FEDERAL LABOR RELATIONS AUTHORITY OALJ 14-27
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
SHERIDAN, OREGON

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3979, AFL-CIO

CHARGING PARTY

Case No. SF-CA-11-0607

John R. Pannozzo, Jr.
Robert Bodnar, On Brief
For the General Counsel

Steven R. Simon
Kari Hiebenthal
For the Respondent

Michael Ellis
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/FLRA), Part 2423.

Based upon unfair labor practice (ULP) charges filed by the American Federation of Government Employees, Local 3979, AFL-CIO (Union), a complaint and notice of hearing was issued by the Regional Director of the San Francisco Region of the FLRA. The

complaint alleges that the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon (Respondent) violated § 7116(a)(1) and (5) of the Statute by repudiating a June 11, 2011, AWS agreement and Article 18(b) of the parties' Master Labor Agreement (MLA). The Respondent filed a timely Answer denying the allegations of the complaint.

On May 2, 2012, the Respondent filed a Motion for Summary Judgment in this matter. (G.C. Ex. 1(f)). On May 11, the General Counsel filed an Opposition to Respondent's Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment. (G.C. Ex. 1(g)). The Respondent filed a Response Brief on May 21. I issued an Order Denying Motions for Summary Judgment on May 25, 2012. The hearing was held in Portland, Oregon on July 19, 2012. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. Both the General Counsel and Respondent filed timely post-hearing briefs which I have fully considered.[1]

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent committed an unfair labor practice when it repudiated both the June 7, 2011, CWS agreement and Article 18(b) of the parties' MLA. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon is an agency under 5 U.S.C. § 7103(a)(3). The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4) and the exclusive representative of a nationwide bargaining unit that includes employees of FCI Sheridan. AFGE Local 3979 is an agent of AFGE for the purpose of representing employees at FCI Sheridan. (G.C. Ex. 1(b) & 1(e)).

AFGE and the Federal Bureau of Prisons are parties to a MLA for this nationwide bargaining unit and it applies to employees of FCI Sheridan.

Article 18(b) of the MLA states in part:

Section b. 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. [A]ny 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

[1] Respondent filed a Motion to Correct the Transcript, which was joined by the General Counsel. The motion to correct that G.C. Exhibits 1(a) through (j) were received into the record is hereby granted.

Council of Prison Locals for review. These reviews will be completed within thirty (30) calendar days from the date the agreement is signed;
2. [I]f 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. [A]ny agreement that is renegotiated will be reviewed in accordance with the procedures outlined in this section.

(G.C. Ex. 1(e), Answer Attachment A; G.C. Ex. 2).

On February 11, 2011,[2] AFGE Local 3979 and FCI Sheridan signed an Arbitration Settlement Agreement, which, among other items, called for the following: "1. The Agency and Union agree to meet for the purpose of discussion regarding the Sick & Annual Custody positions. This will be done in accordance with the 5 U.S.C. and the Master Agreement. Discussion should begin within 30 days, but no later than Monday, March 14, 2011. If an agreement is established both parties will sign in writing." (G.C. Ex. 1(f), Ex. 2). The purpose of the negotiations was to discuss the establishment of a compressed work schedule (CWS) for Sick & Annual Custody positions. (Tr. 50, 51).

The parties negotiated and reached agreement regarding a compressed work schedule for certain sick and annual leave positions within the Custody/Correctional department. The agreement was titled Custody Sick & Annual Agreement and signed by Rod Knofler, LMR Chairman for FCI Sheridan and Danny Payne, President Local 3979, on June 7, 2011. The agreement states, in relevant part:

1. Six Sick & Annual positions will be designated as twelve hour shifts (see attached addendum A).

2. Three positions will work from 6:00 am to 6:00 pm.

3. Three positions will from 6:00 pm to 6:00 am.

. . .

7. A 6 month temporary pilot program will be in effect during the first 2 full quarters.
8. At the end of the fourth month during the second quarter the parties agree to meet for the purpose of evaluating the overall pilot program with the possibility of continuing a compressed work schedule.

. . .

[2] All dates are in 2011 unless otherwise stated.

10. Twelve hour Sick & Annual positions may be utilized to curtain overtime generated by hospital duty.
11. Should any adverse impact arise, the agency will notify the Union and both parties will meet within 5 business days to address the issues.
12. Prior to implementation, this agreement must be approved by the Office of General Counsel. Once signed by both parties as agreed this will be forwarded to the OGC for the final approval.

. . . .

(G.C. Ex. 1(e) Answer Attachment B; Ex. 5)[3]

On June 21, Michael T. Ellis, Vice President of AFGE Local 3979, sent an e-mail to Kari F. Hiebenthal, Human Resource Manager, requesting an update on the progress of the CWS agreement for the Custody employees. Hiebenthal responded on July 1 that the CWS agreement had been submitted to the Region for review on June 30 and that she did not know the projected approval time frame from the General Counsel. (G.C. Ex. 6; Tr. 57, 58, 77, 78).

On August 16, Jason Hermens sent an e-mail to Ruth Asuega in the Office of the General Counsel asking about the status of the CWS agreement forwarded on June 29. Asuega responded on August 16, apologizing that the request "fell through the cracks[,]" and that she was reviewing it that same day. (G.C. Exs. 10 & 11; Tr. 93-95).

On August 19, 2011, a Memorandum was sent to J.E. Thomas, Warden, FCI Sheridan from Robert E. McFadden, Regional Director regarding the Request for Compressed Work Schedule. The Memorandum rejects the June 7 CWS agreement, stating:

> We are in receipt of your schedule and negotiations with your local union to have a CWS for your Custody Sick and Annual posts at the Federal Correctional Institution, Sheridan, Oregon. The Agency has already fulfilled its duty to bargain in good faith regarding the Sick and Annual posts. The Master Agreement, Article 18, covers and preempts all disputes about particular rosters issued pursuant to and in compliance with the procedures in Article 18(d). The procedures prescribed in Article 18 cover the substance of all decisions reached by following those procedures. Article 18, specifically in sections (d) and (g), reflects the parties' earlier bargaining over the impact and implementation of the Agency's statutory right to assign work. The Agency's statutory right to assign work includes determining the numbers, types, and positions assigned to any work project or tour of duty. Specifically, these provisions represent the agreement of the parties about the procedures by which a Warden formulates a roster, assigns Officers to posts, and designates Officers for the relief

[3] The complaint in this matter refers to the June 7 AWS (alternative work schedules) agreement, but the evidence consistently referred to the June 7 agreement as the CWS (compressed work schedules) agreement. For consistency, it will be referred to as the CWS agreement. Further, it is noted that the parties used the term Custody and Correctional interchangeably and there is no difference between the two terms in the context of this decision.

> shift. The parties' prior collective bargaining reflected in Article 18, reserved the discretion to the Warden to formulate the rosters. The Agency has no further duty to engage in additional bargaining regarding work schedules of the Sick and Annual posts. Therefore, your request for a CWS is denied. (G.C. Ex. 7; Tr. 110).

A labor management meeting was scheduled for August 24, and on that date, Associate Warden Knofler furnished the Union with a copy of the above August 19 Memorandum and informed the Union that this continued to be the position of the Respondent. (Tr. 59-60, 79-80, 110). The Union, although disagreeing with the Office of General Counsel (OGC) decision, requested that the Respondent return to the table. (Tr. 80). On September 2, Knofler sent an e-mail to Ellis, reminding him that the Union had been furnished a copy of the Memorandum and stating: "Mr. McFadden was very clear in stating that 'the agency has already fulfilled its duty to bargain in good faith regarding the Sick and Annual posts.' And 'the agency has no further duty to engage in additional bargaining regarding work schedules of the Sick and Annual posts." Knofler further stated: "Therefore, the Agency has no present intention of returning to the table to bargain over this issue." (G.C. Ex. 8; Tr. 65, 80).

On August 31, Hermens sent an e-mail to Michael D. Rank, Deputy Associate General Counsel, Federal Bureau of Prisons, Office of General Counsel in Washington, D.C., requesting information regarding the review process and asking for an explanation of what technically was wrong with the agreement. Rank responded on August 31, stating in part, as follows:

> Good morning Vice President Hermens – The CWS agreement for correctional services posts was reviewed by OGC. OGC determined that the CWS agreement could not be approved because the issues addressed in the CWS agreement were already covered-by the Master Agreement. OGC's reasoning was based primarily on a recent decision by the U.S. Court of Appeals for the District of Columbia – attached to this e-mail. Moreover, that decision found that in regard to correctional services,
>
> *"Article 18, specifically in section (d) and (g), reflects the parties' earlier bargaining over the impact and implementation of the Bureau's statutory right to assign work. See § 7106(b)(permitting bargaining over the 'numbers, types, . . or positions assigned to any . . . work project[ ] or tour of duty"). Specifically, these provisions represent the agreement of the parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift."*
>
> Thus, as the Court found, the Union and the Agency have already bargained and agreed in the Master Agreement Article 18 regarding roster assignments in correctional services. Under the Master Agreement, the parties agreed that the Warden retained the discretion to formulate those rosters on a quarterly basis. Based on this agreement, the Agency has no duty to engage in additional bargaining regarding these same issues in correctional services. The CWS agreement would have materially modified the parties' Master Agreement by removing the Warden's

> discretion to formulate the rosters on a quarterly basis is a material aspect of Article 18. An agreement that materially modified the Warden's discretion to formulate the rosters every quarter cannot be approved because it would materially modify the parties' Master Agreement Article 18.
>
> The Regional Office did not conduct the review of the CWS. OGC conducted the review. The Regional Office notified the Warden regarding OGC's conclusion that the CWS agreement could not be approved.
>
> In short – it is the Agency's position that the CWS agreement could not be approved because the parties already bargained about the issues of the numbers, types, or positions assigned to a work project or tour of duty in the context of correctional services, and agreed that the Warden retains the discretion to determine the rosters for correctional services positions on a quarterly basis. Agreements that modify this fundamental and material aspect of Article 18 cannot be approved.
>
> I hope this good faith effort successfully addresses your questions and concerns. I do not believe there is any additional explanation that I can provide that will make the Agency's position more clear. I understand that the Union may not agree with the Agency's position; however, it seems that the Agency and the Union's positions on this issue are clear at this point.

(G.C. Ex. 13; Tr. 96).

The CWS agreement for the six sick and annual posts has not been placed in effect. There have been no further negotiations on this subject.

FCI Sheridan does have several CWS agreements in place, including Food Service, Religious Services, and Health Services. None of these departments involved Custody or Correctional Services. These agreements were negotiated in 2011 and OGC approval was obtained within 30 days.

The Union filed the unfair labor practice charge in this matter on September 15, 2011. The Union also filed two grievances on September 21, 2011, regarding the denial of the agreement at issue in this matter. One grievance was directed to the Warden; the other to the Regional Director. Both grievances have been held in abeyance pending the processing of this ULP. (G.C. Ex. 1(f) pp. 27-33; R. Ex. 4; Tr. 61, 87-88).

Article 18 of the MLA is titled Hours of work. Section d covers how quarterly rosters for Correctional Services employees will be prepared. Section g covers sick and annual relief positions and states:

> Sick and annual relief procedures will be handled in accordance with the following:

1. [W]hen there are insufficient requests by employees for assignment to the sick and annual relief shift, the roster committee will assign employees to this shift by chronological order based upon the last quarter the employee worked the sick and annual relief shift;
2. [S]ick and annual relief shift is a quarterly assignment that will not impact upon the rotation through the three (3) primary shifts;
3. [N]o employee will be assigned to sick and annual relief for subsequent quarters until all employees in the department have been assigned to sick and annual relief, unless an employee specifically requests subsequent assignments to sick and annual relief;
4. [E]mployees assigned to sick and annual relief will be notified at least eight (8) hours prior to any change in their shift; and
5. [R]easonable efforts will be made to keep sick and annual relief officers assigned within a single shift during the quarter.

(G.C. Ex. 2 at 41).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that flexible and compressed work schedules are fully negotiable and the Respondent has a duty to adhere to the CWS agreements that it makes. *See The Federal Employees Flexible and Compressed Work Schedules Act of 1982*, 5 U.S.C. 6120 *et. seq*. The evidence establishes that the Respondent and the Union negotiated a CWS agreement, which called for a six month pilot program for six sick and annual posts, which was signed on June 7, 2011. The CWS agreement, as well as the parties' master agreement, allows for 30 days for the Respondent's (OGC) to disapprove the agreement. In this case, the CWS agreement should have been approved by July 7, but was not disapproved until August 24, 2011, 78 days after the original signature date. The GC denies that paragraph 12 of the local agreement extended the OGC review deadline and excuses its delay, and notes that there was no specific discussion of the 30 day review period during negotiations and that it was included consistent with Article 18 of the MLA.

Parties at the local level do not have any authority to modify the terms of the master agreement, as set forth in Article 9. Therefore, the local parties would not be able to modify the 30 day deadline for review set out in the MLA. The GC notes that the Union's actions, subsequent to the signing of the local agreement, were entirely consistent with their knowledge of the 30 day deadline.

The denial of the CWS agreement was based on an interpretation of Article 18(d) and (g) of the MLA and the reading of a D.C. Circuit decision, which was actually issued on July 8, one day after the 30 day deadline. The Respondent, through OGC attorney Michael Rank, never offered any excuses or explanations for missing the July 7 deadline or acknowledged any consequences to missing that deadline. But, the GC asserts that the D.C. Circuit decision does not even say what the Respondent hopes it says. The dispute in the

D.C. Circuit cases was not about compressed work schedules or Article 18(b). However, based on that decision, Rank told the Union that Article 18, section (d) and (g) reflect that all bargaining over the assignment of work – contained assignment rosters – so the local CWS agreement had to be rejected, and "the Agency has no duty to engage in additional bargaining regarding these same issues in correctional services." (G.C. Ex. 13).

The GC argues that, contrary to the Respondent's assertions, the Union did request to renegotiate even after the untimely denial of the local CWS agreement. But this request was also rejected by Knofler, based on the D.C. Circuit rationale. (Tr. 14, 111-12; G.C. 8 & 15). At the Labor-Management Relations meeting Knofler refused to bargain, stating that the Respondent "had no duty to bargain and they weren't going to negotiate any further on the issue." (Tr. 60).

The GC asserts that the Respondent repudiated the local CWS agreement by refusing to effectuate it on July 7. Under the MLA, OGC was not privileged to render a denial 78 days later. The Respondent cannot avoid the consequences of missing this deadline and the agreement must be implemented. Citing to *Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 862 (1996) (*Scott AFB*), the GC first argues that the Respondent's breach of the local agreement was clear and patent. The 30 day deadline in Article 18(b) is absolutely clear and unambiguous and states that OGC review "will be completed within (30) calendar days from the date the agreement is signed[.]" The local parties on both sides have acknowledged applicability of the 30-day OGC review deadline in the master agreement and this deadline was not extended. The MLA governs, and under its provisions, the only way that Respondent could have avoided its obligation to implement this lawful local agreement was if the OGC had denied it within 30 days. Respondent has admitted that the OGC failed to do so. Because the review wasn't completed before the deadline, the Respondent's subsequent failure to implement the local agreement amounts to a clear and patent breach.

The only purpose of the local agreement was to establish a six month trial period for six of the 35 sick and annual relief positions. By establishing a trial period for the CWS, the local parties would obtain actual data to determine if the 12-hour shift was effective. At the end of the test period, the parties retained the option to modify the schedule. The agreement states that it would be evaluated "with the possibility of continuing a compressed work schedule." (G.C. Ex. 5). Obtaining CWS for any custody employees was an area of significant concern, given that custody and corrections are where the largest number of employees at the prison (or any prison) are found. This is why Respondent's refusal to honor the local agreement, absent any legitimate justification, strikes at the heart of the collective bargaining relationship, and therefore, the heart of the agreement.

The GC further argues that, in addition to repudiating the local CWS agreement, the Respondent repudiated Article 18(b) by declaring CWS off-limits for custody or corrections employees based on its flawed interpretation of the D.C. Circuit decision. The GC rejects the Respondent's argument that because it had allowed CWS for employees who are not in custody and corrections, it can avoid liability for its declaration that the D.C. Circuit decision

prohibits any CWS negotiations for all of the "mission-critical positions", i.e., all those in custody and corrections. Tolerating such a defense renders the guarantee in Article 18(b) that CWS is available for all employees utterly meaningless. Philip Glover, AFGE Northeast Regional Vice President, testified that the intent behind Article 18(b) was that CWS should be available for everyone, and the local level parties have the authority to establish CWS schedules in negotiations consistent with the Work Schedules Act, which might include Federal Service Impasses Panel (FSIP) assistance, and the structure set forth in the master agreement.

Instead, the Respondent has declared Article 18(b) null and void for all those in custody and corrections. The plain meaning of Article 18(b) has been subverted by Respondent's unreasonable interpretation of the D.C. Circuit case. It is unreasonable because the decision has nothing to do with CWS at all. The term "alternative work schedules" does not even appear in the decision; nor does "Article 18(b)". It is a basic "canon of construction that contracts should be read to give effect to all provisions." And "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Restatement (Second) of Contract; Standards of Preference in Interpretation,* § 203 (1981). Respondent's D.C. Circuit excuse, which relies on Article 18(d) and (g), and completely ignores Article 18(b), fails this basic logic test. Thus, Respondent's attempt to rely on this decision as a basis to refuse to negotiate over CWS for any custody and corrections employees, including all 35 sick and annual positions at Sheridan, is flawed and amounts to a repudiation.

Moreover, this cannot be characterized as a one-time mistake that was corrected. The Respondent, with support from higher level officials, has repeatedly referred to the D.C. Circuit decision. Knofler referred to it at the LMR meeting where the Union first received the news, and afterward, when the Union asked for reconsideration, both Knofler and Rank. Every communication to the Union on this point has been consistent.

In terms of remedy, the GC argues that the Respondent should be required to implement the June 7, 2011, local agreement and that it should be told that the D.C. Circuit decision is fundamentally flawed and not sufficient grounds to refuse to honor its contractually-mandated duty to bargain over local compressed work schedules for any employees in custody or corrections, including all sick and annual positions. The GC also requests that, in addition to physical postings, the remedy in this case should include electronic distribution of the Notice signed by the Warden. The GC argues that the record evidence establishes that the Respondent uses its GroupWise email system to notify bargaining unit employees of important matters and has done so for a number of years.

Respondent

The Respondent denies that it has repudiated either the June 7 CWS agreement or Article 18(b) of the MLA.

With regard to the June 7 agreement, the Respondent notes that the agreement requires that it be approved by OGC prior to implementation. (G.C. Ex. 5). Since OGC did not approve the agreement, it could not have been implemented and the Respondent therefore could not have repudiated the agreement by not implementing it. Respondent argues that the inadvertent delay in the OGC review and non-implementation does not constitute repudiation. Further, the OGC apologized for the delay and there is no evidence that there have been similar review delays in other cases. (Tr. 70-73). Further, there are numerous CWS agreements in effect at the FCI Sheridan, in accordance with the MLA. (Tr. 63). The purpose of the 30 day contractual review period was to prevent a delay of "years" for such reviews. (R. Ex. 2; Tr. 21). The master agreement does not specify any consequences for delayed CWS review. (R. Ex. 5, Article 18(b)).

The instant complaint does not even allege that either the inadvertent delay beyond the 30 day contractual CWS review period or non-implementation due to such delay constituted repudiation.

With regard to the allegation of repudiation of Article 18(b) of the MLA, the Respondent argues that in view of its' apology for the inadvertent delay when review "fell through the cracks"[,] (G.C. Ex. 11), the delay in processing under the facts and circumstances of this case did not constitute a repudiation. *NTEU*, 62 FLRA 45 (2007), *ACS, LLC*, 345 NLRB 1080 (2005).

The Respondent further argues that it did not repudiate Article 18(b) of the MLA when it declined to implement in strict compliance with the plain terms of paragraph 12 of the CWS agreement. *U.S. Dep't of VA, Consol. Mail, Outpatient Pharmacy, Leavenworth, Kan.*, 60 FLRA 844, 848-850 (2005) (Respondent's actions in accordance with specific contract provision precludes repudiation finding.)

The Respondent asserts that, following OGC disapproval of the CWS agreement, the Union only asked to return to the table on that specific issue. (G.C. Ex. 1(a) & 15). Respondent's election not to return to the table was restricted to the specific Custody department sick and annual CWS at issue. (G.C. Exs. 7 & 8). The local supplement agreement requires the Union to make a written request to bargain for a CWS, which the Union failed to do in this case. (R. Ex. 6, Article 18(b)(1)). Therefore, the evidence disproves that Respondent refused to bargain over CWS for any employee in the correctional services. The Respondent's election not to renegotiate the disapproved sick and annual CWS did not constitute a repudiation of Article 18(b) of the MA. Further, Respondent's contractual prerogative under the MA not to return to the table following disapproval of a CWS is highlighted by the differing contractual language between Article 9(d) and Article 18(b). (R. Ex. 5).

Article 9(d) mandates a return to the table following any non-ratification of a local supplemental agreement, and sets forth three mandatory options for the parties following disapproval of a local supplemental agreement. The specific language concerning CWS negotiations in Article 18(b) makes renegotiation elective following disapproval of a CWS. Under the plain language of 18(b), the Respondent had no contractual duty to return to the table. *Okla. City Air Logistics Ctr., Tinker AFB, Okla.*, 3 FLRA 516, 521-22 (1980).

Action based on a disagreement as to controlling law on the scope of the duty to bargain CWS under Article 18(b) of the master agreement does not establish repudiation. The parties expressed differing interpretations as to what posts and positions were eligible for CWS under the terms of Article 18 of the MLA. (R. Ex. 1f & 13). In *DOD, Eglin AFB, Eglin AFB, Fla.*, Case No. AT-CA-00482 *et al.* (2001), ALJDR No. 163 (Oct. 15, 2001), the parties entertained different interpretations as to which unit employees would be eligible under a MOU for the union to bargain for the wearing of shorts. The Judge held that respondent's different expectations as to which unit employees were eligible beneficiaries of such bargaining did not constitute a repudiation of the MOU. In *Fed. Bureau of Prisons v. FLRA*, the Court of Appeals for the District of Columbia held that Respondent had plenary discretion under Article 18(d) of the contract to set whatever posts, schedules and shifts it wished to make available for bid on the quarterly roster and there was no duty to bargain over the custody roster. 645 F.3d 91 (D.C. Cir. 2011). Whether such reasoning restricted CWS bargaining within the Custody Departments at the local level, such issue was at that time, reasonably arguable as a matter of contract interpretation. (G.C. Ex. 1(f) & 13). Accordingly, Respondent's action in declining to return to the table to bargain over the Custody Department sick and annual CWS at issue was based on a reasonable interpretation of the contract under existing law at that time. Therefore, even if mistaken, such action did not constitute a repudiation. *Scott AFB*, 51 FLRA at 864; *Laughlin AFB, Del Rio, Tex.*, 52 FLRA 413, 419 (1996).

Additionally, the bargaining context, including a prior FSIP decision, a subsequent agreement to return to the table, Respondent's action in accordance with the express terms of paragraph 12 of the agreement, two subsequent grievances, Respondent's response to the grievances and two pending arbitrations, preclude any finding of bad faith or union animus on the part of the Respondent. *Vickers Inc.*, 153 NRLB 561, 570 (1965).

The Respondent further argues that repudiation is not a continuing violation. *EEOC, Wash., D.C.*, 53 FLRA 487, 494-96 (1997). Accordingly, the putative ULP in the instant case either occurred or did not occur at the LMR meeting on August 24, 2011. Respondent argues an election of remedies bar under § 7116(d) as to any and all conduct alleged to have occurred on or after September 21, 2011, the date of the two grievances in this matter. (R. Ex. 4; G.C. Ex. 1(f)).

Even if a repudiation is found, the Respondent argues that the remedy should be limited to a posting and return to the table on the specific June 7 agreement. The parties specifically agreed that approval by Respondent's OGC was a prerequisite to implementation. And it is undisputed that OGC did not approve the CWS agreement at issue. Accordingly, if repudiation were found only a limited remedy would be appropriate consistent with the undisputed facts of the case.

ANALYSIS AND CONCLUSIONS

In *Scott AFB*, 51 FLRA at 858, the Authority clarified the analytical framework it will follow for determining whether a party's failure or refusal to honor an agreement constitutes a repudiation of a collective bargaining agreement. Consistent with its previous decision in *Dep't of Def., WRALC, Robins AFB, Ga.*, 40 FLRA 1211, 1218-19 (1991) (*Warner Robin I*), the authority held that it will examine two elements in analyzing an allegation of repudiation: (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 breach (i.e., did the provision go to the heart of the parties' agreement?) The examination of either element may require an inquiry into the meaning of the agreement provision allegedly breached. *See also U.S. DOD, Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 747 (2010); *SSA, N.Y.C, N.Y.*, 60 FLRA 301, 3014 (2004).

As a result of a settlement agreement, the Respondent and the Union agreed to negotiate a compressed work schedule for certain sick and annual leave positions at FCI, Sheridan, in accordance with Article 18(b) of the MLA. On June 7, both parties signed the CWS agreement, which called for a pilot program for six of the approximately 35 annual and sick leave positions to work 12 hour shifts. The agreement, in paragraph 12, stated that "prior to implementation, this agreement must be approved by the Office of General Counsel. Once signed by both parties as agreed this will be forwarded to the OGC for the final approval." Article 18(b), section 1 of the MLA states "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[.]"

As the evidence reflects, the agreement was signed by both parties on June 7. The CWS agreement was not immediately forwarded to the OGC for review and was apparently not sent for review until June 30, after the Union had requested an update on the status of the review. (G.C. Ex. 6). The OGC did not conduct its review within the thirty days of the signing of the agreement, which would have been July 7. On August 19, the Warden was informed that the CWS agreement has not been approved by OGC (G.C. Ex. 7), and the Union is not informed until August 24, at a scheduled Labor Management Relations meeting.

The evidence further reflects that the June 7 CWS sick and annual leave agreement has not been implemented by the Respondent. The GC asserts that OGC had thirty days in which to approve or disapprove the agreement and when it failed to do so, the agreement went into effect on July 7. The Respondent rejects this argument, essentially arguing that the failure to abide by the thirty day time limit set forth in Article 18(b) has no consequences. Therefore, the OGC was free to take as long as it needed and its rejection of the CWS agreement in August is all that matters. The Respondent also argues that it apologized for the inadvertent delay and that the agreement "slipped through the cracks." Finally, the Respondent argues that the CWS agreement, in paragraph 12, required that the agreement be approved by the OGC; since the OGC did not approve the agreement, even outside the thirty day time limit, there was no duty to implement the CWS agreement.

In determining whether the Respondent repudiated the local CWS agreement, two elements must be met. First, the breach must be clear and patent. *Dep't of the Air Force, WRALC, Robins AFB, Ga.*, 52 FLRA 225, 231-32 (1996) (Warner *Robins II*). A finding of a clear and patent breach can be avoided "where the meaning of a particular agreement term is unclear, [as] acting in accordance with a reasonable interpretation of that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of the terms of the agreement." *Scott AFB*, 51 FLRA at 863. But this applies only if the "employer has a sound arguable basis for ascribing a particular meaning to the contract". *Id.*

Respondent has no arguable basis here. The 30 day deadline in Article 18(b) is absolutely clear and unambiguous. It states that OGC review "will be completed within thirty (30) calendar days from the date the agreement is signed." The local parties on both sides have acknowledged applicability of the 30 day OGC review deadline in the master agreement. They did not extend this deadline. The master agreement governs, and under its provisions, the only way Respondent could have avoided its obligation to implement this lawful local agreement was if the OGC had denied it within 30 days. The Respondent has admitted that the OGC failed to do so. Because the review was not completed before the 30 day deadline, Respondent's subsequent failure to implement the local agreement amounts to a clear and patent breach.

With regard to the second element, the only purpose of the local agreement was to establish a trial period for six out of the 35 sick and annual leave positions. With this trial period, the local parties would obtain actual data to determine if the 12 hours shift was effective for all those involved. Further, by the terms of the agreement, the issue was to be evaluated with the possibility of continuing a compressed work schedule. Obtaining CWS for any custody employees was an area of significant concern for both the Union and the Respondent. The largest number of employees at the prison are in custody and corrections. Therefore, Respondent's refusal to honor the local agreement, absent any legitimate justification, strikes at the heart of the collective bargaining relationship and therefore the heart of the agreement. See *Warner Robins II*, 52 FLRA at 232.

I find, therefore, that the Respondent's failure to implement the June 7 CWS agreement meets both elements and establishes a repudiation of the agreement. The breach was clear and patent: the complete refusal to implement the June 7 CWS agreement even though it had not been disapproved by the OGC within the required 30 day period of the MLA. And the provision, the application of CWS to a small unit of sick and annual leave relief positions within the custody department, went to the heart of the agreement.

The same elements must also be determined with regard to the allegation that the Respondent repudiated Article 18(b) of the MLA by its conduct in this matter. Following the refusal to implement the June 7 CWS agreement, the Respondent declined to return to the table, as allowed by the MLA. The Respondent argues that it cannot be found to have breached Article 18(b) of the MLA because it has negotiated CWS agreements for other groups of employees within FCI Sheridan, even though none of those employees are within the custody department. Based on its interpretation of the D.C. Circuit case, negotiations for CWS for "mission-critical positions", i.e., employees in custody and corrections, are not permitted. The GC argues that this interpretation cannot stand, because it would render the guarantee in Article 18(b) that CWS is available to all employees meaningless.

In *DOJ, Fed. Bureau of Prisons, FCI Texarkana, Tex.*, 12 FSIP 5, pp. 2, 4 (2012), the Panel rejected the Agency's position that the D.C. Circuit decision stated that it had no duty to bargain CWS for correctional service employees in Texas. The decision noted that an examination of Article 18(d) shows the focus of that section is on quarterly rosters for custody employees and the focus of Article 18(g) involves sick and annual relief procedures for custody employees. Neither section involves flexible and/or compressed work schedules, which are detailed in Article 18(b). The Panel explained its decision stating, "While it may be easy to understand why the [D.C. Circuit] Court's decision appeals to the Employer, in the view of this arbitrator, the case is substantially off point" and "the Employer's reliance on this case is flawed and overreaching." *Id.*

Respondent has repeatedly stated – in essence- that Article 18(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(b) is based solely on the unreasonable interpretation of the D.C. Circuit decision. The nature and scope of the breach here "manifest an intent not to honor similar requests by the Union" *Warner Robins I*, 40 FLRA at 1219. I find the wording of Article 18(b) is clear and unambiguous. The plain language of Article 18(b) expressly recognizes that local negotiations over compressed work schedules at the local level may take place and does not prohibit such negotiation on behalf of employees in any department, including custody or correctional services. Moreover, the plain wording of Section (d) of Article 18 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. Section (g) does not limit Section (b) in any way and it does not reference Section (b) or address compressed work schedules.

Further, I find that Respondent's breach of Article 18(b) goes to the heart of the agreement. In *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 355 (2009), 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 Judge 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." Similarly, in *Warner Robins I,* 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." *Warner Robins I*, 40 FLRA at 1220. Likewise, in *Warner Robins II*, 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 agreement."

In this matter, the plain meaning of Article 18(b) is to allow for local negotiation of flexible and compressed work schedules for all employees without exception. Respondent's reliance on the D.C. Circuit decision and its refusal to negotiate flexible and compressed work schedules directly conflicts with Article 18(b) and as such amounts to a repudiation of Article 18(b) of the MLA.

REMEDY

As requested by the General Counsel, I will order an appropriate cease and desist order to be signed by the Warden at FCI Sheridan. In accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, such postings are ordered. *See U.S. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

Having found that the Respondent has violated the Statute by repudiating both the June 7, 2011 CWS agreement and Article 18(b) of the Master Agreement by its conduct in this matter, it is therefore recommended that the Authority adopt the following Order:

ORDER

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

1. Cease and desist from:

(a) Failing and refusing to implement a compressed work schedule agreement that established a compressed work schedule for six sick and annual relief positions for custody or corrections employees.

(b) Failing and refusing to negotiate over compressed work schedules (CWS) for any of the employees in custody or corrections, including sick and annual relief positions, as Article 18(b) of the MLA specifically allows for local CWS negotiations for all such positions.

(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) Implement the local CWS agreement signed on June 6, 2011.

(b) In accordance with Article 18(b) of the Master Agreement, upon the request of the American Federation of Government Employees, Local 3979, AFL-CIO (Union/AFGE), negotiate over compressed work schedules for any custody and corrections employees, including sick and annual relief positions.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, Sheridan Federal Correctional Institution, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(d) Send, by electronic mail, the Notice to all AFGE Local 3979 bargaining unit employees in the Respondent's Sheridan, Oregon facility. This Notice will 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, San Francisco 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., September 30, 2014

Susan E. Jelen

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, Federal Correctional Institution, Sheridan, Oregon, 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 refuse to implement a compressed work schedule agreement negotiated with the American Federation of Government Employees, Local 3979, AFL-CIO (Union/AFGE), the exclusive representative of bargaining unit employees, that established a compressed work schedule for six sick and annual relief positions.

WE WILL NOT refuse to negotiate over compressed work schedules (CWS) for any other employees in custody or corrections, including sick and annual relief positions, as Article 18(b) of the Master Labor Agreement specifically allows for local CWS negotiations for all such positions.

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 CWS agreement for the six sick and annual relief positions, and upon AFGE Local 3979's request, negotiate over compressed work schedules for any other custody or corrections employees in accordance with law.

_____
(Agency/Respondent)

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, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 470, San Francisco, CA 94103, and whose telephone number is: 415-356-5000.