American Federation of Government Employees, Council 222, AFL-CIO **Union** **v.** **United States Department of Housing and Urban Development** **Agency**	**FMCS Case No. 191207-02230**

Rushab Sanghvi, Esquire

Counsel for the Union

Nicole Y. Drew, Esquire

Counsel for the Agency

BEFORE: GARVIN LEE OLIVER

Arbitrator

OPINION AND AWARD

This arbitration proceeds from a grievance filed by the American Federation of Government Employees, Local 222 AFL-CIO, hereinafter "AFGE" or "Union," against the United States Department of Housing and Urban Development, hereinafter "HUD" or "Agency." The grievance alleged that the Agency violated Article 16.03(2) of the Collective Bargaining Agreement, hereinafter "CBA," by not allowing certain employees with Maxiflex schedules to

receive compensation on a holiday for the number of hours they were otherwise scheduled to work. The grievance also alleged that the Agency violated Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute by repudiating the CBA and refusing to abide by its negotiated terms. The Agency denied the violations asserting, in part, that Article 16.03(2) of the CBA in this respect is contrary to law and unenforceable because it authorizes the combination of work schedules in violation of the Federal Employees Flexible and Compressed Work Schedule Act of 1982 and applicable regulations.

A hearing was held on September 17, 2019 in Washington, D. C. The parties were represented by counsel, afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and present documentary and oral argument. The parties served briefs in late November 2019.

Based on the entire record, including my observation of the witnesses and their demeanor, and consideration of the oral and documentary arguments presented, I make the following findings, conclusions, and award.

ISSUE PRESENTED

1. Whether the Agency violated the Collective Bargaining Agreement and the law when it discontinued allowing holiday pay in excess of eight hours to employees on a Maxiflex schedule?

2. Whether the Agency violated Section 7116(a)(1) , (5), and (8) of the Federal Service Labor-Management Relations Statute by repudiating the collective bargaining agreement and refusing to abide by its negotiated terms?

APPLICABLE PROVISIONS

1. Article 16.03(2) of the 1998 Collective Bargaining Agreement

Maxiflex Schedules. Full-time employees shall be permitted to work Maxiflex Schedules, as defined in this Article, subject to the following limitations: (a) Employees working the Maxiflex Schedule have a basic work requirement of 80 hours in each biweekly pay period. They may

designate a different starting time from 6:00 a.m. to 9:30 a.m. for each workday, and they may designate a varying number of hours to work each workday, between six (6) and ten (10) hours on any given workday, exclusive of the meal period. The number of hours per workweek may vary between 30 and 50 hours each workweek, or be set to the standard 40 hour workweek. They are required to work during the core hours established in Section 16.02 (2) of this Article, and may designate no more than one (1) workday off per week. The previous 5/4/9 and 4/10 compressed work schedules are types of Maxiflex Schedules and are included under this section. All work schedules are subject to supervisory approval. An employee may participate in both maxiflex and telework programs. Management has the responsibility to coordinate maxiflex and telework. Following are examples of a Maxiflex Schedule:

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Example 3: A 5/4/9 Work Schedule

Example 4: A 4/10 Work Schedule

2. Article 16.06(2)(c) of the 1998 Agreement:

   For Maxiflex Schedules, an employee shall be credited with holiday leave according to the number of hours they were scheduled to work on that holiday.

3. Article 1.01(4) of the 1998 Agreement states:

   The parties recognize that changes may be made to this agreement when required by law, Govdernment regulation, or other appropriate authority outside the Department, such as the Comptroller General.

.3 5 U. S. C. Section 6124

Notwithstanding sections 6103 and 6104 of this title, if any employee on a flexible schedule under section 6122 of this title is relieved or prevented from working on a day designated as a holiday by Federal statute or Executive order, such employee is entitled to pay with respect to that day for 8 hours (or, in the case of a part-time employee, an appropriate portion of the employee's biweekly basic work requirement as determined under regulations prescribed by the Office of Personnel Management).

4. 5 CFR § 610.406(a) (2018) Holiday for employees on compressed work schedules. (a) If a full-time employee is relieved or prevented from working on a day designated as a holiday by Federal statute or Executive order, the employee is entitled to basic pay for the number of hours of the compressed work schedule on that day.

5. ARTICLE 53 DURATION AND DISTRIBUTION OF THE 1998 AGREEMENT Section 53.01 - Duration. The terms of this Agreement shall remain in effect for three (3) years from the effective date [July 23, 2015].. The provisions of this Agreement shall continue in full force and effect until a new Agreement goes into effect. This Agreement supersedes the previous Agreement (1998) and all Supplements to it (National, Regional, and Local), and all other written Agreements or memoranda of understanding and conflicting past practices, between the parties.

6. Article 101(4) of the 1998 Agreement: Management and the Union agree that, in regard to the bargaining unit, they will not do anything by custom or practice that will contravene or violate this Agreement. The parties recognize that changes may be made to this Agreement when required by law, Government-wide regulation, or other appropriate authority outside the Department, such as the Comptroller General.

FINDINGS OF FACT

From July of 2015 through October 1, 2018 , AFGE bargaining unit employees on a Maxiflex schedule were credited with holiday pay for the hours they were scheduled to work on a Federal holiday pursuant to Article 16.06(2)(c of the CBA.

On October 11, 2018, the Agency sent the Union notice that a new WEB TA update was being implemented immediately as required by law. The notice stated that if bargaining unit employees on a Maxiflex schedule other than 4/10 or 5/4/9 had previously been receiving more than 8 hours of holiday pay, it was a violation of law and regulations and they would be required to take leave to cover any additional hours.

A meeting of the parties on October 17, 2018 did not resolve the matter. On October 22, 2018, the Union filed a grievance alleging that the Agency violated Article 16.03(2) of the CBA by not allowing employees on Maxiflex schedules to receive the number of hours for the holiday they were scheduled to work.[1] The Union also alleged that the Agency violated Sections 7116(a)(1) of the Statute by repudiating and refusing to abide by the collective bargaining agreement.

On November 21, 2018, the Agency denied the grievance and asserted that its actions had not violated or repudiated the collective bargaining agreement.

[1] As set forth above, Article 16.06(2)(c) of the 1998 Agreement more specifically covers holiday pay under Maxiflex.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The Union claims that Maxiflex schedules are work schedules with fixed starting times; that, according to Article 16.03(2), they include compressed work schedules; that employees on compressed work schedules are entitled to holiday pay for the hours scheduled to work pursuant to 5 CFR § 610.406(a) (2018); and, therefore, Article 16.06(2)(c) does not conflict with existing law or regulation, and the Agency's action in repudiating it violated the Article and Section 7116(a)1 and 5 of the Statute.

The Union cites *U. S. Department of Defense and AFGE, Local 3529*, 35 FLRA 316 (!990) where the Authority upheld an arbitration award of more than eight hours. The Authority noted that the law and regulations gave the parties wide latitude in fashioning flexible and compressed work schedules, and it was not apparent that the parties were precluded from adopting both types of work schedules.

The Union asks (1) that any employee who used annual or sick leave in order to receive full pay for a holiday be reimbursed plus interest and (2) the Union receive attorney fees and costs. (Joint Exh. 2).

The Agency responds that a fixed starting time does not prescribe a Maxiflex schedule; that Section 16.03(2) incorrectly lists the 5/4/9 and 4/10 compressed work schedules as examples of Maxiflex Schedules and this erroneous linkage does not allow the Union to classify a Maxiflex schedule as a compressed work schedule; that the other Maxiflex schedules, which allow more flexibility than a compressed schedule, may not receive more than eight hours of holiday pay, and to the extent that Section 16.06(2)(c) provides for employees on such schedules to receive more than eight hours holiday leave on a holiday, it is an attempt to create a hybrid schedule, which is contrary to the Federal Employees Flexible and Compressed Work Schedule Act of 1982 and applicable regulations. The Agency cited the FLRA decision in GSA and NFFE, 50 FLRA 136 (1995) where the Authority held that governing OPM regulations prohibited combining compressed and flexible work schedules.

Conclusion

The Agency's position is a correct interpretation of the Federal Employees Flexible and Compressed Work Schedule Act of 1982, the applicable regulations, and the Authority's decision in GSA and NFFE, 50 FLRA 136 (1995. Therefore, I conclude that the Agency did not violate Article 16.03(2) and Article 16.06(2)(c) of the collective bargaining agreement and the law when it discontinued allowing holiday pay in excess of eight hours to employees on a Maxiflex schedule. Nor did the Agency's action constitute a violation of Section 7116(a)(1), (5), and (8)of the Federal Service Labor-Management Relations Statute by repudiating the collective bargaining agreement and refusing to abide by its negotiated terms.

Based on the foregoing findings and conclusions, I enter the following

AWARD

1. The Grievance is Dismissed.
2. Pursuant to Section 52.04 of the Collective Bargaining Agreement, the Union is hereby determined to be the losing party and shall pay the Arbitrator's fees and expenses as set forth in an accompanying invoice.
3. Pursuant to Section 52.10(7) of the Collective Bargaining Agreement, payments to the arbitrator shall be immediately paid regardless of whether any exception(s) are filed. Exceptions may include requests for reimbursement of arbitrator fees.

_____/s/_____
GARVIN LEE OLIVER
Arbitrator

Dated: December 5, 2019

Fort Belvoir, Virginia

CERTIFICATE OF SERVICE

I certify that a copy of the Decision and Award of Garvin Lee Oliver in **FMCS Case No. 191207-02230** was served by email on the following representatives of the Parties on the date set forth below:

Rushab Sanghvi, Esquire **Sanghr@afge.org**

Counsel for the Union

Nicole Y. Drew, Esquire **Nicole.Y.Drew@hud.gov**

Counsel for the Agency

_____/s/_____

GARVIN LEE OLIVER

Arbitrator

Fort Belvoir, Virginia

Dated: December 5, 2019

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