

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
CASE NUMBER: 181128-01944

In the Matter of Arbitration between:

NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION

And

NATIONAL WEATHER SERVICE

Date of Hearing:	May 10, 2018
Date of Grievance:	September 11, 2017
Contract Provisions Involved:	Article 10, Section 10 of the October 25, 2001 collective bargaining agreement (“Agreement”)
Memorandum of Understanding:	I and I Agreement of March 1, 2011 Agreement regarding the Plan to Reduce Hours of Operations of Staffing at Selected Weather Service Offices (“MOU”).
Statement of the Award:	January 28, 2019.
Statement of the Grievance:	September 11, 2017

In this MOU, the parties agreed that the hours of operation at WSOs McGrath, Yakutat and Cold Bay would be 16 hours per day / 7 days per week (16×7), and that WSOs Annette and St. Paul Island would remain part-time at 16×7, but reduced staffing from 4 to 3 persons. However, since August 20, 2017, management has unilaterally reduced the hours of operation at McGrath, Yakutat and Annette to 16 hours per day for 3 days each week (16×3) and 8 hours per day for the remaining 4 days each week (8×4), and has announced an intention to unilaterally make similar reduction in hours at WSO Cold Bay in the near future.

Further, paragraph 16 of the MOU provides that the Local Office Team (“LOT”) will discuss coverage of leave and vacancies that exceed 2 weeks by determining whether to use overtime or other means. Management did not convene a LOT for the purpose of WSO (McGrath, Yakutat and Cole Bay), and at any of the other WSOs to which this

particular provision applies (WSO Anette, WSO Kotzebue, WSO Bethel, and WSO Barrow). Instead management unilaterally reduce hours of operation.

Grievance Statement:

November 25, 2017

On November 14, 2017 management unilaterally reduced the hours of operations at the WSO

St. Paul from 16 hours a day, 7 days a week, to 16 hours a day, 3 days a week and 8 hours a day, 4 days a week. This is a violation of the MOU in which the parties agreed that this and several other WSOs would operate 16×7. Further, this reduction in hours was done unilaterally, without notice to the Union, or compliance with section 15 of the MOU which mandates that a LOT meeting be conducted to discuss shift coverage for vacancy related absences that exceed two weeks. This unilateral action, without notice and an opportunity to bargain, also constitutes an unfair labor practice in violation of 5 U.S.C. section 7116 (a) (1) and (5).

Remedy Requested: As relief we demand that the NWS restores 16×7 operations at the offices (WSOs Anette, Barrow, Bethel, Cold Bay, Kotzebue, McGrath, Yakutat) compensating the employees for the overtime lost as a result of the reduction in hours of operations.

On May 10, 2018 the undersigned arbitrator held a hearing between the National Weather Service Employees Organization (NWSEO) (hereafter the “Union”) and National Weather Service (NWS), Alaska Region, a division of the United States Department of Commerce. Attorneys Molly Dennison and William T. Yon of the US Department of Commerce office of the General Counsel Employment and Labor Law Division represented NWS (hereafter the “Agency”), while Attorney Richard J. Hirn, General Counsel, National Weather Service Employees Organization represented the Union. During the hearing the parties were afforded wide latitude in the presentation of witnesses and evidence at the close of which leave was granted for the submission of Post Hearing Briefs which were received and considered by the arbitrator.

BACKGROUND

James Brader testified that he is the Lead Forecaster in Fairbanks, Alaska educated at the University of Wisconsin where he received a BS Degree in Atmospheric Science and became employed with the Agency in July 1987. He stated that as lead forecaster he is responsible for directing the staff of his shift to conduct watch, warnings, advisories and all forecasts for aviation, marine, fire, weather, hydrology, and public forecasting in that area of Fairbanks which stretches from Canada to Russia and from the Atlantic range to the North Pole. He testified that

there are six that regions and he is the Alaska Region Chair of the National Weather Service Employees Organization representing non-managerial employees of the National Weather Service.

Continuing, Brader stated that there are forecast offices in the Alaska region that provide forecasts and watch warnings, advisories to the public, aviation, marine users, hydrology, river users, and fire weather users, to protect life and property by providing graded forecasts, which are used throughout the database of the Weather Service. He stated that during severe weather the forecast offices disseminate watch warnings and advisories to alert for severe weather. He also explained that weather services offices in Alaska historically have been data collection, observation and dissemination offices, meaning that they essentially collect weather information for airports, climatological observations, measure snowfall and depth, measure sea height and sea surface temperatures, river height and conduct upper air or radiosonde observations and transmit the data collected.

Brader further stated that in 2002 the operating hours of WSOs at Barrow, Bethel, King Salmon and Kotzebue operated on a 16-hour 7 days a week (16/7) schedule with 2 - 3 meteorological technicians while Cold Bay, Kodiak, McGrath, Nome, Valdez, St. Paul and Yakutat operated on a 24/7 schedule each with 4 meteorological technicians. He stated that all WSOs were supervised by an Official in Charge (OIC) or a Meteorologist in Charge (MIC) on all operating shifts.

Brader further explained that when he was Regional Chair in 2009, management requested a temporary reduction in the hours at Cold Bay because of staffing shortages. In September 2009, an agreement was struck with management to a temporary reduction in hours at Cold Bay until February 2010. In September 2010, for the same reason and for unavailability of staff, management requested a reduction in hours at WSO McGrath. He explained that management's failure to return these WSOs to the 24/7 operations resulted in a grievance which was granted with back pay for employees who lost overtime and an agreement to resume 24-hour operations as soon as possible for those locations. Brader further stated that the Union agreed to management's proposal to reduce the hours and staff and later to close Valdez; that in 2010 management proposed permanent reduction in hours and staff at Cold Bay, McGrath and Yakutat; that the 24/7 schedule at St. Paul was reduced to 16/7 sometime between 2002 and 2010; that he was involved in bargaining over the impact and implementation of the proposed reduction in hours at Cold Bay, McGrath, and Yakutat and also the reduction in staff at Cold Bay, McGrath, Yakutat, St. Paul and Annette. He stated that the changes in these WSOs resulted in the March 1, 2011 Memorandum of Understanding which was intended to cover all WSOs at Weather Forecast Offices and the Alaska Aviation Weather Units. He further stated that the 25 provisions of the MOU were intended to apply to Cold Bay, McGrath, Yakutat, St. Paul, and Annette among others.

Brader stated that OICs were removed; that Alaska Regional Office's three remote OICs supervised meteorological technicians at more than one WSO; that management proposed to permanently reduce the hours of operations at Barrow, Nome and Kodiak, which were operating full time; that the Union demanded bargaining over the impact of those reductions; that management implemented the reduction in hours at these stations in June 2015 while impact

bargaining was ongoing; that the Union filed an unfair labor practice; and that the complaint was resolved by a settlement agreement before the FLRA to return to the bargaining table; that an agreement has not been reached; that the agency once again reduced the hours of operations even further at WSO Barrow.

Brader further stated that he was contacted by several members of WSO's in June, 2017 and learned that management was going to reduce the hours of operations at WSOs operating on a 16/7 schedule. An email was sent demanding bargaining at the regional level since it involved more than one office. The response received was that the Alaska Regional Office had conducted LOT meetings and that it was within their purview to close offices when they wished. An email exchange ensued on the subject of LOTs involvement in the decision to reduce hours. He stated that in August, 2011 management implemented the changes in hours of operations at WSOs Cold Bay, McGrath, Yakutat, Annette Island, Barrow and Kotzebue as covered by the stipulation. He noted that he was the Union steward McGrath and no LOT meeting occurred there.

Brader commented on the financial impact of the implemented changes to employees; the effect of the changes on employees in small remote locations and communities; discussions with management before and after the grievance was filed; the qualifications of employees to bid on Hydro-meteorological Technician positions ("HMT"); the impact of a reduced number of balloons launched would have on the accuracy of weather service forecasting; and management conducting the LOT meeting after the filing of the St. Paul grievance and the absence of a consensus.

Agency witness, John Dragomir, Deputy Director of the Office of Region in the National Weather Service, testified by telephone. He stated that he has held the position for about four years and that he was previously Director of Operations for about four years. Before that he was a meteorologist in charge of the Fairbanks Forecast Office in Fairbanks, Alaska for eight years and held several other positions before that totaling 29 years. He stated that his current job is to assist senior leadership and the Alaska Region develop a strategic direction for the Alaska Region in addition to being the employee relations and labor-management relations representative for the Alaska Region. He stated that the mission of the Weather Service is to protect life and property through issuing weather forecasts, watches, warnings, advisories to the public as well as providing position support to those people that make decisions which would include emergency managers and state and federal agencies.

Dragomir described the function of the WFOs as maintaining weather watches and having the primary responsibility to maintain weather watch and issue routine forecast products, watches, warnings and advisories; and provide position support to emergency managers, state and federal agencies. Additional responsibilities include responding to information requests from the public and having responsibility for several different programs within the Weather Service like marine weather, fire whether, radiation weather, public weather, hydrologic forecasting, and in some locations recreational forecasts; and products and services that support the mission of the National Weather Service.

Dragomir explained that advances in technology improve science reduced WSO services over the past 10 years, such as the introduction of the Automated Service Observing System (“ASOS”) which eliminated taking surface observations. Recent FAA, Alaska Region takeover of all augmentation and all weather observations in the region. The Coast Guard has taken over of broadcasting marine warnings over HS frequencies and fully automated NOAA weather radio broadcasting 24/7 over VHS. He stated that the primary function of the WSO today is conducting upper air observations with the use of a Radiosonde which takes about an hour to set up and launch the balloons that measures temperature, dew point, wind speed and direction which is transmitted to a computer for use by meteorologists. He also stated that upper air soundings were taken by a system called TAMTAR and by satellite; and that the WSOs have no active hand in weather watches, warnings and advisories. The WSOs have undergone a shift in responsibilities towards a data collection office versus a traditional WSO. He stated that the objective is to transition the employees into offices that provide statewide forecast support and position support, and moving those positions into other centers or units or WFOs that provide forecasts services; that the changed decrease in responsibility of WSOs and the reduction in operating hours helps support the National Weather Service mission.

Dragomir stated his understanding of the MOU regarding operating hours was that it applied to offices that were dropped down to part-time reducing hours of operation and staff for three offices, Cold Bay, Yakutat and McGrath; that these offices have 16/7 operating hours; that he did not understand that the WSO would be open those hours no matter what the circumstances; and that it applied to two other offices (St. Paul and Annette) but that it just reduced manning from four to three without a change to the 16/7 operating hours. He also testified to how the staff of Annette, Bethel, Kotzebue, St. Paul, Cold Bay, Yakutat and McGrath was supplemented by a mobile meteorological technician to cover absences of regular staff members at the WSO which may have entailed the use of overtime. He stated that his goal in making schedules in light of manning increases and decreases, was to keep the WSOs staffed with at least 2 people with the use of meteorological technicians to avoid having any office missing data for upper air soundings. He stated that his expectation when the MOU was signed in 2011 is that employees would work 40 hours a week with unscheduled overtime opportunities and the WS would meet its mission.

On cross-examination Dragomir acknowledge that none of the provisions of the 2011 MOU were contemplated in anticipation that the balloon launches will be automated; that management’s expectation of the MOU was that employees would work 40 hours a week and if there was overtime to be workd, they would work overtime; that there was no intent that employees would work less than 40 hours a week; that the MOU contemplated that there would be situations where overtime would be necessary to ensure 16/7 operations; that during the past 2-3 years several WSOs fluctuated between 2 and 3 people on station; that for the majority of time before late August 2017, management in fact assigned overtime whenever it was necessary to operate the office 16/7 either due to third person taking leave or because staff was down to only to 2 people; that while he did not know firsthand at his location in Anchorage, he was told that at Cold Bay, Yakutat and McGraw it was necessary to drive to perform upper air balloon launches; that the reduction in hours that took place in the latter part of 2017 was not the result of having relocated

staff from the coastal to the interior WSOs; and that the reduction in hours that took place regarding the grievance was not the result of having relocated staff from the WSOs to the WFOs.

CONTENTIONS OF THE PARTIES

The National Weather Service Employees Organization (“NWSEO” or “Union”)

The Union contends that in March 2010 management proposed to permanently reduce the hours of operations at WSO on of Cold Bay, McGrath and Yakutat to 16 hours a day 7 days a week and to reduce the staff from 5 to 3 employees. Management also proposed to reduce the staffing at WSO Annette and St. Paul which it operated with a 16/7 time schedule, from 4 to 3 employees. Bargaining over the impact of this change led to a comprehensive March 2011 MOU.

The Union further contends that Provision 1 of the MOU was the parties’ agreement that staffing would be reduced at the five mentioned weather service stations through attrition only and that hours of operations would be reduced to 16/7 days a week once staffing was reduced to 4 employees. It also contends that Provision 14 was intended to apply to any WSO whose hours were reduced to 16/7; that Provision 15 addresses the issue of how two shifts a day would be covered in the event of a personnel shortage (since 3 employees, working 5 eight-hour shifts a week, are required to cover the 14 shifts necessary to operate 16 hours a day, 7 days a week) and that this provision was intended to apply to all WSOs.

Reason for grievance number 1

On September 11, 2017 the Union’s regional chair filed a grievance which alleged a continuing violation of the March 2011 MOU alleging that:

the reduction in hours of operations at WSOs McGrath, Cold Bay, Annette and Yakutat violated the explicit provisions of the MOU which promised operations would be conducted 16 hours a day, 7 days a week

the unilateral reduction of hours of operations at WSO Barrow was a violation of Article 8 of the CBA (governing impact bargaining) ...

management violated Provision 15 of the 2011 MOU at WSOs Annette, Cold Bay, McGrath, Yakutat, Barrow, Bethel and Kotzebue by failing to conduct a LOT meeting to obtain an agreement on how to cover vacancies that exceed two weeks.

Management denied the grievance on October 10, 2017, claiming that it was untimely; that the MOU applies only to WSO Cold Bay, McGrath and Yakutat; that Provision 15 does not require management to obtain the agreement of the LOTS on how to cover vacancies that exceed two weeks; that there was no violation of the scheduling article of the parties’ CBA; and that it retained a generalized management right to assign-or not to assign work.

Reason for grievance number 2

A second grievance was filed on November 25, 2017 alleging that the reduction in the hours of operation at WSO St. Paul from 16/7 to 16 hours a day, 3 days a week and 8 hours a day 4 days a week violated the promise and the March 2011 MOU to conduct operations 16/7. The grievance

also alleged that management violated Provision 15 by failing to conduct a LOT meeting to discuss and come to a consensus on how to cover for vacancies that exceed two weeks. The grievance was denied alleging that management had been granted discretion not to fill a vacant shift; that the MOU did not promise to maintain 16/7 operations; that the MOU did not apply to St. Paul because it was already operating on a 16/7 basis; and that it granted that portion of the grievance which alleged that management violated Provision 15 of the MOU and claimed that it had granted retroactive relief by conducting a LOT meeting with the steward at St. Paul.

It argues that the MOU specifically states that the hours of operations at WSOs Cold Bay, McGrath, Yakutat, Annette, and St. Paul will be 16/7 as determined by LOTS depending on the local service requirement provided they are scheduled between 10 p.m. and 6 p.m.; that the agreement on operating and working hours is enforceable; that the provisions of the MOU that address operating hours applies to all five WSOs identified in the agreement that the resolution of the 2010 Cold Bay and McGrath grievance provides a precedent for resolving the two most recent grievances; that Article 20 of the CBA covering scheduling is immaterial to the resolution of this grievance; that management cannot unilaterally decide to breach the 2011 MOU for the benefit of the employees; and that enforcement of the MOU does not violate management's right to assign work.

It further argues that management unilaterally reduce the hours of operations at the WSO in Barrow and other WSOs below 16/7 and eliminated overtime without providing the Union with notice and an opportunity to bargain over the impact and implementation of this reduction in violation of the CBA and 5 U.S.C. § 7116 (a)(1) and (5).

As contended, the Union argues that management breached Provision 15 of the March 2011 MOU by failing to conduct a LOT meeting to discuss and obtain a consensus on coverage of leave or vacancies exceeding two weeks at McGrath, Yakutat, Annette Island, St. Paul, Barrow and Kotzebue. He contends that a LOT meeting was held at St. Paul after the grievance was filed and after management granted partial relief of the St. Paul grievance. It maintains that Provision 15 was intended to apply to all WSOs that had staffing and hours reduced noting that the MOU states that it was intended to apply well beyond the five offices listed in the first paragraph of the MOU because it noted that the changes in the staffing and hours would impact in turn all the other offices' workload and staffing.

The Agency

The Agency contends that management did not violate the 2011 MOU because it was not required to maintain 16/7 operating hours at any WSO. Additionally it argues that the Union's interpretation of the MOU would result in a flagrant violation of management's statutorily reserved right to establish the operating hours of its facilities under 5 U.S.C § 7106. It maintains that management has the right to set its office's operating hours and that any interpretation of the MOU that would require the Agency to maintain certain operating hours at WSOs would render the MOU illegal under 5 U.S.C. § 7106.

The Agency argues that the MOU applies to every WSO cited by the Union's grievance; that there was no meeting of the minds in bargaining for the MOU; that it applied to every WSO

which would exclude Barrow, Bethel and Kotzebue which were already at a 16/7 schedule, only the Annette, Cold Bay, McGrath, St. Paul and Yakutat; and that the Union's interpretation of the 2011 MOU to require WSOs Annette, Cold Bay, McGrath, St. Paul, and Yakutat to maintain a 16/7 operating schedule violates management rights of 5 U.S.C. § 7106. It maintains that unions must comply with existing law and the head of an agency can only approve an executed agreement in accordance with the provisions of law, rule or regulation and that the duty to bargain includes matters covered by federal laws or regulations. It argues that the Union's interpretation of the 2011 MOU would override management's decision as to the hours of operation of the relevant WSOs. The Union's interpretation of the MOU renders it illegal under the provisions of the statute. Part of the Agency's mission is to provide data to the public. It is within management's non-negotiable rights to determine when it is necessary to collect and disseminate data from upper-air soundings. The Union's interpretation of the MOU fundamentally infringes management right to define each office's operating hours and mission, and interpretation which cannot be adopted.

Continuing, the Agency argues that it had no duty to bargain under 5 U.S.C. § 7116 (a)(1)&(5) when it reduces the operating hours of any WSO in the Alaska region because the Union has not produced sufficient evidence to establish more than a *de minimis* change in conditions of employment. It maintains that the FLRA's test for *de minimis* is to determine if the nature and extent of the effect, or reasonable foreseeable effect on conditions of employment of bargaining unit employees is significant; that the reduction in operating hours at the relevant WSOs did not result in more than a *de minimis* change to the current WSO employees working condition; that the evidence in the record does not establish that employees at the relevant WSOs experience a reduction in overtime opportunities; that the record shows that the employees who are expected to work 80 hours every 2 weeks work 80 hours every 2 weeks with occasional overtime both before and after the management change of operating hours; that the change in operating hours was announced at least 2 weeks prior to the implementation and did not surprise any employee after they worked an overtime shift; and there is no evidence that establishes that the NWS reduced staffing permanently at WSOs; that the number of staff employees at the relevant WSOs remain at 3; that the Union has failed to produce evidence sufficient to show that the decision to reduce operating hours resulted in a significant change to the conditions of employment of bargaining unit employees; and that the changes to the operating hours at the relevant WSOs are helpful for employees to maintain their health and family life.

PERTINENT CONTRACT PROVISIONS

ARTICLE 8

LABOR-MANAGEMENT RELATIONS

SECTION 2. Local Office Teams and Labor Councils...

C. Process...

3. All council/team recommendations and decisions will be reached by consensus....

SECTION 6. Management will maintain the status quo pending bargaining under this article unless the Union fails to respond within the timeframe contained herein, or except if in doing so, the agency would be continuing an illegal practice, or if there is an overriding exigency....

ARTICLE 10

GRIEVANCE PROCEDURE

SECTION 10. MEMORANDUM OF UNDERSTANDING

A. The grievance procedure created by this section shall be used exclusively to resolve differences over interpretations or applications of MOUs referenced in Article 8.

I and I Agreement between National Weather Service (NWS) and
National Weather Service Employees Organization (NWSEO)
Regarding the Plan to Reduce Hours of Operation and Staffing
at Selected Weather's Service Offices (WSO)
March 1, 2011

Statutory Provisions: 5 USCS § 7116

§ 7116. Unfair labor practices ...

5 USCS § 7106

§ 7106 Management rights ...

ANALYSIS AND AWARD before the word statutorily quit

This matters raises questions about the propriety of the Agency's unilateral change in working conditions at certain WS0s in the Alaska Region of the NWS. The change involved adjusting the hours of operation of the county WS0 and the need for employees okay to maintain service due to employee's absences and vacancies. The Union has grieved under the authority of the CBA and a March 1, 2011 MOU reducing hours of operation and staff at selected WS0s, namely, Cold Bay, McGrath, Yakutat, Annette and St. Paul whose 24/7 operations were reduced to 16/7 and also Kotzebue, Bethel and Barrow which operated part-time at 16/7 but experienced personnel changes to 16/3 and 8/4 working hours. The MOU was entered into to cover leaves of absence and vacancies exceeding 2 weeks by determining whether to use overtime or other means to address the personnel shortage. The MOU called for the use of LOT consensus to temporarily address the staffing emergency after which they would be returned to their original pre-MOU status of WSO operations and personnel. The announcement of the permanency of management's changes without employing the LOT process precipitated the grievances as a violation of the CBA and MOU.

Surprisingly, the Agency averted the merits of its action and asserted for the first time in its brief that it had not violated the 2011 MOU because it was not required to maintain operating hours at any WSO and also that the Union's interpretation of the MOU will result in a flagrant violation of management's statutorily reserved right to establish operating hours of its facilities under 5 U.S.C. § 7106 and that any interpretation that would require the Agency to maintain certain operating hours would render the MOU illegal under 5 U.S.C. § 7106. It also claims that the Agency had no duty to bargain since the Union has not produced sufficient evidence to establish more than a *de minimis* change in conditions of employment.

The CBA strongly suggests that the parties intended to create a document that was expected to address multiple issues that could arise during the parties' relationship. This includes the mechanism of an MOU and the LOT as a process and means for promoting optimal employee/management bilateral cooperation. Their purpose is to create an atmosphere for dispute resolution by consensus, if possible. The Agency's claim, presented for the first time in its Post Hearing Brief that the Union's interpretation of the MOU is a "flagrant violation of management's statutory rights" to establish operating hours for its WSOs is accordingly rejected.

The evidence is clear that the Agency violated the CBA and breached the MOU by failing to engage the LOT process to achieve management's intended result. It worked before and there is no reason to believe that it could not work in connection with the interests of the parties and the affected WSOs. The denial of pay albeit overtime pay to which an employee is entitled is not a *de minimis* event. The claim of the Union is sustained and the remedy requested is granted.

AWARD

The grievances are sustained.

The agency is directed to restore 16/7 operations at WSOs Cold Bay, McGrath, Yakutat, Annette and St. Paul. Back pay in the form of overtime is awarded to employees for any applicable Sunday or night differentials employees would have earned to keep WSOs open 16/7.



January 28, 2019