

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
SCHUYLKILL
MINERSVILLE, PENNSYLVANIA

and

LOCAL 3020, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 07 FSIP 66

DECISION AND ORDER

The Department of Justice, Federal Bureau of Prisons (FBOP), Federal Correctional Institution (FCI) Schuylkill, Minersville, Pennsylvania (Employer), filed a request for assistance with the Federal Service Impasses Panel (Panel) under the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Act), 5 U.S.C. § 6120, *et seq.*, to resolve an impasse between it and Local 3020, American Federation of Government Employees, AFL-CIO, arising from the Employer's finding that the 4/10 compressed work schedule (CWS) for employees in the Education Department is causing an adverse agency impact and, therefore, should be terminated.

After investigation of the request for assistance, the Panel determined that the dispute should be resolved through an informal conference by telephone with Panel Member Richard B. Ainsworth. The parties were advised that if no settlement were reached during the teleconference, Member Ainsworth would notify the Panel of the status of the dispute, including the parties' positions and his recommendations for resolving the impasse. After considering this information, the Panel would take final action in accordance with 5 U.S.C. § 6131 and 5 C.F.R. § 2472.11 of its regulations.

In accordance with the Panel's procedural determination, Member Ainsworth convened an informal conference by telephone

with the parties on May 21, 2007, but a voluntary resolution was not reached. Member Ainsworth has reported to the Panel, which has now considered the entire record, including the parties' pre-conference submissions.

BACKGROUND

The Employer's mission is to protect society by confining criminal offenders in the controlled environments of prisons and community-based facilities that are safe, humane, and secure. The FCI is a medium-security facility that houses approximately 1,630 inmates; the site also includes a Federal Prison Camp. The Education Department offers various courses of instruction, including classes for obtaining high-school equivalency diplomas (GED), designed to enable inmates to complete their prescribed or desired educational objectives. Overall, the Union represents about 260 employees, who are part of a consolidated nationwide unit of about 23,000. There are 10 bargaining-unit employees in the Education Department, eight of whom are on the 4/10 CWS; an education technician aide and the teacher assigned to the Prison Camp work a standard 8-hour tour of duty.^{1/} The parties are covered by a master collective-bargaining agreement (MCBA) that expired on March 8, 2001; its provisions will remain in effect until a successor agreement is implemented.

ISSUE AT IMPASSE

The sole issue before the Panel is whether the finding on which the Employer has based its determination to terminate the 4/10 CWS in the Education Department is supported by evidence that the schedule is causing an adverse agency impact.^{2/}

1/ The Panel recently issued a *Decision and Order in Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Schuylkill, Minersville, Pennsylvania and Local 3020, American Federation of Government Employees, AFL-CIO, Case No. 06 FSIP 111 (December 22, 2006)*, in which it determined that the Employer had not supported its allegation with evidence that a proposed 5-4/9 CWS for the teacher assigned to the Prison Camp was likely to cause an adverse agency impact. The Panel has ordered the parties to negotiate over the proposed schedule.

2/ Under 5 U.S.C. § 6131(b), "adverse agency impact" is defined as:

(1) a reduction of the productivity of the agency;

POSITIONS OF THE PARTIES

1. The Employer's Position

The Panel should find that the evidence on which the Employer bases its determination to terminate the 4/10 CWS establishes that the schedule is causing an adverse agency impact, as defined under the Act. Essentially, an adverse agency impact has occurred primarily in four ways: (1) loss of instruction hours; (2) failure to meet educational goals; (3) an increase in idle man-hours; and (4) failure to meet policy requirements. More specifically, in regard to the loss of instruction hours, because teachers are only present 4 of 5 days each week under a 4/10 CWS, their absence on a regular day off (RDO) directly affects the amount of time that is available for inmates to receive instruction. Since the Employer has discontinued the practice of allowing teachers to simultaneously cover two classes when a teacher is absent on an RDO, the classes must now be cancelled. When classes are cancelled it takes inmates longer to complete course requirements; furthermore, they must be sent back to their housing units, placing an additional strain on correctional officers who staff those units. The allegation that the CWS has resulted in the failure to meet educational goals is supported by the fact that, for the most part, inmates had a higher GED pass rate when they were taught by teachers who were not working a CWS.

(2) a diminished level of the services furnished to the public by the agency; or

(3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed work schedule).

The burden of demonstrating that the implementation of a proposed CWS is likely to cause an adverse agency impact falls on the employer under the Act. See 128 CONG. REC. H3999 (daily ed. July 12, 1982) (statement of Rep. Ferraro); and 128 CONG. REC. S7641 (daily ed. June 30, 1982) (statement of Sen. Stevens).

The CWS also has resulted in an increase in "idle man hours," which translates into a loss of productivity. During the course of the day, there are several hours when inmates are unavailable for classroom instruction or other meetings with teachers (10:15 a.m. to 12:30 p.m., 3:30 to 5 p.m., and 8:30 to 9 p.m.) because they are required to attend official counts, eat meals, etc. A teacher who works a regular 8-hour daily schedule has $2\frac{3}{4}$ hours each day of non-instruction and non-inmate contact time. This time increases significantly, however, by an additional $1\frac{1}{2}$ hours per day when a teacher works a 6 a.m. to 4 p.m. schedule, for a total of $4\frac{1}{4}$ hours a day of non-instruction time. As a result of CWS, therefore, the Employer has teachers scheduled when they are not needed and cannot teach inmates. Teachers are hired because of their special skills to teach students, and are paid an average of \$93,372 per year; the CWS leaves management with no choice but to reduce services to the inmate population while paying teachers for time they cannot teach.

Finally, the CWS has resulted in a failure to meet policy requirements. In this regard, under Program Statement 5300.21, "Education, Training and Leisure Time Program Standards," dated February 18, 2002, "(a)ll full-time teachers and education specialists must spend at least 75% of their 40-hour work week in instruction or in work related to instruction, with a minimum of 50% of their work spent in direct classroom instruction." According to the Employer's calculations, if the teachers worked a traditional 8-hour schedule, they would be available to provide 7,348 hours of direct classroom instruction, which equates to 50.5-percent of their time and meets policy requirements. Under the CWS, during 2006, seven teachers spent only 5,387 of their 14,560 work hours in direct classroom instruction; this equates to an average of 36.9-percent of their time in direct classroom instruction per week, far below the 50-percent standard. Because of the reduced number of direct classroom instruction hours for teachers, using the Employer's statistics for 2006, inmates would be required to remain in class an average of 18.93 weeks longer, thereby delaying further educational opportunities designed to aid in their successful reintegration into society.

2. The Union's Position

The Panel should find that the Employer has not met its burden of proof under the Act because management has deliberately created the situation about which it now complains. Had the Employer not unilaterally discontinued the practice of allowing teachers to cover for one another on their RDOs, a practice that

had worked well for the first 2 years of the CWS, there would not be a decline in instructional hours. In addition, the Employer's determinations in this regard have been inconsistent. It allows teachers to cover for each other when they are on annual or sick leave, for example, but not when they are on their RDOs. The Employer's data, which purport to show that returning to a traditional 5-day schedule would increase instructional hours, is flawed because it did not compare the CWS with the prior non-compressed work schedule (NCWS), or the NCWS worked by the GED teacher at the Federal Prison Camp before she went on maternity leave. Instead, it used an idealized 5/8 schedule that has never existed at the FCI. When the Union made that comparison using the GED teacher's NCWS, the data showed that CWS teachers had 190 more hours of direct classroom instruction during a 6-month period.

As to the allegation that the CWS has resulted in failure to meet educational goals, the Employer arbitrarily determines the annual goals for the number of inmates who it expects to be eligible to take the GED test. Passing rates have much more to do with inmate I.Q.s, motivation, learning disabilities and other factors not related to instructional time, so the Employer has not demonstrated that the CWS is responsible for any failure in this connection. Concerning the Employer's claim that the CWS has resulted in an increase in "idle man hours," from the time a teacher arrives at work until the time of departure, there are no "idle man hours." Staff members are "correctional workers first" and, when they are not teaching, they perform a wide variety of jobs relating to inmate security. During non-instruction and non-inmate contact time, teachers prepare and review lesson plans, grade papers and perform many of the other duties assigned to them. Management, and not the teachers, determines the number of classes a teacher will teach and the duration of each class. It has the ability, therefore, to increase the teaching hours to any amount it chooses, thereby minimizing any remaining hours not spent in instruction. Furthermore, under CWS inmate contact time has increased, thereby offering additional hours of operation for the department. Under the NCWS, the Education Department was open to inmates 55 hours per week. Under the CWS, the department is open 74.5 hours per week, thereby increasing services to the inmate population.

Finally, with respect to the Employer's claim that the Education Department has failed to meet policy requirements concerning the percentage of time teachers should be spending in direct classroom instruction, the Union vigorously disputes the Employer's methodology in reaching the conclusion that teachers

who work a CWS are failing to meet minimum policy requirements for classroom teaching time. The Employer's own data show that even a NCWS could not meet the Employer's interpretation of the FBOP's policy, as five out of seven teachers taught less than the 1,040 hours per year the Employer believes are necessary to meet policy requirements.

CONCLUSIONS

Under § 6131(c)(2) of the Act, the Panel is required to take final action in favor of the agency head's (or delegatee's) determination to terminate a CWS if the findings on which it is based are supported by evidence that the schedule is causing an "adverse agency impact." Panel determinations under the Act are concerned solely with whether an employer has met its statutory burden. The Panel is not to apply "an overly rigorous evidentiary standard," but must determine whether an employer has met its statutory burden on the basis of "the totality of the evidence presented."^{3/}

Having carefully considered the totality of the evidence presented in this case, we are persuaded that the 4/10 CWS has caused a reduction in the agency's productivity. While the Union has done a commendable job of refuting much of the Employer's statistical information, in our view it is clear from the record that the CWS has increased, by 1½ hours each workday per teacher, the amount of time spent in non-teaching and non-teaching related activities. Thus, teachers on CWS spend 4¼ hours, rather than the 2¾ hours under an 8-hour schedule, in tasks that do not involve the direct instruction of inmates. The additional hours of non-inmate contact time under the 4/10 CWS represent a significant loss of productivity because teachers do not perform

3/ See the Senate report, which states:

The agency will bear the burden in showing that such a schedule is likely to have an adverse impact. This burden is not to be construed to require the application of an overly rigorous evidentiary standard since the issues will often involve imprecise matters of productivity and the level of service to the public. It is expected the Panel will hear both sides of the issue and make its determination on the totality of the evidence presented. S. REP. NO. 97-365, 97th Cong., 2d Sess. at 15-16 (1982).

the jobs they were hired to do and for which they generally receive higher compensation than other correctional officers, that is, the instruction of inmates. Moreover, although the Employer may have the ability to lengthen classroom hours, as the Union contends, we do not believe it should be required to disrupt the schedule of the entire FCI merely to accommodate a CWS in the Education Department. Given our conclusion that the Employer has met its statutory burden, consistent with the requirements of the Act, we shall order that the 4/10 CWS in the Education Department be terminated.

ORDER

Pursuant to the authority vested in it by 5 U.S.C. § 6131 (c) of the Federal Employees Flexible and Compressed Work Schedules Act, the Federal Service Impasses Panel, under 5 C.F.R. § 2472.11(b) of its regulations, hereby orders that the 4/10 CWS in the Education Department be terminated.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

May 30, 2007
Washington, D.C.