) (Mr. Samuel Faircloth's testimony that the date was April 1, 1994, i.e. Good Friday (Tr. 21), was in error).

3. By letter dated December 15, 1993 (Joint Exh. 4), Respondent notified the Union of its intent to discontinue the compressed work schedule in the Resource Management Division effective January 9, 1994. Respondent stated that, ". . . The current schedule of 4, 10-hour days has proven to be in conflict with providing support to their internal and external customers and has increased overtime requirements . . . ." (Joint Exh. 4). It enclosed in support a memorandum dated December 8, 1993, signed by Colonel Raymond A. Barbeau, Director of Personnel and Community Activities.

4. By letter dated December 29, 1993 (Joint Exh. 5), the Union responded, in part, as follows:

> ". . . the following proposals are submitted:
>
> "1. Status Quo;
>
> "2. There will be no change in the Compressed Work Schedule, without negotiation;
>
> . . .
>
> "The current agreed to I & I 'Ground Rules' will apply to these negotiations.
>
> . . . ." (Joint Exh. 5).

In addition, the Union submitted a request for information pursuant to § 14(b)(4) of the Statute and suggested that the parties begin negotiations on January 4 or 6, 1994; however, the letter closed with the statement that, "Upon receipt of requested information and a reasonable amount of time to review requested information, Impact and Implementation bargaining . . . may continue . . . ." (Joint Exh. 5).

5. Respondent replied by letter dated January 5, 1994 (Joint Exh. 6) and stated that the information requested was not retained in Personnel but that the information had been requested and would be supplied upon receipt.

6. Initially, the Union had designated Mr. William Hall as its spokesperson and point of contact (Joint Exh. 5); but in January, 1994, Mr. Ronald R. Katt was designated as the Union's point of contact. Mr. Katt stated that one of the first things he did was ask to meet with the employees of Resource Management; that Respondent did not

object; and he met with the two supervisors and the employees during the first week of January (Tr. 41). He stated that the employees ". . . did not want to come off of it" [compressed work week] (Tr. 41, 42).

7. Respondent supplied the information requested by letter dated January 27, 1994 (Res. Exh. 2, Enclosures) and in its letter of transmittal stated,

> "Documentation regarding specific situations which conflict with providing support for internal and external customers are not maintained. However, verbal summaries of such instances can be provided during discussions with your office." (Res. Exh. 2).

8. Mr. Katt stated that he suggested to Ms. Ruth Crumley, Respondent's representative, after talking to the employees, that ". . . maybe Management could just put the two supervisors back" (Tr. 43); that they had negotiations scheduled for 9:00 a.m. on January 10, 1994, and Ms. Crumley called at about 8:15 a.m. and told him that the two supervisors were going to be put back on a five day work week and, "That that would probably take care of the problems . . ." that the "main focal point was having those supervisors right there constantly." (Tr. 44). Mr. Katt stated that Ms. Crumley said she didn't see any need for them to meet at that time.

Ms. Crumley did not wholly agree with Mr. Katt's version. She stated that there had, indeed, been a meeting set for January 10 but, "There was a conflict, and I don't remember exactly what the conflict was, but for some reason the meeting could not be held, but I passed on the information at that time that the supervisors' schedules had already been changed, that Colonel Barbeau would access the impact of it, and we probably would get together at a later date for any actual negotiations." (Tr. 103). Ms. Crumley specifically denied that she ever said that just taking the supervisors off the compressed schedule would satisfy the situation and emphasized that she said only that Colonel Barbeau would assess the impact of taking the supervisors off the compressed work schedule. (Tr. 103).

9. By letter dated January 19, 1994 (Joint Exh. 7), Respondent informed the Union that it intended to reinstate the 8-hour-a-day, 5-day-a-week schedule for all personnel in Resource Management Division, supervisory personnel having already been converted to that schedule. Respondent concluded by stating,

> "Please provide any proposals you care to make by January 26, 1994. We will then arrange a meeting . . . for Impact and Implementation bargaining . . . . ." (Joint Exh. 7).

10. The Union replied by letter dated January 24, 1994 (Joint Exh. 8), asserting, in part, that inasmuch as 5 U.S.C. § 6131(a) states, "if the head of an agency finds . . . ." and, "There is <u>no</u> indication in your correspondence that Lieutenant General (LTG) Shelton is even aware of the proposal . . . Barring such a determination by LTG Shelton, the issue of not continuing any flexible or compressed schedule is not in an appropriate posture for negotiations. . . ." (Joint Exh. 8).

11. Mr. Katt stated that he might have had a conversation with Ms. Crumley between the date of the Union's letter of January 24 and Respondent's letter of April 13, 1994 (Tr. 48); however, the first response of any moment by Respondent was its letter of April 13, 1994 (Joint Exh. 9) in which it stated, in part, as follows:

> ". . . your unilateral determination that the Commanding General is the only person authorized to decide whether or not activities continue or discontinue flexible or compressed schedules at the unit level is puzzling. The Commander delegates personnel management responsibilities to the head of the local activity as a necessary part of command. The Director of Community Activities is charged with the operation of that Directorate and, as such, is responsible for making these determinations.
>
> However, we need to resolve the matter. My belief is that we have supplied the rationale and all documentation to you to illustrate Management's view. In a telephone conversation with you sometime in late January we discussed the two proposals you made in your December 29, 1993, letter (i.e., (1) status quo and (2) no change without negotiation). While these two items might possibly be considered proposals in a technical sense, they, in effect, say "No" without any chance of resolution. We have nothing to work with in reaching a common ground.
>
> As I stated, I would like to resolve this issue. If you have concerns, please advise me. Otherwise, Management intends to implement the termination . . . on April 18, 1994 . . . ." (Joint Exh. 9).

12. The Union replied by letter dated April 18, 1994. (Joint Exh. 10). At the outset, the Union reiterated its position that,

> ". . . The above Statute does not contain any authority to delegated [sic] the decision to cease flexible or compresses [sic] work schedules. Further, ceasing flexible or compressed work schedules are agency wide decisions. . . ." (Joint Exh. 10, p. 1).

The Union further stated, in part, that,

> "While you view statue [sic] quo and no change without negotiations as merely saying "no" without any chance of resolution, the Union sees the Agency's proposal of totally ceasing AWS as providing no possible middle ground for resolution. You should expect your ultimatum from management to beget an ultimatum from the Union. If indeed you would like to resolve the issue, provide the demonstrated need to cease all AWS for the three Resource Management Division; otherwise, make an alternative proposal of some other AWS. Also, I request you should reconsider your intentions to implement without completing negotiations." (Joint Exh. 10, pp. 2-3).

13. Respondent terminated the compressed workweek on April 18, 1994.

Conclusions

If this case involved merely bargaining under the Statute, one would have to conclude that neither party demonstrated any good faith effort to bargain. cf. U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York, A/SLMR No. 620, 6 A/SLMR 119, 6 A/SLMR Supp. 30 (1976). But here the provisions of the Flexible and Compressed Work Schedules Act of 1982 (hereinafter also referred to as the "Act"), P.L. 97-221, 5 U.S.C. § 6121, et seq., also apply and, in my judgment, are controlling. Thus, § 6130 provides, in part, as follows:

> "(a)(1) In the case of employees in a unit represented by an exclusive representative, any flexible or compressed work schedule, and the establishment and termination of any such schedule, shall be subject to the provisions of this subchapter and the terms of a collective

bargaining agreement between the agency and the exclusive representative.

"(2) Employees within a unit represented by an exclusive representative shall not be included within any program under this subchapter except to the extent expressly provided under a collective bargaining agreement. . . .

. . . ." (5 U.S.C. § 6130)

Section 12 of Article XI of the parties' Agreement (Joint Exh. 1) provides:

"Irregular tours of duty, if established, will be in accordance with government-wide rules and regulations.";

and Section 13 of Article XI provides:

"The parties acknowledge that Agency regulations recognize the possibility of establishing flextime work schedules. Where the Employer determines that such schedules would promote efficiency of government operations and/or improve productivity, such arrangements may be implemented. The Union will be entitled to present its views to the Employer regarding the feasibility of establishing flextime work schedules on a case-by-case basis and the parties will discuss the matter.

Mr. Truman Earl Bullard, Sr., President of the Union, testified that the alternative work schedule (AWS), compressed workweek, etc. were currently used at Fort Bragg in a wide variety of situations (Tr. 72); that Respondent did not want to negotiate a post-wide policy because of the diversity in the activities (Tr. 73); and that Respondent gives the Union notice of intent to implement an AWS and if the employees want it and they benefit from it, the Union does not object and the AWS is implemented; however, if employees later wanted a different schedule, the Union would negotiate further. (Tr. 73). Mr. Bullard further testified that AWS terminations had been negotiated. (Tr. 74).

§ 6131 provides, in relevant part, as follows:

(a) Notwithstanding the preceding provisions of this subchapter or any collective bargaining agreement and subject to subsection (c) of this section, if the head of an agency finds that a particular flexible or compressed schedule under

this subchapter has had or would have an adverse agency impact, the agency shall promptly determine not to--

(1) establish such schedule; or

(2) continue such schedule, if the schedule has already been established.

(b) For purposes of this section, "adverse agency impact" means--

(1) a reduction of the productivity of the agency;

(2) a diminished level of services furnished to the public by the agency; or

(3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).

(c)(1) This subsection shall apply in the case of any schedule covering employees in a unit represented by an exclusive representative.

. . .

(3)(A) If an agency and an exclusive representative have entered into a collective bargaining agreement providing for use of a flexible or compressed schedule under this subchapter and the head of the agency determines under subsection (a)(2) to terminate a flexible or compressed schedule, the agency may reopen the agreement to seek termination of the schedule involved.

(B) If the agency and exclusive representative reach an impasse in collective bargaining with respect to terminating such schedule, the impasse shall be presented to the Panel.

. . .

(D) Any such schedule may not be terminated until--

(i) the agreement covering such schedule is renegotiated . . . ; or

(ii) the date of the Panel's final decision, if an impasse arose in the reopening of the agreement under subparagraph (A) of this paragraph.

. . . ." (5 U.S.C. § 6131)

(Emphasis supplied).

Respondent supplied data which it asserted demonstrated adverse agency impact, the Union asserted that the data failed to show any adverse agency impact, or, as Mr. Bullard testified, ". . . we analyzed the information [Res. Exh. 2], and found no evidence that supported the -- there was no relationship to the ten hour schedule to cause this situation." (Tr. 89). Mr. Bullard asserted that until Respondent produced, ". . . adequate evidence to show that the ten hour schedule is causing the overtime, and the other problems as alleged . . . ." (Tr. 91) it was inappropriate for the Union to make "I & I" proposals; that it would proceed to "I & I" proposals only when we got beyond the substantive issue of termination; that "I & I" would have been appropriate if Respondent had made proposals of other AWS, but Respondent never made any alternative proposal. Respondent repeatedly sought proposals from the Union but received none. In effect, Respondent proposed termination of the compressed work schedule; the Union said don't make any change; Respondent said here is proof of adverse agency impact; the Union said we aren't convinced; Respondent said give us your proposals; the Union said our proposal is: don't make any change; etc. [2]

The Regulations of the Federal Service Impasses Panel implementing the provisions of section 6131 of Title 5 of the United States Code, define "impasse" as:

> ". . . that point in the negotiation of flexible and compressed work schedules at which the parties are unable to reach agreement on whether a schedule has had or would have an adverse agency impact." (5 C.F.R. § 2472.2(j)).

2
There is no dispute that termination of the compressed work schedule was negotiable; nor may there be, National Treasury Employees Union, 39 FLRA 27, 34 (1991); Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee, 44 FLRA 599 (1992); National Treasury Employees Union, Chapter 24, 50 FLRA 330 (1995).

Plainly, the parties did not agree that the compressed work schedule, which had been in effect in the Resource Management Division for about eighteen months, had had an adverse agency impact. It is equally plain that, where there is an exclusive representative, a compressed work schedule may be terminated only if it has had an adverse agency impact; and if there is disagreement as to whether there has been an adverse agency impact, the agency may not terminate the schedule until the Panel determines whether the agency's findings, on which its determination to terminate the CWS was based, are supported by evidence. Unlike other negotiation impasses where, pursuant to § 19 of the Statute, the services of FSIP may be requested and the failure of a union after impasse to timely request the assistance of FSIP permits the agency to implement, U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 288 (1981); U.S. Customs Service, 16 FLRA 198 (1984); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 217 (1984); Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532, 545-547 (1988), the Act prohibits termination of a CWS until the date of the Panel's final decision (5 U.S.C. § 6131(c)(3)(D)(ii)). It matters not that an agency has bargained in good faith and/or that the union has not; if there is disagreement, as clearly there was here, as to whether the CWS has had an adverse agency impact, the agency may not terminate the CWS until the Panel's final decision. To be sure, either party could have requested the Panel to resolve the impasse, 5 C.F.R. § 2472.3; but the Act prohibits the Agency from terminating the CWS until the Panel has decided. Respondent was not obligated to request that the Panel resolve the impasse; but it could not lawfully terminate the CWS unless and until the Panel decided that Respondent's determination to terminate the CWS was supported by evidence. Because it is unnecessary, I expressly do not decide the merits of the Union's assertion concerning non-delegation of "head of an agency" authority in § 6131, although it is noted that the FSIP appears to disagree, Department of Veterans Affairs, Edith Nourse Rogers Memorial Veterans Hospital, Bedford, Massachusetts, Case No. 95 FSIP 24, FSIP Release No. 374 (May 24, 1995); as does the Authority with respect to the use of that term in § 14(c) of the Statute, National Treasury Employees Union, supra, n.2, 39 FLRA at 30. Because termination of a compressed work schedule is part of the bargaining process under the Statute, 5 U.S.C. §§ 6121 (8), 6131; Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee, 44 FLRA 599 (1992); National Treasury Employees Union, Chapter 24, 50 FLRA 330, 332 (1995), Respondent violated §§ 16(a)(5) and (1) of the Statute by its termination of the compressed work schedule without a final decision of the FSIP finding that

Respondent's determination to terminate the schedule was supported by evidence. Space Systems Division, Los Angeles Air Force Base, Los Angeles, California, 45 FLRA 899, 904 (1992). Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, shall:

1. Cease and desist from:

(a) Unilaterally terminating a compressed work schedule for its Resource Management Division employees prior to the date of the Federal Service Impasses Panel's final decision, pursuant to 5 U.S.C. § 6131(c)(1), (3)(A), (C) and (D), that Respondent's determination to terminate the schedule is supported by evidence.

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

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

(a) Upon request of the American Federation of Government Employees, Local 1770 (hereinafter, "Union"), the exclusive representative, re-establish the previous compressed work schedule for its Resource Management Division employees.

(b) Give the Union notice and the opportunity to negotiate with respect to any proposed change in the compressed workweek schedule after its re-establishment.

(c) Post at its facilities at Fort Bragg, North Carolina, 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 Commanding Officer of the XVIII Airborne Corps, 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 § 2423.30 of the Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, 1371 Peachtree Street, NE, Suite 122, Atlanta, Georgia 30309-3102, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 27, 1995
Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally terminate a compressed work schedule for the employees of our Resource Management Division without a final decision of the Federal Service Impasses Panel finding that our determination to terminate the schedule is supported by evidence.

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 Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, Local 1770, the exclusive representative, re-establish the previous compressed work schedule program for the employees of our Resource Management Division and WE WILL give the American Federation of Government Employees, Local 1770, notice and opportunity to negotiate with respect to any proposed change in that schedule after its re-establishment.

(Activity)

Date: By:

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Region, whose address is: 1371

Peachtree Street, NE, Suite 122, Atlanta, Georgia 30309-3102, and whose telephone number is: (404) 347-2324.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CA-40818, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Michael T. Rudisill, Esquire
Office of the Staff Judge Advocate
XVIII Airborne Corps, Building 2-1133
Fort Bragg, NC 28307-5000

Mr. Ronald Ray Katt
Executive Vice President
American Federation of Government
Employees, Local 1770
P.O. Box 70027
Fort Bragg, NC 28307

Sherrod G. Patterson, Esquire
Federal Labor Relations Authority
1371 Peachtree Street, NE, Suite 122
Atlanta, GA 30309-3102

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: July 27, 1995
Washington, DC