

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF HOMELAND SECURITY  
BUREAU OF CUSTOMS AND BORDER  
PROTECTION  
HOULTON PORT OF ENTRY  
HOULTON, MAINE

and

CHAPTER 141, NATIONAL TREASURY  
EMPLOYEES UNION

Case No. 15 FSIP 135

ARBITRATOR'S OPINION AND DECISION

Chapter 141, National Treasury Employees Union (NTEU or Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Homeland Security, Bureau of Customs and Border Protection, Houlton Port of Entry, Houlton, Maine (Employer, Agency or CBP).

Following investigation of the request for assistance, concerning a dispute over the memorandum of understanding (MOU) that would implement work schedules for two newly-created work units,<sup>1/</sup> the Panel directed the parties to resolve the issues through mediation-arbitration with the undersigned. In accordance with the Panel's directive, the proceeding was convened on January 13 and 14, 2016, in Bangor, Maine. Having failed to resolve the matter during the mediation phase, it now is before me for resolution. In rendering my decision, I have considered the entire record in the case, including statements made during my meetings with the parties, documentary evidence, the parties' final offers, and post-hearing briefs.

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<sup>1/</sup> While the parties have agreed on a mix of both 4/10 compressed work schedules (CWS) and straight 8-hour tours of duty for the new units, they did not sign off on the schedules because of their dispute over the MOU.

### BACKGROUND

The Employer's mission is to prevent terrorists and terrorist weapons from entering the U.S. It also is charged with the interdiction of drugs and other contraband and the prevention of illegal entry of individuals into the U.S. The Union represents approximately 320 employees in New England and Canada who are part of a consolidated bargaining unit consisting of approximately 25,000 employees. Most are Customs and Border Protection Officers (CBPOs) who screen passengers and cargo at more than 300 ports of entry. There are approximately 40 CBPOs at the Houlton Port of Entry. The parties are covered by a national collective-bargaining agreement (NCBA) that was to expire on May 11, 2014, but remains in effect until a successor is implemented.

In 2015, the Employer created two new work units - the Lobby/Warehouse and Warehouse/Lobby Units; in doing so, it reduced the number of employees available to staff the existing Passenger and Cargo Units. Essentially, the two new work units were created so that employees assigned to them would work on both passenger screening (now known as "Lobby" work) and cargo screening (now known as "Warehouse" work) without being transferred to another unit. Pursuant to the bidding and rotation procedures in Article 13 of the NCBA, on September 1<sup>st</sup> of each year, CBPOs bid on the units where they would like to work and are permitted to express a preference for available shifts or schedules within each work unit.<sup>2/</sup> Typically, seniority among equally qualified employees determines selection. Once bid selection is determined, every 2 weeks the CBPO would rotate through the various work schedules in the work unit to which he or she is assigned.

### ISSUES AT IMPASSE

The parties essentially disagree over whether the Employer should have the discretion to adjust CWSs to cover operational needs, the frequency of such adjustments, and the amount of notice that should be given to a CBPO whose CWS is adjusted.

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<sup>2/</sup> A CBPO who prefers to do more passenger screening than cargo screening likely would bid on work assignments in the Lobby/Warehouse unit, while one who has a preference for performing more cargo screening than passenger screening would likely bid on work assignments in the Warehouse/Lobby unit.

PARTIES' POSITIONS

1. The Employer's Position

The Employer proposes the following:<sup>3/</sup>

1. CBP and NTEU recognize and acknowledge that broad use of alternative work schedules enable employees to better balance their work and personal responsibilities, increase employee effectiveness and job satisfaction, and aid CBP's recruitment and retention efforts.
2. Placement of employees on the CWS will conform to Article 13 of the National Collective Bargaining Agreement.
3. Eligibility for participation in the CWS is reserved to those CBPOs who have successfully completed the formal Federal Law Enforcement Training Center Academy and structured post academy training programs. An exception may be made for trainees in order to permit them to mirror their respective FTO's schedule.
4. Except as may be provided for elsewhere in this MOA, employees shall participate in the CWS negotiated for their work unit.
5. An employee who bids and is assigned to the CWS may request to terminate his or her assignment in the CWS based upon a personal/family hardship exemption, which may include but are not limited to the following:
  - Child Care
  - Medical
  - Other (long term TDY assignment)
6. An employee request for exemption from the CWS may, on a case-by-case basis, be granted for reasons other than personal/family hardship(s).

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<sup>3/</sup> The Union does not dispute the first eight provisions of the Employer's proposal.

7. Employees assigned to a CWS who are assigned to a light duty assignment may remain on a CWS during the time of the assignment.
8. An employee who is temporarily removed/exempted from the CWS will, upon return to the CWS, be reestablished at the point on the CWS rotation s/he would have been but for the removal/exemption.
9. All employees will rotate through a CWS that incorporates a 4/10 work schedule. The hybrid Lobby/Warehouse Work Unit will consist of 10 lines and 4 half lines of CWS. The hybrid Warehouse/Lobby Work Unit will consist of 4 lines of CWS.<sup>4/</sup>
10. In order to provide greater flexibility for employees and to meet the Agency's operational requirements, management may adjust an employee's tour of duty during an administrative workweek under the conditions in 10(a)-(d). When an adjustment to a tour of duty and/or regularly scheduled day(s) off within an administrative workweek is required to meet operational need, management will determine which lines of the CWS require adjustment. Management will solicit volunteers assigned to these lines to adjust their tour of duty and/or regularly scheduled day(s) off. If there is more than one volunteer, the adjustment will be made by seniority. Absent volunteers, management will effect necessary schedule adjustments by least seniority.
  - a. An exemption from this provision will be granted for an employee's regularly scheduled day(s) off that occur(s) in conjunction with the employee's scheduled annual leave at the employee's request.

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<sup>4/</sup> The parties negotiated the starting and stopping times and days off for the work schedules in the Lobby/Warehouse and Warehouse/Lobby units and they are not in dispute, though they were never formally signed or initialed.

- b. Management will not reassign an officer to more than one tour of duty during an administrative workweek.
- c. All start and stop times of an administrative workweek will conform to the shifts currently available in the negotiated CWS.
- d. The work unit's schedule will be posted at least four (4) weeks in advance of the start of the pay period.
- e. When adjustments to posted schedules are required, management will notify affected employees within 7 days or as soon as practicable.

The Employer contends that, while it has agreed to include CWSs for the work units, an integral part of that commitment is that it must have the ability, set forth in an implementing MOU, to make adjustments to work schedules on short notice to meet unanticipated operational needs and exigent circumstances. The Employer seeks flexibility to react to situations quickly, without having to bargain to impasse on minor adjustments to the work schedule that supports the operation. The proposal is consistent with Article 14, Alternative Work Schedules, Section 6 of the NCBA, which provides that "(f)lexible and compressed work schedules established through local negotiations must reasonably align to staffing and workload requirements." Due to the nature of its mission, the Employer must function in an environment that is constantly changing. Having the ability to make adjustments to work schedules to accommodate evolving circumstances is a necessity.

Management has agreed to implement CWS to enable employees to better balance their work and personal responsibilities; the *quid pro quo* for that arrangement is to give the Employer the discretion to make scheduling adjustments to meet operational needs. The Employer's discretion, however, would not be unfettered. In this regard, a CBPO would not be assigned to more than one tour of duty during an administrative work week; the starting and stopping times would conform to the shifts currently available in the negotiated CWS and, when adjustments to schedules are required, management would provide 7 days advance notice or notice as soon as practicable. These limitations on management's discretion would afford CBPOs more

predictability in their schedule and allow them to continue to balance work/life needs.

## 2. The Union's Position

The Union proposes the following:

1. This MOU incorporates in its entirety Article 14: Alternative Work Schedules of the parties' National Collective Bargaining Agreement (NCBA) dated May 11, 2011 as revised October 2013.
2. The Houlton CWS shall be comprised of a 4/10 schedule as negotiated and incorporated into the MOU and as found at Attachment 1 for the Lobby/Warehouse Work Unit and Attachment 2 for the Warehouse/Lobby Work Unit. These schedules may not be further altered except in accordance with the procedures in Article 14 of the NCBA.
3. The parties have mutually agreed to the specific lines of the Lobby/Warehouse and Warehouse/Lobby Work Unit CWS to be designated as Relief Lines. The agreed upon lines are clearly delineated within Attachment 1 and Attachment 2 and may not be changed without further bargaining.
4. When the Relief Line is utilized to backfill for leave or other absences (e.g. TDY, LWOP, extended training) they should, when possible, be scheduled at least four (4) weeks in advance, management may, [sic] not less than 4 weeks in advance and, in no instance, less than 7 days in advance.
  - a. Management may only assign the Relief Officer scheduled to work the Relief Line to the line(s) of the schedule being vacated by the CBPO(s) taking leave or otherwise being absent.
  - b. No change shall be made to the hours of work, regular days off, or any other detail regarding the line of the schedule being relieved. (Example: If the Line 5 Relief Officer is to backfill for, say, Line 3, there shall be no changes made to Line 3 as

negotiated and the Relief Officer shall work Line 3 just as if s/he had normally rotated into that Line.)

- c. The relief assignment shall be for either one entire administrative workweek or both entire administrative workweeks. Where the necessity should arise to provide relief for the first week of one line of the schedule and the second week of another, the Agency may assign the Relief Officer to two different lines on the schedule corresponding to each of the administrative workweeks for which relief is require.
5. In order to meet unanticipated training requirements of less than an administrative workweek in duration, management may adjust the Officer's CWS schedule to accomplish the training requirement.
6. An employee who bids and is assigned to the CWS may request to terminate his/her participation based upon a personal/family hardship exemption, which may include but be not limited to the following: Child Care, Medical, Other (Long Term TDY Assignment), etc. The effective date of the CWS termination, if approved, shall be the first workday of the next schedule that is not yet posted on the date the exemption is approved.
7. An employee request for exemption from the CWS for reasons other than personal/family hardship may be approved on a case-by-case basis.
8. Per the provisions of the Flexible and Compressed Work Schedules Act (Act) and Article 14: Alternative Work Schedules as stated above, no changes shall be made to the negotiated schedule or the terms thereof without further bargaining. Any bargaining disputes or impasses shall be handled in accordance with the Act and Article 14.
9. Six months following the effective date of this MOU, either party may request a meeting to review

the efficacy of the CWS and discuss potential modifications.

10. This MOU shall become effective not later than 30 days following signature by the parties stated below, or Agency Head Review, whichever occurs soonest.

In essence, the Union contends that the Employer is seeking absolute discretion to modify compressed schedules with no guarantee of advance notice to the affected CBPO. The parties jointly developed both compressed and 6101 schedules (8-hour tours) for the two work units and, in doing so, they provide the Employer with the greatest level of coverage for its mission and allow employees to have an improved home and work life balance. The Employer now is proposing to disrupt that balance by creating a situation where CBPOs no longer could rely on fixed starting and stopping times or regular days off (RDOs) for their CWS tours. In effect, the Employer's proposal disregards agreed upon schedules and, essentially, would designate them as "sample schedules," with the Employer having the right to modify at will. It is essential that the schedules developed by the parties be implemented as negotiated; otherwise, the Employer would be at liberty to adjust work schedules and employees would not have fixed and regular tours of duty upon which they may rely.

Under the Federal Employees Flexible and Compressed Work Schedules Act (Act), 5 U.S.C. § 6120, *et seq.*, CWSs are fully negotiable, except to the extent that they have an adverse impact on agency operations. The Employer has not alleged that the CWS negotiated by the parties would cause an adverse agency impact, nor has it provided any argument or evidence in that regard. The Employer has raised only a speculative need for flexibility to modify CWSs in circumstances where the parties already have taken into consideration factors to address operational needs.

The NCBA provides the Employer with the ability to adjust, either temporarily or permanently, CWSs. By incorporating Article 14 into the MOU, as the Union proposes, the Employer has the ability to avail itself of those protections. Moreover, the 6-month reopener provision proposed by the Union would give the parties the opportunity to gather data in support of "fine-tuning" the schedules, if need be. Thus, the Employer is not without recourse if it has a legitimate need to re-work schedules; at this point, however, the Employer has not provided



any data or anecdotal evidence to support its claimed need for complete discretion to adjust CWSSs. Over the past several years, Chapter 141 has negotiated 17 other MOUs with CBP for the employees it represents, with each having clearly defined regular and fixed tours of duty, days of the workweek and RDOs. Except for relief lines, none of those agreements include the sort of flexibility that the Agency now seeks for the Houlton Port of Entry and no adjustments were made to them except through bargaining "based upon tangible, supported operational or workload need." In conclusion, the Union's proposal addresses the Employer's need to adjust CWSSs when there is a specific demonstrated need for doing so, and it protects employees from arbitrary changes so that they are afforded a measure of predictability.

#### OPINION

Having carefully considered the record presented by the parties, I shall impose a compromise that incorporates into their MOU the first eight provisions of the Employer's final offer, and portions of the Union's final offer that, among other things, implement the schedules that were jointly developed for the Lobby/Warehouse and Warehouse/Lobby Work Units. On the key issue separating the parties, the MOU will provide for stability in CBPO CWSSs. In this regard, I am persuaded that the work schedules for the two new units should not be considered illustrative or sample schedules, as the Employer prefers. Rather, the MOU will incorporate by reference the schedules the parties tentatively agreed upon that set forth fixed work hours for the various lines and the RDOs for the CPBOs assigned. While the Employer would like the ability to modify CWSSs, with no guarantee that the affected CBPO would be given a specific amount of notice that his/her anticipated work schedule would be changed, in my view it has failed to substantiate a need for its proposal. For example, management does not contend that overtime costs are likely to increase at the Houlton Port of Entry unless it has the discretion to assign those on CWSSs to cover for unanticipated absences of other CBPOs.

At this point, the parties do not have the experience of utilizing CWSSs for the two new work units and, therefore, their impact is unknown. For this reason, the MOU also will include the Union's wording allowing them to review the efficacy of the CWSSs 6 months following their implementation to make necessary adjustments. The parties apparently agree that CWSSs should be part of the rotational assignments for the new work units because of the benefits they afford to CBPOs in balancing their

work and personal lives. In addition, management has acknowledged that CWSS may have a positive impact on the retention of CBPOs stationed at the Houlton Port of Entry. Such mutual interests are conducive to the successful implementation of CWSS and the parties are encouraged to be responsive to issues raised by either side as the new work schedules take effect.

#### DECISION

The parties shall adopt the following to resolve their dispute over implementation of work schedules for the Lobby/Warehouse and Warehouse/Lobby Work Units at the Houlton Port of Entry:

#### MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (MOU) constitutes the agreement between U.S. Customs and Border Protection (CBP) and the National Treasury Employees Union (NTEU) Chapter 141 to implement a compressed work schedule (CWS) for the CBP officers assigned to the Lobby/Warehouse Work Unit and Warehouse/Lobby Work Unit at the Port of Entry at Houlton, Maine.

1. CBP and NTEU recognize and acknowledge that broad use of alternative work schedules enable employees to better balance their work and personal responsibilities, increase employee effectiveness and job satisfaction, and aid CBP's recruitment and retention efforts.
2. Placement of employees on the CWS will conform to Article 13 of the National Collective Bargaining Agreement.
3. Eligibility for participation in the CWS is reserved to those CBP officers who have successfully completed the formal Federal Law Enforcement Training Center Academy and structured post academy training programs. An exception may be made for trainees in order to permit them to mirror their respective FTO's schedule.

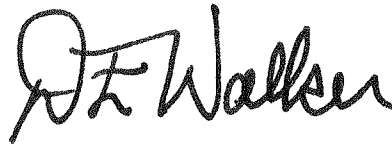
4. Except as may be provided for elsewhere in this MOU, employees shall participate in the CWS negotiated for their work unit.
5. An employee who bids and is assigned to the CWS may request to terminate his or her assignment in the CWS based upon a personal/family hardship exemption, which may include but are not limited to the following:
  - Child Care
  - Medical
  - Other (long term TDY assignment)
6. An employee request for exemption from the CWS may, on a case-by-case basis, be granted for reasons other than personal/family hardship(s).
7. Employees assigned to a CWS who are assigned to a light duty assignment may remain on a CWS during the time of the assignment.
8. An employee who is temporarily removed/exempted from the CWS will, upon return to the CWS, be reestablished at the point on the CWS rotation s/he would have been but for the removal/exemption.
9. This MOU incorporates in its entirety Article 14: Alternative Work Schedules of the parties' National Collective Bargaining Agreement (NCBA) dated May 11, 2011, as revised October 2013.
10. The Houlton CWS shall be comprised of a 4/10 schedule as negotiated and incorporated into the MOU and as found at Attachment 1 for the Lobby/Warehouse Work Unit and Attachment 2<sup>5/</sup> for the Warehouse/Lobby Work Unit. The compressed schedules and the 8-hour schedules on the Attachments may not be further altered except in accordance with the procedures in Article 14 of the NCBA or paragraph 11 below.

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5/ Attachments 1 and 2 referenced in this provision set forth the work schedules through which CBPOs shall rotate when assigned to the Lobby/Warehouse and Warehouse/Lobby Work Units. They are incorporated by reference into the MOU.

11. The parties have mutually agreed to the specific lines of the Lobby/Warehouse and Warehouse/Lobby Work Unit to be designated as Relief Lines. The agreed upon Relief Lines are clearly delineated within Attachment 1 and Attachment 2 and may not be changed without further bargaining, except for hours of work while on a relief assignment.
12. When the Relief Line is utilized to backfill for leave or other absences they should, when possible, be scheduled at least four (4) weeks in advance, but, in no instance, less than 7 days in advance.
  - a. Management may only assign the Relief Officer scheduled to work the Relief Line to the line(s) of the schedule being vacated by the CBP officer(s) taking leave or otherwise being absent.
  - b. No change shall be made to the hours of work, regular days off, or any other detail regarding the line of the schedule being relieved. (Example: If the Line 5 Relief Officer is to backfill for, say, Line 3, there shall be no changes made to Line 3 as negotiated and the Relief Officer shall work Line 3 just as if s/he had normally rotated into that Line.)
  - c. The relief assignment shall be for either one entire administrative workweek or both entire administrative workweeks. Where the necessity should arise to provide relief for the first week of one line of the schedule and the second week of another, the Agency may assign the Relief Officer to two different lines on the schedule corresponding to each of the administrative workweeks for which relief is require.
13. In order to meet unanticipated training requirements of less than an administrative workweek in duration, management may adjust the Officer's CWS schedule to accomplish the training requirement.

14. Per the provisions of the Flexible and Compressed Work Schedules Act (Act) and Article 14: Alternative Work Schedules as stated above, no changes shall be made to the negotiated schedule or the terms thereof without further bargaining. Any bargaining disputes or impasses shall be handled in accordance with the Act and Article 14.
15. Six months following the effective date of this MOU, either party may request a meeting to review the efficacy of the CWS and discuss potential modifications.
16. This MOU shall become effective not later than 30 days following signature by the parties or Agency Head Review, whichever occurs soonest.

A handwritten signature in black ink that reads "D E Walker". The signature is written in a cursive, flowing style.

David E. Walker  
Arbitrator

March 12, 2016  
Owls Head, Maine