QUESTIONS AND NTEU'S ANSWERS ABOUT THE 2012 ARTICLE 23 ALTERNATIVE WORK SCHEDULE AGREEMENT (July 20, 2012)

Q.1-- How much time does a manager have to approve an AWS request?

A- Under Article 23, Section 5.B.2, employees (Non-Campus) who have requested a new AWS "will be informed as soon as practicable, but no later than two (2) pay periods". Once approved, the schedule must be implemented the next pay period.

Q.2 ─ Can an employee who is working a "staggered work schedule" as defined by Section 2.E entitled to earn credit hours?

A. – No. A staggered work schedule is *not defined* as an authorized Flexible Work Schedule under Article 23. Section 2.D sets forth the three Flexible Work Schedules on which an employee is entitled to earn credit hours. They are: Flexitour with Credit Hours (Sec. 2.D.1); Gliding flexible work schedule (Sec. 2.D.2); and a Maxiflex work schedule (Sec. 2.D.3).

Q.3 ─ What remedy can we get from a grievance filed to enforce any of the following provisions of Art. 23:

- An employee currently on an AWS/CWS schedule is wrongly taken off of it; (Sec. 6);
- A manager does not give the employee a timely written explanation of why he was denied the right to earn or use credit hours; (Sec. 4A1);
- A manager refuses to let a new employee participate once he/she has finished formal training; (Sec. 5.A.2);
- Employees are improperly forced into or denied the right to make a temporary or permanent change to their schedule; (Sec. 5.G and 6.D & F);
- An employee is improperly suspended from his/her schedule; (Sec. 6);
- Management unilaterally changes AWS/CWS schedules; (Sec. 6 & 7);
- Recalled Seasonals are not allowed to return to their prior AWS/CWS arrangement. (Sec. 7E).

A. ─ If management violates an employee's AWS rights we can often get far more of a remedy than just asking that it cease and desist from the violation and restore the employee to his/her rightful schedule. For example, FLRA has upheld arbitration decisions granting the remedies below in factual situations similar to what we will encounter in AWS–

- Restore any leave the employee would not have had to take but for the violation (58 FLRA 549) For example, if any employee's request for a 4/10 schedule is denied, you could ask for a restoration of sick or annual leave the employee used for activities that the employee would have performed their RDO if the requested schedule had been approved, e.g., scheduled doctor's appointments, or volunteering at their child's school. Ideally, leave for those activities should be taken on the day that would have been the RDO while the grievance over the denial is pending. The employee should also keep records of nature of the activities to help establish that they could have and would have been scheduled on the denied RDO.

- give the employees credit hours that they would have earned but for the violation — even if the total exceeds the 24-hour carryover limit (64 FLRA 306 and 55 FLRA 219),

- reimburse him/her for any overtime, with interest, he/she would have worked but for the error (63 FLRA 157 and 59 FLRA 564),

- restore employees to positions, shifts, or tours the employee gave up or lost because of the violation (57 FLRA 126)

- compensate them for any shift differentials they would have received if there was no violation (61 FLRA 38), and

- give them retroactive holiday pay (58 FLRA 519).

For example, if an employee was forced to work a 5/4/9 schedule rather than a credit hours, we could request he/she receive overtime pay for the extra hour worked each day. Or, if the employee would have received overtime to perform the work on a straight-8 schedule--that he/she would have had off under a 5/4/9 or 4/10 schedule, we will ask that he/she be paid overtime for having been improperly required to work on a day he/she should have had off. (55 FLRA 553)

Commuting expenses are not generally compensable, but FLRA has yet to squarely address a case where an arbitrator orders an employee's commuting expenses reimbursed on the grounds that had his/her 5/4/9 schedule been approved he/she would not have had to commute on his/her day off. (66 FLRA 106)

Q.4 ─ What options will I have if the agency argues that some AWS/CWS practice I want to continue was never a past practice? (2C)

A ─ The term "past practice" has a specific legal meaning. Typically, both parties must have been aware of the practice, allowed the practice to continue for a significant period of time, and have otherwise acquiesced in it. We can expect management to object to certain practices we allege. However, we have the right to litigate whether the alleged practice meets the legal test

and thus must be considered a binding past practice. If management terminated or denied the practice incorrectly, it can be required to compensate the employee for any tangible harm done.

Assuming the AWS schedule qualifies as a "practice", and is not inconsistent with any provisions in Article 23, the chapter should submit it to NTEU National (c/o of Ken Moffett) to include in the list of practices we must submit to the IRS by October 1 under Section 2C, as one we wish to continue. We will send a specific call for that information in September.

As noted, a past practice must be consistent with the terms of Article 23 for it to be continued, under Section 2C. This includes any practices that management may wish to continue. For example, a practice that did not allow a particular group of employees to participate in certain AWS schedules that are now available to them under Article 23 would be inconsistent with Article 23 and could not be continued, even if the IRS included the practice on the list of practices

Q.5 ─ There is language in Section 4.A.1 that gives management discretion when I request to work credit hours. Does the phrase “if it determines” in that Section give management immunity from challenge or can I grieve the decision if I disagree with management?

A ─ It does not give management immunity, but generally if we are going to challenge management’s determination as to whether the employee should have been allowed to earn credit hours, we need more than a simple disagreement to prevail. First, we need to be able to show that the conditions for approving credit hours under Section 4A1(a) exist: there was work available to be performed and no logistical, safety or other factors prevented performing the work. Our case can be further bolstered by showing that similarly situated employees' requests were approved and/or by showing that the denial was motivated by illegal reasons, such retaliation for employee union activity, disparate treatment, a previously unknown unilaterally implemented policy, or even that the denial is evidence of a policy management has implemented without notice to NTEU and bargaining.

NTEU does not accept the argument that because there is no overtime to work, credit hours are always inappropriate. For example, an employee might ask to work an extra hour on Monday so that he/she can report to work an hour later the next day. Credit hours earned and used in the same week should rarely conflict with the appropriate, necessary, or available criteria. Remember that employees can ask for written denials and explanation for the denial of credit hours.

Finally, nothing in the contract authorizes management to restrict credit hours earning during peak periods. If it wishes to do so, it must meet the criteria of Sec. 6, which applies to all restriction efforts.

Q.6 ─ What can we do if a manager refuses to give an employee standing approval to work credit hours each week, e.g., two hours every Tuesday and Thursday as allowed under section 4?

A ─ The agreement gives management the discretion to enter into these written agreements. If a manager refuses, to challenge it, we must show that management abused its discretion or that their motivations were illegal (e.g., an illegal retaliatory motive). The best way to establish an abuse of discretion is by showing that standing approval was given to similarly situated employees.

Q.7 ─ Can we continue to work noncontiguous credits hours like we could under the former Art. 23? (Section 4.A.4(b))

A ─ Nothing in the agreement's language prohibits that. However, if the employee wants to work past 8:30 p.m. or even before 6:30 a.m. she would need the supervisor's approval pursuant to Section 4.A.4(b).

Q.8 ─ Can management use Sec. 5.A to force me off of my schedule because I move from one grade level in my position series to another, e.g., from an RO-11 to a RO -12?

A ─ No. Even if there is some "initial formal training" associated with the move, the employee can retain his schedule once the formal training is over. (Sec. 5.A.2)

Q.9 ─ What role does the NTEU chapter play, if any, in management creating a totally new or modified AWS pursuant to a disabled employee's request for a reasonable accommodation?

A ─ Chapters play a big role. While the individual employee is entitled to a reasonable accommodation if disabled, NTEU is entitled to advance notice and an opportunity to bargain if the accommodation provided changes working conditions. For example, suppose an employee was given permission to start work at 4 a.m. Management must inform us of that and give us a chance to bargain. We probably cannot bargain to block a reasonable accommodation unless it violates our contract or law. But, we might be able to use that incident to get other people the same benefit.

Q.10 ─ What is the difference between the terms "periodically" and "ongoing" as used in Section 5.B.1 and 2?

A ─ "Ongoing" means that the day one employee moves out of a schedule, another employee can move into it so long as a change in mid-pay period is possible. For example, one could not move from a credit hour schedule to a 5-4/9 in mid-pay period. The change would be effective at the beginning of the next pay period. In contrast, "periodically" permits management to delay the change so as to accommodate its scheduling practices. For example, if someone leaves a 5-4/9 schedule on a Friday, management could delay making the change until that normal time of the work cycle where it makes scheduling changes. If management argues it only makes scheduling decisions twice a year, we could disagree if we can prove that it makes changes more often. As far as we are concerned, whenever management makes changes to deal with

unexpected FMLA leave, an imbalance of work, or production problems, it can make these changes as well.

Q.11─ How much discretion does management have to disapprove a request for any of the reasons listed in Section 5.C, e.g., diminished level of service, insufficient coverage, or increased cost.

A ─ The burden is on management to prove that one or more of these criteria exist. The burden is not on the employee or the union to prove they do not exist. These three criteria come from the law and the case law shows that they are very hard to prove. For example, management has the burden of proof and its evidence cannot be speculative. The following excerpt is from an FSIP decision: "Having carefully considered the totality of the evidence presented in this case, I find that the Employer has not met its statutory burden. Its concerns with respect to a reduction in productivity and diminishment in the level of service to inmates are speculative. . . .In particular, the Employer's claim that the only institutions comparable to USP Leavenworth are the USPs in Atlanta and Lewisburg is unsupported by evidence confirming that their repair rates are higher than the rest of the institutions within the federal prison system. Further, there is a dearth of information to show any nexus exists between the asserted repair needs and CWS." (See 09 FSIP 62)

The Panel stressed the issue of tangible evidence versus management speculation again with these words, "The Employer's assertions, conclusions and worries are not supported by predictive evidence. As serious as its worries may be, the Act requires evidence. If Congress had intended to allow agencies to avoid trying alternative work schedules on the basis of worries and untested assumptions about impact, it would not have required evidence." (See 10 FSIP 84)

The Panel has also made clear its preference that the Employer test out a disputed schedule to generate actual evidence rather than base its case on speculation or projections, "In summary, while the adoption of the union's 4/10 proposal may have some affect on the Employer's ability to meet its service goals, in the absence of a trial period it is unclear whether this would meet the Act's standard of adverse agency impact. The parties can contribute to the success of the trial by further modifying the union's proposal through the additional bargaining that will occur as a result of this decision." (See 09 FSIP 59)

Q.12 ─ What does it mean in Sec. 5.C that he parties can discuss different approaches to the seating issue?

A ─ It means that we hope that the parties can work something out informally, but each reserves its legal rights, which in our case would mean we have the right to bargain over our demands unless the matter is covered-by a specific agreement.

Q.13 ─ Why cannot those employees on 5/4/9 or 4/10 work credit hours?

A ─ That was not our decision. OPM regulations prohibit the working of credit hours on a compressed work schedule. The Flexible and Compressed Work Schedules Act (5 USC Section 6120-6133), as interpreted by the FLRA, limits credit hours to flexible work schedules, as opposed compressed work schedules. OPM's AWS regulations incorporate this interpretation by prohibiting the earning and using of credit hours on a compressed work schedule.

Q.14 ─ What kind of a hardship qualifies under Sec. 5.G?

A ─ Because we do not have a formal definition of a "hardship" in Art. 23, it is likely that any arbitrator would be guided by the common meaning of the term in a dictionary. "Hardship" is not limited to the concepts in the Art. 15, Sec. 5 definition.

Q.15 ─ What does the following expression in Sec. 6 mean: "related to the abuse of or the integrity of the AWS agreement?"

A ─ It means that management will have to show a connection or nexus between the conduct incident and its ability to trust someone working an AWS schedule, particularly if it is difficult to assess whether the employee worked when he said he did. For example, an incident of credit card abuse would have no connection to AWS as far as we are concerned.

Q.16 ─ What does the following expression in Sec. 6 mean: "serious wrongdoing?"

A ─ This would have to be something for which the IRS Table of Penalties recommends an adverse action for the first instance of the violation. Similarly, if management has not asked TIGTA to investigate an allegation but is doing the investigation itself, we would not agree that it is potentially a "serious wrongdoing."

Q.17 ─ What does the expression "exigent circumstances" mean in Sec 6.E?

A ─ This is another term of art. It need not create an emergency as that term is used in labor law; however, Webster's defines it as something "requiring immediate attention."
Q.18 ─ Why cannot a temporary change in schedules be made for less than the two weeks cited in Sec. 6.E.5?

A ─ Generally, these schedules require a full pay period to play out. For example, an employee could not change from a 5/4/9 schedule to a 4/10 schedule in mid-pay period with some radical adjustment to ensure he works 80 hours that pay period.

Q.19 ─ What if management only proposes to make the Sec. 6.F reduction in my office/chapter?

A ─ In that case, NTEU would appoint the chapter president to negotiate over the proposal.

Q.20 ─ Does every dispute under this agreement have to go through the streamlined grievance process as hinted at in Sec 7G?

A ─ The parties have agreed that disputes over hours of work, including AWS, credit hours and religious comp time, will be resolved pursuant to the streamlined grievance procedures set forth in Article 41, Section 4.A. However, that only applies to individual grievances. Mass or institutional grievances would move along their normal route.

Q.21 ─ Can management require a unit employee to move to a compressed work schedule?

A ─ No.

Q.22 – Can management take an employee off AWS simply because it has withheld (or proposed to withhold) a step increase, rated him/her below Fully Successful on a midyear review, or it has placed the employee on leave restrictions?

A—No, but neither is it required to prove that the employee's AWS schedule caused the performance problems that led to a PIP. If the employee is placed on a PIP, he/she can be taken off AWS, absent some violation of law or regulation, e.g., discrimination, retaliation, etc.

Once the employee comes off the PIP and returns to Fully Successful, NTEU contends that he/she must be returned to the AWS schedule. The agreement does not address what happens if management has already given the employee's AWS slot to someone else or if scheduling no longer allows that slot.

Q.23 – Can management "black out" certain days and deny everyone the right to use it as an AWS/CWS day off?

A.—Yes, it can. We can push back by identifying data showing that everyone is not needed on certain days or finding that similarly situated employees are allowed the day off. There is no systemic fix to this problem; we will have to push back wherever it makes AWS impossible for our members who want it.