

AFGE Local 1403
441 Fourth Street, N.W. 6th Floor
Washington, D.C. 20001

Steven J. Anderson
President

April 22, 2009

Peter J. Nickles
Attorney General for the District of Columbia
Office of the Attorney General
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Nickles:

I write to object to Office Order 2009-06 (Revised AWS Order) that essentially eliminates the “flexible work place” and “compressed work schedule” components of the alternative work schedule compensation benefits. This Order violates the collective bargaining agreement (Compensation Agreement or Agreement) between the lawyers’ union and the District of Columbia, which has been in effect since October 1, 2007.

The Revised AWS Order Violates the Collective Bargaining Agreement

The Agreement was approved by the Council by Resolution 16-952 (December 19, 2006) and has the effect of law.¹ The Revised AWS Order, which unilaterally revokes these AWS compensation benefits, violates that Agreement. The Compensation Agreement expressly provides that employees are “entitled” to participate in a compressed time program and that “Supervisors may permit employees in their work unit to use flex place plans”... provided that these employees are “accessible and available for recall to their regular offices for work needs that cannot be performed at the alternative worksite” and that “[e]mployees shall be entitled to have the option of compressed work schedules consistent with applicable law and regulations.” Agreement at 11,12.

The terms of the Agreement, including the AWS Program², may not be changed without consent of the parties. The preamble of the Agreement states that it “shall not be reconsidered during its life nor shall either party make any changes in compensation for the duration of the Agreement unless by mutual consent or as required by law.” Agreement at 2. The Agreement clearly provides for attorneys to use flexible work, compressed work and flexiplace schedules. Further, it states that a request for

¹ Copies of the Agreement and Resolution are attached.

² For purposes of this letter, the “AWS Program” refers to the flexible work place and compressed work schedules.

participation in the flexible work schedule, flexiplace plan or compressed work schedule shall not be “unreasonably denied.” (*Id.* at 11). These provisions are consistent with OAG Office Order No. 2006-19 “Office of the Attorney General Attorney and Non-Attorney Managers Alternative Work Schedule Program”, issued on May 30, 2006 (AWS Order). By including the AWS provisions in the Agreement, the parties expressed an intent that the policy contained in the AWS Order would continue for the duration of the Agreement, and that no significant change would be made without new negotiations and a further agreement by the parties.

You have acknowledged in other discussions regarding upcoming pay raises that you could not unilaterally change a term of a collective bargaining agreement without the consent of the union. Similarly, the AWS Program is part of the Compensation Agreement and cannot be substantially changed without the consent of or renegotiation with the union. In *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999), the Court upheld a preliminary injunction against the operation of a statute amending wage payment schedules on the grounds that the law substantially impaired the implicit terms of a collective bargaining agreement with state employees. The court held that even though the payment schedules were not expressly provided for in the collective bargaining agreement they were an implicit part of the agreement reflecting the status quo when the agreement was executed. *See also United Steelworkers of American v. Warrior & Gulf Navigation*, 263 U.S. 574 (1960) (Collective bargaining agreement is not simply a contract so that express provisions are not the only source of an employee’s rights.) In our situation, the AWS program at issue was both the status quo at the time the Compensation Agreement was executed and was also expressly included in the terms of the Agreement. Similarly, as in *University of Hawaii*, OAG management is precluded from significantly impairing the AWS terms of the Compensation Agreement.

The 20% Cap is Arbitrary and Unlawful

The union’s specific objections to the Revised AWS Order are as follows.

- The new policy unlawfully limits the use of AWS Schedules by capping the use to 20% for each Division. By your own estimates, 60% of OAG attorneys use these schedules with the consent of their supervisors. Management has not previously informed the Union of any notable performance issues due to the prevalence of AWS Schedules used in the office. In fact, we understand that managers have mentioned to line attorneys that workforce morale and productivity have increased as a result of the existing policy. The 20% cap is arbitrary and without justification.
- The new policy effectively eliminates the use of AWS, a compensation term, in violation of D.C. Official Code § 1-608.58 (Legal Services Act). By denying the OAG attorneys a benefit provided to the federal government, the office is further distanced from achieving parity with the federal government as required in the Legal Services Act. Further, the new policy essentially converts a viable ongoing alternative work plan for the entire office into a minor perk for senior employees

that may be doled out after several years for a six-month term. The proposed new policy contravenes widely-accepted rationales for the use of AWS as a resource for both management and the workforce to achieve meaningful work-life balance for employees, expand office coverage hours, further green workforce best practices (including reducing pollution), and create viable continuity of operations plans for the office in the event of an emergency.

- The policy unlawfully denies the use of the grievance process in violation of the collective bargaining agreement. (*See Article 36 of the Non-Compensation Agreement between AFGE 1403 and OAG. The parties have been operating under the agreement pending the resolution of the arbitration litigation.*)

The Drastic Reduction in AWS is Inconsistent with the District's Green Policy

In addition to violating the Agreement with the union, any severe curtailment of the use of telecommuting is at odds with the District's well-settled commitment to becoming a Green City by, among other things, fighting climate change by reducing greenhouse gas emissions. In 2007 the District signed the Conference of Mayors Climate Protection Agreement, agreeing to promote commuter trip reductions. The District is a member of the ICLEI Local Governments for Sustainability's Cities for Climate Protection Campaign, which urges cities to adopt compressed work schedules and telecommuting as part of a global effort to reduce commuter trips and greenhouse gas emissions. And, in 2005, in its Greenhouse Gas inventory, the District noted that telecommuting and compressed work schedules could play a significant role in reducing greenhouse gas emissions associated with city operations. Also, the Comprehensive Plan for the National Capital promotes flexible work schedules and telecommuting as ways to reduce traffic congestion, reduce air pollution and promote workforce development. The District Elements of the Comprehensive Plan were enacted by the Council as 10 DCMR. As part of the Transportation Development Management Plan the District has agreed to "[d]evelop strategies and requirements that reduce rush our traffic by promoting flextime..." 10 DCMR 414.11; to reduce air pollution to promote "trip reduction measures such as videoconference facilities, telecommuting, flextime, and carpooling." 10 DCMR 618.10; and to provide "increased opportunities for alternative work schedules, such as part-time employment, flextime, job-sharing and in-home employment. 10 DCMR § 717.22. The planned new policy turns its back on these commitments.

Flexiplace and Compressed Time are Important Benefits for OAG Attorneys

You should also consider that many, if not most, District agencies currently allow both telecommuting and compressed work schedules. Although you have indicated that your plan to change the AWS policy for OAG is a cost-cutting measure, you have provided no evidence that the program costs anything or adversely affects productivity. In practice, the AWS makes the office more productive as less time is lost from the job for sick and annual leave to attend to medical or household matters. As you know, other District agencies are faced with the same financial considerations and we do not know of any that

is considering eliminating its AWS policy. Moreover, under the Revised AWS Order, supervisory approval is required to participate in the AWS programs, provided that the request is not unreasonably denied. If an attorney is not as productive using one of the AWS programs, the supervisor may act accordingly.

Moreover, the severe restriction on the use of AWS schedules at OAG eliminates this benefit as a recruiting tool. While federal agencies, and many private sector firms allow and even mandate the use of AWS, a newly hired attorney at OAG would have to wait several years to have the seniority to use an AWS schedule for a limited six-month period. Without being able to offer reasonable access to a flexible work benefit, which is widely available in law firms and in federal agencies, the Office will have difficulty retaining its best attorneys and attracting highly qualified new attorneys in the future.

At a time when the union has said that it is willing to negotiate measures to save jobs, including forfeiting the upcoming raise, and when attorneys are told that there will be no promotions, withdrawing the benefit of flex place and compressed work schedules (as you observed at our recent meeting) comes as another blow that has significantly affected the morale of OAG attorneys.

For the reasons stated in this letter, the Revised AWS Order violates our Compensation Agreement and is unacceptable to the union. Again, as we attempted at our last meeting with you, we are willing to negotiate changes to the AWS Program that allow for a reasonable use of the compressed time and flexplace programs. In the alternative, the union will explore its remedies regarding the violation of the Agreement.

Sincerely,

Steven Anderson
by S.K.

Steven J. Anderson
President
AFGE 1403