LOCAL 1998

National Federation of Federal Employees
International Association of Machinists & Aerospace Workers, AFL-CIO

October 26 – 28, 2004 Arbitration Hearing

What is the purpose of this arbitration?

1) To determine whether Management did violate the 9-5-2001 Seattle Work Schedule Agreement, the 7-3-2001 Passport Services Collective Bargaining Agreement, and the law – in particular, the Work Schedules Act of 1982.

2) If the arbitrator finds that these violations did occur, what is the appropriate remedy?

The issues before the Arbitrator are the charges alleged by the Union.

The Union has divided its charges into two headings:

1) Implementation of the proposed change prior to the completion of the negotiation process – termination of the 6:30 AM, 6:45 AM, 6:50 AM, and 6:55 AM CWS in violation of the 9-5-2001 MOU, the 2001 CBA, and the law (including the 1982 WSA)

2) Other contract violations:
    a. Management did not negotiate in good faith

    b. Management did not raise the negotiability issue in a timely fashion (early stages)

    c. Management failed to provide a written rationale for the nonnegotiability claim

    d. The employees are receiving disparate and inequitable treatment

What is the purpose of this hearing?

The purpose of the hearing is to clarify the arguments and the facts, in order to resolve the grievance/arbitration. A substantial written record already exists, and many documents have been introduced.

Now that the Negotiability Appeal has been decided, many of the matters that were in contention have now been clarified.

Requested Remedy/Relief

In our February 26, 2004 Arbitration Brief and our March 11, 2004 Arbitration Rebuttal, we respectfully requested that the Arbitrator grant the following relief:

1. Issue a finding that Management violated the following sections of the collective bargaining agreement:
    a. Article 12, Section 1: Requirement to negotiate in good faith
    b. Article 12, Section 8: Timely declarations of non-negotiability
    c. Article 12, Section 8: Providing a written statement of non-negotiability rationale
    d. Article 6, Section 5: Employees to receive equitable treatment

2. Instructing the appropriate Management official to sign a "posting" acknowledging the violations, and committing to not repeating them in the future.

3. "Status quo ante": Ordering that the negotiated September 5, 2001 work schedule agreement be honored and the previous schedules restored, ~~pending the decision on the negotiability appeal that is before the FLRA. If the FLRA finds for the Union, then the previous schedules and work schedule agreement shall continue to remain in affect, but if the FLRA finds for Management, then Management's July 28, 2003 schedule change may be reinstituted~~.

Violation #1

Regarding the first charge, the Union's argument is simple:

- The WSA of 1982 sets the rules for CWS
- Congress intended CWS to be fully negotiable, and not subject to Management's Rights under 5 U.S.C. 7106
- The only way to terminate a CWS is to either negotiate the termination with the Union (e.g., the Union agrees or chooses not to respond) or to have an order from the FSIP (after proving "adverse impact")
- Management did not have the agreement of the Union to terminate the CWS
- Management did not have an order from the FSIP (Management did not even go to the FSIP) to terminate the CWS
- Therefore, the CWS should continue

5 U.S.C. § 6131(c)(3)(D) [the 1982 WSA] states:

(D) Any such schedule may not be terminated until—

(i) the agreement covering such schedule is renegotiated or expires or terminates pursuant to the terms of that agreement; or

(ii) the date of the Panel's final decision, if an impasse arose in the reopening of the agreement under subparagraph (A) of this paragraph.

July 3, 2001 CBA:

Article 26, Section 1 (last paragraph):
Where the provisions of this Article describe procedures for Union/Management Councils to develop Flexitour and Alternate Work Schedules, it is understood that Management or the Union may also make proposals relating to tours and Alternate Work Schedules and establish policies through traditional Union-Management bargaining methods. Each office will work out a local agreement through its Union/Management Council including the availability of each plan and the distribution of available slots among interested employees.

Article 26, Section 3b:
Each location will maintain the status quo unless the Union/Management Council at each location sets the following:

(1) The earliest and the latest time an employee may work;
(2) The lunch period; and
(3) The core time (that time during which each employee must be present for work).

September 5, 2001 Seattle MOU:

This agreement is subject to all provisions in the Agreement Between Passport Services and the National Federation of Federal Employees – Local 1998, dated July 3, 2001; hereafter referred to as the Agreement. In particular, Article 26 of the Agreement covers procedures, requirements for alternative work schedule (AWS) plans, types of schedules, and modification or restrictions of AWS plans and compressed schedules.
This local agreement is subject to change to comply with any future national agreement between Passport Services and NFFE, National Union Management Partnership agreements, or directives by Passport Services in conformity with Article 12 and 26 of the Agreement.
….
The earliest start time for any employee on the compressed schedule is 6:45 AM…. Two limited exceptions to these restrictions will be allowed for Denise Sleister and Sandi Gaston to work either a 6:30 AM – 4:00 PM (30 minute lunch) or 6:30 AM – 4:15 PM (45 minute lunch) schedule, subject to the other conditions in the Agreement. These exceptions are limited to these two employees. If either one drops from or is removed from the compressed schedule, the slot will no longer be available.
….
Compressed 9 hr day
6:45 – 4:30 (45 minute lunch)
6:45 – 4:15 (30 minute lunch)
7:00 – 4:30 (30 minute lunch)
7:00 – 4:45 (45 minute lunch)
7:15 – 4:45 (30 minute lunch)
7:15 – 5:00 (45 minute lunch)
7:30 – 5:00 (30 minute lunch)

The Union's argument boils down to this:

- Management agreed to the 9-5-2001 Seattle MOU and then broke its word, in violation of the contract and the law.
- The law allows Management to seek to terminate CWS if there is an adverse impact, but Management is only given two options – not three.
- These options are to either bargain the termination with the Union, or have the FSIP order the termination.
- There is no third option – unilateral termination.
- Therefore, Management violated the law by terminating the CWS without either the agreement of the Union or an order from the FSIP.

Compressed Work Schedules	FLRA	Arbitrator	FSIP
Type of case	Negotiability Appeal	Contract/Law Violation	Adverse Agency Impact
Question considered	Are the proposals negotiable (lawful)?	Was the contract/law violated?	Is the schedule wasting money?
Authority to order	Proposals are negotiable (yes or no), Management has duty to bargain (yes or no).	Compliance with contract/law, or finding that no violation took place.	Termination or continuation of work schedule.
Union's Argument	• CWS proposals are negotiable. • Adverse agency impact arguments should be presented to the FSIP.	• The law (e.g., 5 U.S.C. § 6131), CBA, & MOU have been violated. • Adverse agency impact arguments should be presented to the FSIP.	• No adverse agency impact. • Any increased costs are manufactured by Mgmt.
Management's Argument	• MOU causes adverse agency impact. • Interferes with Management Rights.	• MOU causes adverse agency impact. • Interferes with Management Rights. • Negotiability Appeal constrains Arbitrator's authority.	• MOU causes adverse agency impact.
Ruling for the Union means:	• The Union's proposals are lawful. • Management must negotiate with the Union.	• Management must honor its agreements. • Management must comply with law, CBA, & MOU. • Morale improved, AWS purpose fulfilled.	• There is no adverse agency impact and the schedules may continue.
Ruling for the Union does NOT mean:	• Management must honor MOU (Arbitration decides). • There is no adverse agency impact (FSIP decides). • Management cannot terminate the schedule (can still go to FSIP).	• There is no adverse agency impact (to be decided by FSIP). • Management's hands are tied and they are unable to terminate the schedule (can still go to FSIP).	• The Union cannot propose a 6:30 AM CWS again.
Ruling for Management means:	• There would have been no obligation to bargain. • The Union's proposals would have been declared unlawful.	• Delete Art 26, Sec 3b. • Delete Art 26, Sec 1 last sentence: no need for MOU. • Can terminate all CWS.	• There is an adverse agency impact and the schedules may be terminated.

Role of the FSIP in terminating a CWS

From OPM Guidance "Negotiating Flexible and Compressed Work Schedules":

> If the head of an agency finds adverse agency impact and determines not to establish a particular flexible or compressed work schedule, or where a schedule is already established, not to continue that schedule, the agency and the union must negotiate over that determination. If an impasse is reached, either party may ask the Panel for assistance. The F&CWS law gives the Panel exclusive jurisdiction over the resolution of negotiation impasses concerning decisions not to establish or to terminate a and 5 U.S.C. § 6131(c)(3)(B).
>
> When a negotiation impasse is reached over the agency head's determination to terminate an already established schedule because of adverse agency impact and either party asks the Panel for assistance, the *status quo* must be maintained. The head of the agency may not terminate the schedule unless the collective bargaining agreement expires or until final action is taken by the Panel. 5 U.S.C. § 6131(c)(3)(D). The Panel is obliged to promptly consider the impasse and to rule in favor of the agency if its determination is supported by the evidence. 5 U.S.C. § 6131(c)(3)(C).

5 U.S.C. § 6133 (b) (1) The Office shall provide educational material, and technical aids and assistance, for use by an agency in connection with establishing and maintaining programs under this subchapter.

2004 FSIP Cases

2004 FSIP Case	CWS?	Ruling: Management or Union
04 FSIP 005	Yes	Union
04 FSIP 007c	Yes	Split (mostly for Management)
04 FSIP 009	No	Management
04 FSIP 018	No	Management
04 FSIP 019	No	Management
04 FSIP 026	Yes	Management
04 FSIP 029	No	Management
04 FSIP 035	No	Management
04 FSIP 041	No	Management
04 FSIP 042	No	Union
04 FSIP 045	No	Split (mostly for Management)
04 FSIP 049	No	Management
04 FSIP 062	No	Management
04 FSIP 063	Yes	Management
04 FSIP 067	No	Declined (Negotiability Issues)
04 FSIP 076	No	Management

16 Cases
11 for Management
2 Split decisions – mostly for Management
2 for Union
1 declined due to negotiability issues

13 out of 15 decisions in 2004 for or mostly for Management = 87% for Management

Violation #1: Grievance/Arbitration History

July 25, 2003: The Union filed a grievance that "concerns the Seattle Passport Agency Management's decision to unilaterally change the work schedules of bargaining unit employees in violation of the Agreement and the law, and by means that are in violation of the Agreement and the law". The Union asks in its requested relief that "Management rescind its plan to change the start times to 7:00 AM on July 28th outlined in its June 30th memo", "agree to honor its agreement of September 5, 2001 and abandon its unnecessary attempts to change employees' schedules", and that if "Management continues to insist that there is a need for a change in the start times, then our requested relief is to have PPT/SE Management return to the bargaining table to negotiate any proposed changes as required by both the Agreement and the law."

August 25, 2003: Management's reply to the Union's grievance states that "the grievance and the relief requested by NFFE Local 1998 are denied" and Management refused to restore the previous schedules.

September 23, 2003: The Union invokes arbitration after the ADR session (which the Union requested in the July 23, 2003 Negotiability Appeal) failed: "This arbitration request concerns the Seattle Passport Agency Management's decision to unilaterally change the work schedules of bargaining unit employees in violation of the local Seattle Work Schedules Agreement, the Agreement Between Passports Services and NFFE Local 1998, and the law, and by means that are in violation of the agreements and the law. We are invoking arbitration in response to Management's denial of the Union's July 25, 2003 Grievance."

December 9, 2003: Due to personal considerations and the need for a new Department of State attorney to be hired, Susan Moorse and John Kim ask if the hearing can be postponed until January so that Paul Veidenheimer can come on board.

January 20-23, 2003: Due to personal considerations, the Union agrees to Management's proposal/suggestion to do written submissions for arbitration instead of a hearing.

February 26, 2004: The parties submit their briefs for arbitration. The Union notes that the "'tense' of the request has changed – from 'do not change' to 'should not have changed' – but the point is the same: Management should not have implemented this change while the process was continuing". Management does not dispute this in their brief. The Union argues that the law, the contract, and the 9-5-2001 MOU have been violated. The Union cites the Flexible and Compressed Work Schedules Act of 1982 (WSA of 1982), and also the fact that Management committed to abiding by the status quo during the May 15, 2003 UMC meeting. The Union requests a "status quo ante" order from the Arbitrator. Management argues in a footnote that "it is worth noting the Union's decision to go forward with this arbitration proceeding, despite the pendency of the negotiability appeal, represents a clear attempt to perform an end-around on an issue that already rests before the FLRA."

March 11, 2004: The parties submit their rebuttals for arbitration. Management does not argue that the Union cannot charge Management with Violation #1, and in fact Management adopts the Union's numbering of the violations. Management argues that they have "the right to act on its

rights reserved to it by law and as incorporated in the contract", referring to the Management's Rights provision of 5 U.S.C. 7106. Management also repeats its claim that "the negotiability appeal … substantially limit[s] the arbitrator's authority in this case". The Union responds by stating that it "reiterates that it is not asking the Arbitrator to rule on the negotiability of the Union's proposals."

September/October 2004: After the Negotiability Appeal ruling was issued, the Union sought to settle this arbitration case on the basis that the ruling so strongly supported the Union's position that there was not any need for the arbitration, at least as far as the overriding matter of Violation #1 was concerned. Management responded that the ruling did not order Management to restore the 9-5-2001 MOU. The ruling only determined that the Union's proposals (including maintaining the 9-5-2001 MOU) were lawful and negotiable, and that Management must bargain with the Union over these proposals. However, the Union never sought an order from the FLRA to order Management to restore the 9-5-2001 MOU since that is not the role of the FLRA in a negotiability appeal. The order to restore the 9-5-2001 was the goal of the grievance/arbitration. The point that the Union was making in attempting to settle the case was the same arguments Management made in the grievance/arbitration were dismissed by the FLRA, and the FLRA spelled out in no uncertain terms that the lawful procedures for terminating a CWS were not followed by Management. Respectfully, we did not believe that Management had any arguments left.

In order to support their claim that Management did not commit alleged Violation #1, Management would have to convince the Arbitrator that the FLRA's interpretation of the laws pertaining to CWS was incorrect, and that the facts cited by the FLRA were erroneous.

October 6, 2004: The Union's final settlement offer was this:

- The Union withdraws the grievance and arbitration.
- Management agrees to honor the September 5, 2001 Seattle Work Schedule Agreement and restore the Seattle employees to the schedules that were agreed to, including the 6:30 AM and 6:45 AM arrival times.
- Management agrees to pay all of the costs of the arbitration.
- Regarding Article 22, Section 4 of the contract, Management agrees that the costs of this arbitration will count in the 12 month period that ended on July 3, 2004.
- Management agrees that any proposed changes in schedules at the various Passport Agencies will be made in advance, and in writing.

October 7, 2004: Management rejected this offer, on the basis that honoring the 9-5-2001 MOU would result in increased costs to the Agency:

- The end result [of supervisors opening the office at 6:30 AM] would be that a supervisor on an 8-hour schedule who started work at 6:45 or 6:30 AM would have to work overtime several days a week to be available to handle supervisory or internal controls duties until 4:00 PM.

- This [option of honoring the 9-5-2001 MOU but locking employees out when the FPM was not present] would be a waste of Government resources to have several employees wait in the hall for 15 to 30 minutes for weeks out of the year.

Note: Management is continuing to cite "adverse agency impact" as the basis for refusing to comply with the law, even though the FLRA ruling stated that these arguments must be submitted to the FSIP, and that the FSIP would be the appropriate authority to order termination on this basis.

Current Status: the parties have agreed that we are at an impasse, and Management has scheduled a mediation session and has indicated that it is planning on going to the FSIP to terminate the schedules based on adverse agency impact.

60 FLRA No. 34: The FLRA rules that the Union's proposals are negotiable

The August 17, 2004 FLRA ruling in NFFE Local 1998's Negotiability Appeal supports our position that this matter concerns the termination of Compressed Work Schedules:

> Pursuant to the parties' collective bargaining agreements at the national and local levels, eight compressed work schedules were available for use at the Agency. The Agency terminated the three schedules that had the earliest possible start times. *See* Response at 27-28. The proposals at issue in this case were submitted in response to the Agency's termination of those three compressed work schedules. *See* Record at 2; Statement of Position (SOP) at 1; Response at 27-28.
>
> After filing the petition for review in this case, the Union filed a grievance challenging the Agency's termination of the compressed work schedules on the grounds that the Agency "unilaterally change[d] the work schedules of bargaining unit employees in violation of the [a]greement and the law[.]"

The Union was only bargaining over work schedules for Bargaining Unit Employees:

> The Union argues that the proposals concern only unit employees and not supervisors. *See* Record at 2; Response at 46. Because the Union's explanation is consistent with the wording of the proposals, and in the absence of any wording in the proposals that pertain to supervisors, we adopt the Union's explanation.

The procedures for terminating compressed work schedules are outlined in the WSA of 1982, and they must be followed:

> In this case, the parties bargained and entered into a collective bargaining agreement providing for the use of a compressed work schedule and establishing several different compressed work schedules. The Agency terminated three of the eight schedules, which prompted the Union to submit its proposals seeking either to retain all of the existing schedules or negotiate several alternatives.
>
> Our review of the Work Schedules Act demonstrates that where, ***as here,*** the agency seeks to terminate a compressed work schedule, ***the procedures of § 6131(c)(3) of the Act must be followed***. As described more fully in the Act's legislative history: *[emphasis added]*
>
> > Paragraph (3) of subsection (c) allows an agency at any time to reopen a collective bargaining agreement to seek termination of a schedule if the agency determines that the schedule is having an adverse impact. The agency must attempt **[v60 p144]** to negotiate with the exclusive representative over the question of termination. It is expected that the agency will consider a less drastic alternative to termination if that is possible. Any modification to the schedule is subject to the normal collective bargaining process, the authority of which resides in other provisions of the Code. If, however, the parties reach an impasse over

> termination, the impasse shall be presented to and resolved by the Panel. The burden again is on the agency to show that the schedule has caused an adverse agency impact. If a sufficient showing is made, the Panel must uphold the agency decision to terminate. The Panel must rule on the impasse within 60 days of its presentation. Finally, an agency may not terminate a schedule until the agreement covering such schedule is renegotiated, expires or terminated pursuant to the agreement or where an impasse arose in the reopening of the agreement, the date of the Panel's final decision.

Management's termination of the 6:30 AM, 6:45 AM, 6:50 AM, and 6:55 AM CWS was in violation of the law because they did not comply with 5 U.S.C. § 6131(c)(3):

> The arguments that the Agency makes, including those pertaining to the effect of the proposals on supervisory personnel, appear to be based on a claimed adverse agency impact. In this regard, the Agency contends that the proposals would preclude proper supervisory coverage of employees in the performance of adjudication of passport applications, and would require the Agency to hire more supervisors to ensure such supervisory coverage. As these arguments appear to relate to the potential adverse impact of the compressed work schedules on the Agency's operations, we construe them as claims under 5 U.S.C. § 6131(c)(3) that the schedules would cause an adverse agency impact. The Authority does not resolve claims concerning adverse agency impact. Rather, as described above, the claims are more appropriately addressed by the Panel if, after bargaining, the parties reach an impasse in their negotiations. **[n7]** *See* 5 U.S.C. § 6131(c)(3).

As far as the Negotiability Appeal decision is concerned, what is the bottom line?

The existence and the continuation of the 6:30 AM, 6:45 AM, and other pre-7:00 AM CWS is allowed by the law. There are no legal arguments that undermine or negate their existence or continuation. The only legal way to terminate these schedules is to either negotiate the termination with the Union, or to have an order from the FSIP.

Management's response to Violation #1

Management's arguments in response to **Violation #1** include the following:

1) Adverse Agency Impact
2) The Negotiability Appeal process severely constrains the ability of the arbitrator to decide this case
3) Not an elimination of schedules, simply a change in start time
4) Management's "reserved rights" and right to determine internal security practices are controlling

1) Adverse Agency Impact: Management has repeatedly argued that the September 5, 2001 Seattle Work Schedule Agreement would have an adverse agency impact (see the August 25, 2005 Management denial of the grievance, the November 6, 2003 and December 10, 2003 Management statements on the Negotiability Appeal, and the February 26, 2004 and March 11, 2004 Management arbitration briefs). "Adverse agency impact" is defined by 5 U.S.C. 6131(b) as: "a reduction of the productivity of the agency", "a diminished level of services furnished to the public by the agency", or "an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule)". Management has never cited the 2nd type of adverse agency impact and appears to be relying on the 3rd (and possible the 1st) type of impact.
    a. *This argument does not address what is being grieved.* These arguments should be made to the Federal Service Impasses Panel (FSIP). That is what the law requires – 5 U.S.C. 6131(c) – and what the Authority stated in 60 FLRA No. 34. If the agency determines that there is an adverse agency impact, then the agency may reopen the work schedule agreement. During bargaining, if an impasse is reached, "the impasse shall be presented to the Panel". There is no option for either declaring the issue non-negotiable or unilaterally eliminating the schedule. There are only two options under the law for eliminating the work schedule if there is an adverse agency impact: 1) the Union agrees to the termination [6131(c)(3)(D)(i)], or 2) the Panel orders the schedule to be terminated [6131(c)(3)(D)(ii)].
    b. This argument is irrelevant – even if it is true that there is an adverse agency impact (and in fact that claim is false) that has no bearing on whether or not Management violated the law and the contract and unilaterally terminated compressed work schedules. The law contemplates work schedules causing an adverse agency impact and the continuation of this state of affairs until either agreement is renegotiated or until the FSIP orders the termination of the schedule on the basis of the adverse impact. There are numerous examples in the FSIP decisions of schedules that were in existence and which were causing an adverse impact continuing until the FSIP ordered their termination.
    c. Management made these adverse agency impact arguments to the FLRA in the Negotiability Appeal, and the FLRA dismissed these arguments. The FLRA Chairman disagreed so strongly with Management's position that he went beyond the majority decision that ruled for the Union and argued that the entire appeal

should be dismissed and the parties should be making their arguments before the FSIP.

d. Allowing these arguments to be made or considering these arguments in the Arbitration process gives Management three "bites at the apple" – 1) the Negotiability Appeal, 2) the grievance/arbitration, and 3) the Impasse hearing. This is not fair to the Union. Management is making the same arguments (adverse impact) to the FLRA, the Arbitrator, and the FSIP. The Union has a separate argument for each authority.
e. The September 5, 2001 MOU has no adverse agency impact. In fact, there is a benefit to the agency in terms of productivity, services furnished to the public, and decreased costs of agency operations.
f. Any increased cost of agency operations or reduction in productivity cited by Management is unrelated to the September 5, 2001 MOU. Locking out the employees prior to 7:00 AM or paying supervisors overtime in order to provide supervisory coverage are examples of waste and mismanagement. According the Department of State's Office of Inspector General's website and brochure, these instances of waste and mismanagement should be reported to the OIG. The bottom line is that if Management chooses to waste resources and mismanage the office in order to create an adverse impact, then that is the fault of Management, not the September 5, 2001 MOU.

2) The Negotiability Appeal process severely constrains the ability of the arbitrator to decide this case: Management made this argument repeatedly throughout the process. However, now that the FLRA ruled for the Union in the Negotiability Appeal, this is no longer a factor.
3) Not an elimination of schedules, simply a change in start time: Management has made the argument to the FLRA in the Negotiability Appeal, and in their response to the Union's settlement offer Management appears to be hinting at repeating it. The FLRA already ruled that this issue involves the elimination of compressed work schedules and that the Work Schedules Act of 1982 governs this matter. Therefore, Management's arguments have already been rejected. Management has repeatedly erred by citing the authority to move arrival times for Flexible schedules under 5 U.S.C. 6122. However, as the Authority explained in its decision, Compressed Work Schedules are governed by 5 U.S.C. 6127, not 5 U.S.C. 6122. Also, see the OPM Guidance: "The provisions of section 6122(b) do not apply to employees under a compressed work schedule."
4) Management's "reserved rights" and right to determine internal security practices are controlling: Management has made these arguments to the FLRA in the Negotiability Appeal, and the FLRA already ruled that the Work Schedules Act of 1982 governs this matter. The FLRA ruled that Management must bargain over the continuation of the status quo (the September 5, 2001 MOU) and that the status quo was lawful: "Therefore, the Agency's claim that the proposals violate various provisions of § 7106 of the Statute provides no basis for finding that the proposals, which concern the termination of alternative work schedules, are contrary to law". Management's 7106 arguments have been rejected.

REQUESTED REMEDY (Violation #1)

The Union respectfully requests that the Arbitrator find that Management did terminate the 6:30, 6:45, 6:50, and 6:55 CWS in Seattle, did unilaterally abrogate the 9-5-2001 MOU, and did violate the law and the contract by taking these actions.

We ask that the Arbitrator impose what we believe is the appropriate remedy: an order to Management to honor the 9-5-2001 and return employees to the status quo ante.

We also ask that the Arbitrator require Management to issue a signed posting acknowledging this violation, and committing to not taking these actions in this manner in the future.

We believe that there is precedence for a "status quo ante order" even if we were not dealing with CWS and the stringent constraints on Management's unilateral actions imposed by the WSA of 1982. From our March 11, 2004 Arbitration Rebuttal:

> In 55 FLRA No. 157, the Authority ruled that "it is immaterial that the [local office] … may simply have followed the instructions of its national office …." in a case where a local Memorandum of Understanding (MOU) was being violated. The FLRA ruled in 32 FLRA No. 124 that Management must "cease and desist from … unilaterally instituting any change in the starting and quitting times of its employees without affording the [Union] … the opportunity to negotiate with respect to any proposed change". In 46 FLRA No. 41, the FLRA upheld a Union's Unfair Labor Practice charge against Management when Management changed the work schedules of two employees without bargaining with the Union – and the FLRA ordered Management to return to "status quo ante" and uphold the original schedules until the bargaining was complete (even though changing the tours of duty was deemed a Management Right).
>
> Considering these rulings from the FLRA, it would not be reasonable to conclude that the FLRA would find a "status quo ante" order from the Arbitrator to be in excess of his authority. Any exception that Management would consider filing on an award by the Arbitrator would have to be based on the Arbitrator exceeding his authority or a violation of the law, and those issues do not apply.

Violation #2a

The Union charges that Management did not negotiate in good faith, which is a violation of Article 12, Section 1 of the CBA.

The Union bases this charge on the following seven topics:

- Not negotiating with the Union over the ground rules for bargaining
- Failing to explain what objections Management had to the ground rules
- Not empowering the negotiators at the table with the authority to make agreements
- Being unwilling to even consider the Union's 6:30 AM and 6:45 AM proposals
- Not being forthcoming with the Union regarding the impetus for the proposed change
- Failing to propose the "suggested guidelines" from the July 17, 1997 memo when negotiating the July 3, 2001 Agreement
- Failing to provide information requested to support a grievance

Violation #2b

The Union charges Management with violating Article 12, Section 8 of the CBA by not abiding by this requirement:

> If management alleges a union proposal is nonnegotiable, it will raise the issue of negotiability in a timely fashion in the early stages of the negotiations process.

Regarding this charge, the Union's argument is straightforward:

There were 53 days from beginning of negotiation process to the date that Management raised the issue of negotiability, which was the very last day of negotiations.

April 22 Management proposal (did not raise issue of negotiability)
April 23
April 24
April 25
April 26
April 27
April 28
April 29
April 30
May 1
May 2
May 3
May 4
May 5
May 6 Union counter-proposal
May 7
May 8 Union-Management Council Meeting (did not raise issue of negotiability)
May 9
May 10
May 11
May 12
May 13
May 14
May 15 Union-Management Council Meeting (did not raise issue of negotiability)
May 16
May 17
May 18
May 19
May 20
May 21
May 22
May 23
May 24

During this time, there were informal discussions between the Union and Management

May 25
May 26
May 27 First negotiation session: Management stated that the Union's proposal to maintain the status quo was negotiable
May 28
May 29
May 30
May 31
June 1
June 2 Second negotiation session (did not raise issue of negotiability)
June 3
June 4
June 5
June 6
June 7
June 8
June 9
June 10
June 11
June 12 Third negotiation session (did not raise issue of negotiability)
June 13 Fourth negotiation session: Management raised the issue of negotiability at the end of the meeting, and subsequently refused to bargain with the Union.

Management essentially admitted this violation when it declared in its March 11, 2004 Arbitration Rebuttal the following statement:

> The Union alleges that Management implemented the proposed change prior to the completion of the negotiation process. *This is not true – the negotiation process had been completed.* Management negotiated in good faith with the Union following an attempt to reach consensus through the Union-Management Council. When Management issued its declaration of nonnegotiability, there were no unresolved negotiable proposals that remained on the bargaining table. *Consequently, Management made its declaration of nonnegotiability, provided the basis for its declaration, and advised the Union of its planned implementation date. At that point, the negotiation process was completed. (emphasis added)*

It is worth noting that the contract states that "[i]f the Union alleges a management proposal is nonnegotiable, it will advise management immediately". So, the contractual requirements on both Management and the Union are separate and apart from the FLRA requirements. They do not replace those requirements – again, they cannot replace them. So, Management's reliance on the procedures of the FLRA's negotiability appeal process as a defense against the charge that Management violated the collective bargaining agreement is misplaced. Management is not being charged with violating the negotiability appeals process or procedures.

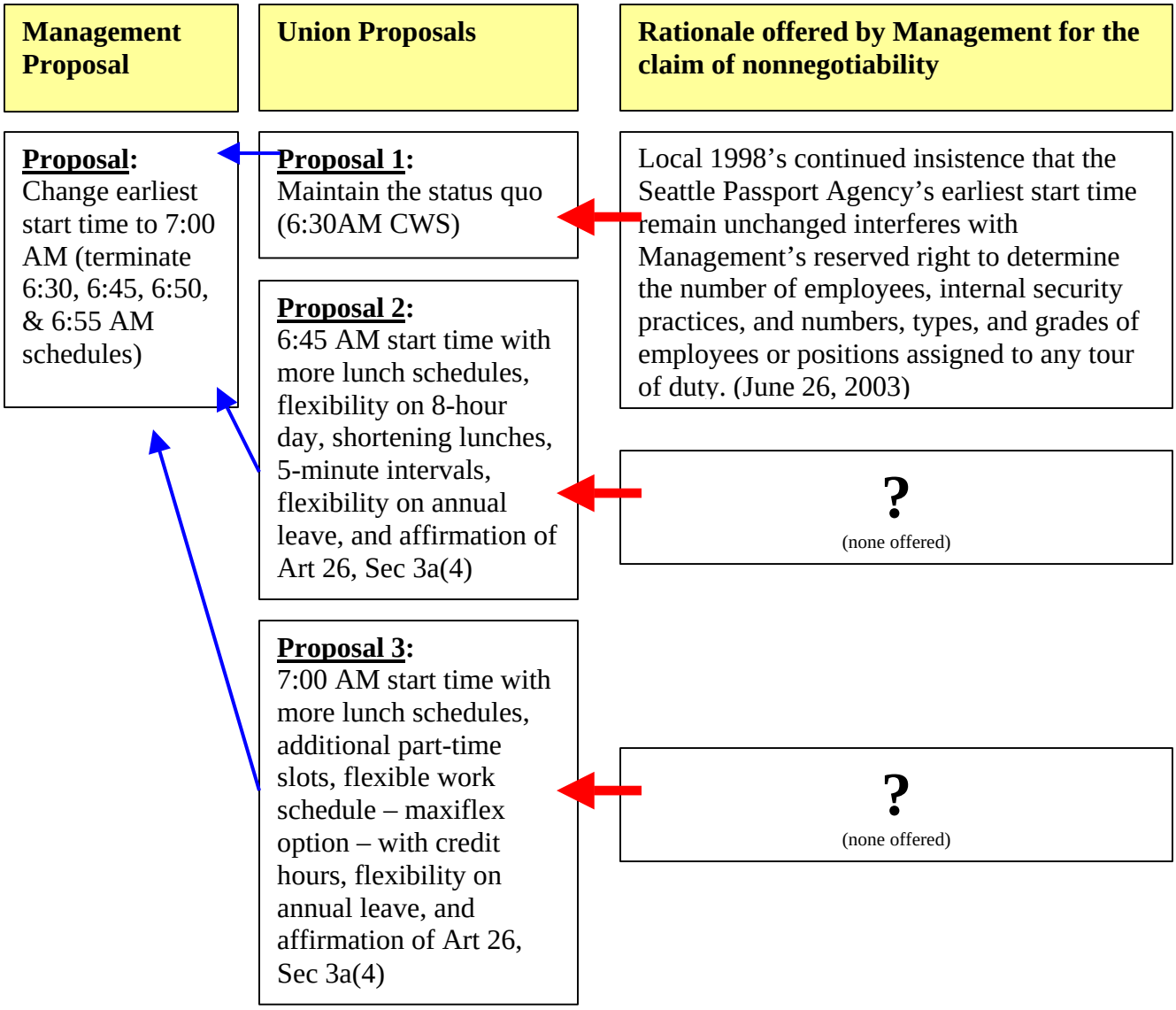
Management's worry that raising this issue early in the process will clog the negotiability appeals mechanism is not borne out by the history of negotiations between the parties. By bringing up the issue early on, one side has a better idea of the context in which the other side is

viewing an issue. As previously stated, this very case demonstrates the opposite effect takes place when the issue is not brought up in a timely basis. The Union never had any intention of needlessly or prematurely filing a Negotiability Appeal. This is borne out by the Union's proposed ground rules (Attachment L), and by other statements by the Union that the Union did not even believe that a Negotiability Appeal was the appropriate forum to resolve the issue (see the memo from Union VP Rob Arnold on June 30, 2003 – Attachment T – and the July 1, 2003 memo from Bill Beardall attached to the Union's February 26, 2004 Arbitration Brief).

Violation #2c

The Union charged Management with violating Article 12, Section 8 of the CBA, which requires that, "[u]pon written request, the Union will be provided with a written statement of the rationale for a claim of nonnegotiability". This is a contractual requirement.

Management's June 26, 2003 written statement of the rationale for the claim was based on "Local 1998's continued insistence that the … start time [of 6:30 AM] remain unchanged", yet Management had received in writing proposals from the Union that had different start times.



Violation #2d

Management was charged by the Union with violating Article 6, Section 5 of the CBA because the bargaining unit employees at the Seattle Passport Agency have received disparate and inequitable treatment vis-à-vis:

- Another bargaining unit employee at the same location who is allowed access into the office without a supervisor present and who is given alarm code access
- Employees in other offices who are allowed access into the office without a supervisor present and who are given the alarm code access
- Supervisors and managers at the Seattle Passport Agency