LABOR ARBITRATION

FEDERAL MEDIATION AND CONCILIATION SERVICE

# OPINION AND AWARD

## IN THE MATTER OF THE ARBITRATION BETWEEN:

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| FEDERAL BUREAU OF PRISONS<br>FEDERAL CORRECTIONAL COMPLEX<br>FORREST CITY, ARKANSAS<br><br>AGENCY,<br><br>AND<br><br>AMERICAN FEDERATION OF GOVERNMENT<br>EMPLOYEES, LOCAL NO. 0922<br>FEDERAL CORRECTIONAL COMPLEX<br>FORREST CITY, ARKANSAS<br><br>UNION. | )<br>)<br>)<br>)<br>)<br>)<br>) FCMS Case No. 13-00312-3<br>) Grievants: Mr. Norman Vaden and<br>) AFGE, Local No. 0922<br>)<br>)<br>)<br>)<br>) |

APPERANCES:
Arbitrator:
Mr. Steven Zimmerman

Agency Advocates:
Mr. John W. Weeks, Labor Relations Specialist
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS
Ms. Leslie Swan, Assistant Human Resource Manager, Federal Correctional Complex
Agency Witnesses:
Mr. Norman Vaden, Grievant, Religious Services Assistant
Mr. Jay Westbrook, Sergeant-At- Arms, Material Handler Supervisor

Union Advocates:
Mr. Jay Westbrook, Sergeant-At-Arms
AFGE, Local No. 0922
Mr. Tommy Bradshaw, Steward
AFGE, Local No. 0922
Union Witnesses:
Mr. Jeff Roberts, President
AFGE, Local No. 0922
Mr. Norman Vaden, Grievant, Religious Services Assistant
Mr. John M. Johnson, Supervisory Chaplain, Agency

## THE HEARING:

After informal resolution failed to resolve the grievance, the Union filed a formal grievance with the Agency pursuant to Article 31, Grievance Procedure, of the parties Collective Bargaining Agreement. (hereinafter referred as "Master Agreement") The parties mutually agreed to submit the Master Agreement as joint exhibit number 1. (Jt. Ex. 1)

There was no objection from the Agency that the formal grievance was not filed on the Bureau of Prisons "Formal Grievance" form. The parties mutually agreed to submit the formal grievance filed by the Union as joint exhibit number 2. (Jt. Ex. 2) The Arbitrator reviewed the formal grievance form but could locate the date the formal grievance was filed. Item number 7 of the form asked for the date(s) of violation(s), which read: "July 24, 2012 to present." Item number 11 calls for the "signature of recipient" and item number 12 "date signed." The blocks for these two item numbers are blank. However, the Agency states to receiving the formal grievance on August 28, 2012 in its final response to the formal grievance on September 27, 2012. The parties mutually agreed to submit the Agency's final response as joint exhibit number 3. (Jt. Ex. 3)

The Union found the Agency's final response to be unsatisfactory. The Union then invoked arbitration pursuant to Article 32, Section (a) of the Master Agreement. The Union provided the Agency with written notification on

October 4, 2012 of its intent to submit the formal grievance to arbitration. The parties mutually agreed to submit the Union's written notification to invoke arbitration as joint exhibit number 4. (Jt. Ex. 4)

According to the Master Agreement, Article 32, Section (b), when arbitration is invoked, the parties will select an arbitrator from the Federal Mediation and Conciliation Service (FMCS). Following the parties selection, FMCS officially appointed Steven A. Zimmerman, as the impartial arbitrator to hear the case. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute, pursuant to Article 32, Section (h) of the Master Agreement.

Jurisdiction of the arbitrator is defined in Article 32, Section (h). Contractually, the arbitrator does not have the power to add to, subtract from, disregard, alter, or modify any of the terms of the Master Agreement or published Federal Bureau of Prisons policies and regulations.

The arbitrator's fees and all expenses of the arbitration shall be borne equally by the Agency and the Union according to Article 32, Section (d) of the Master Agreement.

The arbitration hearing was held on Thursday, June 5, 2014. The hearing was held in the training facility at the Federal Correctional Complex, Forrest City, Arkansas.

Each party was given full and complete opportunity to present oral testimony and documentary evidence in support of its position and arguments. Pursuant to the parties' request, all witnesses were first duly sworn by the court reporter before giving their testimony. A record of the proceeding was reported by Ms. Sandra J. Vaughn, LCR with Alpha Reporting Corporation, Memphis, TN, according to Article 31, Section (i) of the Master Agreement.

Neither party objected to filing a post hearing brief. The parties agreed to file their post hearing briefs on or before July 30, 2014. The post hearing briefs

were timely received by the arbitrator. The proceeding was declared closed by the arbitrator on July 31, 2014.

## ARBITRABILITY - AGENCY ARGUMENTS:

The Agency argues three (3) threshold issues concerning the arbitrability of this grievance.

1. **Timeliness:**
   The Agency's first argument is a timeliness issue concerning the time (date) the grievance was filed. The Agency argues the Union was notified on April 10, 2012 of its proposal to move Vaden (grievant) from the Low to the Medium security institution. The Agency argues the Union did not respond to this notice. The Agency proceeded to implement this change on May 17, 2012. (Ag. Ex. 7) (Jt. Ex. 3, p. 3)

   The Agency argues neither the grievant nor the Union grieved this change and its impact on the grievant until August 29, 2012, which is well outside the forty (40) day time limit expressed in Article 31, Section (d) of the Master Agreement. Therefore, contractually, this grievance is untimely filed and should be procedurally denied. The Agency, in its final response to the grievance, procedurally rejected the Union's formal grievance based on timeliness. (Jt. Ex. 3, p.3)

   The evidence revealed that in addition to the change in work location from the Low to the Medium institution, the Agency changed also the work schedule of the grievant. He was removed from the compressed work schedule he had been assigned to since 2008.

2. **Filing both, Unfair Labor Practice (ULP) charges & Grievance:**
   The Agency's second threshold argument involves the Union filing five (5) ULP charges against the Agency with the Federal Labor Relations Authority on May 24, 2012. The Agency introduced these charges in support of its timeliness argument and to prove its argument that the Union, statutorily,

cannot file both, ULP charges and subsequently file a formal grievance on the same issues in question in the ULP charges. The Agency cites their argument is governed by Title 5 U.S.C. § 7116 (d) which states: "… *an employee has the option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."* (Ag. Ex. 1, 2, 3, 4 & 5)

3. **Grievance - Inappropriately filed:**
   The Agency's third threshold argument is the formal grievance was filed incorrectly pursuant to Article 31, Section (f) (2) of the Master Agreement. The Agency argues the grievance should have been filed against the Chief Executive Officer (Warden) of the Forrest City Federal Correctional Complex and not to the appropriate Regional Director. Chaplain Johnson, the supervisor over the Religious Services Department is an individual for which the Chief Executive Officer has disciplinary authority over.

   By the Union filing the formal grievance with an appropriate Regional Direct and not to the Chief Executive Officer, the Union violated Article 31, Section (f) (1) of the Master Agreement.

## ARBITRATIBILITY - UNION ARGUMENTS:

1. **Timeliness:**
   The Union argues the grievance is timely because it was filed within the recovery period allowed by the Fair Labor Standards Act (FLSA) and the Back Pay Act, 5 U.S.C. §5596. The grievance was filed to recover pay the grievant is losing and continues to lose by not being allowed to rotate his scheduled days off. He is losing Sunday premium pay, which is 25% of his basic pay rate for Sunday work that he was receiving before being removed from his compressed work schedule. These statutes control the time limits when grieving a recovery period. The right to grieve under a statute that

provides for a longer filing period is expressed in Article 31, Section (d) of the Master Agreement. (Un. Ex. 2, 3, & 5)

2. **Filing both, Unfair Labor Practice (ULP) charges & Grievance:**
   The Union argues the ULP charges have nothing to do with the grievance's loss of Sunday premium pay for not working Sundays. The grievant's Sunday pay was not taken from him until July 2012 and is a continuous violation commencing from such date. The ULP charges were filed before his Sunday premium pay was taken away. The ULP charges were filed on May 24, 2012. (Ag. Ex. 1,2,3,4, & 5)

3. **Grievance – Inappropriately filed:**
   The Union argues the grievance was properly filed with the appropriate Regional Director according to Article 31, Section (f) (2) of the Master Agreement. The Union followed the grievance procedure by trying to resolve the issue through informal resolution. The Union testified to informally speaking with Harold Taylor, the Agency representative who negotiated and signed the Religious Services Department, Compressed Schedule Agreement, to resolve the grievance. They felt Taylor lead them to believe that those conversations were leading to resolution until Dense Heuett; Acting Warden told them they were not going to informally resolve the grievance. (Tr. pp. 101, 108-110)

   Based on the decision of Heuett, the Union filed the formal grievance against the acting warden. Contractually, when grieving against the acting warden/warden, the grievance is to be filed with the appropriate Regional Director, according to Article 31, Section (f) (2) of the Master Agreement. (Un. Ex. 4)

## ARBITRABILITY – OPINION & FINDINGS:

Pursuant to Article 31, Section (e) of the Master Agreement, the arbitrator will decide timeliness if raised as a threshold issue. The Agency raised timeliness as a threshold issue. The Agency also raised two other threshold issues. One issue

involves the Union filing both Unfair Labor Practice charges and using the contractual grievance procedure to resolve the formal grievance. The other threshold issue is to whom the grievance was filed.

The arbitrator informed the parties of the hearing procedure regarding arbitrability. Presented first will be the evidence and arguments on the issues of arbitrability raised by the Agency. Following, will be evidence and arguments presented on the merits of the case. The arbitrator will render a decision on the issues of arbitrability before deciding the merits of the case. If the arbitrator finds the grievance not to be arbitral, then a ruling on the merits will not follow.

## OPINION & FINDINGS:

### 1. Timeliness:

The evidence shows the parties did in fact negotiate and enter into a Compassed Schedule Agreement for the Religious Services Department at the Federal Correctional Complex (FCC), Forrest City, Arkansas on January 31, 2008.

The statutory right for the parties to negotiate and legally enter into such agreement is governed by Title 5, U.S.C., Part III, Subpart E, Chapter 61, Subchapter II- Flexible and Compressed Work Schedules, Sections 6120 – 6133. The contractual right to negotiate flexible or compressed work schedules at the local level is recognized in Article 18, Section (b) of the Master Agreement. Thereby, the terms and conditions found in Religious Services Department, Compressed Work Schedule Agreement (herein after referred to as MOA) is contractually binding on both parties. The MOA states the terms and conditions will be implemented as of February 3, 2008. (Un. Ex. 1, p. 3)

The evidence shows the grievant complied with the terms and conditions of the MOA by requesting to work a compressed work schedule and agreeing to the mandate to rotate days off/schedules every six months. He made his request on April 9, 2008. It was approved by Harold Taylor, Associate Warden, Programs on the same date. The grievant's immediate supervisor, Pamela Rains approved his

request the following day, April 10, 2008. At the time of his request he had been assigned to the Low institution. ( Un. Ex. 1, pp. 7 & 8)

The evidence shows Chaplain Johnson, the grievant's supervisor, reassigned him from the Low to the Medium institution on May 17, 2012. The arbitrator finds this personnel action to be a violation of the MOA. The MOA clearly states … *"Bargaining unit staff will be **assigned** to either Medium, Low, or the Camp. Staff will be maintained at their **assigned** location (except as provided for hereafter) with rotating schedules." The MOA allows the Agency (management) that it "... **may** change a staff member's assignment in area other than where the staff member is normally **assigned** on a daily temporary as needed basis, and during an emergency situation only."* (emphasis added) (Jt. Ex. p. 2)

The arbitrator finds the evidence to prove that the grievant is a bargaining unit staff member and was assigned to the Low institution by the Agency ***after*** the implementation of the MOA. The MOA was implemented on February 3, 2008. The grievant was hired in March 2008. At the time of his hire, the grievance was assigned by the Agency to the Low institution, in the Religious Services Department. The evidence shows that the date of his assignment to the Low institution had to fall under the terms and conditions of the MOA. The MOA does not identify positions or job classifications. It only identifies employees in the Religious Services Department to be Staff. The evidence does not support the Agency's position that it does not consider the MOA to be applicable to the Religious Services Assistant position held by the grievant.

The arbitrator agrees the Agency has the right to ***assign*** employees according to Article 5, Section (a) (2) (a) of the Master Agreement. It was this right that gave the Agency the right to ***assign*** the grievant to either the camp, low or medium institution at the time of his hire. However, after the initial assignment, the Agency negotiated limitations to its right to again ***assign*** the grievant in the Religious Services Department. According to the MOA, the Agency can ***assign*** him to the Medium institution, but only in accordance with the terms and conditions of the MOA, which states ... *"only on a daily, temporary basis as needed."* Afterwards, the Agency's right to ***assign work,*** which is different than

the right to ***assign*** location, is not limited by the MOA and is prescribed pursuant to Article 5, Section (a) (2) (b). (emphasis added) (Jt. Ex. 1)

Although the Agency gave notice to the Union on April 10, 2012 of its intent to relocate the grievant to the Medium institution, the personnel action did not occur until May 17, 2012. This is the ***date*** of the alleged grievable occurrence. Pursuant to Article 31, Section (d) of the Master Agreement, it states *"Grievances must be filed within forty (40) calendar days of the* ***date*** *of the alleged grievable occurrence."* Thereby, contractually, the Agency cannot advance a timeliness argument before the ***date*** of the alleged grievable occurrence. (emphasis added) (Jt. Ex. 1)

The arbitrator finds the personnel action to reassign the grievamt to be a "continuing" violation of the MOA. The MOA clearly addresses the Agency's right to change the grievant's assignment to the Medium institution, however; not on a permanent basis or on a relocation basis. The MOA gives the Agency only the right to assign the grievant from the Low institution to the Medium institution on a daily, temporary as needed basis. Such direct, clear and unambiguous language gives the grievant cause to file a grievance daily, because each day he is permanently assigned to the Medium institution is a "continuing" occurrence. *How Arbitration Works, 5th Edition, pp. 274-283 (BNA-1997, Marlin M. Volz, Edward P. Goggin, Co-Editors)*

Based on all the above, the arbitrator finds the grievance to be timely.

**2. Filing both, Unfair Labor Practice (ULP) charges & Grievance:**

The in the opinion of the arbitrator, the evidence shows Chaplain Johnson was unwilling to professionally work with the grievant and the Union concerning his demand to relocate the grievant to the Medium institution. From the moment Chaplain Johnson first informed the grievant about his intent to relocate him to the Medium institution and following the grievant's response that he involve the Union about such move, sufficient evidence shows Chaplain Johnson began making uncooperative and disparaging remarks to the grievant and Jeff Roberts, Union President.

The arbitrator's opinion is supported by the Agency's own documentary evidence whereby the conduct of Chaplain Johnson was found to be an unfair labor practice in violation of 5 U.S.C. §§ 7116 (a) (1) and (2). The Authority has only rendered a decision on the conduct of Chaplain Johnson. There has been no decision on the issues by the Authority. (Ag. Ex. 6)

Based on all the above, the arbitrator finds the formal grievance concerning all issues in this case are properly raised in the contractual grievance procedure. Some issues in the formal grievance were not raised in the Union's filing of Unfair Labor Practice charges. (Jt. Ex. 2).

**3. Grievance – Inappropriately filed:**

The evidence shows the Union was in constant deliberations with Harold Taylor, Associate Warden Programs, in its attempts to informally resolve the grievance. Those discussions lead the Union to believe informal resolution would occur following the transition in the Warden's position. The Union argues, eventually, it was Dense Heuett, in the role of the Warden who ultimately told them there would not be an informal resolution to the grievance.

The arbitrator finds the decision made by Heuett to be perfunctory. The evidence shows Harold Taylor, as Associate Warden Programs, negotiated and signed the MOA on behalf of the Agency on January 31, 2008. The evidence shows Taylor approved the request from the grievant to work the compressed work schedule on April 9, 2008. This is the same date Taylor signed and approved the requests for Chaplains Ford and Collier. Taylor assigned the grievant and Chaplains Ford and Collier to the compressed work schedule and to rotate according to the schedule. The assignment of the Chaplains to the terms and conditions of the MOA were made and approved at the same time as the Religious Services Assistant. The Warden did not submit the MOA for legal and technical review, accompanied with local management review until April 10, 2008, which is after such signings.

No evidence was presented by the Agency to establish a fact that according to the MOA, the Chaplain positions were filled and functioning prior to the Religious Services Assistant position. The evidence on record establishes the fact that although the roster/schedule states "Chaplain's Schedule," Chaplains were not assigned to this compressed work schedule before the grievant. The evidence proves he was assigned to the compressed work schedule at the same date and time as the Chaplains. There was no evidence presented by the Agency to establish a prima facie case whereby the Religious Services Assistant position was not governed by the MOA prior to May 17, 2012.

Acting Warden Heuett had Taylor, the most knowledgeable and involved person within the Agency regarding the intent and implementation of the MOA at her side, to answer any questions she may have had to understand the issues being grieved, before giving her answer to the Union. The Agency made no argument that the Warden did not consultant with Taylor before giving her decision. The Warden informed the Union that she was not going to resolve the informal grievance. After the receiving the Warden's answer, the Union now had the procedural right to file a formal grievance against the Warden.

The Agency failed to provide evidence from Taylor concerning the date or time the Union first approached him about the personnel actions taken against the grievant. Nor was evidence presented about the duration of Taylor's discussions with the Union or his position on the issues Was he in fact leading the Union to believe the issues were going to be resolved in the Union's favor as testified to by Roberts? Whereby, prolonging the Union's decision on when to file a formal grievance. The evidence concerning the date Warden Heuett informed the Union of her decision to deny the informal grievance is unknown.

Based on the evidence above, the arbitrator finds the grievance was properly filed with the Regional Director pursuant to the grievance procedure, Article 31, Section (f) (2) of the Master Agreement.

## ARBITRABILITY – DECISION:

Based on the evidence and the findings of each threshold issue, it is the decision of the arbitrator that the grievance is arbitral.

## ISSUE – MERITS:

Pursuant to Article 32 – Arbitration, Section (a) of the Master Agreement, if the parties fail to agree on a joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard.

The parties did not agree on the issue to be heard by the arbitrator.

The Agency stipulates the issue is: "Did the Agency violate the Master Agreement, Policy, or Law when Mr. Vaden was re-assigned on May 17, 2012? If not, deny the grievance. If so …"

The Union stipulates the issue is: "Did the Agency violate the Master Agreement and relevant sections of 5 U.S.C. by denying Mr. Vaden the opportunity to work Sundays and participate in the compressed work agreement for religious service staff? If so, what shall be the remedy?"

The arbitrator finds the issue to be: "Did the Agency violate the parties MOA for the Religious Services Department, Compressed Work Schedule Agreement when it re-assigned the grievant to the Medium institution and removed him from the compressed work schedule rotation? If so, what shall be the remedy?"

## BACKGROUND FACTS:

The majority of the background facts have been identified in the parties' testimony and evidence to the issues of arbitrability. The arbitrator found it

necessary to understand and consider this evidence to render a decision on the issues of arbitrability. Before beginning the hearing on the merits of the case, the Union asked and the Agency agreed that all evidence that was presented in the threshold part of the hearing be also accepted as to the merits of the case. Therefore, the arbitrator may refer to his opinion and findings on the issues of arbitrability when reaching a finding on the merits of the case

On January 31, 2008 the parties entered into an agreement for FCC Forrest City, Religious Services Department, Compressed Schedule Agreement. The agreement is signed by Jonathon King, AFGE Local 0922 Chief Steward and Harold Taylor, Associate Warden Programs. The agreement states that it will be implemented on February 3, 2008. (Un. Ex. 1, p. 3)

The Federal Correctional Complex (FCC) at Forrest City, Arkansas contains a low security Federal Correctional Institution (FCI) with an adjacent minimum security satellite camp and a medium security FCI. The agreement begins by stating: "*It is agreed the Religious Services Department at FCC Forrest City Complex will be viewed as one department, with one management team for both institutions. Bargaining Unit Staff will be assigned to the MEDIUM, LOW, or the CAMP."* (Un. Ex. 1, p. 3)

On March 16, 2008 the Agency hired the grievant for the position of Religious Services Assistant. He remains in that position today. (Tr. p. 13)

On April 9, 2008 the grievant completed and signed an Agency document titled "Religious Services Department, Memorandum of Understanding." By signing the document, he agreed to work a compressed work schedule, which was fully explained and understood as an option to a regular work schedule. He agreed also to return to standardized working hours should this compressed work schedule have an adverse impact on the operation of the institution as determined by the CEO. His request was approved by Harold Taylor, Associate Warden on the same date and by his supervisor Pamela Rains on April 10, 2008. In addition to the grievant signing such document, a request and approval was made for Chaplain Collier and Chaplain Ford also. (Un. Ex. 1, pp. 4-6)

On April 10, 2008 T. C. Outlaw, Warden, sent a memorandum to Donald Laliberte, Associate General Counsel, Office of General Labor Law Branch to request approval for a compressed work schedule for the Religious Services Department at FCC Forrest City, Arkansas. He submitted the schedule for legal and technical review, along with a Management review of the schedule. (Un. Ex. 1, p. 1)

In September 2011 Mr. Johnson came to FCC Forrest City as the supervisory chaplain. He testified to seeing the MOA but could not recall the grievant's work schedule upon his arrival. He testified to assigning the grievant to a different work schedule than what he had been working. He made the change to the grievant's work schedule in May 2012. (Tr. pp. 196 – 200)

On cross examination by the Agency, Chaplain Johnson testified to knowing that the grievant was working a compressed work schedule at the Low institution. He testified to asking the grievant when he first arrived why he was working at the Low. (Tr. p. 202)

Chaplain Johnson testified that he coordinated the move of the grievant from Low to the Medium with his supervisor, Harold Taylor, Acting Labor Management Relations Chairperson and Human Resources. Notification to the Union, Jeff Roberts, President, Local 0922 was made from me through Harold Taylor on April 10, 2012. The memo directed the Union to see Ricky Galloway, Human Resource Manager with any concerns regarding the Agency's decision to relocate the grievant. The Union's concerns were to be in writing and due to Ricky Galloway on or before April 27, 2012. (Tr. p. 204, 206) (Ag. Ex. 7)

## AGENCY ARGUMENTS:

The Agency argues the MOA for the Religious Services Department was written only for the position of Chaplain. The Religious Services Assistant position did not exist at the time the MOA was written.

The Agency argues the Union knew of its intent to relocate the position of Religious Services Assistant from the Low to the Medium institution but failed to voice any concerns about the move to Human Resources by their mandate of April 27, 2012. (Ag. Ex. 7)

The Agency argues the issues addressed in the Unfair Labor Practice charges are the same issues addressed in the grievance. Specifically stating a "unilateral change" in working conditions was made by the Agency. (Tr. pp. 27, 49)

The Agency argues the Union did not approach the Agency to negotiate an agreement to add the position of Religious Services Assistant to the MOA. Without a negotiated agreement, management has the right to assign the grievant to his tour of duty to include his days off and hours of work. (Jt. Ex. 3, p. 3)

## UNION ARGUMENTS:

The Union argues the Unfair Labor Practice charges filed on May 24, 2012 are not relevant to the issue of the grievant's rotation. The charges involve the grievant's reassignment and remarks made to him about anti-labor practices by Chaplain Johnson. The charges have nothing to do with rotation. Rotation is a separate issue. The violation referenced in the grievance is Chaplin Johnson not letting the grievant to work Sunday and receive 25% differential pay. (Tr. pp. 26 - 29)

The Union argues the MOA is written for the Religious Services Department. It is not limited only for Chaplains. The MOA provides a rotating schedule to the bargaining unit staff of the Department. The grievant is part of the staff. The grievant's request and approval to work a compressed work schedule according to the MOA are the same dates as Chaplains Collier and Ford. The grievant rotated with Chaplain Ford. (Un. Ex. 1, pp. 3, 4-8)

The Union argues the Agency has not declared the MOA to have an adverse impact on the Religious Services Department. To make such declaration, the

Agency would have to proceed with a cause under 5 U.S.C. §6131, which has not occurred.

The Union argues the Agency does not have a quarterly roster prepared for the Religious Services Department as required pursuant to Article 18, Section (d) on the Master Agreement. Agency compliance with this section may have helped in this matter and possibly prevent like occurrences in the future.

The Union argues the following "conditions of employment" were made to the grievant before he made his decision to accept employment with the Agency. Those conditions of employment were his salary, leave and benefits and work schedule. His work schedule included a differential allowance for Sunday pay, which is 25% of his hourly wage. When Chaplain Johnson changed his work schedule, it caused the grievant to lose the differential allowance for Sunday pay. The Union argues this is a "unilaterally change" regarding the grievant's conditions of employment, which cannot be made without first negotiating with the Union.

## OPINIONS & FINDINGS:

In July 1982 the Congress found that the use of flexible and compressed work schedules has the potential to improve productivity in the Federal Government and provide greater service to the public. This matter was expanded upon in July 1994 from a Memorandum of the President of the United States addressed for the Heads of Executive Departments and Agencies. In part, the Memorandum states: *"The head of each executive department or agency (hereafter collectively "agency" or "agencies") is hereby directed to establish a program to encourage and support the expansion of flexible family-friendly work arrangements, including: job sharing; career part-time employment; alternate work schedules; telecommuting and satellite work locations. Such a program shall include: (1) identifying agency positions that are suitable for flexible work arrangements; (2) adopting appropriate policies to increase the opportunities for employees in suitable positions to participate in such flexible work arrangements; (3) providing appropriate training and support necessary to implement flexible work arrangements; and (4) identifying barriers to implementing this directive and providing recommendations for addressing such barriers to the President's Management Council. I direct the Director of the*

*Office of Personnel Management (OPM) and the Administrator of General Services ("GSA") to take all necessary steps to support and encourage the expanded implementation of flexible work assignments. ... The OPM and GSA also shall assist agencies, as requested, to implement this directive."* (Title 5, U.S.C. §6120)

The arbitrator finds the Agency to be in compliance with this statute for the Religious Services Department pursuit to the parties' MOA, dated January 31, 2008; effective February 3, 2008. (Un. Ex. 1, p. 3)

The evidence shows that the grievant was hired in March 2008 to a position titled Religious Services Assistant. The position did not exist within the Religious Services Department at the time of his hire. However, the evidence shows that at the time of his hire, he was assigned to the Low institution. In January 2008, it was agreed that the Low institution is included in the Religious Services Department as agreed to in the MOA.

The Agency did not provide evidence to the contrary that the grievant, in the new position of Religious Services Assistant was not included in the Department as prescribed in the MOA at the time of his hire. Nor did the Agency argue that his position was not part of the Religious Services Department at the time of his relocation to the Medium institution in May 2012. Therefore, the arbitrator finds the evidence to prove that the grievant has been a bargaining unit staff member in the Religious Services Department since the date of his hire. The Agency assigned the grievant, at the time of his hire to the Low institution according to its right pursuant to Article 5, section (a) (2) (a).

The arbitrator finds further evidence to establish that the position of Religious Services Assistant is governed by the MOA. The first sentence brings together the different institutions and camp to create one department with one management team. The second sentence identifies those employees brought together to form the Religious Services Department to be "*Bargaining Unit Staff*." The position of Chaplain is only mentioned one time in the MOA. It is mentioned in the context whereby the Staff will ensure programming needs are met for each Chaplain. The evidence proves, in just a little over a month from the signing of the MOA, the Agency hired an Assistant, the grievant. Why? The MOA states in part

… "*to ensure programming needs are met for each chaplain."* The reason for an Assistant is explained in the MOA and confirmed by the testimony of Chaplain Johnson.

The Agency did not provide any evidence regarding the grievant's work schedule from the time of his hire until the time of his request to work a compressed work schedule. The grievant made a request to work a compressed work schedule on April 9, 2008. It was approved by Taylor on the same date. His request was approved also by his supervisor, Rains a day later. The right to work a compressed work schedule must be made by each staff member. This directive is required by the MOA.

The evidence proves that the grievant's request and approval to work a compressed work schedule occurred on the same dates as Chaplain's Collier and Ford. The Agency did not present evidence that the Chaplains were working a compressed work schedule before the grievant or that their compressed work schedule did not apply to the Assistant position. The evidence shows the grievant was assigned to the same compressed work schedule as the Chaplains and at the same time the compressed work schedule was implemented in the Religious Services Department. The grievant's testimony that he was assigned to a compressed work schedule with Chaplain Ford at the Low institution and that he and Chaplain Ford rotated every six months since 2008 according to the compressed work schedule was not refuted by the Agency.

The MOA states the Staff will rotate days off/schedules every six (6) months. Accordingly, the compressed work scheduled required the grievant to be scheduled for work on Sundays six months of the year. The Agency did not provide evidence to show that the grievant was not rotating days off / schedules with Chaplain Ford as claimed. In evidence, is the Agency's stipulation that the grievant did rotate from 2008 until Chaplain Johnson no longer allowed him to follow the rotation of the compressed work schedule.

The grievant was scheduled to rotate his days off / schedule in July 2012. If he had not been removed from his compressed work schedule, he would have been scheduled to work Sundays beginning July 2012. Pursuant to Title 5, U.S.C. §6128

an employee must be assigned to a compressed work schedule that requires him/her to work Sunday to be eligible to receive premium pay. By being assigned to a compressed work schedule whereby such schedule requires Sunday work, an employee is paid a premium pay at a rate equal to 25 percent of his basic pay rate. The Agency did not present evidence to disprove that the grievant was not assigned to a compressed work schedule in 2008, nor that he did not receive Sunday premium pay when working Sundays at such time in 2008 through 2011.

The grievant is grieving that he should not have been removed from his compressed work schedule and is requesting to be paid premium pay for not being scheduled to work Sundays. Each Sunday not worked under his compressed work schedule is a continuing occurrence until a formal grievance on the issue of Sunday premium pay was filed on August 28, 2012. The arbitrator finds the evidence to prove that the Agency did not abide by the procedures found in the MOA and/or the statutory requirement that the compressed work schedule of the Religious Services Department has had or would have an adverse agency impact as defined in Title 5, U.S.C. § 6131.

According to the terms and conditions of the MOA, staff participation in the compressed work schedule will continue unless his participation conflicts with his job performance. There was no evidence presented or arguments made by the Agency to show that the grievant's participation in the compressed work schedule caused any conflict with assigned work or unsatisfactory job performance. The Agency had four (4) years to evaluate the grievant's job performance while working a compressed work schedule. The Agency did not make the argument that the grievant was removed from the compressed work schedule as a result of his job performance. The arbitrator finds the Agency to have violated the MOA when it removed the grievant from his compressed work schedule without cause of job performance.

The arbitrator finds no evidence or argument from the Agency that the compressed work schedule for the Religious Services Department has had or would have an adverse agency impact. Such a finding by the Agency is necessary ***not*** to continue the compressed work schedule if such a schedule has already been established. The evidence shows the compressed work schedule was negotiated

and agreed to on January 31, 2008 and effectuated on February 3, 2008. The arbitrator finds the Agency did not have cause to remove the grievant from the compressed work schedule or to discontinue the compressed work schedule according to Title 5, U.S.C. §6131 (a) (2).

The arbitrator finds the evidence to establish that the Agency's personnel action to relocate the grievant from the Low institution to the Medium institution and to remove him from the rotation of the compressed work schedule, whereby causing him to lose Sunday premium pay was arbitrary, capricious, and unjustified. The Agency did not present evidence to warrant its action. They had the capability to call as their witness Harold Taylor to discredit the evidence presented by the Union. They did not. Instead, they choose to let their case stand or fall on threshold arguments, without consideration to the merits of the case.

During the four year period before the arrival of Chaplain Johnson, the Agency never once raised the issue that the Religious Services Assistant position was not governed by the MOA. How could it? Pursuant to Title 5, U.S.C. §6128 (c) in parts states … *"in the case of any full-time employee on a compressed schedule who performs work (other than overtime work) on a tour of duty for any workday apart of which is performed on a Sunday, such employee is entitled to pay for work performed during the entire tour of duty at the rate of such employee's basic pay, plus premium pay at a rate equal to 25 percent of such basic pay rate."*

Someone at the Agency had to approve and submit paperwork to payroll showing that the grievant was working a compressed work schedule and eligible for Sunday premium pay. Without being assigned to a compressed work schedule, an employee is not eligible for this Sunday premium pay. The fact that the grievant received Sunday premium pay since 2008 is evidence to prove that the MOA is applicable to the position of the Religious Services Assistant, If not, the Agency has illegally paid Sunday premium pay to the grievant.

The arbitrator find that the preponderance of the evidence proves the Agency violated the MOA, Master Agreement and Title 5, U.S.C. §§6120, 6121,6127, 6128, 6130, 6131, and 6132 when it relocated the grievant to the Medium

institution and removed him from the rotation of the compressed work schedule agreement for the Religious Services Department.

## AWARD:

The arbitrator rules, based on his findings from the evidence in both, the arbitrability issues and the issue to be decided in this case, that the grievance is sustained.

The arbitrator rules that the grievant is to return to the Low institution, Religious Services Department on or before September 22, 2014.

The arbitrator rules that the grievant is to be returned to the compressed work schedule prescribed in the MOA for the Religious Service Department. He is to be returned to the position on the rotation schedule that he held at the time he was removed from the rotation schedule. He is to be returned on or before September 22, 2014.

The arbitrator rules that the grievant is to be paid Sunday premium pay at a rate equal to 25 percent of the rate of his basic pay for each Sunday he lost such premium pay due to the Agency removing him from the rotation of the compressed work schedule. This ruling is pursuant to Title 5, U.S.C. §6128 (c). Payment is to be made on before October 6, 2014, pursuant to the Back Pay Act, Title 5, U. S.C. §5596.

The arbitrator rules that the grievant is to be paid for work he would have performed on a holiday, according to his rotation on the compressed work schedule, had he not been removed from such schedule at the time of such holiday. This ruling is pursuant to Title 5, U.S.C. §6128 (d). Payment is to be made on or before October 6, 2014, pursuant to the Back Pay Act, Title 5 U.S.C. §5596.

The arbitrator rules that he will retain jurisdiction of these proceedings until October 7, 2014.

Entered into this 26th day of August, 2015.

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Steven A. Zimmerman, Arbitrator, FMCS No. 3917