**U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**
451 7th Street, SW
Washington D.C. 20410

Office of the Chief Human Capitol Officer
Pay, Benefits and Retirement Division

November 21, 2018

TO: Ashaki Robinson, Executive Vice President, AFGE National Council of HUD Locals #~~222~~

FROM: Lorraine Shackleford, Director, Pay, Benefits and Retirement Division

SUBJECT: Response to Grievance of the Parties – (Maxiflex and Holiday Pay)

The purpose of this memorandum is to respond to the Grievance of the Parties filed on October 22, 2018 regarding the WebTA update bringing the program into alignment with applicable law, government-wide regulations in place prior to the enactment of the current collective bargaining agreement (CBA), and other appropriate authorities from outside of the Department, such as the Comptroller General.[1] The grievance was filed according to the CBA between the U.S. Department of Housing and Urban Development (HUD) and the American Federation of Government Employees (AFGE), Article 51, *Grievance Procedures*, Section 51.15.

In your grievance you stated you were not requesting to meet to discuss informal resolution under CBA 51.15(2). As the Deciding Official, I have carefully reviewed and considered all the documents relating to the grievance. Your grievance also claimed the agency engaged in an unfair labor practice (ULP).

You have decided to address both your alleged contract violation as well as your alleged statutory violation through the negotiated grievance process contained in CBA Article 51 and are forgoing having this concern processed as a ULP before the Federal Labor Relations Authority.

**The Agency has not violated the Collective Bargaining Agreement**

You stated in your grievance that the agency violated CBA Section 16.03(2) by not allowing certain employees who have Maxiflex schedules from receiving the number of hours for the Holiday that they were scheduled to work. CBA Section 16.03(2) does not mention holiday pay. The agency has not proposed any changes to Section 16.03 and continue to provide Maxiflex schedules to employees.

[1] Section 1.01(4) of the CBA states, "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."

Prior to filing the grievance, you requested an informational meeting with management, which was held on October 18, 2018. In that meeting were yourself, Linda Hawkins, Director of Policy of the Chief Human Capitol Officer, and Ginger Richardson, Branch Chief, Employee and Labor Relations. In your grievance you stated in paragraph 14 that Ms. Hawkins admitted that the Maxiflex provisions of the contract did not conflict with state or federal[sic] regulation and that repudiation of the contract was required by the OPM Handbook on Alternative Work Schedules. This is not an accurate representation of the words that were said during that meeting. Ms. Hawkins did state she would continue to review the law and regulation but did not state that the contract did not conflict with regulation.

In paragraph 3 of your grievance you stated "Maxiflex schedules are work schedules with a fixed starting time." This attaches an incorrect definition of fixed schedule to Maxiflex in an effort to describe something that would better align with a Compressed Work Schedule (CWS) description. The assertion in your grievance about fixed starting times is unsupported by the work schedule requests attached to the grievance. Those documents demonstrate that employees on Maxiflex schedules other than 4/10 or 5/4/9 select both the starting times, which in those examples vary on different days, and the number of hours worked each day. In any event, a fixed starting time does not prescribe a Maxiflex schedule. As defined in CBA Section 16.02 (4)(b), a Maxiflex schedule allows variation in the number of hours worked on any work day or the number of hours in each work week. CBA Section 16.03 (2)(a) further explains the flexibility within the limitation for employees to select their schedule. The variation of selection defines the flexibility for Maxiflex, not fixed arrival times. These aspects of the Maxiflex work schedule are distinguishable from compressed work schedules.

Paragraph 6 of your grievance states the Agency credited holiday pay for the hour's employees were scheduled to work on a federal holiday. Any prior instance where Management provided greater than 8 hours of Holiday pay to an employee on a Maxiflex Schedule was done erroneously and does not negate a legal or regulatory requirement.

Paragraph 12 of your grievance states that Maxiflex under the current CBA is a compressed work schedule. CBA Section 16.03(2)(a) incorrectly lists the 5/4/9 and 4/10 CWS as examples of Maxiflex Schedules. This erroneous linkage does not allow the Union to classify a Maxiflex Schedule as a CWS. The 5/4/9 and 4/10 schedules meet the definition of a compressed work schedule set forth in the Federal Employees' Flexible and Compressed Work Schedule Act of 1982. There are three types of permissible compressed work schedules, defined as "(1) 4-day week (4 days of 10 hours each), (2) 3-day week (3 days of 13 hours and 20 minutes each), and (3) 5-4/9 plan under which employees are required to complete the 80-hour biweekly work requirement in 9 days (for example, eight 9-hour days and one 8-hour day)."[2] The examples of Maxiflex schedules provided in Example 1 and Example 2, Section 16.03(2)(a) are not compressed work schedules and employees on such schedules may not receive more than eight hours of holiday leave on a holiday.

[2] Comptroller General of the United States, B-179810, December 4, 1979.

This interpretation of the Federal Employees' Flexible and Compressed Work Schedule Act of 1982 is required by the law itself, applicable government-wide regulations in effect prior to the date of the CBA, and OPM's interpretation of the law as expressed in its guidance and authoritative legal decisions. See, for example, FLSA decision F-5729-05-01 (2002), wherein OPM defines Maxiflex as "a type of flexible work schedule that contains core hours on fewer than 10 workdays in the biweekly pay period and in which a full-time employee has a basic work requirement of 80 hours for the biweekly pay period, but in which an employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization."

To the extent Section 16.06(2)(c) provides for employees on such schedules to receive more than eight hours of holiday leave on a holiday, it is contrary to law, government-wide regulation, and other appropriate authorities, such as decisions of the Comptroller General. The situation may occur where an employee on a Maxiflex schedule coded in WebTA, as Variable Workweek or Variable Workday has elected to work a schedule that is the same as someone on a 5/4/9 or 4/10 CWS. However, since the employee chose to be on a Maxiflex schedule, the employee is provided the benefits of a Flexible Work Schedule under law and regulation and is thus required to be governed by the applicable rules and regulations. Employees who elect to work a CWS either on the 5/4/9 or 4/10 are the ones correctly coded and authorized to receive greater than 8 hours of Holiday Pay IAW 5 U.S.C. § 6128.

**The Agency has not committed an Unfair Labor Practice**

You received an email notice to this effect on or about October 11, 2018. That notification did not constitute a repudiation of the CBA, as alleged in paragraph #7 of your grievance. Attempting to provide the benefit of greater than 8 hours of Holiday Pay to an employee on a Maxiflex schedule 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. Consistent with the FLRA decision in *GSA and NFFE,* 50 FLRA 136 (1995), HUD has "no authority to establish hybrid work schedules that borrow selectively from the authority for flexible work schedules and the authority for compressed work schedules in an effort to create a hybrid work schedule program providing unauthorized benefits for employees or agencies." Such benefit would be the granting of greater than 8 hours of holiday pay to employees on a flexible work schedule. Further outlined in *GSA and NFFE, id.*, the FLRA found that the Federal Employees Flexible and Compressed Work Schedule Act of 1982 "separately defines and authorizes flexible and compressed schedules, and that the two types of schedules have different requirements with respect to such matters as overtime, holidays, and night pay." They further found "that the Work Schedules Act is silent with respect to combining the two schedules. On the basis of these findings and the responsibility delegated to OPM to prescribe regulations necessary for the administration of flexible and compressed work schedules established under the Act," they adopted "OPM's interpretation of the Act as prohibiting such combination."

Therefore, CBA Section 16.06(2)(c) "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," is contrary to law because it authorizes the combination of work schedules in violation of the Work Schedules Act. As such, it is not enforceable under the Statute and Managements' refusal to honor Section 16.06(2)(c) does not constitute unlawful repudiation.

**The Requested Remedies Are Inappropriate**

As discussed above, your first remedy is contrary to law, government-wide regulation, and other appropriate authorities and is therefore denied. The second remedy requested is for attorney fees related to the preparation and conduct of the arbitration, as well as the full costs of the arbitration. This request for attorney fees does not meet the criteria for reimbursement under the Back Pay Act or any other waiver of sovereign immunity applicable to the Agency in this case. This aspect of the request is denied. Payment of costs for the arbitration is addressed in the collective bargaining agreement, at Section 52.04. No such costs exist, and this request is denied. Finally, the grievance seeks any other remedy available. This request is too vague to warrant a specific response and is denied.

However, in order to mitigate future negative impact by the holiday, OCHCO will notify supervisors to review employees' schedule to discuss options stay on a Maxiflex, or switch to a 5/4/9 or 4/10 CWS. Employees who choose to remain on a Maxiflex schedule may discuss upcoming holidays in advance with their supervisor. Supervisors are encouraged to approve temporary adjustments of work hours for the pay period that will accommodate an 8-hour holiday and still meet mission requirements.

If you are dissatisfied with my decision, arbitration may be invoked by the Union in accordance with Article 52 of the Collective Bargaining Agreement between HUD and AFGE.

CC: Dan Raymond, Employee and Labor Relations