

**67 FLRA No. 81**

UNITED POWER TRADES ORGANIZATION  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
NORTHWESTERN DIVISION  
PACIFIC REGION  
(Agency)

0-AR-4938

DECISION

March 19, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

The Agency discontinued a particular scheduling practice after finding that the practice imposed unnecessary costs and, as a result, had an “adverse agency impact.”<sup>1</sup> Arbitrator Douglas V. Knudson found that the Agency properly discontinued the practice. There are two issues before us.

The first issue is whether the award is contrary to 5 U.S.C. §§ 6103 and 6131. Because those statutes do not specify precisely how adverse agency impact must be calculated, the Union’s claims – which primarily argue that the Agency and the Arbitrator miscalculated the impact – do not demonstrate that the award is contrary to those statutes. Therefore, the Union has not shown that the award is contrary to law.

The second issue is whether the award is based on nonfacts. Several of the Union’s nonfact arguments challenge matters that were disputed below, the Arbitrator’s legal conclusions, or the Arbitrator’s contract interpretations. These challenges do not provide bases for finding awards based on nonfacts. And other Union arguments do not meet the standard for showing nonfacts because they do not demonstrate that the Arbitrator made clearly erroneous factual findings, but for which he would have reached a different result. Therefore, the

Union has not demonstrated that the award is based on nonfacts.

**II. Background and Arbitrator’s Award**

The Agency operates dams that generate hydroelectricity. The Union represents operators who staff the dams twenty-four hours a day, seven days a week, in rotating shifts. The operators work a “compressed work schedule” under which, in each two-week period, they work six twelve-hour shifts and one eight-hour shift.<sup>2</sup> For each operator’s eight-hour shift and “generally for at least one twelve-hour shift,” the Agency schedules at least one more operator to work.<sup>3</sup> These overlapping shifts are called “lap day[s].”<sup>4</sup>

In the past, when a federal holiday fell on one of the operator’s days off, the Agency designated either the regular workday immediately before, or the regular workday immediately after, the holiday as an “in-lieu-of” holiday for the operator.<sup>5</sup> If the operator worked alone on that designated in-lieu-of holiday, then the Agency paid the operator “triple time.”<sup>6</sup>

The Agency determined that this practice (the disputed practice) was too costly, and issued a policy (the policy), which did two things. First, it “expanded” the “window” for when the Agency would set operators’ in-lieu-of holidays, so that the in-lieu-of holiday could be set anytime in one of three pay periods: the period in which the holiday fell (the holiday period), the period before the holiday period, or the period after the holiday period.<sup>7</sup> Second, the policy stated that, “[t]o the maximum extent practicable,” the Agency would schedule the in-lieu-of holiday on a lap day, so that another operator was already scheduled to work it.<sup>8</sup> This would enable the Agency to give the operator the day off, rather than paying triple time.

The Union filed a grievance over the issuance of the policy, and the grievance went to arbitration.

The Arbitrator found that, under 5 U.S.C. § 6103(d)(2) (the pertinent wording of which is discussed in section III.A. below), for employees on compressed schedules, agencies may adjust the scheduling of in-lieu-of holidays in order to avoid an “adverse agency impact.”<sup>9</sup> Looking to the definition of “adverse agency impact” in 5 U.S.C. § 6131(b) (the pertinent wording of

<sup>2</sup> *Id.* at 4.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 9.

<sup>1</sup> Award at 5.

which also is discussed in section III.A. below), the Arbitrator found that the relevant question was whether the disputed practice had “created an increase in cost above what would have been experienced without th[at] practice.”<sup>10</sup> The Arbitrator noted that the existing compressed work schedules had been in effect for many years, but he rejected a Union claim that the Agency could change the practice only to “prevent a new or an additional increase” in costs that did not already exist.<sup>11</sup> Instead, he determined that preventing an adverse agency impact may include “avoidance of ongoing inappropriate increased costs.”<sup>12</sup>

The Arbitrator found that, in deciding to implement the policy, the Agency had estimated that the disputed practice had added costs of \$840,000 in fiscal year 2010, and \$820,000 in fiscal year 2011. But the Arbitrator found that, for various reasons cited by the Union, those amounts did not “appear” to be accurate.<sup>13</sup> Accordingly, the Arbitrator revised the estimated increase in costs to \$441,000 for fiscal year 2010 and \$444,425 for fiscal year 2011. Nevertheless, the Arbitrator found that these reduced amounts were sufficient to show an adverse agency impact.

In addition, the Arbitrator addressed a Union claim that the costs should be further reduced by comparing the costs of scheduling in-lieu-of holidays for employees on compressed schedules with the costs for employees who did not work compressed schedules. The Arbitrator found that the Union “gave no detailed explanation as to how such a comparison would be made.”<sup>14</sup> But, “theoriz[ing]”<sup>15</sup> that the Union was arguing for a further two-thirds reduction in the already-reduced cost estimates, the Arbitrator found that this would mean that the disputed practice increased the Agency’s costs by \$147,000 in fiscal year 2010 and \$148,141 in fiscal year 2011. The Arbitrator then stated: “[E]ven if all of the adjustments proposed by the Union were made,” which the Arbitrator was “not persuaded would be justified,” the remaining amounts still showed an adverse agency impact.<sup>16</sup>

Further, the Arbitrator noted that the Agency did not present any evidence that it attempted to determine possible savings from the disputed practice, such as reduced overtime, reduced sick-leave usage, or increased productivity. However, the Arbitrator found that the Union did not provide, and he did not “believe there is, a statistically reliable method to determine [whether] there

were actual savings from” such factors to offset the increased costs of the disputed practice.<sup>17</sup> The Arbitrator stated that such computations would be “subjective” and unreliable.<sup>18</sup> Therefore, the Arbitrator found that the Agency’s failure to calculate such savings was not “fatal” to its finding of adverse agency impact.<sup>19</sup>

Moreover, the Arbitrator rejected the Union’s claim that the disputed practice conflicted with a previous settlement agreement. The Arbitrator found that the settlement agreement, which applied to one particular dam, related only to a previous practice of “moving the in-lieu-of holiday to an eight[-]hour day rather than to a twelve[-]hour day.”<sup>20</sup>

Finally, the Arbitrator noted that the Bonneville Power Administration (the Power Administration) sells the power generated by the dams, and that those sales, along with congressional appropriations, directly fund the dams’ operation and maintenance. But the Arbitrator found that the source of the Agency’s funding was irrelevant to whether the policy was valid.

The Arbitrator thus concluded that the Agency had established an adverse agency impact that justified implementing the policy. Accordingly, he denied the grievance.

The Union filed exceptions to the Arbitrator’s award, and the Agency filed an opposition to the Union’s exceptions.

### III. Analysis and Conclusions

#### A. The award is not contrary to law.

The Union contends that the Arbitrator’s finding that the Agency established an adverse agency impact is contrary to 5 U.S.C. §§ 6103 and 6131.<sup>21</sup>

Section 6103(b)(2) designates the days on which in-lieu-of holidays generally must be scheduled.<sup>22</sup> But § 6103(d)(2) provides that, “notwithstanding any other provision of law or the terms of any collective[-]bargaining agreement,” an agency may schedule the in-lieu-of holiday on a different day (within certain limitations not at issue here) “if the agency head determines that it is necessary to do so in order to prevent an adverse agency impact.”<sup>23</sup> For these purposes,

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 10.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 11.

<sup>21</sup> Exceptions at 14.

<sup>22</sup> See 5 U.S.C. § 6103(b)(2).

<sup>23</sup> *Id.* § 6103(d)(2).

“adverse agency impact” has the meaning set forth in § 6131(b),<sup>24</sup> which (as relevant here) is “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).”<sup>25</sup>

According to the Union, the Agency was required to show that the policy was necessary to prevent an increase in costs.<sup>26</sup> The Union notes that compressed work schedules have been in effect at the Agency for at least twenty years, with no change, and claims that this indicates that there is no adverse agency impact.<sup>27</sup> To support its arguments, the Union cites<sup>28</sup> the Federal Service Impasses Panel’s (the Panel’s) decision in *DOJ, Federal BOP, U.S. Penitentiary, Lewisburg, Pa. (BOP)*.<sup>29</sup>

Sections 6103(d)(2) and 6131(b)(3), read together, allow agencies to change in-lieu-of holidays when necessary to “prevent”<sup>30</sup> an “increase in the cost of agency operations.”<sup>31</sup> Nothing in this wording precludes the Agency from relying on the projected costs of continuing the disputed practice. That is, the wording does not preclude the Agency from (1) determining that continuing the practice would “increase” the Agency’s costs relative to what those costs would be if the practice ended,<sup>32</sup> and (2) deciding that it was necessary to end the practice in order to “prevent” that increase in costs.<sup>33</sup> As a result, that the disputed practice existed for a long period of time did not preclude the Agency from discontinuing the practice based on the costs that the Agency would incur if it *continued* the practice. As for the Union’s reliance on *BOP*, in that decision, the Panel relied on many factors – including the agency’s use of outdated data and the fact that the cost of a compressed work schedule “appear[ed] to be negligible” – to find that the agency should not have terminated a compressed work schedule.<sup>34</sup> In making that finding, the Panel stated that the agency “should have . . . anticipated” certain costs before it implemented the compressed work schedule.<sup>35</sup> Even assuming that *BOP* is relevant in this case – which does not involve termination of compressed work schedules – *BOP* did not hold that agencies may not

consider the projected, continuing costs of an existing program when assessing adverse agency impact.<sup>36</sup>

Further, the Union asserts that, in order to show adverse agency impact, the Agency was required to demonstrate an increase in costs “related to” either: (1) the implementation of the compressed work schedule; or (2) the scheduling of the in-lieu-of holidays.<sup>37</sup> And the Union asserts that the costs of the disputed practice are “negligible and well within a reasonable administrative cost relating to establishing a compressed work schedule.”<sup>38</sup>

Sections 6103(d)(2) and 6131(b)(3) neither set forth how agencies must calculate adverse agency impact nor establish a threshold cost level necessary to establish an adverse agency impact.<sup>39</sup> And the Union provides no support for its claims regarding how the Agency was required to calculate that impact. The Union also provides no support for its claim that these amounts were within reasonable administrative costs relative to establishing a compressed work schedule. Thus, the Union’s assertions provide no basis for finding the award contrary to law.

Moreover, the Union argues that the Arbitrator erroneously put the burden of proof on the Union by stating that the Union “gave no detailed explanation” for some of its proposed offsets.<sup>40</sup> According to the Union, this is inconsistent with burdens in Panel proceedings involving the termination of compressed work schedules where agencies – not unions – have the burden of establishing adverse agency impact.<sup>41</sup> The Union also argues that a Union witness did, in fact, provide a “detailed analysis”<sup>42</sup> of many of the proposed offsets,<sup>43</sup> and that – contrary to the “totality[-]of[-]the[-]evidence” standard that the Panel applies<sup>44</sup> – the Arbitrator ignored the totality of the evidence in determining that the Agency established adverse agency impact.<sup>45</sup>

As the Union correctly notes, in Panel proceedings involving agency terminations of compressed work schedules, agencies have the burden of establishing adverse agency impact.<sup>46</sup> But even assuming

<sup>24</sup> See *id.* § 6103(d)(1)(B).

<sup>25</sup> *Id.* § 6131(b); see also *AFGE, Local 1709*, 57 FLRA 453, 456 (2001); *U.S. Dep’t of Educ.*, 45 FLRA 1144, 1150 (1992).

<sup>26</sup> Exceptions at 5.

<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> See *id.* at 8.

<sup>29</sup> 5 FSIP 89 (2005).

<sup>30</sup> 5 U.S.C. § 6103(d)(2).

<sup>31</sup> *Id.* § 6131(b)(3).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* § 6103(d)(2).

<sup>34</sup> 5 FSIP 89 at 3.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> See *id.*

<sup>37</sup> Exceptions at 5.

<sup>38</sup> *Id.* at 8.

<sup>39</sup> See 5 U.S.C. §§ 6103(d)(2), 6131(b)(3).

<sup>40</sup> Exceptions at 6.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *id.* at 6-8.

<sup>44</sup> *Id.* at 9 (internal quotation marks omitted).

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Dep’t of the Navy, Portsmouth Naval Shipyard, Naval Sec. Force, Portsmouth, N.H.*, 13 FSIP 61 at 5 (2013) (*Naval Sec. Force*); *Dep’t of the Navy, Portsmouth Naval Shipyard*,

that this burden applies in cases like this one that do not involve terminations of compressed work schedules, the Union's arguments provide no basis for finding the Arbitrator's award contrary to law. The Panel has held that it "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."<sup>47</sup>

Further, § 6131(b)(3) does not prescribe how the Agency was required to calculate the costs of continuing the disputed practice. So there is no basis for finding that the Agency had the burden to calculate all of the offsets that the Union asserted. As a result, when the Arbitrator said that the Union did not give a detailed explanation for those asserted offsets, he did not improperly shift any legal burden that the Agency had. With respect to the Union's claim that it did provide a "detailed analysis" of offsets,<sup>48</sup> the Union neither cites the amounts that it calculated nor explains how the reductions that the Arbitrator did make are inconsistent with those offsets. Finally, as for the Union's claim that the Arbitrator ignored the totality of evidence, he did consider the evidence that the Union cites, including evidence that the Power Administration's sales assist in funding the operation and maintenance of the Agency's facilities, and that the number of operators has not increased since the Power Administration began directly funding the Agency's operations. But the Union provides no basis for finding that these factors are relevant to an assessment of adverse agency impact in this case. Thus, the Union provides no basis for finding the award contrary to law in this regard.

B. The award is not based on nonfacts.

The Union argues that the award is based on several nonfacts.<sup>49</sup> To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>50</sup> However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.<sup>51</sup> In addition, neither legal conclusions<sup>52</sup>

nor conclusions based on the interpretation of a collective-bargaining agreement<sup>53</sup> may be challenged as nonfacts.

As set forth above, the Union argues that, to establish an adverse agency impact, the Agency was required to prevent an increase in costs – not just eliminate costs that already exist<sup>54</sup> – and to show the increase in costs was "a result of the employees working a compressed schedule."<sup>55</sup> Therefore, the Union claims, the Arbitrator made clearly erroneous factual findings when he stated that: (1) the question before him was "whether the [disputed] practice . . . created an increase in cost above what would have been experienced without" that practice;<sup>56</sup> (2) \$441,000 for fiscal year 2010 and \$444,425 for fiscal year 2011 "still would constitute an adverse agency impact";<sup>57</sup> (3) the Union failed to give a "detailed explanation" of how the Agency's costs "increased when compared to employees not working compressed schedules";<sup>58</sup> and (4) "even if all of the adjustments proposed by the Union were made," which the Arbitrator was "not persuaded would be justified, the remaining additional cost amounts would have been sufficient to constitute an adverse economic impact."<sup>59</sup>

Even assuming that the methodology of calculating adverse agency impact is a "factual" matter, the parties disputed, at arbitration, whether it was sufficient for the Agency to show that the disputed practice imposed costs, or whether the Agency had to show an *increase* in costs that resulted from the employees working a compressed schedule.<sup>60</sup> As this issue was disputed at arbitration, the Union's argument provides no basis for finding that the Arbitrator's statements are nonfacts.<sup>61</sup>

The Union also argues that one of the Arbitrator's challenged statements – specifically, that the Union failed to give a "detailed explanation" of how the

*Emergency Mgmt. Dispatch Ctr., Portsmouth, N.H.*, 12 FSIP 36 at 6 (2012) (*Dispatch Ctr.*).

<sup>47</sup> *Naval Sec. Force*, 13 FSIP 61 at 5 (citation and internal quotation marks omitted); *see also Dispatch Ctr.*, 12 FSIP 36 at 6.

<sup>48</sup> Exceptions at 6.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

<sup>51</sup> *Id.*

<sup>52</sup> *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (*Local 801*) (citing *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 744, 749 (2000)).

<sup>53</sup> *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 501 (2000) (*Warner Robins*); *NLRB*, 50 FLRA 88, 92 (1995).

<sup>54</sup> Exceptions at 10.

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.* at 10 (quoting Award at 9).

<sup>57</sup> *Id.* (quoting Award at 9) (internal quotation mark omitted).

<sup>58</sup> *Id.* at 11 (quoting Award at 9).

<sup>59</sup> *Id.* (quoting Award at 10).

<sup>60</sup> *See* Award at 6 (Union argued Agency had to show increase in costs relative to the same employees not working a compressed work schedule); *id.* at 7 (Agency argued that actual funds expended on the disputed practice was sufficient to show adverse agency impact).

<sup>61</sup> *Local 1984*, 56 FLRA at 41 (citation omitted).

Agency's cost estimates should be offset in certain respects – placed the burden on the Union, which the Union claims is contrary to case law holding that the Agency has the burden of proof.<sup>62</sup> To the extent that the Union is arguing that the Arbitrator's statement is contrary to law, as stated above, legal conclusions may not be challenged as nonfacts.<sup>63</sup> Thus, the Union's argument provides no basis for finding the award deficient on nonfact grounds.

In addition, the Union claims that the Arbitrator erred in stating that he did not believe that there was a "statistically reliable method" to calculate the offsets that the Union proposed.<sup>64</sup> But the Union provides no basis for concluding that the Arbitrator made a clearly erroneous factual finding when he stated that there was not a "statistically reliable" way to conduct the Union's proposed offsets.<sup>65</sup> As such, the Union does not demonstrate that the Arbitrator's finding is a nonfact.

Finally, the Union contends that the Arbitrator erred in finding that the disputed practice did not conflict with the settlement agreement.<sup>66</sup> The Union claims that "while the initial grievance [that resulted in the settlement agreement] concerned the practice of moving the in-lieu-of holiday at a single dam, by the time an arbitration was scheduled, this had become an issue throughout the [Agency]" – so the settlement agreement applied to all bargaining-unit members.<sup>67</sup> To the extent that the Union is challenging the Arbitrator's interpretation of the settlement agreement, as stated above, challenges to arbitrator's contract interpretations do not provide a basis for finding nonfacts.<sup>68</sup> Further, the Union provides no basis for concluding that the Arbitrator made a clearly erroneous factual error, but for which the Arbitrator would have reached a different result. Therefore, the Union's contention does not demonstrate that the award is based on a nonfact.

#### **IV. Decision**

We deny the Union's exceptions.

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<sup>62</sup> Exceptions at 11 (quoting Award at 9).

<sup>63</sup> *Local 801*, 58 FLRA at 456-57 (citation omitted).

<sup>64</sup> Exceptions at 12 (quoting Award at 10).

<sup>65</sup> Award at 10.

<sup>66</sup> Exceptions at 13.

<sup>67</sup> *Id.*

<sup>68</sup> *Warner Robins*, 56 FLRA at 501; *NLRB*, 50 FLRA at 92.