68 FLRA No. 125

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3935
AFL-CIO
(Charging Party/Union)

CH-CA-12-0271

_____

DECISION AND ORDER

July 24, 2015

_____

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

I. Statement of the Case

In the attached decision, Federal Labor Relations Authority (FLRA) Administrative Law Judge Susan E. Jelen (the Judge) found that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by repudiating a local compressed-work-schedule agreement (the local agreement) and Article 18, Section b (Article 18(b)) of the governing master labor agreement (the master agreement). This case presents two substantive questions.

The first question is whether the Agency repudiated the local agreement. Because the Agency's purported disapproval of the local agreement was untimely, the local agreement took effect by operation of law. Accordingly, the answer to the first question is yes.

The second question is whether the Agency's breach of Article 18(b) amounts to a repudiation of the master agreement. Because the Authority has determined that Article 18(b) requires the Agency to bargain over compressed work schedules for correctional-services employees, the answer to the second question is yes.

[1] 5 U.S.C. § 7116(a)(1), (5).

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.

On September 1, 2011,[2] the Union and local management at the Agency's facility in Duluth, Minnesota (the prison camp) entered into negotiations over a compressed work schedule for correctional-services employees, and reached agreement that same day. The Union signed the local agreement on September 1, and on September 16, the prison camp signed the agreement and forwarded it to the Agency's Office of General Counsel (OGC) for review.

In a memorandum dated September 23, OGC disapproved the local agreement because it determined that Article 18, Section d (Article 18(d)) of the master agreement covered compressed work schedules for correctional-service employees. OGC informed the prison camp of its decision on September 27;[3] however, it did not notify the Union until October 19.

Article 18(b) 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 [OGC] in the [c]entral [o]ffice who will coordinate a technical and legal review. A copy of this agreement will also be forwarded to the [p]resident of the Council of Prison Locals for review. These reviews will be completed within thirty . . . 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

[2] All dates are in 2011 unless otherwise noted.
[3] *See* Resp't Ex. B at 1.

> 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.[4]

Article 18(d) concerns the preparation of quarterly rosters for correctional-services employees.[5]

After receiving the Agency's disapproval of the local agreement, the Union filed a ULP charge. The FLRA's General Counsel (GC) issued a complaint, alleging that the Agency repudiated the local agreement and Article 18(b) of the master agreement, in violation of § 7116(a)(1) and (5) of the Statute. The GC filed a motion for summary judgment, and the Agency filed both a response to the GC's summary-judgment motion and a cross-motion for summary judgment. The GC filed a response to the Agency's cross-motion. The Judge determined that summary judgment was appropriate and, thus, did not hold a hearing.

The Judge found that "[t]he 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," and that "the plain wording of [Article 18(d)] does not limit [Article 18(b)] in any way."[6] Thus, the Judge found that "the [Agency]'s refusal to bargain over compressed work schedules for employees in correctional services constitutes a clear and patent breach of Article [18(b)]."[7] Further, the Judge found "that [the Agency]'s breach of Article [18(b)] goes to the heart of the [master agreement]."[8] Thus, the Judge found that the Agency's breach of Article 18(b) "amounts to a repudiation of the [master agreement]."[9] The Judge applied the same analysis to conclude that the Agency's failure to implement the local agreement amounted to a repudiation of that agreement.[10] Additionally, the Judge rejected the Agency's argument that U.S. Court of Appeals for the District of Columbia Circuit's decision in *Federal BOP v. FLRA* (*Federal BOP*)[11] established that Article 18(d) covered compressed work schedules for correctional-service employees, explaining that the Authority's "covered-by" doctrine did not provide a defense to repudiation allegations.[12]

As a remedy, the Judge ordered the Agency to cease and desist from violating Article 18(b) and refusing to implement the local agreement. The Judge also ordered the Agency's director to sign, and the Agency to post and electronically distribute nationwide, a ULP notice.

III. Preliminary Matter: Section 2429.5 of the Authority's Regulations bars the Agency's exception to the remedy.

The Agency excepts to the Judge's order to post and electronically distribute the notice nationwide and her order that the Agency's director sign the notice, claiming that such an "extraordinary" remedy is unwarranted.[13] However, the GC requested a nationwide notice posting signed by the director in its motion for summary judgment.[14] And, although it filed a response to the GC's summary-judgment motion, the Agency did not argue that a such a posting was inappropriate.[15]

Under § 2429.5 of the Authority's Regulations, the Authority will not consider any evidence, arguments, or issues "that could have been, but were not, presented in the proceedings before the . . . Administrative Law Judge."[16] The Authority applies § 2429.5 to bar challenges to a remedy if the remedy was requested by one of the parties and not objected to by the other.[17] Because the Agency did not object to the GC's requested remedy before the Judge, we dismiss the Agency's exception to the remedy.

---

[4] Judge's Decision at 3-4 (quoting GC Mot. for Sum. J., Ex. 2 (Master Agreement) at 38-39).
[5] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 580-81 (2015) (*FCI Williamsburg*) (Member Pizzella dissenting) (citation omitted) (setting forth text of Article 18(d)).
[6] Judge's Decision at 10.
[7] *Id.* (citing *SSA, N.Y., N.Y.*, 60 FLRA 301, 305 (2004); *Dep't of Transp., FAA, Fort Worth, Tex.*, 55 FLRA 951, 956, 961-62 (1999)).
[8] Judge's Decision at 12.
[9] *Id.*
[10] *Id.*
[11] 654 F.3d 91 (D.C. Cir. 2011).
[12] Judge's Decision at 10 & n.5 (citing *U.S. Dep't of the Treasury, IRS, Plantation, Fla.*, 64 FLRA 777, 780 (2010) (*Plantation*)).
[13] Exceptions at 11.
[14] GC Mot. for Sum. J. at 11, 13.
[15] *See* Agency Opp'n to GC Mot. for Sum. J. at 1-11.
[16] 5 C.F.R. § 2429.5.
[17] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 331 (2015).

IV. Analysis and Conclusions: The Agency repudiated both the local agreement and the master agreement, in violation of § 7116(a)(1) and (5) of the Statute.

It is a ULP, in violation of § 7116(a)(1) and (5) of the Statute, for an agency to repudiate a negotiated agreement.[18] The Authority analyzes repudiation allegations under the two-pronged test set forth in *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois* (*Scott*).[19] Under this test, the Authority examines: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?).

Under the first prong, the Authority will analyze the clarity of the provision that the charged party allegedly breached.[20] The Authority will not find a repudiation where a party acts in accordance with a reasonable interpretation of an unclear contractual term.[21] Under the second prong, the Authority focuses on the importance of the provision that was allegedly breached relative to the agreement in which it is contained.[22] Of course, expressly rejecting an agreement in its entirety will always amount to a clear and patent breach that goes to the heart of the agreement.[23]

A. The Agency repudiated the local agreement.

The Agency argues that it did not repudiate the local agreement because the local agreement never went into effect.[24] Rather, the Agency contends that it followed Article 18(b) by forwarding the local agreement to OGC, which then appropriately disapproved the local agreement.[25] Specifically, the Agency argues that "[s]ince OGC did not approve the agreement, it could not have been implemented[,] and the [Agency], therefore, could not have repudiated the agreement by not implementing it."[26]

It is well established that if an agency does not timely and properly serve its disapproval of an agreement on the union, then the agreement automatically goes into effect.[27] Section 7114(c) of the Statute establishes a

[18] *E.g.*, *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 861 (1996) (*Scott*) (quoting *DOD, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 40 FLRA 1211, 1218-19 (1999)(*Warner Robins I*); *see also AFGE, AFL-CIO*, 21 FLRA 986, 988 (1986) (repudiation by a union violates § 7116(b)(5)).

[19] 51 FLRA 858.

[20] *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 52 FLRA 225, 230-31 (1996) (*Warner Robins II*).

[21] *Id.*

[22] *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ari.*, 64 FLRA 355, 357 (2009) (term-agreement provision providing safe harbor for employees undergoing drug treatment goes to heart of agreement; similar provision in local drug-testing agreement goes to heart of local drug-testing agreement); see also, e.g. *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 60 FLRA 943, 952 (2005) (then-Member Pope dissenting on other grounds) (provisions related to bargaining obligation on firearm policy were sole purpose for, and therefore go to heart of, memorandum between parties); *24th Combat Support Group, Howard Air Force Base, Rep. of Pan.*, 55 FLRA 273, 282 (1999) (provisions related to availability of negotiated grievance procedure go to heart of agreement); *Warner Robins II*, 52 FLRA at 231-32 (provisions related to indoor smoking go to heart of smoking-policy agreement); *U.S. Dep't of the Interior, Bureau of Reclamation, Wash., D.C. & Mid-Pacific Reg'l Office, Sacramento, Cal.*, 46 FLRA 9, 28 (1992) (provisions related to scope of legacy bargaining unit go to heart of agreement); *Pan. Canal Comm'n, Balboa, Rep. of Pan.*, 43 FLRA 1483, 1508-09 (1992) (provisions related to ability to appeal adverse decisions through administrative grievance procedure go to heart of agreement); *Warner Robins I*, 40 FLRA at 1219-20 (1991) (provisions related to shift scheduling and official time for union representatives go to heart of agreement).

[23] *See, e.g., DOD, Dependents Sch.*, 50 FLRA 424, 426-27 (1995); *AFGE, AFL-CIO*, 21 FLRA at 988.

[24] Exceptions at 9-10.

[25] *Id.* at 9.

[26] *Id.*

[27] *AFGE, Local 1301*, 51 FLRA 1294, 1297 (1996) (*Local 1301*).

process for agency review of a negotiated agreement.[28] Under § 7114(c)(3), an agency head has thirty days to disapprove a negotiated agreement.[29] In order to timely disapprove an agreement under § 7114(c)(3), the agency must serve the union with notice of the disapproval within thirty days.[30] In other words, the date of service, rather than the date that the agency head decides to disapprove the agreement, is what matters as far as § 7114(c)(3) is concerned.

Section § 7114(c)(4) permits parties to establish their own procedures for review of agreements that are subordinate to a higher-level agreement.[31] But in the absence of contrary contractual language or agency regulations, the rules applicable to approval of agreements under § 7114(c)(1-3) apply.[32] Even where parties have adopted a procedure under § 7114(c)(4), the § 7114(c)(1-3) default rules will supply any missing terms.[33]

Here, the master agreement provides for a thirty-day review period for local compressed-work-schedule agreements.[34] Moreover, the master agreement does not provide for additional time for service of disapproval of a compressed-work-schedule agreement or otherwise modify the rule that service of disapproval must occur before the end of the review period. Thus, consistent with the above discussion, the Agency's disapproval of the local agreement – which the Agency did not communicate to the Union until thirty-three days after the local agreement was signed[35] – was untimely.

Accordingly, because the local agreement took effect automatically thirty-one days after it was signed, there is no merit to the Agency's argument that it could not have breached the local agreement because the local agreement was never finalized. Moreover, as the Agency has rejected the local agreement in its entirety, the Agency's violation amounts to a repudiation of the local agreement.[36] As such, the Agency has not established that the Judge erred in concluding the Agency repudiated the local agreement.

Further, the Agency's reliance on the Authority's "covered-by" doctrine is misplaced. The covered-by doctrine provides that the Statute does not require a party to bargain over matters that already have been resolved by bargaining.[37] An argument that a matter is covered by an agreement is an affirmative defense that a respondent has the burden of proving.[38]

However, the Authority has held that the covered-by doctrine does not provide a defense to the repudiation of a collective-bargaining agreement, including a subordinate agreement (such as a settlement agreement, local supplement, or subject-specific memorandum) that is subject to a controlling agreement (such as a national or master agreement).[39] So, to the extent that the Agency argues that the covered-by doctrine permitted it to reject the local agreement even after the agency-head-disapproval deadline had passed, that argument is contrary to Authority precedent.[40]

We therefore deny the Agency's exception to the Judge's finding that it repudiated the local agreement.[41]

B. The Agency repudiated the master agreement.

The Agency argues that the Judge erred in concluding that it repudiated the master agreement.[42] In addition to arguing that it properly disapproved the local agreement – a contention that we have rejected – the Agency argues that its "position that it has no duty to bargain over schedules [for employees] in [correctional services] is a reasonable interpretation [of Article 18(d)], supported by [*Federal BOP*]."[43]

[28] *NTEU, Chapter 52*, 23 FLRA 720, 721 (1986).
[29] *Id.*
[30] *See id.* at 722.
[31] *Id.* at 721.
[32] *Id.*
[33] *See Local 1301*, 51 FLRA at 1298 (negotiated approval process omitted rules for method of service).
[34] Judge's Decision at 3 (quoting Master Agreement at 38).
[35] *Id.* at 5.
[36] *See DOD, Dependents Sch.*, 50 FLRA at 426 (finding a refusal to recognize grievance settlement constitutes repudiation).
[37] *FCI Williamsburg*, 68 FLRA at 582 (citing *NTEU*, 68 FLRA 334, 338 (2015)).
[38] *Id.* (citing *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 617 n.2 (2009)).
[39] *Plantation*, 64 FLRA at 780 (citing *Scott*, 51 FLRA at 864 n.7 (1996)).
[40] *Id.* (citing *Scott*, 51 FLRA at 864 n.7).
[41] Member DuBester notes the following: I agree with the decision to find that the "covered-by" doctrine does not provide a defense to an allegation that a party has repudiated a collective-bargaining agreement. *Plantation*, 64 FLRA at 780; *Scott*, 51 FLRA at 864 n.7. 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, 575-76 (2012) (Dissenting Opinion of Member DuBester); *accord FCI Williamsburg*, 68 FLRA at 583 n.38; *NTEU, Chapter 160*, 67 FLRA 482, 487 (2014) (Dissenting Opinion of Member DuBester).
[42] Exceptions at 6-8.
[43] *Id.* at 9.

The Agency's argument lacks merit. The Authority has already rejected the Agency's interpretation of Article 18 in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Williamsburg, Salters, South Carolina* (*FCI Williamsburg*).[44] In *FCI Williamsburg*, the Authority found that "nothing in th[e] wording [of Article 18(b)] indicates that the obligation to bargain over compressed work schedules is limited to employees other than correctional-services employees"; "nothing in Article 18(d) discusses compressed work schedules"; and "nothing in *Federal BOP* supports a different interpretation."[45] Thus, we find that the Judge correctly concluded that the Agency did not rely on a reasonable interpretation of the master agreement when it refused to engage in further bargaining over compressed work schedules for correctional-services employees.

Further supporting the Judge's conclusion that the Agency's breach of the master agreement was clear and patent is the Judge's finding that the Agency "repeatedly stated that . . . no bargaining [over compressed work schedules for correctional-services employees] would take place,"[46] thus "manifest[ing] an intent not to honor similar requests by the Union."[47] Accordingly, the record supports the Judge's determination that the Agency committed a clear and patent breach of Article 18(b). Finally, because the Agency does not claim that the Judge erred in concluding that Article 18(b) is at the heart of the master agreement, it has not established that the Judge erred when she found that the Agency repudiated the master agreement.

Accordingly, we deny the Agency's exception to the Judge's finding that the Agency repudiated the master agreement.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[48] and § 7118 of the Statute,[49] we order the Agency to:

(1) Cease and desist from:

(a) Failing and refusing to abide by and honor the local agreement.

(b) Failing and refusing to abide by and honor Article 18(b) of the master agreement by refusing to negotiate over compressed work schedules for any correctional-service-department employees.

(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 actions in order to effectuate the purposes and policies of the Statute:

(a) Abide by and honor the local agreement.

(b) Comply with Article 18(b) of the master agreement and, upon the request of the American Federation of Government Employees, Council of Prison Locals, Council 33 (Council 33) negotiate at the local level over flexible and/or compressed work schedules for all unit employees, including those assigned to the correctional-services department.

(c) Post at its facilities where bargaining unit employees represented by the Council 33 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 Director, Federal Bureau of Prisons, 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. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Disseminate a copy of the notice signed by the director through the Agency's email system to all bargaining-unit employees. The notice shall be sent on the same day that the notice is physically posted.

(e) Pursuant to § 2423.41(e) of the Authority's Regulations,[50] notify the Regional Director, Chicago Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

[44] 68 FLRA at 582-83; *accord U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Littleton, Colo.*, 68 FLRA 605, 606 (2015) (Member Pizzella dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Oxford, Wis.*, 68 FLRA 593, 599 (2015) (Member Pizzella dissenting).

[45] *Id.* at 583 (internal citations omitted).

[46] Judge's Decision at 11.

[47] *Id.* (quoting *Warner Robins I*, 40 FLRA at 1219) (internal quotation marks omitted).

[48] 5 C.F.R. § 2423.41(c).

[49] 5 U.S.C. § 7118.

[50] 5 C.F.R. § 2423.41(e).

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, 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 or refuse to abide by the September 16, 2011, Correctional Services 12 Hour Compressed Work Schedules agreement negotiated with the American Federation of Government Employees (AFGE), Local 3935, AFL-CIO (Union) for the Duluth Federal Prison Camp.

WE WILL NOT fail or refuse to negotiate over compressed work schedules for any bargaining-unit employee, including those in Correctional Services, as provided by Article 18, section b of the parties' Master Agreement.

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 implement the September 16, 2011, Correctional Services 12 Hour Compressed Work Schedules agreement negotiated with the Union for the Duluth Federal Prison Camp.

WE WILL comply with Article 18, section b of the parties' Master Agreement and, upon request of the AFGE, negotiate at the local level over flexible and/or compressed work schedules for all unit employees, including those assigned to Correctional Services.

_____

Agency/Activity

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 other material.

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, and whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.

Member Pizzella, dissenting in part:

I agree with my colleagues' determination that the Agency repudiated the local compressed-work-schedule agreement.

However, for the reasons that I set forth in my dissent in *U.S. DOJ, Federal BOP, Federal Correctional Institution Williamsburg, Salters, South Carolina*,[*] I do not agree that Article 18(b), when read in conjunction with Article 18(d), requires the Agency to bargain over compressed work schedules for correctional-services employees. Accordingly, I would not find that the Agency violated – let alone repudiated – Article 18(b).

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
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3935, AFL-CIO
Charging Party

Case No. CH-CA-12-0271

Greg A. Weddle
Alicia E. Weber
For the General Counsel

Tina Hauck
For the Respondent

Brian M. Henrickson
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor‑Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the rules and regulations of the Federal Labor Relations Authority (Authority), Part 2423.

Based upon unfair labor practice (ULP) charges filed by the American Federation of Government Employees, Local 3935, AFL-CIO (Union), a Complaint and Notice of Hearing was issued by the Regional Director of the Chicago Region of the FLRA. The complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons violated § 7116(a)(1) and (5) of the Statute by repudiating the Duluth Compressed Work Schedule (CWS) agreement and Article 18, section b of the parties' Master Agreement (MA). The Respondent filed a timely Answer denying the allegations of the complaint.

On January 9, 2013, 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 6, and the affidavit of Brian M. Henrickson, President, American Federation of Government Employees, Local 3935.

On January 11, 2013, the Respondent filed a MSJ as well as a Response to the General Counsel's MSJ. In support of its MSJ the Respondent set forth a Statement of Undisputed Material Facts and attached exhibits thereto. The Respondent denied that its actions violated the Statute as alleged in the complaint and asserts that it acted in accordance with the MA, Article 18, section b, and that it did not repudiate the CWS agreement at the Federal Prison Camp in Duluth, Minnesota (FPC Duluth).

On January 23, 2013, the General Counsel filed its Response to the Respondent's MSJ.

Having carefully reviewed the pleadings, exhibits and arguments of 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 (1985). 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,[1] I find that the Respondent violated § 7116(a)(1) and (5) of the Statute when it repudiated the 2011 Duluth CWS agreement and when it repudiated Article 18, section b of the parties' MA, and make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

1. The Union filed the original charge in this proceeding on March 9, 2012, and a copy was served on the Respondent. The Union filed an amended charge on June 28, 2012, and a copy was served on the Respondent. (R. Ans.; G.C. Ex. 1)

2. The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (R. Ans.)

[1] The parties dispute certain facts, as discussed below; despite these disagreements, I still find the facts sufficient in order to render a decision in this matter.

3. (a) The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (AFGE), is a labor organization within the meaning of section 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of employees of Respondent's employees. (R. Ans.)

(b) The Union is an agent of AFGE for the purpose of representing the unit employees at Respondent's FPC Duluth. (R. Ans.)

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of the Respondent acting upon its behalf:

Michael Rank	Deputy Associate General Counsel
Meryl A. White	Assistant General Counsel
Jeff Krueger	Warden, FPC Duluth
Scott Johnson	Captain, FPC Duluth
Dan Gravdal	Lieutenant, SIS, FPC Duluth
Jason Gunther	Supervisor of Education, FPC Duluth
Carrie Foster	HR Manager, FPC Duluth

(R. Ans.)

5. At all material times, the individuals named in paragraph 4 were supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (R. Ans.)

6. AFGE and the Respondent are parties to a MA covering employees in the bargaining unit described in paragraph 3(a) and (b), which has been effective since March 9, 1998. (R. Ans.)

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 states that quarterly rosters for Correctional Services employees will be prepared in accordance with the procedures set forth. Section d(2) states: "seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests . . . ." (G.C. Ex. 2)

8. On November 22, 1999, Respondent's Central Office issued a memorandum to all Chief Executive Officers (Wardens) of its facilities nationwide concerning the negotiation of flexible and compressed work schedules. (G.C. Ex. 3)[2]

[2] The Respondent does not question the existence of this memorandum, but asserts that it does not apply to the 12 hour CWS schedule at issue in this case. The Respondent argues that the memorandum deals generally with the agency's approval of compressed work schedules and makes no mention of a 12 hour CWS. The memorandum specifically cites to Chapter 640.1 of Program Statement 3000.02 on page 5. I find the document itself relevant to these proceedings.

9. Pursuant to Article 18 of the MA, the Union and Respondent have a history of negotiating compressed work schedules for Respondent's FPC Duluth employees (G.C. Ex. 4), including employees who work in the Correctional Services Department. (G.C. Ex. 5) The parties have previously negotiated CWS for individual positions at FPC Duluth, to include the Special Investigative Technicians, a position not on the Correctional Services roster, the Mid-Level Practitioner and Financial Management Specialist positions. All of these CWS requests were approved prior to 2011.

10. There are currently 21 employees who are assigned to the Correctional Services Department, which makes up about one-third of the total number of bargaining unit employees at the FPC Duluth. These employees have worked under a negotiated, compressed work schedule since 2000. (Affidavit of Henrickson). The agency notes that the current 10 hour CWS for the Correctional Services Department was approved by the OGC for the Bureau of Prisons in September 2000. (R. Ex. A ¶5)

11. On September 1, 2011, the Union and Respondent entered into negotiations over a new compressed work schedule for FPC Duluth Correctional Services Department employees and an agreement (the Duluth CWS agreement) was reached that same day. (R. Ans.; G.C. Ex. 6; Henrickson affidavit)

12. The Duluth CWS agreement was signed by the Union on September 1 and by Respondent on September 16. It was sent to the OGC for approval on September 16. (R. Ans.; G.C. Ex. 6; Henrickson affidavit; R. Ex. A ¶6)

13. On October 19, 2011, the Respondent notified the Union for the first time that it would not implement the Duluth CWS agreement and that it had no further duty to engage in additional bargaining over compressed work schedules for the Correctional Services Department as a whole. (G.C. Ex. 7; Henrickson affidavit). [3] The CWS for the Correctional Service Department at FPC Duluth was disapproved for legal insufficiency by a memorandum from L. Christina Griffith, Associate General Counsel, OGC, Labor Law Branch, to Warden J.E. Krueger, dated September 23, 2011. (R. Ex. A, Attachment 4, p. 2). Warden Krueger was advised of the denial of this CWS agreement on behalf of CSD through Carrie Foster, Human Resource Manager at FPC Duluth, by an email message sent by Assistant GC Meryl White on September 7, 2011. (R. Ex. B at 1)

14. Respondent's decision not to implement the Duluth CWS agreement and its determination that it had no further duty to engage in bargaining over compressed work schedules for the Correctional Services employees was made at the national level by Respondent's Office of General Counsel based upon its determination that the matter of compressed work schedules for correctional service employees is covered by Article 18, section d of the MA. (G.C. Ex. 7)

15. Since October 19, 2011, Respondent has failed and refused to implement the Duluth CWS agreement. (R. Ans.; Henrickson affidavit)

[3] The Respondent disputes the characterization of the email message sent to Henrickson on October 19, 2011. The message explained since the "mission critical" case was decided in July of 2011, the OGC was no longer approving blanket CWS requests for Correctional Services as a whole because the Correctional Services Department is critical to the mission of the agency. The explanation further stated that Article 18d of the MA reserved the discretion to the Warden to formulate rosters and assign officers to posts in the CSD and because the right is covered by Article 18d and should not be waived, the agency has no further duty to engage in additional bargaining regarding compressed work schedules for the CSD as a whole. (Respondent's Resp. to the GC MSJ).

16. Since on or about October 19, 2011, Respondent has failed and refused to negotiate with the Union over a compressed work schedule for Respondent's Correctional Services unit. (G.C. Ex. 7)[4]

POSITIONS OF THE PARTIES

General Counsel

In support of its motion for summary judgment, the General Counsel (GC) states that 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). Consistent with the Act, Article 18, section b of the parties' MLA provides for local level bargaining over compressed work schedules.

Pursuant to the Act and the MA, Respondent negotiated with the Union and reached agreement over compressed work schedules for correctional service employees at FPC Duluth. But shortly after this agreement was reached, the Respondent, at the headquarters level, rejected the Duluth CWS agreement and stated it would no longer engage in negotiations over compressed work schedules for correctional services employees. Absent an affirmative defense, these actions constituted unlawful repudiations of the Duluth CWS agreement and Article 18, section b of the parties' MA.

The sole defense offered by Respondent to the Union for these actions is that the matter of compressed work schedules is covered by Article 18, section d of the MA and that under the Authority's covered by doctrine, it had no underlying duty to bargain over the Duluth CWS agreement, citing the D.C. Circuit's recent opinion in *Fed. BOP v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011), *reh'g en banc denied* (D.C. Cir. 2011) (*BOP v. FLRA*), *decision on remand, U.S. DOJ, Fed. BOP, Wash., D.C.*, 67 FLRA 69 (2012). But the covered by defense is not a defense in a repudiation case. *U.S. Dep't of the Treasury, IRS, Plantation, Fla.*, 64 FLRA 777, 780 (2010) (*IRS*). Furthermore, Article 18, section d concerns the establishment of quarterly rosters and makes no reference to compressed work schedules, while another provision of the parties' agreement, Article 18, section b, specifically provides for such bargaining. So the matter of compressed work schedules is not covered by the MA because the MA specifically provides for bargaining over compressed work schedules. *U.S. Dep't of Hous. & Urban Dev.*, 66 FLRA 106, 109 (2011).

The GC therefore asserts that Respondent violated section 7116(a)(1) and (5) of the Statute by repudiating the Duluth CWS agreement and its Article 18, section b obligation to locally negotiate over compressed work scheduled for correctional service employees.

It is undisputed that on September 16, 2011, the parties entered into an agreement by which Duluth correctional service employees would begin working a revised compressed work schedule. Then, on October 19, the Respondent informed the Union that it would not abide by the Duluth CWS agreement. It is therefore uncontested that Respondent clearly and patently breached the Duluth CWS agreement. *SSA, N.Y., N.Y.*, 60 FLRA 301, 304 (2004) (*SSA, N.Y.*). Additionally, there can be no dispute that Respondent's clear and patent breach went to the heart of the Duluth CWS agreement, since the sole purpose of that agreement was to establish a revised compressed work schedule for the Duluth correctional services department employees, which Respondent declared it would not implement and had no further duty to bargain over the subject. *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 355 (2009) (*Davis-Monthan AFB*).

In addition, Respondent declared that it would no longer negotiate over compressed work schedules for correctional service employees. However, Article 18, section b provides for local bargaining over compressed work schedules for all unit employees and contains no exclusions or limitations. Thus, Respondent has clearly and patently breached Article 18, section b. *Davis-Monthan AFB*, 64 FLRA at 357. Furthermore, Respondent's breach of Article 18, section b goes to the heart of the agreement. Under the Act, bargaining unit employees may participate in an alternative work schedule program only under the terms provided in a negotiated agreement. 5 U.S.C. § 6130(a)(1) and (2). Thus, without the ability to negotiate over a compressed work schedule, correctional service unit employees are denied the significant opportunities provided by an alternative work schedule. Article 18, section b is vitally important as it provides unit employees with the opportunity to gain greater control over their time and to balance their myriad work and family responsibilities more easily. Thus, Respondent's clear and patent breach of Article 18, section b goes to the heart of the agreement. *Davis-Monthan AFB*, 64 FLRA at 357-58.

[4] The Respondent contends that the GC has not presented any evidence that the Union attempted to renegotiate the CWS agreement at issue in this matter.

As to a remedy, the GC requests that, given the involvement of Respondent's headquarters level Office of General Counsel in this matter, the Notice to all bargaining unit employees be signed by Respondent's Director and posted nationwide. *Soc. Sec. Admin.*, 64 FLRA 293, 297 (2009); *U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394-95 (1999) (*BOP, OIA*). 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 asserts that the CWS agreement at issue in this matter is covered by the Master Agreement. So the Respondent had no further duty to negotiate the proposed 12 hour CWS for the correctional services department after it was not approved for legal insufficiency on September 23, 2011.

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*, 654 F.3d at 92 citing *Dep't of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992). The covered by doctrine is a defense to a claim that an agency failed to provide a union with notice and an opportunity to bargain over changes in conditions of employment. *U.S. Dep't of the Treasury, IRS, Denver, Colo.*, 60 FLRA 572 (2005) citing *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45 (2000). This doctrine excuses parties from bargaining on the ground they have already expressly bargained and reached agreement concerning the matter at issue.

Citing the language of Article 18, section b and d, the Respondent asserts that it did not violate the Statute or the contract by sending the locally negotiated CWS schedule for the correctional services department at FPC Duluth to the Office of the General Counsel for the BOP in the Central Office for review, pursuant to Article 18, section b (1). Moreover, the Agency did not repudiate the contract by finding the CWS agreement legally insufficient due to the fact Article 18, section d reserved the discretion of the Warden to formulate rosters and assign officers to posts and should not be waived; thus, Article 18 covers the issue, so the Agency is under no further duty to bargain over tours of duty (i.e. compressed work schedules) for correctional services employees at FPC Duluth.

The decision in *BOP v. FLRA* 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. Accordingly, the Court held that Article 18 "covers and preempts challenges to all specific outcomes of the assignment process." *Id.* at 96. 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 the assignment of correctional services department employees has already been negotiated at the national level when the MA was signed.

The Respondent argues that it had no duty to bargain over the Union's request for a 12 hour compressed work schedule because the subject matter is covered by Article 18. The correctional services department at FPC Duluth has been on a 10 hour CWS since August 2000, which was approved by the Office of General Counsel for the BOP in September 2000. CWS requests in excess of 10 hours are not recommended for inclusion in a compressed work schedule under the Agency Program Statement 3000.03, Human Resource Manual. (Ex. A ¶10). A new 12 hour compressed work schedule would directly impact hours of work or "shifts" that would be available for bid on the roster and would create posts not currently on the roster. There is no language in Article 18 that contemplates that the wardens would negotiate over the assignments, days off and shifts, which would be available on a roster. This also directly conflicts with management's right to assign work, determine the number of employees and to determine the personnel by which agency operations shall be conducted under 5 U.S.C. § 7106(a). Since Article 18 covers all processes pertaining to how and when management would assign work in correctional services, management did not commit an unfair labor practice when it sent the locally negotiated CWS agreement to the OGC for approval and when it was subsequently rejected for legal insufficiency under Article 18, section d of the MA.

Therefore, the Respondent did not repudiate the agreement by failing to approve the 12 hours CWS agreement for the Duluth FPC. In order to establish a contract repudiation, the Union must prove a clear and patent breach and that the provision goes to the heart of the parties' agreement. *Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 861-62 (1996) (*Scott AFB*). The GC cannot establish repudiation in the instant complaint. Respondent was acting in accordance with the MA when it sent the locally negotiated CWS to the OGC for review. When the OGC disapproved the agreement for legal insufficiency, under Article 18, section b(2), either party at the local level could have elected to renegotiate the schedule and/or exercise their statutory appeal rights through the Federal Service Impasses Panel. The failure

to approve the locally negotiated CWS schedule was not a clear and patent breach of the MA because the MA does not expressly provide for negotiation of such in the correctional services. To the contrary, Article 18, section d explicitly provides that the employers, by submission of the blank roster, will determine the shifts and days off for posts in correctional services. Accordingly, Management's position, that it has no duty to bargain over schedules in correctional services, is a reasonable interpretation, supported by *BOP v. FLRA*, and not a breach of the contract.

The Respondent asserts that its position is further supported by the fact that management has entered into a 10 hour compressed work schedule agreement with the correctional services department in accordance with the MA, as well as for departments other than correctional services, as the contract provides. Since compressed work schedules exist at FPC Duluth, it is evident that management recognizes and abides by the CWS contract provision where it is applicable and allowed under policy.

As for the second prong of *Scott AFB*, that the breached contract provision goes to the heart of the parties' agreement, the truth is actually that the MA itself provides instruction for the procedures to be followed for locally negotiated compressed work scheduled under Article 18 b. Respondent did engage in negotiations, and followed this section of the MA when it sent the proposed CWS scheduled to the OGC for review on September 16, 2011 (Ex. A ¶7). Because it was denied for legal insufficiency under the logic articulated in *BOP v. FLRA*, does not mean that the agency failed to negotiate in good faith regarding the agreement at the local level.

Not only does Respondent assert it complied with the MA, the fact Respondent did negotiate with the union in good faith at the local level and did not return to the table to continue negotiations when the CWS was found to be legally insufficient by the OGC does not go to the heart of the agreement. *See Okla. City Air Logistics Ctr., Tinker AFB, Okla.*, 3 FLRA 512, 516, 521-22 (1980). (when contractual provision provides negotiation may take place regarding a change in working conditions and Respondent's obligation to bargain is explained in a negotiated document, and interpretation of the contracts is arguably within the terms of the negotiated agreement, the matter would be resolved through the parties' grievance and arbitration procedures and not rise to the level of an unfair labor practice.)

ANALYSIS AND CONCLUSIONS

The Authority analyzes an allegation of repudiation using the test established in *Scott AFB*, 51 FLRA at 858; *E.g., U.S. Dep't of Def., Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 747 (2010). That test consists of two elements: "(1) the nature and scope of the alleged breach of an agreement – *i.e.*, was the breach clear and patent?; and (2) the nature of the agreement provision allegedly breached – *i.e.*, did the provision go to the heart of the parties' agreement?" *Id.*; *see also SSA, N.Y.*, 60 FLRA at 304.

With regard to the first element of the test, the General Counsel contends that the language of Article 18 of the parties' agreement is not unclear or ambiguous and expressly provides for bargaining over compressed work schedules at the local level with no limitations. In contrast, the Respondent claims that its position – that it has no duty to bargain over compressed work schedules for correctional services employees – constitutes a reasonable interpretation of Article 18, is supported by *BOP v. FLRA*,[5] and does not constitute a breach of the parties' agreement. Moreover, the Respondent asserts that, because it has entered into agreements with the Union concerning compressed work schedules for employees in other departments, it has clearly abided by Article 18, Section b when appropriate.

The record does not support the Respondent's claim that it acted in accordance with a reasonable interpretation of Article 18. As the General Counsel contends, the wording of Article 18 is clear and unambiguous. The plain language of Article 18, section b, as discussed above, 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. Moreover, the plain wording of section d does not limit section b in any way. Section d does not reference section b or address compressed work schedules, but, rather, merely provides, among other things, that the Agency shall post quarterly rosters for employees in correctional services. Also, a memorandum dated November 1999 demonstrates that, before the Respondent refused to negotiate over compressed work schedules for correctional services employees, BOP's central office instructed all wardens to bargain at the local level over compressed work schedules for all employees in accordance with Article 18, section b. Further, the Respondent admits that it has bargained over compressed work schedules for employees in departments other than correctional services

[5] To the extent that the Respondent relies on the D.C. Circuit's opinion in *BOP v. FLRA* and its covered by arguments in asserting that it did not repudiate the parties' agreement, such reliance is misplaced. The Authority clearly has held that "the 'covered by' defense does not apply to allegations that an agency repudiated a collective bargaining agreement." *See IRS*, 64 FLRA at 780.

in accordance with that provision. Thus, I find that the Respondent's refusal to bargain over compressed work schedules for employees in correctional services constitutes a clear and patent breach of Article 18, section b. *See SSA N.Y.*, 60 FLRA at 305 (finding that the agency committed a clear and patent breach of the agreement when the provisions of the agreement that the arbitrator addressed were not "sufficiently ambiguous so as to give room for a reasonable differing interpretation"); *Dep't of Transp., FAA., Fort Worth, Tex.*, 55 FLRA 951, 956, 961-62 (1999) (upholding the judge's determination that the respondent committed a clear and patent breach of a memorandum of understanding (MOU) by refusing to allow a union member to serve on a panel in a representative capacity when the record did not support the respondent's contention that the terms of the MOU were unclear or that the respondent acted in accordance with a reasonable interpretation of such terms based on the parties' prior practice).

With regard to the second element of the test, the General Counsel asserts that Article 18, section b goes to the heart of the parties' agreement. According to the General Counsel, a compressed work schedule provides employees with tremendous benefits, such as giving employees more control over their time so that they can balance work and family responsibilities. Moreover, the General Counsel contends that, under the Act, an employee "may participate in an alternative work schedule program only under the terms provided in" the parties' agreement. The Respondent does not contest the General Counsel's contentions.

Here, Article 18, section b, which concerns local bargaining over compressed work schedules, is contained in the parties' master agreement. In cases where the Authority has held that a provision went to the heart of an agreement, a supplemental, or other similar agreement, was typically at issue, and the provision was a focal point of that agreement. *See, e.g., Davis-Monthan AFB*, 64 FLRA at 358 (finding that section which dealt solely with the drug rehabilitation process, went to the heart of a local drug agreement); *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 52 FLRA 225, 231-32 (1996) (*Warner Robins I)* (holding that a provision concerning indoor smoking went to the heart of a smoking policy agreement); *Dep't of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1219-20 (1991) (*Warner Robins II)* (determining that a provision requiring that union negotiators would be placed on the day shift during negotiations went to the heart of a ground rules agreement setting the rules that the parties agreed to follow in meeting and bargaining over a local supplement to the master agreement). However, in cases where the Authority has found that a provision went to the heart of the parties' master agreement, the provision generally was closely linked to the parties' collective bargaining relationship. *See, e.g., 24th Combat Support Grp., Howard AFB, Republic of Pan.*, 55 FLRA 273, 282 (1999) (finding that provisions relating to the availability of the negotiated grievance procedure went to the heart of the parties' master agreement); *U.S. DOI, Bureau of Reclamation, Wash. D.C.*, 46 FLRA 9, 28 (1992) (Member Talkin dissenting) (determining that a provision concerning the positions that were included in the bargaining unit went to the heart of the parties' master agreement); *Pan. Canal Comm'n, Balboa Republic of Pan.*, 43 FLRA 1483, 1508 (1992) (concluding that provisions concerning the availability of appealing adverse actions through the administrative grievance procedure went to the heart of the parties' master agreement).

Respondent has repeatedly stated – in essence- that Article 18, section b does not apply to mission critical/custody and corrections employees; they may not have compressed work schedules; and no bargaining will take place. This steadfast refusal to acknowledge the validity of Article 18, section b is based solely on the unreasonable interpretation of the D.C. Circuit decision. The nature and scope of the breach here "manifested an intent not to honor similar requests by the Union." *Warner Robins II*, 40 FLRA at 1219. I find that the wording of Article 18, section b is clear and unambiguous. The plain language 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 custody or correctional services. Moreover, the plain wording Article 18, section d does not limit section b in any way. Section d does not reference section b or address compressed work schedules, but, rather, merely provides among other things, that the Agency shall post quarterly rosters for employees in correctional services.

Further, I find that Respondent's breach of Article 18, section b goes to the heart of the agreement. In *Davis-Monthan AFB*, 64 FLRA at 355, the Authority focuses on the importance of the provision that was breached. In that case, the Authority found that repudiation of Article 27 in a collective bargaining agreement, a provision that protected employees' job security during drug rehabilitation, went to the heart of the agreement. The ALJ found that the agreement was "clear and wholly unambiguous" and the Agency's "continuous" and "intentional actions" amounted to repudiation. And, as the Authority noted, when looking at the second part of the repudiation test, it must "give effect to the plain meaning of the agreements . . . ." *Id.* at 357. Similarly, in *Warner Robins II*, the Authority found that the Agency's refusal to honor an agreement,

"went to the heart of the agreement and the collective bargaining relationship itself and, therefore, amounted to a repudiation of the obligation imposed by the agreement's terms." 40 FLRA at 1220. Likewise, in *Warner Robins I*, where the agreement negotiated at the level of exclusive recognition governed how lower-level bargaining was to take place over an area of significant concern, "it also went to the heart of the collective bargaining relationship itself." 52 FLRA at 232.

In this matter, the plain meaning of Article 18, section b is to allow for local negotiation of flexible and compressed work schedules for all employees without exception. Respondent's repeated declaration that it has no duty to bargain regarding correctional service department employees directly conflicts with Article 18, section b and as such amounts to a repudiation of the MA. Based on the same analysis, Respondent's rejection of the FPC Duluth agreement and subsequent refusal to engage in negotiations over compressed work schedules for correctional services employees amounts to a repudiation of the agreement. Respondent's failure to implement the Duluth agreement meets both elements and establishes a repudiation of the agreement. The breach was clear and patent and the provisions at issue went to the heart of the agreement.

Therefore I find that the Respondent violated section 7116(a)(1) and (5) of the Statute by repudiating the Duluth Compressed Work Schedule agreement and by repudiating Article 18, section b of the parties' Master Agreement.

REMEDY

As requested by the General Counsel, I will order an appropriate cease and desist order to be signed by the Director of the Bureau of Prisons and posted nationwide. "In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice." *BOP, OIA*, 55 FLRA at 394; *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 152-53 (2005). First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. Second, in many cases, the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. *See BOP, OIA*, 55 FLRA at 394-95. The Authority has denied requests for nationwide postings where violations were committed solely by the local subdivision of an agency and did not involve higher-level organizational components of the agency. *See, e.g., U.S. Dep't of VA*, 56 FLRA 696, 699-700 (2000); *Wyoming Air Nat'l Guard*, Cheyenne, Wyo., 27 FLRA 759, 763 (1987). In this matter, the higher-level organizational components of the Bureau of Prisons were directly involved in the decision not to abide by Article 18, section b of the Master Agreement. This directly involves bargaining unit employees at facilities other than just FPC Duluth.

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

ORDER

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

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, shall:

1. Cease and desist from:

(a) Failing and refusing to abide by and honor the September 16, 2011, Correctional Services 12 Hour Compressed Work Schedules agreement negotiated with the American Federation of Government Employees, Local 3935, AFL-CIO (AFGE) for the Duluth Federal Prison Camp.

(b) Failing and refusing to abide by and honor section b of Article 18 of the parties' Master Agreement by refusing to negotiate over compressed work schedules for any Correctional Service Department employees.

(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 actions in order to effectuate the purposes and policies of the Statute:

(a) Abide by and honor the September 16, 2011, Correctional Services 12 Hour Compressed Work Schedules agreement negotiated for the Duluth Federal Prison Camp.

(b) Comply with section b of Article 18 of the Master Agreement and, upon the request of the AFGE, negotiate at the local level over flexible and/or compressed work schedules for all unit employees,

including those assigned to Correctional Services Department.

(c) Post at its facilities where bargaining unit employees represented by the AFGE, Local 3935 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, Federal Bureau of Prisons, 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 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.

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

(e) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Chicago 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., October 29, 2014.

_____

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 the U.S. Department of Justice, Federal Bureau of Prisons, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to abide by the September 16, 2011, Correctional Services 12 Hour Compressed Work Schedules agreement negotiated with the American Federation of Government Employees, (AFGE) Local 3935, AFL-CIO (Union) for the Duluth Federal Prison Camp.

WE WILL NOT fail or refuse to negotiate over compressed work schedules for any bargaining unit employee, including those in Correctional Services, as provided by Article 18, section b of the parties' Master Agreement.

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 implement the September 16, 2011, Correctional Services 12 Hour Compressed Work Schedules agreement negotiated with the Union for the Duluth Federal Prison Camp.

WE WILL, comply with Article 18, section b of the parties' Master Agreement and, upon request of the AFGE, negotiate at the local level over flexible and/or compressed work schedules for all unit employees, including those assigned to Correctional Services.

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