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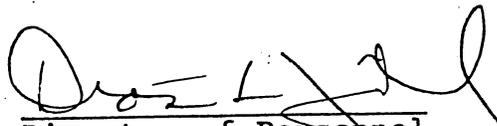
DPM LETTER: 711- 3

SUBJECT: Labor Relations Guidance on Negotiating  
Alternative Work Schedules

DATE: JUN 29 1990

The authority to approve Alternative Work Schedules (AWS) established under the provisions of The Federal Employees Flexible and Compressed Work Schedules Act of 1982, as extended in 1986 (hereafter referred to as the "Act"), was recently delegated to the operating administrations. (see DPM Letter 610-1.) As AWS programs are planned, it is important to focus on the management requirements in the aforementioned DPM letter that will govern their initiation and implementation. Where bargaining unit employees are involved, the additional information and guidance contained in the attachment to this letter will assist managers in meeting their collective bargaining obligations when establishing or terminating AWS programs under this policy. Because of the number of options and variations possible under the Act and the differences in each work situation, this guidance cannot cover all the potential issues and/or problems that may arise. The Labor and Employee Relations Division (M-17) staff is available to provide further assistance or guidance as necessary. (See Section VIII of attachment.) During negotiations, management should also consider the potential impact of a negotiated AWS schedule on non-bargaining unit employees in the same organization.

Attachment

  
Director of Personnel

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LABOR RELATIONS GUIDANCE ON NEGOTIATING  
ALTERNATIVE WORK SCHEDULES

I. BACKGROUND

Public Law 97-221 established the statutory basis for Alternative Work Schedules in the Federal service. This law replaced Public Law 95-390 and was to expire 3 years from the date of passage. Public Law 97-221 was subsequently made permanent in 1986 by Public Law 99-196. The Federal Employees Flexible and Compressed Work Schedules Act of 1982, as extended in 1986, provides that certain collective bargaining requirements must be met when implementing AWS for employees represented by a union having exclusive representational rights.

II. KEY LABOR MANAGEMENT RELATIONS RESPONSIBILITIES

- A. Agency obligation to bargain: Employees in a bargaining unit may be included in an AWS program only to the extent expressly provided for by a negotiated agreement. [5 U.S.C. 6130(a)(1) and (2)] An agency wishing to establish such programs for employees in a bargaining unit must negotiate the establishment of the program with the exclusive representative. Programs initiated by agency management should meet the requirements set forth in DPM letter 610- . Agencies may also be required to bargain on proposals to establish AWS programs as part of any union-initiated midterm bargaining, unless prevented by a contractual bar or waiver.
- B. Exclusions: An agency has the right to exclude individual employees or groups of employees and to establish certain restrictions where the coverage of those employees substantially disrupts the organization in carrying out its program or additional costs are incurred. [5 U.S.C. 6122(b)] Provisions for exclusions of bargaining unit employees are subject to negotiation and any disputes over such exclusions are subject to appeal to the Federal Service Impasses Panel (FSIP).
- C. Dispute Resolution: If an impasse results from negotiations to initiate or terminate an AWS program, the dispute goes to the FSIP, which will decide whether the agency's determination is supported by the evidence. If it is

supported, then the FSIP must act in favor of the agency. [5 U.S.C. 6131(c)(3)(B)&(C)] Existing AWS schedules may not be terminated until agreement is reached or the FSIP acts [5 U.S.C. 6131(a)(3)(D)], unless termination is otherwise provided for by an agreement. (See Section VI for further guidance.)

### III. NEGOTIATIONS

Negotiations on AWS programs generally take place under one of the following circumstances: 1) management-initiated midterm bargaining, 2) union-initiated midterm bargaining, or 3) general contract negotiations. While circumstances will vary, it is generally preferable that negotiations on AWS be handled as a midterm bargaining obligation with a specific duration provision (usually 1 year). If AWS is proposed in contract negotiations, it is advisable to agree to a general commitment to an AWS program, but reserve the specific policies and procedures for subsequent local or midterm bargaining at the appropriate level. Some organizations have handled the development of an AWS program through their labor-management committees. Both management and unions have found these approaches preferable to holding up AWS programs with other unrelated subjects in contract negotiations. These approaches also permit the parties to experiment with AWS programs and avoid having modification or termination of the programs tied to the reopener or duration clause of the basic contract.

Management should give careful attention to the following matters before commencing negotiations:

#### A. Preparations

The need for thorough preparation prior to any negotiations on AWS programs cannot be stressed enough. It is also important that the appropriate payroll and pay policy personnel be consulted when negotiating on AWS options because of the impact on these program areas. In addition to reviewing the requirements of the Act, pertinent OPM regulations, and Department policies, preparations should include a review of existing employee work schedules proposed for inclusion in an AWS program(s). This information should include the series, grade levels, locations, and the current starting and departure times of these employees. Information on any special security and facility requirements should also be reviewed.

## B. Costing out proposals

If management does not consider a union's proposed AWS program(s) workable, it must show actual or likely adverse impact. Management must be able to present substantive evidence and/or testimony that there will be an increase in current operational costs or a decrease in productivity/services by the adoption of the union's proposed AWS program. Supporting information/documentation may include staffing (S&E) and overtime costs, leave restoration, utility/building maintenance expenses, security costs, and any other support costs directly related to the operation of the affected organization. These costs should be aggregated to the extent possible in order that an approximate hourly rate of expenditure for current employees' work schedules can be determined. Costs associated with the initial implementation of such a program, i.e. start-up costs, cannot be considered because they are presumed to be one time only costs.

## C. Options

The Act presents a significant number of possible work schedule options and combinations from which employees can choose and unions can bargain. Some of the more common options for flexible schedules are flexitour (with or without credit hours), the gliding tour, the variable day, the variable week, and maxiflex schedules. Compressed work schedule options include the 4-day week, the 3-day week, and the 5-4/9 plan. Specific descriptions of these and other programs can be found in FPM Supplement 990-2, Book 620.

Unions may propose that multiple options be made available to all employees. From a management point of view, this is generally undesirable in that organizational needs vary greatly even within the same components. Offering several options, instead of only those that contribute to the effectiveness and productivity of the particular work situation, can lead to more disputes and increases the likelihood of management having to deny employees' AWS requests. When both compressed and flexitime work schedules are proposed, they should be reviewed carefully and discussed fully with the union to ensure that they meet the requirements of the Act and features are not "mixed and matched."

Transportation modes and commuting patterns also dictate and often limit the options in which employees can realistically participate. Work schedule options should be consistent with the actual functions of the organization

and its staffing requirements and not drawn up as a "wish list." This will reduce the need to later eliminate or modify options that prove unworkable and would be subject to further negotiations.

#### IV. CONTENT OF NEGOTIATED AWS PLANS

While the options and combinations available under either flexitime and/or compressed work schedules vary considerably, there are some basic provisions that management must include in any AWS plan/agreement:

- A. Provide for the right of management to determine the number and kinds of employees on duty during core hours (flexitime) or for shifts/watches on any given day to ensure that essential work functions are covered outside the core hours.
- B. Provide for the right of management to exclude from the AWS or flexitime plan any employee and to restrict employee arrival and departure times when participation will be disruptive and have an adverse impact. The plan or agreement may either list the specific positions and incumbents not covered or provide a categorical exclusion.
- C. Provide a written procedure for keeping track of employee attendance. If feasible, the plan should have some form of sign-in/sign-out sheet, preferably in seriatim, or other effective record keeping system. [Note that the provision permitting the use of recording clocks in the District of Columbia applies only to flexible schedules as defined in the Act, 5 U.S.C. 6122, where employees at their discretion, and within the prescribed limits, come to work early or stay late to accumulate credit hours to reduce the length of the work week. This does not apply to compressed work schedules, which do not have this feature.]
- D. Provide a clause that will permit the agency to reopen the agreement to terminate any AWS schedules when there is an adverse agency impact. It is also prudent, but not required, to include a specific expiration clause in any midterm agreement when the agency is initiating AWS schedules. This provides an opportunity for the agency to evaluate its effect on operational efficiency without any contractual obligation to continue those schedules in effect before a final decision is made. Otherwise, the agency will have a bargaining obligation should it initiate termination of such programs and will have to

maintain existing AWS programs until agreement is reached or a ruling by the FSIP is made on the impasse.

- E. Provide for individual exceptions for hardship reasons.
- F. Provide for a specific period of core time for flexitime programs and basic work requirement for all employees in both flexitime and compressed programs.

V. NEGOTIABILITY ISSUES

AWS programs are governed by the Act and are to be considered fully negotiable, except when such proposals conflict with those limited aspects of management rights discussed below. Therefore, the number of issues related to bargaining on such programs that may give rise to negotiability disputes is limited. Some of the more common issues are discussed below:

A. Hours of work, shifts, tours of duty

The right to assign work is composed of two parts: 1) the particular duties and responsibilities to be assigned, and 2) the specific employees to whom they will be assigned. Management has the right to determine which employees are qualified to do the work. Management also has the right to determine the location and the hours the work will be done. Furthermore, the establishment of a new shift or tour of duty is negotiable only at the election of the agency as it involves numbers, types, and grades of employees assigned to an organization or tour of duty. Having made those determinations, other disputes alleging AWS schedules conflicting with management rights under section 7106 of the Federal Service Labor-Management Relations Statute (hereafter referred to as the "Statute") will not be resolved under the procedures in section 7117. (See Section VI for further guidance.) It should be noted that the exercise of the management rights described above is subject to impact and implementation bargaining, unless otherwise provided for by an agreement.

Unions may negotiate flexitime proposals that establish the work hours in a day, core time, and the maximum hours that may be worked in a day, so long as such proposals do not limit management's right to assign employees or to determine the numbers, types, or grades of employees assigned to specific tours of duty during flexitime hours. The same rights and limitations would apply to the negotiation of compressed work schedules.

## B. Work schedules/shift changes

There are three basic procedural aspects to establishing/changing employee work schedules or shifts that are applicable to most AWS options:

- 1) advance notice of the schedule/shift change,
- 2) how employees request changes, and
- 3) how management initiates changes.

All three aspects of this process are proper subjects for bargaining and are discussed below:

### 1. Notice

As provided by 5 U.S.C. 6101(a)(3)(A) and 5 C.F.R. 610.121(a)(2), management may change an employee's tour of duty as long as the 7 (calendar) days' advance notice is provided. Management also has the right to make changes with less than the 7 days' notice, when the agency would otherwise be handicapped in carrying out its mission or if costs would be substantially increased. While union proposals that specify advance written notice of schedule or shift changes are negotiable, they cannot preclude the making of schedule changes as provided in OPM regulations. For example, a proposal that would require the agency to give 14 days' notice before changing work schedules, except in emergencies, is nonnegotiable as it restricts the agency's ability to change work schedules within the 7-day notice period to only emergencies. Scott AFB, 23 FLRA No. 97 (1986).

### 2. Employee-Requested Changes

Provisions that permit the requesting and granting of schedule/shift changes or swaps are negotiable provided they are contingent on a management determination that the employees have the requisite qualifications/competence to do the job and staffing/grade levels permit such a change or swap. NFFE Local 1798 V.A.M C. Martinsburg, West Virginia, 27 FLRA 239 (1987) and New York State Nurses Assoc. and V.A., 30 FLRA 706 (1987).

The key to whether or not these proposals are negotiable is the degree to which the positions on the shifts are interchangeable and employees having the requisite skills and qualifications. NTEU and Department of Treasury, IRS, 14 FLRA 243 (1984). It is important that AWS agreements/plans contain a provision that requires management approval of employee-requested schedule/shift changes.

### 3. Management-Initiated Changes

Under an AWS program, employee starting and quitting times are negotiable, unless they are related to or affect management's ability to determine the numbers, types or grades of employees assigned to a particular shift/tour of duty. Department of Treasury, Customs Service and NTEU, 9 FLRA 606 (1982). Management, however, has the right to change employee starting and quitting times for any established AWS schedule. Such decisions are subject to bargaining, except where the change will affect the numbers, types, or grades of employees. Department of Transportation, FAA and PASS, 19 FLRA 732 (1985).

Union proposals that would require establishing a separate tour of duty, rather than merely changing starting times for employees within a single tour of duty, are nonnegotiable as they violate management's right to assign employees to tours of duty. Establishment of a new shift or tour of duty is negotiable only at the election of the agency, as it involves the numbers, types, and grades of employees to be assigned to a tour of duty. However, if shift/schedule changes will affect the internal security of the organization, such proposals are then nonnegotiable. AFGE Local 683 and Department of Justice, FCI Sandstone, 30 FLRA 497 (1987). Proposals that would fix particular schedules or shifts for tours of duty and would prevent their being changed by management are also nonnegotiable.

In order to avoid disputes over management-initiated schedule/shift changes, it is strongly advised that a specific provision be included in any AWS agreement/plan that permits management to change employee work schedules anytime needed due to work related reasons. The FSIP will generally support a management proposal to include such a provision in any agreement.

#### C. Seniority Clause

Proposals that use seniority as the determining factor when more than one equally qualified employee request a schedule or shift change are negotiable. AFGE Local 1409 and Army Adjutant General Publications Center, 16

FLRA 352 (1984). In addition, the use of seniority to determine which employees (among those determined equally qualified by management) work a particular shift is negotiable. Lowry AFB and AFGE Local 1974, 16 FLRA 1104 (1984). The key to such provisions is that management retains the right to determine who is equally qualified and that staffing assignments/levels are not affected. If a seniority provision will affect staffing levels or leave certain positions unfilled, then such a provision is nonnegotiable as it would affect numbers and types of employees assigned to a tour of duty or shift.

In general, seniority clauses can be a useful tool to break ties in schedule requests among equally qualified employees or when rotating shifts of identical positions. However, they must be viewed carefully for potential effects on coverage and potential compromising of management's right to determine employee qualifications and suitability in the broadest terms. Full discussion at the table of any such proposals and how they will be operative is a must in order to avoid future misunderstandings.

## VI. DISPUTE RESOLUTION

### A. Impasse Resolution

If an agency objects to a union's proposed AWS program because it believes such a schedule will have an adverse agency impact as defined in 5 U.S.C. 6131(b), it may refer the dispute to the FSIP for resolution as provided in 5 U.S.C. 6131(c)(2). Department of Energy and NTEU, 26 FLRA 563 (1987) and AFSCME Local 2027 and ACTION, 28 FLRA 621 (1987). It should be noted that AWS schedules are fully negotiable and are subject only to the provisions of the Act itself. Allegations that AWS schedules are nonnegotiable as violations of sections 7106 of the Statute will not be considered by the FSIP. If management cannot reach agreement with the union on AWS proposals, it should be prepared to demonstrate the adverse impact of the union's proposals and/or prevail on the merits of their proposals and not rely on negotiability arguments before the FSIP.

In order to establish adverse impact before the FSIP, the agency must show that the AWS program would  
1) reduce productivity, 2) result in diminished level

of services to the public, or 3) increase the cost of agency operations. These criteria are really more like merit considerations, rather than strict legal criteria the FSIP will apply in making a final decision. Agencies should keep this in mind when preparing their arguments before the FSIP.

#### B. Negotiability Appeals

It was the intent of Congress that the use of Alternative Work Schedules would be fully negotiable within the limits set forth in the Act. AFGE, Local 1934 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 FLRA No. 107 (1986). However, questions concerning whether a proposed AWS conflicts with the Act or other applicable laws are subject to the negotiability appeal procedures of section 7117 of the Statute. For example, if a proposal for a compressed work schedule included flexible bands for starting and stopping times, such a proposal would conflict with the requirements of the Act as there is no provision for such bands under subsection 6127 of the Act. Arrival and departure times for a compressed work schedule must be regular and fixed.

Issues that do not directly concern the institution, implementation, administration, or termination of an AWS program or matters governed by other laws or regulations can also be reviewed under the appeal procedures of section 7117 of the Statute. For example, stays of management-initiated work schedule changes through the grievance procedure, advance notice requirements for changes in work schedules, breaks, lunch periods, rotation of shifts, qualifications determinations, inclusion of non-unit employees under AWS, or the number of employees to be assigned to a particular shift would be issues covered under section 7117.

#### VII. SUMMARY

Agencies negotiating AWS programs should carefully examine the issues at impasse, including negotiability conflicts, before presenting them to the FSIP or Federal Labor Relations Authority (FLRA) as appropriate as there are limited grounds on which an objection will be sustained. This does not mean that management should or must agree to whatever AWS options the union proposes. However, if there is no demonstration of actual or likely adverse impact of the union's proposed

AWS program(s), management should focus on the merits of their AWS proposals and those procedures that will give supervisors the ability to manage their employees with the maximum amount of predictability under an AWS program. Another approach when there is not sufficient evidence to establish that the union's proposals would have an actual or likely adverse impact, is to agree to establish the AWS program on a time-limited trial basis. This should be followed by a comprehensive evaluation before a decision is made on extending the program. This will provide better data on the actual impact of the program.

After completion of negotiations and as part of any implementation process, both parties should allow sufficient time for the training of supervisors, employees, and timekeepers on the new procedures and policies before starting the AWS schedules. This reduces the potential for disputes over schedules and possible payroll problems. The need to have payroll system changes completed before an agreement is made final is critical.

#### VIII. DEPARTMENTAL CONTACT

Questions regarding this guidance or other matters related to negotiating AWS programs may be addressed to Michael Herlihy on the Labor and Employee Relations Division staff (M-17), who can be contacted on (FTS) 366-9440.