

In the Matter of

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
NAVAL SECURITY FORCE
PORTSMOUTH, NEW HAMPSHIRE

and

LOCAL 2024, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 13 FSIP 61

ARBITRATOR'S OPINION AND DECISION

The Department of the Navy, Portsmouth Naval Shipyard, Naval Security Force (NSF), Portsmouth, New Hampshire (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 with Local 2024, American Federation of Government Employees, AFL-CIO (Union) arising from its determination that the 4/10 compressed work schedule (CWS) of the 27 civilian police officers is causing an adverse agency impact.^{1/}

Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through mediation-arbitration by telephone with the undersigned. The parties were informed that if a settlement were not reached during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, on June 27, 2013, I conducted a mediation-arbitration proceeding by telephone with representatives of the parties. The parties were unable to settle the matter voluntarily during the proceeding. Thus, in accordance with 5 U.S.C. § 6131 and 5 C.F.R. § 2472.11 of the Panel's regulations, I am required to issue a final decision resolving the parties' dispute. In reaching this decision, I have considered the entire record, including the Employer's pre-hearing brief and accompanying documentary evidence, and the testimony and arguments offered by both parties.

^{1/} The case was filed after the parties signed an unfair labor practice (ULP) Settlement Agreement (SA), approved by the Regional Director of the FLRA's Boston Regional Office on December 28, 2012. In this regard, the Employer unilaterally terminated the schedule on August 21, 2011, without bringing the matter to the Panel under the Act. Under the terms of the SA, the Employer agreed to reinstate the previous 4/10 CWS on January 27, 2013.

BACKGROUND

The mission at the Portsmouth Naval Shipyard is to overhaul, repair and modernize the U.S. Navy nuclear powered submarine fleet. It is the function of NSF, which falls under the jurisdiction of the Commander, Navy Region Mid-Atlantic, "to protect and provide a secure environment for personnel and assets who live, work and visit Mid-Atlantic Regional Navy installations and to implement clear region-wide policies to guide [NSF] personnel and customers." The Union represents a bargaining unit consisting of approximately 209 professional General Schedule accountants and non-professional employees, including police officers, dispatchers, computer clerks and computer assistants. The parties' most recent collective-bargaining agreement (CBA) expired on January 13, 2009, but they continue to adhere to its terms and conditions.

ISSUE AT IMPASSE

The issue before me is the following:

Whether the February 28, 2013, finding by the Regional Program Director,^{2/} upon which the Employer bases its determination to terminate the 4/10 compressed work schedule of the Naval Security Force civilian police officers, is supported by evidence of adverse agency impact as defined under the Act.^{3/}

^{2/} The Employer's request for assistance included a written finding by the Regional Program Director (RPD), K.R. Hibbert, that the 4/10 CWS is causing an adverse agency impact, and COMNAVREGMIDLANT Instruction 5233.1, which delegates to RPDs the responsibility "to allocate program resources while seeking the best possible service delivery and ensuring standardization and economy of operations throughout his area of responsibility." Accordingly, the Employer has met the statutory and regulatory requirements for presenting this case to the Panel under the Act.

^{3/} Under 5 U.S.C. § 6131(b), "adverse agency impact" is defined as:

- (1) a reduction of the productivity of the agency;
- (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 an existing CWS is causing 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 PARTIES' POSITIONS

1. The Employer's Position

The Arbitrator should find that the current 4/10 CWS is causing an adverse agency impact because it has: (1) reduced the productivity of the Agency; and (2) resulted in a significant increase in the costs of Agency operations. With respect to productivity, to fulfill its mission, NSF is required to provide security coverage for each of its 13 validated watch-posts, most of which must be covered 24 hours a day, 7 days a week. The 4/10 schedule, however, "contains unnecessary overlap periods between each of the three daily shifts during which times there are twice as many NSF employees on duty as the Agency needs in order to accomplish its mission." In addition, "there is no benefit to the Agency having the additional NSF employees on-duty during these overlap periods." Hence, the unnecessary overlap periods require the Agency to pay NSF employees for 30 hours of duty to provide each 24 hours of security coverage that is required.

To illustrate the reduction in productivity created by the 4/10 schedule, each watch-post that NSF must staff per shift can be viewed as a "unit" of output. The number of watch-posts that must be manned and, thus, the total units that are output, is the same under either the current 4/10 CWS or the Employer's preferred 5/8 schedule. Productivity, on the other hand, "is not simply a measure of output" but in economic terms can be defined as "the ratio of what is produced to what is required to produce it," or the ratio of output to input. The 4/10 CWS is inherently inefficient because the Agency "is required to expend more input to produce each unit of output" than it would under a 5/8 schedule. In this regard, each of the 13 validated NSF watch-posts (*i.e.*, 13 units of output per shift per weekday), multiplied by the three shifts per weekday necessary to provide 24-hour coverage, results in the total daily weekday output of 39 units. The input required to produce 39 units of output under the 4/10 CWS is 390 man-hours (39 units x 10 hours per unit) while the input required to produce the same 39 units of output under a 5/8 schedule is 312 man-hours (39 units x 8 hours per unit). Therefore, because the 4/10 CWS requires the expenditure of "more man-hours of input than necessary" to meet NSF's mission, it "is inefficient and reduces the productivity of the Agency."^{4/}

The 4/10 CWS has resulted in a significant increase in the costs of Agency operations "because it regularly results in . . . a significant amount of [overtime] costs in comparison to a 5/8 schedule." To meet its security requirements, when the total number of weekend shifts is added to the 195 required on weekdays, NSF must staff approximately 261 shifts per week. The 27 civilian police officers currently on the 4/10 CWS permit NSF to schedule only 108 shifts in

^{4/} The Employer argues further that the reduction in the Agency's productivity under the 4/10 CWS also can be broken down into "simple financial terms." Using \$21.55 as the NSF employees' average hourly rate, the total cost of man-hours needed to produce the daily weekday output of 39 units under the current schedule equates to \$8,404.50 (390 man-hours x \$21.55 per hour), or \$215.50 per unit. Because the cost per unit would be \$172.40 under a 5/8 schedule (312 man-hours x \$21.55 per hour ÷ 39 units), the Agency contends that it currently spends 25 percent more than necessary to meet its mission requirements.

any given week without the assignment of overtime. Coupled with the current 31 active-duty military members, who are also on a 4/10 CWS and are regularly assigned to perform watch-standing duties, NSF “can staff only 232 shifts per week” versus the 261 it is required to staff. This 29 shift-per-week deficit increases whenever NSF employees or military members are absent due to annual, sick and holiday leave, etc., which results in the regular assignment of overtime shifts to its civilian employees, beyond their scheduled four shifts per week, “at an increased rate of pay in comparison to their standard pay rates.” Under a 5/8 schedule, however, NSF would have 135 shifts available to schedule its 27 civilian employees, along with 155 shifts where it can schedule its military members, who would also be working a 5/8 schedule, for a total of 290 shifts in any given week. This would result in a surplus of 29 shifts per week (290 minus 261) “between what it must staff and what it can staff without the assignment of [overtime].” A 5/8 schedule also would permit NSF employees and military members to be on various forms of leave, for example, without requiring the assignment of overtime and the related increase in costs to the Agency.

As the Employer’s documentary evidence demonstrates, the increase in overtime costs “is clearly reflected through the NSF employee payroll records.” The average amount of NSF employee overtime per pay period from August 11, 2012, through January 26, 2013, when employees were working a 5/8 schedule, was approximately \$3,135; in contrast, the average amount of NSF employee overtime per pay period from February 9 through May 18, 2013, when employees returned to the 4/10 CWS, has increased to approximately \$8,814 per pay period. There was no increase in demand for security services or increase in leave usage following the return to the 4/10 CWS “which otherwise could account for the associated increase in [overtime].” In summary, the 4/10 CWS significantly increases the costs of Agency operations because it results in the regular assignment of overtime shifts to NSF employees beyond the four shifts per week they currently work. Because the Agency can accomplish its mission under a 5/8 schedule without the need for any regularly scheduled overtime, the current 4/10 CWS results in an adverse agency impact and should be terminated.

2. The Union’s Position

The Arbitrator should find that the Employer has not met its burden under the Act of demonstrating that the current 4/10 CWS is causing an adverse agency impact. Preliminarily, NSF civilian police officers have worked various compressed work schedules since at least 1989, including a 4/10 CWS. The current 4/10 CWS went into effect in October 2010, when employees went from working 12½-hour shifts, which included built-in overtime, to 10-hour shifts, and continued until it was unilaterally terminated by management on August 21, 2011. While the Employer now argues that the overlap between shifts on the 4/10 CWS results in a loss in productivity, management considered it an asset in the past because it permitted NSF to provide greater security, for example, by providing employees to monitor traffic. It also allows employees to receive training without compromising management’s ability to staff its validated watch-posts, and provides employees with the opportunity to take 2 hours of annual leave per day without impacting NSF’s ability to accomplish its mission. The fact that management once touted the benefits of a 4/10 CWS undercuts its current opinion that the schedule is causing a reduction in the productivity of the Agency. With respect to the Employer’s position that the Agency is experiencing an unnecessary increase in overtime costs because of the 4/10 CWS,

consistent with the requirements of the CBA, which is a legally binding contract, NSF should be providing the staffing necessary to comply with its contractual obligations rather than attempting to terminate the schedule. Instead, NSF currently is assigning employees to un-validated posts, *i.e.*, the firing range, the traffic department, and Gate 4, which creates the need for approximately 280 hours of overtime per week that are reflected in the Employer's overtime numbers – hours that could be eliminated if these employees were assigned to the watch posts. The Arbitrator should conclude that such Employer actions undermine its argument as to the real cause of NSF's increased overtime costs and order that the 4/10 CWS continue in effect.

CONCLUSION

Under § 6131(c)(3)(C) of the Act, the Panel is required to take final action “not later than 60 days after the date the Panel is presented the impasse” in favor of the agency head's determination to terminate a CWS if the finding on which it is based is supported by evidence that the schedule has caused an “adverse agency impact.”^{5/} 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.”^{6/}

Having carefully considered the totality of the evidence presented, I must conclude that the Employer has met its statutory burden of establishing adverse agency impact.

The Employer's data show substantially higher overtime costs directly linked to the 4/10 schedule. The Union has not challenged this data. Instead it believes the Employer should reassign several police officers assigned to non-watch post duties (or make new hires) in order to increase watch post staffing to reduce the need for the overtime, regardless of any other considerations. The Employer countered with testimony concerning the three non-watch post assignments describing its reasons for considering them essential to mission, irrespective of their currently being “unvalidated posts,” and there is no basis for concluding that these assignments were made only to “cook the books” on 4/10 schedule overtime when these assignments were in

^{5/} Although the Employer's request for assistance was received on March 15, the parties did not reach an impasse until May 17, 2013.

^{6/} 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).

effect during the prior 6- month period when employees were on a 5/8 schedule. The obligation urged by the Union exceeds what is required by the Act.^{7/}

Neither is there effective rebuttal of the Employer's data showing that under 4/10 shifts, more employees are at the watch posts than are needed for several hours a day, that need having been quantified by a regular "validation" process that determines the level of security required at the facility, including the number and staffing of watch posts. The other tasks that surplus police officers have been given during this overlap time (directing traffic, going to training) do not enhance watch post coverage even if they have other intrinsic value. Under the facts presented here, they are not a productive use of employees' time in terms of the "output" that is needed – 24/7 security at the watch posts – when the effect is to leave other hours uncovered.

It is understandable that the extended period in which bargaining unit employees have worked on compressed work schedules has created an expectation on the part of employees that these schedules provide benefit to the agency. However, at this point and in this environment the Employer has made a different calculation and in the face of the evidence presented, I must conclude that adverse agency impact within the meaning of the Act has been established.^{8/}

DECISION

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. § 6131(c), and § 2472.11(a)(2) of its regulations, I hereby order that the 4/10 CWS of the Naval Security Force civilian police officers be terminated.



Mary E. Jacksteit
Arbitrator

July 15, 2013
Takoma Park, Maryland

^{7/} The Union cited the collective bargaining agreement as the source of a mandate on the Employer to add staff to the watch posts. The appropriate venue for asserting rights under a negotiated agreement is the grievance procedure.

^{8/} This decision applies only to the existing 4/10 schedule. There is no bar to the parties discussing other alternative work schedules that meet the interests of both parties.