February 16, 2011

VIA E-MAIL AND FIRST CLASS MAIL

Ms. Jacqueline Thomas Clay
Director, Division of Workforce Relations
Suite 801
200 Independence Avenue, SW
Washington, DC 20201

Mr. Ken Brown
National Labor Relations Officer
Department of Health and Human Services
National Labor Relations Office
7700 Wisconsin Avenue, Suite 8318
Bethesda Operations Center
Bethesda, MD 20814

RE: National Grievance over HHS' Implementation of Article 25, AWS in Violation of the HHS-NTEU Consolidated CBA, MOUs, and Law

Dear Ms. Clay and Mr. Brown:

Pursuant to Article 45, Sections 8 C and D of the new HHS-NTEU Collective Bargaining Agreement (CBA), the National Treasury Employees Union (NTEU) hereby files this grievance on behalf of all Health and Human Services (HHS or agency) bargaining unit employees represented by NTEU and on behalf of itself regarding HHS's implementation of Article 25, Alternate Work Schedules (AWS) in violation of the HHS-NTEU CBA, Memoranda of Understandings (MOUs), and law.

The HHS-NTEU CBA was implemented on October 1, 2010. Since that time HHS has provided guidance to managers concerning the implementation of AWS that has resulted in numerous violations of the CBA, MOUs, and law. NTEU hereby grieves the following violations:

1. HHS' Improper Denial of Employees' Requests to Work AWS

Article 25, Section 1 of the CBA provides that the HHS AWS Program is designed to enable staff to adopt individualized work schedules that both meet employee needs and enable the employer to carry out its mission. Section 2 commits the employer to fair and equitable participation in AWS where the establishment of the schedule will not interfere with the ability

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of the organization to meet its workload and programmatic objectives effectively. Section 8 requires the supervisor, when approving or denying employees' requested schedules, to consider whether the schedules interfere with the agency's ability to meet its workload, programmatic objectives, and physical office coverage effectively.

HHS has violated and continues to violate Article 25, Sections 1, 2, and 8 of the CBA by improperly and unfairly denying employees' requests to work AWS schedules that do not interfere with the agency's ability to meet its workload, programmatic objectives, and/or physical office coverage effectively. Indeed, in many instances, employees' merely requested to work the very same schedules they had worked for years prior to the implementation of the CBA, modified only by the new flexible time band and core hour requirements in Article 25, Section 4, and the new requirement in Section 5C that employees requesting maxiflex must specify, with supervisory approval, which days and the number of hours per workday they will work. Because of the new flexible time bands and core hours, the majority of the schedules employees requested were more restrictive than those they worked prior to implementation of the new CBA. Despite this and the fact that there have been no changes in the employees' work requirements and/or environment, the agency denied the requested schedules, claiming that they interfere with the agency's ability to meet its workload, programmatic objectives, and/or physical office coverage effectively.

HHS' actions violate Article 25. In addition, HHS' systematic and continuous violations of Article 25 are an outright repudiation of its material terms, constituting a clear and patent breach unfair labor practice under 5 U.S.C. Sections 7116(a)(1) and (5).

2. HHS' Improper Failure to Explain the Reasons for Denying Employees' Requested Schedules

Section 8 of Article 25 requires supervisors to explain the reasons for denying employees' requested schedules orally or, if requested, in writing. HHS has violated Section 8 by denying employees' requests without explaining the reasons they were denied. Rather, the agency has simply stated that the schedules interfered with the agency's ability to meet its workload, programmatic objectives, and/or physical office coverage effectively, or that they were inconsistent with the CBA. The explanations HHS has provided employees for denying their requested schedules are insufficient under the CBA and are nothing more than a recitation of the factors that supervisors must consider when approving and denying employees' requested schedules. The CBA requires the supervisor to do more than simply recite the factors that he/she must consider; it requires the supervisor to explain the reasons why consideration of the factors has resulted in denial of the schedules. That is, the supervisor must explain why/how the schedules interfere with the agency's ability to meet its workload, programmatic objectives, and/or physical office coverage effectively and/or why the schedules are inconsistent with the CBA.

HHS' actions constitute violations of Article 25, Section 8. Furthermore, HHS' actions in violating Article 25 in such a systematic and continuous manner are an outright repudiation of its material terms. These actions constitute a clear and patent breach unfair labor practice under 5 U.S.C. Sections 7116(a)(1) and (5).

3. HHS' Improper Denial of Employees' Requests to Work Maxiflex Schedules that Do Not Contain Eight (8) Hours Per Workday and/or Ten (10) Workdays Per Biweekly Pay Period

HHS has denied and continues to deny employees' requests to work maxiflex schedules that do not contain eight hours per workday and and/or ten workdays per biweekly pay period (including schedules that permit employees to work maxiflex 5/4/9 and 4/10), claiming that the CBA prohibits such schedules. The agency's actions in denying the requests violate Article 25. Section 5C provides that a maxiflex schedule has a basic work requirement of 80 hours per biweekly pay period and may contain core hours on fewer than ten workdays in the biweekly period. Section 2 provides that core hours do not apply on an employee's regular day(s) off under an approved flexible work schedule (which includes maxiflex) or for workdays that are less than eight hours in duration. Accordingly, Article 25 does not require employees to work at least eight hours per workday or ten workdays per biweekly period.

HHS' denials of employees' requests to work maxiflex schedules that do not contain eight hours per workday and/or ten workdays per biweekly pay period violate Article 25. Furthermore, HHS' actions in violating Article 25 in such a systematic and continuous manner are an outright repudiation of its material terms. These actions constitute a clear and patent breach unfair labor practice under 5 U.S.C. Sections 7116(a)(1) and (5).

Moreover, HHS' wholesale denials of employees' requests to work schedules that do not contain eight hours per workday and/or ten workdays per biweekly period, including ANY 8, 40, and 80 maxiflex schedules, constitute a unilateral modification or termination of maxiflex as negotiated by the parties in violation of the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. Section 6122 *et seq.*, (which requires the agency to negotiate fully with NTEU before modifying or terminating AWS), Article 3 of the CBA, and 5 U.S.C. 7116(a)(1) and (5). Finally, the agency's systematic and continuous violations of Article 3 are an outright repudiation of its material terms and also constitute a violation of 5 U.S.C. 7116 (a)(1) and (5).

4. HHS' Improper Denial of Employees' Requests to Change Their Maxiflex Schedules

HHS is denying employees' requests to vary the days and the number of hours per day that they will work, claiming that such changes are prohibited by the CBA. While Article 25, Section 5C requires employees to specify, with supervisory approval, the days and the number of hours per day they will work, it does not preclude employees from changing those days and/or the number of hours per day once they are specified and approved. Indeed, Section 5C(3)

specifically provides that once an employee's maxiflex schedule is approved it shall become the approved schedule "unless altered by the supervisor or *an employee's request to alter it is approved.*" Neither the plain language of the CBA nor its bargaining history supports the proposition that the CBA limits the frequency or the time period for requesting to change either. Indeed, both support the opposite conclusion.

Accordingly, employees are permitted to request to change the days and/or the number of hours per day they will work even on a daily basis if they so choose, and HHS' refusal to allow them to do so violates Article 25. In addition, HHS' actions in violating Article 25 in such a systematic and continuous manner are an outright repudiation of its material terms. These actions constitute a clear and patent breach unfair labor practice under 5 U.S.C. Sections 7116(a)(1) and (5).

Furthermore, HHS' wholesale denials of employees' requests to change the days and/or the number of hours per day they work constitute a unilateral modification or termination of maxiflex as negotiated by the parties in violation of the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. Sections 6122 *et seq.* (which requires the agency to negotiate fully with NTEU before modifying or terminating AWS), Article 3 of CBA, and 5 U.S.C. 7116(a)(1) and (5). The agency's systematic and continuous violations of Article 3 are an outright repudiation of its material terms and also constitute a violation of 5 U.S.C. 7116 (a)(1) and (5).

5. HHS' Unilateral Termination of MOUs Granting Blanket Approval to Earn Credit Hours

Prior to the implementation of the new CBA, the parties negotiated various MOUs that granted blanket approval for employees to earn credit hours. These MOUs have been in existence for years and in some instances for over a decade, and employees have been earning credit hours consistent with their terms. However, since the implementation of the new CBA, HHS has violated the terms of the MOUs, declaring that the MOUs are terminated because they are inconsistent with the CBA. However, the MOUs are not inconsistent with the CBA. Article 25, Section 7 provides that "blanket approval may be provided to earn up to a designated limit per day, week, or pay period so long as work is available." HHS' actions have resulted in violations of the MOUs. In addition, HHS' actions in unilaterally terminating the MOUs constitute violations of Article 3, Section 7 of the CBA, which requires a party seeking to terminate a MOU that is not inconsistent with the CBA to provide specific notice to the other party of its intention to terminate the practice and to bargain in accordance with law, rule, and regulation, and 5 U.S.C. 7116(a)(1) and (5).

Finally, the agency's systematic and continuous violations of the MOUs and Article 3 of the new CBA are outright repudiation of the material terms of each and constitute a clear and patent breach unfair labor practice under 5 U.S. C. Section s 7116(a)(1) and (5).

6. Unilateral Termination of Established Past Practices Granting Blanket Approval To Earn Credit Hours

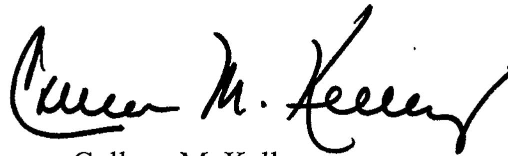
Prior to the implementation of the new CBA, there were established past practices granting blanket approval for employees to earn credit hours. These past practices have been in existence for years and in some instances for over a decade. However, since the implementation of the new CBA HHS has unilaterally terminated the established past practices despite the fact that they are consistent with the CBA. As stated previously, Article 25, Section 7, allows the agency to grant blanket approval to earn up to a designated limit per day, week, or pay period so long as work is available. HHS' unilateral actions constitute violations of Article 3, Section 7 of the CBA, which requires a party seeking to change an established past practice that is not inconsistent with the CBA to provide specific notice to the other party of its intention to terminate the practice and to bargain in accordance with law, rule, and regulation. HHS' actions also constitute unfair labor practices in violation of 5 U.S.C. 7116(a)(1) and (5). Finally, the systematic and continuous manner in which HHS is violating Article 3 is an outright repudiation of its material terms, constituting a clear and patent breach unfair labor practice in violation of 5 U.S.C. 7116(a)(1) and (5).

The violations alleged in this grievance continue through the present. NTEU requests the following remedies: (i) that the agency cease and desist from violating Articles 3 and 25 of the new CBA, the various MOUs granting blanket approval to earn credit hours, the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. Section 6122, *et seq.*, and 5 U.S.C. Sections 7116(a)(1) and (5); (ii) that the agency cease and desist from unilaterally terminating flexible work schedules, and MOUs and established past practices granting blanket approval to earn credit hours, return to the *status quo ante*, and that the agency follow the law and the CBA should it seek to terminate flexible work schedules and/or MOUs and/or established past practices granting blanket approval to earn credit hours, including providing the union with proper notice and an opportunity to bargain and maintaining the *status quo ante* until bargaining is complete; (iii) that the agency comply with Article 25, Section 8 by sufficiently explaining the reasons that employees' requests were denied, including explaining why/how the request interfered with the organization's ability to achieve its workload, programmatic objectives, and/or office coverage effectively and why it was inconsistent with the CBA; (iv) make whole any employees who have been harmed by the agency's illegal actions, including authorizing those employees whose AWS requests were improperly denied to work their requested schedules and compensating employees who used leave, credit hours, and/hour compensatory time as a result of the agency's improper refusal to allow them to alter their maxiflex schedules; (v) that the agency post a notice, signed by the head of the agency, in a conspicuous place and issue an all hands bulletin informing employees that the agency violated the parties' CBA, various MOUs, and the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. Section 6122, *et seq.*, and 5 U.S.C. 7716 (a)(1) and (5), and that it is committed to abiding by all in the future; and (vi) any other remedy deemed appropriate.

NTEU reserves the right to supplement this grievance as additional facts and violations become known. Furthermore, pursuant to Article 45, Section 2B, NTEU hereby joins this grievance with the national grievance that was filed on October 29, 2010.

I have appointed Sharon Quinn Harris, National Negotiator, to be my representative in this matter. She may be reached at (202) 572-5500, ext. 7029.

Sincerely,



Colleen M. Kelley
National President

cc: Christine Youseff, HHS
Sharon Quinn Harris