

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF THE  
ARMY  
WOMACK ARMY MEDICAL CENTER  
FORT BRAGG, NORTH CAROLINA

And

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES  
LOCAL, 1770

Case No. 19 FSIP 025

**DECISION AND ORDER**

This request for assistance concerning the termination of existing compressed work schedules (CWS) was filed by the United States Department of the Army, Womack Army Medical Center, Fort Bragg, North Carolina (Agency) on March 4, 2019, under the Federal Employees Flexible and Compressed Work Schedules Act (Act) of 1982, 5 U.S.C. § 6120, *et seq.* Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through a Written Submissions procedure with an opportunity for rebuttal statements. The parties timely submitted their arguments and accompanying documents. The record is closed and the Panel issues the following decision in accordance with 5 U.S.C. §6131 and 5 C.F.R. §2472.11 of its regulations.

**BACKGROUND**

The Agency's mission is to provide the highest quality health care, maximize the medical deployability of the military force, ensure the combat readiness of the Agency's personnel, and sustain exceptional education and training of U.S. Army Medical Department personnel. It services all branches of the

military and military personnel, retirees, and family. As relevant here, the Agency has a Department of Public Health, which utilizes evidence-based practices to promote health and prevent disease, injury, and disability through clinical services, medical investigation, surveillance, and educational outreach for Army personnel and its family members.

The American Federation of Government Employees, Local 1770 (Union) represents approximately 4,000 bargaining-unit employees. Many are in a variety of medical positions. The parties are covered by a collective bargaining agreement that expires in April 2021. It permits negotiations over CWS and, accordingly, the parties negotiated individual CWS agreements for 27 bargaining-unit employees in the Agency's Department of Public Health. The Department of Public Health consists of seven sections, with five of those sections impacted in this dispute: Occupational Health Services; Industrial Hygiene; Army Public Health Nursing; Environmental Health Services; and Epidemiology and Disease Control Clinic. The Agency wishes to terminate the schedules of the 27 bargaining-unit employees in the five sections.

In Army Public Health Nursing, there is a Medical Support Assistant (MSA) and two Nurses (RNs) that each work a 5-4-9 CWS. In Environmental Health Services, there are three Technicians and one Clerk that each work a 5-4-9 CWS. In Industrial Hygiene, there are four Technicians that work a 5-4-9 CWS; three Technicians and five Hygienists that work a 4-10 CWS; and one Technician and one Hygienist that work a flexible schedule. In Occupational Health Services, there are three Licensed Practical Nurses (LPNs), an Occupational Health Nurse (RN), and an Occupational Health Technician that each work a 5-4-9 CWS. Finally, in Environmental Health Services, there is one Technician that works a flexible schedule.

On August 9, 2017, the Agency notified the Union that it was going to terminate the employees' CWS. Thereafter, the Base Commander changed, so the Agency delayed terminating the schedules. The parties initiated negotiations in November and December 2018, holding three face-to-face bilateral negotiation sessions. They also received in-person mediation from the Federal Mediation and Conciliation Service (FMCS) on February 11, 2019. The FMCS Mediator released the parties from mediation the same day. Accordingly, the Agency filed this request for Panel assistance and formally declared its intention to seek the termination of existing CWS. The Agency's adverse impact statement was signed by the Activity Commander. Pursuant to a

memorandum issued by the Brigadier General of the U.S. Department of the Army on June 29, 2017, Activity Commanders have been delegated authority to make determinations concerning alternative work schedules for civilian medical personnel.

### ISSUE AT IMPASSE

In accordance with §§ 6131(c)(3)(B) and (C) of the Act, the sole issue for the Panel to decide in this CWS case is whether the Agency's decision to terminate CWS for the Department of Public Health is supported by evidence that the schedules have caused "adverse agency impact" within the meaning of the Act.<sup>1</sup>

### POSITIONS OF THE PARTIES

The **Agency** argues that CWS must be eliminated for all 27 employees currently on that type of schedule and return the employees to a traditional 5/8-fixed schedule. The Agency presented evidence supporting its argument that the five sections are not meeting various mission needs for the reasons that will follow. The Agency argues that within the Department of Health, it has four clinical areas, three impacted by this dispute (Occupational Health, Epidemiology, and Army Public Health Nursing) and two non-clinical areas (Environmental Health and Industrial Hygiene). The hours of operation for the five sections are 7:30 a.m. to 4:30 p.m. with the exception of Occupational Health and Environmental Health whose hours are from 7:30 a.m. to 3:30 p.m. and 8:00 p.m. to 4:30 p.m., respectively. The Agency asserts it is essential that employees are available during clinical hours. Many employees on CWS work outside clinic hours and are not available to assist with direct patient care. Several clinical staff members have a Regular Day Off (RDO) on Fridays due to their CWS. Patient appointments are very limited on those days due to inadequate staffing. The Agency states that when one staff member calls in sick on an employee's RDO, the clinic's mission is severely compromised. As a result, the Agency asserts the employees' CWS has diminished the Department of Public Health's level of service to the public and reduced its productivity. )

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<sup>1</sup> 5 U.S.C. § 6131(b)(1)-(3) defines "adverse impact" as:

- (1) a reduction of the productivity of the agency;
- (2) a diminished level of 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 Agency states that CWS improves productivity when it expands the duty-day beyond customer service hours to allow the employees' time to complete administrative paperwork when there is an insufficient amount of time during the customer service hours to complete these duties. However, in all of the sections discussed below, the Agency contends that there is a sufficient amount of time built into clinic customer service hours to accomplish all the necessary administrative functions, and, as such, no need to work before or after the clinics close.

The Agency argues that due to necessity, clinic appointment schedules are often developed around CWS, which severely compromises clinical operations. As a result, work is restructured and workload is absorbed by staff members not utilizing CWS, i.e., working 5/8-schedules, which accounts for a reduction in productivity. The Agency states that it must stagger work assignments and reporting times to offset for the employees on CWS. When employees are off on Fridays and Mondays, and a holiday falls on one of those dates, the Agency states that the loss of an additional day significantly decreases staffing coverage. Furthermore, these employees often miss team meetings and other important interactions with the staff, which contributes to decreased morale and motivation, lower productivity, and quality of work. Employees who are on CWS require the supervisor to adjust mandatory training classes around the employees' RDO. This results in rescheduling challenges, delinquencies in mandatory training requirements, and decreased opportunities for employees to engage in training.

The Agency contends that the Union's position is not accurate, since employees in the Department of Public Health do not support other operations after normal duty hours. For example, the Department's Clerks and Medical Support Assistants provide customer service during the section's duty hours. Therefore, the Agency states that there is no need for them to start before the sections open or stay after it closes.

The **Union** maintains that the Agency has not met its burden under the Act of demonstrating the existing schedules are creating an adverse impact and, therefore, should be terminated. The Union argues that it will demonstrate that the alternate work schedules do not cause an adverse agency impact, but actually contribute to the agency mission, budget, and customer service. Thus, it is the Union's position that the Agency should keep the employees' CWS in place.

## 1. Occupational Health Services

The mission of Occupational Health Service is to promote the health, safety, and quality of life of all workers in the Fort Bragg Installation and its associated agencies by collecting, analyzing, interpreting and disseminating information about work-related injuries, occupational illnesses, and occupational hazards. It will use data and surveys to target intervention activities, guide the development of prevention programs and policies, and raise awareness of workplace risks. It will also educate employees on occupational health and safety problems.

### a. The Agency's Position

The Agency states that the hours of Occupational Health are from 7:30 a.m. to 3:30 p.m. LPNs' Betty Drew, Joan Harris, and Dorothy McCauly, RN Cathy Dixon, and Technician Tanya Sinclair all work on a 5/4/9-CWS from 7:00 a.m. to 4:30 p.m., with a RDO on Mondays or Fridays. The Agency asserts that the employees are required at work by 7:00 a.m. because they "huddle" prior to starting work, receiving their assignments and checking their equipment before seeing patients at 7:30 a.m.

The Agency contends that the section sees a large amount of employees that walk in during lunch hours and instead of closing, the section stays open to accommodate its customers. The Agency states that this is one reason why the section closes at 3:30 p.m. instead of 4:30 p.m. However, 8 out of 9 days in the pay period, the employees work until 4:30 p.m., resulting in 1-hour each day, or 8 hours per pay period of unproductive, administrative time. The Agency states that there is ample time during clinic hours for the employees to complete administrative matters.

The Agency states that the employees' CWS limits their availability to patients and the number of patients that can be seen during a pay period. The Agency asserts that each pay period, because of the employees' RDOs, they miss four days of work. The Agency claims that if the employees were on a 5/8-schedule that would mean four additional days of nurses being available to their patients, which would significantly increase the section's availability to its customers. The Agency notes that the "kept" appointments by RNs reflect a larger discrepancy on the days that the employees have a RDO than other days of the week. The Agency explains that "kept" appointments means the

days that appointments occur. "Kept" appointments on Mondays and Fridays (days that employees have a RDO) account for only 8 and 21 percent of appointments that actually occurred, respectively. The Agency compares this to non-RDOs (Tuesday and Wednesday), which account for a higher percentage of patients seen (29 and 26 percent, respectively) than days when employees have a RDO.<sup>2</sup>

To support its argument, the Agency provided an affidavit from the Chief of Occupational Health, Jeramy McCarty. He testifies that Occupational Health is not a typical clinic. In this regard, most of the scheduled physicals take 1-hour of testing by the nurse followed by a 1-hour visit with the physician. Therefore, one nurse is assigned to complete the initial portion of the physical, one nurse runs the hearing booth, and one nurse is assigned to process walk-ins. Chief McCarty asserts that a typical day requires a minimum of 5 nursing staff, but with at least two nurses off each Friday and only 6 total nurses in the clinic, there is not enough support for the section's daily operations. Chief McCarty states that he often has to deny potential appointments, which diminishes the section's service to the public.

Chief McCarty further states that a staff member on a fixed schedule has the potential to have 65 hours of direct patient encounters each pay period compared to 57 hours for an employee on a CWS. According to Mr. McCarty, that is a 13 percent decrease in available patient contact per employee on CWS. Overall, the clinic functions at a 7 percent reduction of productivity for each employee on CWS. He asserts that this is compounded by having 5 employees in a small clinic on CWS.

#### b. The Union's Position

The Union states that the clinic is open from 7:30 a.m. to 3:30 p.m. Monday through Friday, except Thursdays, it is open from 7:15 a.m. to 12:00 p.m. The employees on a CWS work from 7:30 a.m. to 4:30 p.m. The Union contends that the nurses have no control over the volume of patients that are scheduled, the number of missed appointments, and the number of cancelled appointments. When the nurses are not engaged in patient care during the aforementioned hours, they are performing other functions such as ordering labs, performing T-cons, calling patients, screening records, updating vaccination results,

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<sup>2</sup> Thursday is reserved for meetings and trainings.

entering data, and conducting mandatory online training, as well other tasks as assigned.

The Union argues that appointments are cancelled for a variety of reasons that have nothing to do with CWS. The Union further states that Ms. Sinclair has been detailed to Audiology for over a year and if the Agency were to return the employee from her detail, it would alleviate the concerns the Agency has over the employees' CWS. Finally, the Union indicates that there are two non-CWS employees that have been absent from work for a significant period of time, contributing to the unavailability of the employees, not the CWS.

### c. Discussion

As an initial matter, the Panel notes that the parties attribute different starting and stopping times for the employees on CWS, but do not disagree as to the general types of schedules worked. As discussed below, the Panel's conclusions turn on absences rather than specific times. Thus, it is unnecessary to resolve the foregoing discrepancy.

The Agency supports its argument for terminating CWS within Occupational Health Services by providing evidence from January to November 2018 that establishes a reduction in the number of patients seen on the days the employees have a RDO. Data that postdates the Agency's finding that CWS has caused an adverse impact does not demonstrate adverse impact under the Act.<sup>3</sup> Notwithstanding, the Agency also provided a sworn statement from the section's Chief, which corroborates the Agency's assertion that the employees' CWS contributes to a diminished level of service to the public. Specifically, with 5 out of 6 nurses off 4 days in a pay period due to their RDOs, the section has had to deny appointments to its customers. This lack of availability of the nurses has decreased the section's level of service furnished to the public.

The Union argues that the employees are available to treat patients during the clinic's hours and that the employees have no control over the volume of patients seen; however, the Union's argument overlooks the fact that the employees' unavailability on their RDOs correlates to the number of patients seen by the section. As a result, the section is not able to care for as many patients as it would if the employees

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<sup>3</sup> U.S. Department of the Army, Installation Management Agency, Installation Adjutant General Headquarters, Fort Bragg Garrison Command, Fort Bragg, N.C., Case No. 06 FSIP 79 (2006).

worked a 5/8-schedule. And, while it could be true that the detailed and non-CWS employees might alleviate some of the Agency's scheduling concerns, the Union has not offered any evidence that suggests such would be the case. Regardless, CWS must allow the Agency to accomplish its mission within the confines of normal personnel actions and/or movements, which might include details or extended employee absences. If CWS is only viable in the absence of commonplace personnel movement or employee absences then it does not allow managers to routinely and successfully meet their program's goals. Based on the totality of the evidence, the employees' CWS contributes to a lack of availability of the section's employees to its patients. This creates a "diminished level of services" within the meaning of the Act.

## 2. Industrial Hygiene

The mission of Industrial Hygiene is to anticipate, identify, evaluate and make recommendations that eliminate or control occupational and environmental exposures to chemical, physical, and biological health hazards by monitoring and reporting workforce health and safety.

### a. The Agency's Position

The section's hours of operation are from 7:30 a.m. to 4:30 p.m. There are 14 employees on CWS. Technicians' Daniell Covington, Samuel Jackson, James McQueen, and Travis Rolison each work a 5/4/9-CWS, starting work at 7:00 a.m. and concluding at either 4:30 p.m. or 5:00 p.m., depending on if the employee elects to take a 60-minute lunch break. These employees have a RDO on either Mondays or Fridays. Technicians' Keith Burroughs, Hampton Skipper, and Joseph West each work a 4/10-CWS, starting work at 6:30 a.m. or 7:00 a.m. and concluding at either 5:00 p.m. or 6:00 p.m., depending on if the employee elects to take a 60-minute lunch break. These employees have a RDO every Monday or Friday. Industrial Hygienists' Jasmine Autry, Yolanda Braham, Louis Delaine, Mark Doorey, and Benjamin Simmons each work a 4/10-CWS, starting work 7:00 a.m. and concluding at either 5:30 p.m. or 6:00 p.m., again depending on if the employee elects to take a 60-minute lunch break. These employees have a RDO every Monday, Thursday, or Friday. Technician Ann Stacy and Industrial Hygienists Davita Heard-Melvin each work a flexible work schedule with core hours from 9:00 a.m. to 5:00 p.m., but they are permitted to flex their start and end time by three hours.

The Agency states that due to the amount of employees on CWS, 14 out of 15 employees, it greatly diminishes its service to the public. Every Monday, there are two Technicians and one Hygienist that have a RDO; every Friday there are 3 Technicians and 3 Hygienists with an RDO; and every Thursday there is 1 Hygienist with a RDO. The Agency asserts that there are 20 days per pay period of employees on RDOs, which affects the sections productivity.

The Agency provided an affidavit from an Industrial Hygiene Supervisor, Kimelia Guerrero. She states that Hygienists provide guidance to the Technicians when conducting site surveys to ensure that the sampling is conducted properly; however, because there is only one Hygienist that is present 5 days a week, the Technicians are left to conduct their site visits without the proper guidance, or the surveys are postponed due to a lack of available personnel. Further, Ms. Guerrero asserts that the section has had to allocate more than 150 hours of overtime/compensatory time to assignments on Mondays and Fridays, when the employees are on RDOs.

Ms. Guerrero testifies that 60 percent of the Department's budget is tied to the section completing 100 percent of all worksite surveys by their due date. According to her, the section is operating at less than 40 percent and is unable to meet the goal without proper daily coverage due to the amount of employees on a RDO. She states that the section had to adjust the mission goals and how it conducts its operations. For example, the Department had to revise work plans because time sensitive reports were delayed.

The Agency refutes the Union's assertion that there is continual work before and after the section's duty hours for employees, as there is only a need for early arrival twice a year to perform air monitoring at the Department of Surgery's Operating Room. As another example, the Agency states that the section just completed an assessment for noise exposure to the dining facility staff, which required one staff member to come in early; however, this will not reoccur for another 3 years. Further, Ms. Guerrero states that the section supports a number of organizations that do not require service support requirements outside of these normal duty hours. Finally, the Agency asserts that the daily travel required by the employees that the Union claims occurs before and after work can be performed during normal business hours.

### b. The Union's Position

The Union states that Industrial Hygiene provides a unique service to not only Fort Bragg but also Camp MacKall, Simmons Army Airfield, Pope Army Air Field, Military Ocean Terminal Sunny Point, NC, and services to clinics and military housing in the greater Fayetteville area. The nature of the job requires daily travel to any of the various locations where the bargaining-unit employees may find themselves performing their duties: military housing, troop barracks, industrial facilities, administrative buildings, athletic facilities, medical facilities, veterinary facilities, motor pools, aircraft hangers, flight lines, military training areas, and other areas on any given day. The work required could be comprehensive surveys over several days, or routine surveys that may only require 1-hour of work.

The Union argues that the locations where the employees' tasks are performed do not have a standard set of hours, i.e., 9:00 a.m. to 5:00 p.m., such as locations that operate on a 24-hour schedule. The Union asserts that CWS allows the employees to accommodate the needs of its customers. The Union contends that the employees' CWS is actually a benefit to the Industrial Hygiene's mission and the customers it serves, and that terminating it would reduce the amount of time the employees have available to conduct Industrial Hygiene surveys in the workplace. The time prior to and after the reported service hours provides the employees the opportunity to conduct the other functions of their job. Finally, the Union contends that the employees use their administrative time before or after the section's operating hours to perform the necessary pre- and post-survey tasks, reading and responding to internal/external communication, writing reports, research, travel, and data entry.

### c. Discussion

The Union argues that the nature of the employees' job requires them to work unusual hours, traveling to survey facilities either before or after the workday. The Union, therefore, contends that terminating the CWS would actually reduce the amount of time that the employees have available to conduct site surveys, decreasing the section's ability to accomplish its mission. While the Union makes a palatable argument in its rebuttal that the CWS is actually beneficial to

the employees and the section, it does so without corroborating evidence.

The Agency, on the other hand, has supported its claims of adverse impact by providing a sworn statement from a section supervisor that CWS has contributed to a reduction of productivity. Because there are 14 out of 15 employees within the section that are on CWS, that accounts for 20 RDOs per pay period, which impacts the sections productivity and level of service to its customers. As a result, the section continuously operates at a reduced level of productivity, and consequently is unable to meet its mission goals due to a lack of adequate employee coverage. While some of the overtime/compensatory data postdates the Agency's decision to terminate CWS, the relevant data accounts for approximately 100 hours of additional time paid to employees in order to account for the RDOs. A return to a 5/8-schedule, with employees present each workday of the pay period during the section's hours of operation will enhance the section's ability to timely and properly complete its site visits, thereby achieving its mission goals. Thus, the totality of the evidence demonstrates that CWS in this section has caused a "reduction in productivity" and "diminished level of services" within the meaning of the Act.

### 3. Environmental Health Services

The mission of Environmental Health Services is to provide environmental and sanitary monitoring of water, food services, hazardous and medical waste, pest surveillance, Wet Bulb Globe Temperature, and general sanitation for the Fort Bragg military and civilian community.

#### a. The Agency's Position

The Agency states that the Environmental Health Services' hours of operation are from 8:00 a.m. to 4:30 p.m. There are four employees on a 5/4/9-CWS: Technicians' Jimmy Freeman; Lawrence Garcia; Raymundo Guerrero; and Clerk Kathy Peterson. Mr. Lawrence's and Mr. Guerrero's RDO is on the first Friday of the pay period and Mr. Freeman's and Ms. Peterson's RDO is on the second Friday of the pay period. Mr. Freeman, Mr. Garcia, and Mr. Guerrero start their tours of duty at 7:00 a.m. and end work at 5:00 p.m., while Ms. Peterson starts at 8:00 a.m. and ends at 5:30 p.m. The Agency states that the employees' CWS results in in 44 hours of unproductive, administrative time per pay period, contributing to a reduction in productivity. The Agency further asserts that there have been no events that have

required the employees' participation prior to the section's operating hours. For example, if an employee performs tests on drinking water, the samples are processed during the clinic's hours, and it takes 24 hours for a reading, the results are interpreted the next day, during the clinic's hours. Thus, testing is not performed prior to the clinic opening.

The Agency presented evidence that since Chief Eric Kelly took over in 2018, there has been an increase in inspections completed from 2017 (16 percent) to 2018 (42 percent). The Agency argues that this increase has plateaued because the section is fully staffed only one day a week. The Agency also provided an affidavit from the Director of the Department of Public Health, Sheryl Bedno, who asserts that employees in the Environmental Health Services on CWS start and end work after regular customer service hours. This impacts the sections ability to team with other sections and other Departments. Ms. Beno testifies that with the various RDOs of the employees, the section and the Department end up structuring the work around the employees' CWS, instead of focusing on meeting the mission.

Finally, the Agency states that there is no need for Clerk Kathy Peterson after the operating hours of the section. She is responsible for receiving and screening telephone calls. Ms. Peterson provides assistance or information required to the section's customers and refers questions requiring technical knowledge to the appropriate staff members. Ms. Peterson is needed during the section's operating hours each day to answer telephone calls, receive correspondence, and facilitate the needs of its customers.

#### b. The Union's Position

The Union states the nature of the Environmental Health Services' job requires travel almost daily to various locations, including Camp MacKall, ATF, and Linden Oaks. At these locations, the employees are required to conduct comprehensive public health surveillance of various establishments, during a significant portion of those establishments' operational hours. For instance, an employee inspecting a dining facility should examine breakfast, lunch, and dinner services. CWS extends the window of opportunity for surveillance of these services, to better match the range of the facility's operating hours. The early morning time provided by CWS is crucial, providing sufficient time to arrive at the site, prepare, and conduct an observation.

The Union contends that frequent emerging Environmental Health events occur unexpectedly. As a result, CWS better positions the employees to respond to any developing contingencies. Also, regular time sensitive tests are routinely processed by the section, such as in the water laboratory. Prompt access to these overnight results is permitted through CWS, meaning a head-start on any potentially sensitive findings. Finally, the Union states there are a multitude of Technicians available; thus, there is no problem covering the RDOs provided under the CWS.

In regard to Ms. Peterson, the Union states that she is actually available to the section's customers when most employees have left for the day. All of the functions that Ms. Peterson performs are directly related to the mission, regardless if it is prior to or after the section's hours. The Union asserts that the issues do not stop from arising just because it is before or after business hours.

#### c. Discussion

The Union attempts to rebut the Agency's evidence that CWS causes an adverse impact on this section; however, on balance, the Agency's evidence outweighs the Union's assertions. The Agency met its burden under the Act by providing an affidavit from the Department Director that the employees' CWS adversely impacts the sections ability to efficiently operate. While the Agency relies on some evidence that postdates its decision to terminate CWS (a plateau of inspections), the evidence nonetheless indicates that CWS has caused problems with the section's operating hours matching up with its customers. As a result, it has restructured work around CWS instead of its mission. The four employees' CWS results in a significant amount of unproductive, administrative time each pay period as explained by the Department Director in her affidavit. Although the Union refutes that Ms. Peterson is not needed after the section's operating hours, the Panel credits the Department Director's affidavit, which indicates customer support is only needed during the section's normal business hours. Thus, based on the totality of the evidence, the Agency has met its burden under the Act of establishing that CWS causes a "reduction of productivity."

#### 4. Army Public Health Nursing

Army Public Health Nursing enables total force readiness through promoting population-focused health, mitigating disease

and injury, assuring Force Health Protection, informing policy, and responding to emerging health threats.

a. The Agency's Position

Its hours of operation are from 7:30 a.m. to 4:30 p.m. The Agency provided an affidavit from the Chief of Public Health Nursing, Julie Lee. Chief Lee supervises six employees, three of which are on a CWS: Cassandra Bennet; Susan Deese; and Lona Jones work a 5/4/9-CWS from 7:00 a.m. to 4:30 p.m. The Agency argues that the employees' RDOs, which fall on the first and second Monday and the second Friday of the pay period, have impacted the section's ability to meet its mission.

Chief Lee states that the employees' RDOs have diminished the level of service provided to the public. The Agency asserts that it is unable to conduct community outreach services, training, or educational classes on Mondays or Fridays. For example, patients enrolled in the Latent TB Infection Control Program, which administers the vaccination to Army personnel cannot be held on the employees' RDOs. Training and educational classes are not being held on the first Monday of the pay period due to Ms. Deese's RDO. Community outreach services, such as Child and Youth Services training and educational classes, and Latent Control Program enrollment are not being held on the second Friday of the pay period because of Ms. Jones' RDO.

The Agency states that the Union is correct that the section does support health fairs and flu clinics; however, it does so mostly on weeknights or weekends and provides overtime for its employees. Therefore, the Agency contends that the employees do not need to be on a CWS to work during these functions. Additionally, the Agency contends that the employees' CWS result in nonproductive time spent when the employees first arrive at work from 7:00 a.m. to 7:30 a.m. each day when the clinic is not open. This accounts for 12 hours of unproductive, administrative time per pay period.

b. The Union's Position

The Union contends that the Agency failed to adequately prove the impact of CWS on the section. The Union states that some of the services provided by this section are to organizations that have operating hours that start prior to and close after the normal operating hours of 7:30 a.m. to 4:30 p.m. Therefore, the Union asserts that CWS in the Public Health

Nursing allows for extended coverage. Additionally, Public Health supports health fairs and the flu vaccine program annually and health fairs throughout the year. These two activities fall outside of the normal operating hours and CWS actually saves the Agency overtime during these occasions.

In relation to the TB Program, the Union states that the Program manager has not required the clinic to be open on Fridays. The Union also states that the section has avoided offering classes for Child Youth Services on Mondays and Fridays due to decreased staff, since these days have shown to have an increase in "call outs." The Union states that Ms. Bennett performs additional duties as a health coordinator and fills in for Epidemiology clinic on a daily basis, as well as in other areas where there are vacancies or absences. Thus, the Union states that Ms. Bennett does not accrue any "unproductive" time, since all of her duties support the clinic's operations.

#### c. Discussion

In the Army Public Health Nursing, the evidence provided by the Agency supports its determination to terminate the CWS for the section's employees. In this regard, the employees' RDOs have impaired its ability to accomplish its mission. The Agency provided an affidavit from the Chief of the section, who indicated that the section is unable to conduct community outreach services, training, or educational classes on the days the employees have a RDO. The section's mission is to promote awareness of diseases and emerging health threats. If the section is not fully staffed on all workdays, it cannot provide this outreach, and its mission is severely compromised.

The Union contends that CWS does allow the section to perform community outreach activities, such as flu vaccinations. However, as the Agency notes, it pays employees overtime for this duty during the times that vaccinations are administered each year. The Union also argues that the Program Manager of TB has not required the clinic to be open on Fridays, but this overlooks the fact that one of two nurses is unavailable on Fridays. Additionally, the Union does not explain how the Child Youth Services program's lack of classes on Mondays and Fridays is not due to CWS. On balance, the totality of the evidence supports a conclusion that the CWS creates "a diminished level of services" under the Act.

## 5. Epidemiology and Disease Control Clinic

The mission of this section is to reduce morbidity and mortality due to communicable disease threats and environmental hazards through surveillance, early detection, treatment, counseling, education, immunization, and outreach activities.

### a. The Agency's Position

The Agency states that the Epidemiology and Disease Control Clinic's hours of operation are from 7:30 a.m. to 4:30 p.m. and is the busiest in the mornings. There are three Technicians that conduct epidemiological investigations for suspected and diagnosed communicable diseases, investigate transmission routes and trace contacts of communicable infections, complete notification for patients with abnormal results, and provide education to patients. One Technician, Lashawna Hill is on a flexible CWS that permits her to flex her arrival and departure times by three hours.

The Agency provided an affidavit from the Chief of Epidemiology, Maureen Sevilla. Chief Sevilla stated that the normal time for patient hours are in the morning from 7:30 a.m. to 11:30 a.m. and in the afternoon from 1:15 p.m. to 4:30 p.m. She states that Ms. Hill's flexible schedule results in her not seeing as many patients as the other two Technicians. Ms. Hill typically reports to work at 9:00 a.m., which results in other employees covering the clinic from 7:30 a.m. to 9:00 a.m. Ms. Hill departs work at 5:30 p.m.; however, there are no patients after 4:30 p.m. Chief Sevilla asserts that if Ms. Hill started work at 8:00 a.m., she would be able to see an additional two to three more patients per day, resulting in 20 to 30 additional patients per pay period.

### b. The Union's Position

The Union states that Epidemiology has one employee on CWS, Technician Lashawna Hill. Ms. Hill is on a flexible schedule with core hours identified as 9:00 a.m. to 3:00 p.m. During the negotiations, the Union recognized the Agency's concern over the impact of the scope of Ms. Hill's flexible time. The Union was open to discussions on reducing the flexible time, but no formal agreement was reached prior to the issue coming before the Panel.

## c. Discussion

Finally, with respect to the Epidemiology and Disease Control Clinic, the Agency supported met its burden that CWS has caused an adverse impact on the Agency. The uncontroverted evidence provided by the Agency indicates that patients are seen in the morning from 7:30 a.m. to 11:30 a.m.; however, Ms. Hill is unable to see patients until 9:00 a.m., which is the busiest time of the day. As a result, the Chief has to assign other employees to cover for Ms. Hill. This not only inhibits productivity of the section, but decreases morale. Further, Ms. Hill stays 1-hour after the section closes, resulting in a lost hour of productivity in which she could otherwise see patients if her schedule correlated with the section. If Ms. Hill worked a 5/8-schedule, that would result in the section seeing 20 to 30 more patients per day. The Union did not provide evidence refuting the Agency's arguments. Accordingly, it is appropriate to conclude that Ms. Hill's CWS has caused a "reduction of productivity" under the Act.

### CONCLUSIONS

Under § 6131(c) (3) (C) of the Act, the Panel is required to take final action "in favor of the agency's determination to terminate [CWS] if the finding on which the determination is based is supported by evidence that the schedule has caused an adverse agency impact." Under the plain language of the Act, the evidentiary standard is whether the agency's decision regarding CWS termination is "supported by evidence," and if so, the law requires that the Panel take action "in favor" of that determination. As its legislative history makes clear, Panel determinations under the Act are concerned solely with whether an employer has met its statutory burden on the basis of "the totality of the evidence presented."<sup>4</sup> The plain language of 5 U.S. Code § 6131,<sup>5</sup> and prior decisions of the Panel,<sup>6</sup> demonstrate

<sup>4</sup> See the Senate report, which states:

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, 97<sup>th</sup> Cong., 2d Sess. at 15-16 (1982).

<sup>5</sup> See 5 U.S. Code §6131(a) ("[I]f the head of an agency finds that a particular...compressed schedule under this subchapter has or would have an adverse agency impact...") (emphasis added);" *id.* at (C) ("The Panel

that the Agency must present evidence that "particular" or specific work schedules of each unit involved in a dispute have caused an adverse impact.

The question presented to the Panel is whether the five sections CWS align with the demands of its patients and customers in a way that allows the sections and the Department to meet its program goals. The Agency demonstrated that it has not been able to schedule or maintain appointments for its patients or its customers; has not been able to provide outreach activities; has been unable to complete mission-related assignments; and cannot work in conjunction with other sections and Departments in order to carry out its mission. The Agency is not obligated to adjust its level of service or productivity to accommodate the work schedules of the employees; such a result is not in accordance with the purposes of the Act. Based on the totality of the evidence, the Agency has met its burden of demonstrating adverse impact with respect to all five sections within the Department of Public Health.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. § 6131(c), the Panel hereby orders the termination of the compressed work schedules for personnel in the five sections within the Department of Health: Occupational Health Services; Industrial Hygiene; Environmental Health Services; Army Public Health Nursing; and Epidemiology and Disease Control Clinic.



Mark A. Carter  
Chairman, FSIP

May 1, 2019  
Washington, D.C.

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shall take final action in favor of the agency's determination to terminate a schedule if the finding on which the determination is based is supported by evidence that the schedule has caused an adverse agency impact." (emphasis added).

<sup>6</sup> See, e.g., *Department of the Air Force 412<sup>th</sup> Test Wing*, Case No. 17 FSIP 077 (2017).