

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
BUTNER, NORTH CAROLINA

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
LOCAL 408

Case No. 22 FSIP 006

ARBITRATOR'S OPINION AND DECISION

This request for assistance concerning compressed work schedules (CWS) was filed with the Federal Service Impasses Panel (FSIP or Panel) by the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex (FCC), Butner, North Carolina (Agency or Management) on November 15, 2021 in accordance with Section 7119 of the Federal Service Labor Management Relations Statute (the Statute).¹ Following investigation of the request for assistance, the Panel determined that the dispute should be resolved through Mediation-Arbitration with the undersigned, Panel Member Howard Friedman. The parties were advised that if no settlement was reached during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, I conducted a Mediation-Arbitration on February 15 and 18, 2022 with representatives of the parties. Because the mediation portion of the proceeding failed to result in a voluntary settlement, I am required to issue a final decision resolving the parties' dispute in accordance with 5 U.S.C. §7119 and 5 C.F.R. §2471.11 of the Panel's regulations. In reaching this decision, I have carefully considered the entire record, including post-hearing briefs that the parties submitted to me.

¹ See 5 U.S.C. §7119.

BACKGROUND

The Agency operates low and medium-security Federal Correctional Institutions (FCIs) for men in Butner, North Carolina. The complex houses about 4,000 inmates. It is approximately 25 miles northwest of Raleigh, the state capital. The complex consists of four facilities and a minimum-security Prison Camp.

There are three AFGE local unions representing the bargaining unit at FCC Butner. AFGE Locals 405, 408, and 3696 represent about 1,400 bargaining unit employees at FCC Butner. The bargaining unit employees, represented by the AFGE, Local 408 (Union), are impacted by this proposed schedule change in the FCC Butner Trust Fund Department.

The FCC Butner Trust Fund Department consists of 35 bargaining unit employees located throughout the Complex. The bargaining unit consists of 4 Trust Fund Specialists (Specialists) and 31 Material Handler Supervisors (Supervisors). While the title of the Material Handling Supervisor is "Supervisor," they supervise prisons not other federal employees and, therefore, are eligible to be in a bargaining unit. The department is comprised of 16 operation sections (5 Commissaries, 5 Laundries, 1 Central Warehouse, 1 Commissary Warehouse, and 4 Information Technology Server Rooms). The Trust Fund Department supports the 5 FCC Butner institutions, providing services to approximately 4,000 inmates and 1,500 staff members working within the Complex.

A Specialist is assigned to each of the 5 institutions to provide on-site assistance to staff members and inmates. The Specialist is responsible for servicing all of the Trust Fund Programs. Inmate programs consist of TRULINCS (email) and TRUFONE (telephone). Staff member programs consist of the above, as well as the following: TRUFACS (Accounting), TRUNET (Institution Information), TRUPAID (Inmate Payroll), TRUVIEW (Investigative), and TRUWEB (Co-pay).

The Supervisors bid quarterly on their posts, which include Laundry, Commissary, Central Warehouse, and Commissary Warehouse.

- There is a full-service Laundry located at each institution within the Complex. Staff members are responsible for daily laundering operations for the inmate's institutional clothing and ensuring inmates are issued clothing that is

properly fitted, climatically suitable, durable, and presentable.

- The Commissary operation conducts sales to the inmate population on a daily basis with a yearly budget of 6 million dollars. The Commissary provides inmates the opportunity to purchase items or services not issued by the institution.
- The Central Warehouse provides services to the institution's staff members for the requisitioning and issuance of supplies, property, credit card orders, and purchase orders.
- The Commissary Warehouse receives and processes all Commissary and Trust Fund-related products in a secure location prior to distribution to each Commissary and its section located throughout the Complex.

The parties are covered by a master collective bargaining agreement (CBA) that expires on July 1, 2024. Article 18, Hours of Work, Section B, provides for local bargaining over changes to scheduling.

The Commissary is the only one of the above posts that offers CWS,² and it has been in place for a number of years. The Agency initially tried to end CWS in the summer of 2021; the Union filed an unfair labor practice charge as a result. To settle the charge, the parties engaged in negotiations and mediation with the assistance of the Federal Mediation and Conciliation Services (FMCS) in the Fall of 2021. The FMCS released the parties because they could not reach agreement and the Agency subsequently sought the assistance of the Panel.

ISSUE AT IMPASSE

The primary issue in this matter concerns the circumstances under which the CWS in dispute could be altered to a traditional 5/8 schedule.³ The Agency believes that it should have significant flexibility to potentially revert to such a schedule and the Union disagrees.

² It is a "4/10" CWS, meaning the employees work four 10-hour days a week but have 1 day off per week as well.

³ The Panel also asserted jurisdiction over an issue concerning future evaluations of schedules. On February 15th, the parties agreed to language on that issue. Thus, it is no longer before me.

1. Agency Position

At the conclusion of the Arbitration portion, the Agency provided the below final offers:

During participation in Annual Training performing custody reliefs, and/or departmental reliefs, all effected Trust Fund Specialist staff may be required to revert back to the standard Monday thru Friday schedule, for that particular pay period. In addition, this may apply to half (1/2) of the Federal Holidays.

During participation in Annual Training performing custody reliefs, and/or departmental reliefs, all effected [Material Handler Supervisor]⁴ staff may be required to revert back to the standard Monday thru Friday schedule, for that particular pay period. In addition, this may apply to half (1/2) of the Federal Holidays.

The two proposals are substantively similar. The only difference is that one explicitly applies to Specialists and the other explicitly applies to Supervisors. The language of the Agency's proposals state that impacted employees on CWS may be required to revert to a traditional 5/8 schedule in the event of annual training, relief situations, or Federal holidays. The Agency essentially offered two rationales in support of its proposals: (1) there is an established history of schedule reversions during holidays due to staffing shortages; and (2) an existing Memorandum of Understanding from 2005 (2005 MOU) establishes a "past practice" of reversions.

With respect to staff shortages, the Agency focuses mostly upon pay periods involving Federal holidays. During such periods, the Agency argues, the Agency has regularly had to pull employees from other posts to cover the posts of Supervisors in the Commissary department who were not on duty because of their CWS. This endangered the ability of other related departments--such as the Health Services Department and the Warehouse--to effectively meet their respective missions. Additionally, Supervisors have raised complaints about their CWS-related reassignments to the Commissary department. During the

⁴ At the conclusion of arbitration, the Agency provided two proposals that were each labeled for one of the two positions in this dispute. However, the body of both referenced solely Trust Fund Specialists. From context, however, it appears this was a typo.

Arbitration portion, the Agency provided emails and memorandum from employees who made statements demonstrating the existence of reassignments due to staffing shortages. The Agency also noted that it has reverted to traditional 5/8 schedules during training and medical emergency situations.

Turning to the 2005 MOU, the Agency claims that AFGE, Local 405--which is not this Union--entered into the MOU to create CWS for "Trust Fund Technicians."⁵ But, Local 405 also agreed to language which states that these employees "will work four eight hour shifts" during pay periods where holidays are observed. Thus, according to the Agency, this agreement demonstrates the existence of a "past practice" of the relevant employees reverting to a 5/8 schedule due to holidays. Moreover, the Agency notes that the national CBA and Bureau of Prisons guidance demonstrate the flexibility Management has always had to reassign employees for staffing purposes.

2. Union Position

At the conclusion of Arbitration, the Union provided the following counter offer:

During participation in in-person Annual Refresher Training (ART), and/or times of emergency as declared at the Regional or National level which require all staff to remain at the institution, all effected Trust Fund Specialist⁶ staff may be required to revert back to a standard work week as described in 5 USC 6101(a)(3)(B).

Much of the Union's presentation was devoted to refuting the Agency's proposal. To that end, the Union provided testimony from several bargaining unit employees in work units throughout Butner who claimed that they have never had to alter their respective CWS due to holidays. The Union claims it was never informed of any adverse impact arising from the existing CWS (which it believes has been in place for at least 17 years). Indeed, it provided email communications between the Union President and the Warden from July 26, 2021 to July 28, 2021, in which the Warden stated they would speak to the Trust Fund Specialist department head for confirmation on whether any

⁵ Agency Exhibit 1 at 4. Trust Fund Technicians were the precursor to Trust Fund Specialists.

⁶ The Union clarified that this language should also apply to Supervisors, albeit in a separate MOU that specifically references them.

issues were caused by the relevant CWS. The Union notes that the Agency never provided any evidence that any conversation between the Warden and the department head resulted in any negative information concerning the CWS.

The Union also disputes the significance of the 2005 MOU. The Union notes that the MOU was actually signed by the Agency and the *prior* union. Moreover, the Union provided a memorandum from the Warden dated October 2019 in which the Warden announced that all existing MOU's from the prior union were to be considered defunct.⁷ Indeed, under cross examination, one of the Agency's human resources employees testified that they considered the 2005 MOU to be defunct. Additionally, under further cross examination, Agency witnesses agreed that employees on CWS did not always change their schedule as a result of holidays despite the 2005 MOU's "will" language. Thus, the Union maintains that all the evidence presented actually demonstrates that the 2005 MOU was not considered a "past practice."

CONCLUSIONS

For the reasons set forth below, I will impose a modified version of the Union's final offer to resolve this dispute. There is no dispute that the parties have been operating under a CWS for a number of years. Rather, the controversy between the parties revolves around the status quo of schedule reversions and whether that status quo should remain unaltered. The Agency argues that the relevant employees regularly change their schedules during holidays, and that this practice is engrained in the 2005 MOU. As such, the Agency contends that I should codify this practice in an MOU moving forward. The Union vigorously disputes the idea that *any* changes arise due to holidays, or that the 2005 MOU is somehow precedent setting. On balance, I find the Union's contentions to be more credible.

There is no dispute that witnesses testified that they had to change schedules to provide coverage in the Commissary, but the connection between this coverage and the CWS in question was tenuous. The Agency provided witness testimony from a former Specialist who claimed schedule reversions occurred during some holidays, but they also testified that this was not the case for all holidays. Moreover, several Union witnesses flatly testified that there were no holiday-related schedule changes.⁸ On balance,

⁷ See Union Exhibit 3.

⁸ The Agency attempted to undercut this testimony by providing several e-mails and memorandum from employees who raised issues involving

then, I find the evidence presented concerning regular holiday-related shortages and schedule alterations to be unclear at best. As such, the Agency failed to establish that schedules reverted regularly--if at all--due to CWS and holiday-related issues.

The Agency's reliance on the 2005 MOU fares no better.⁹ As an initial matter, I note that the Agency did not raise or present this MOU until near the end of the mediation portion of this process. That alone raises questions about its credibility. Setting that aside, ample evidence in the record demonstrates that *even the Agency* stopped considering this MOU to be instructive years ago. Both the Warden (through Union Exhibit 3) and one of the Agency's human resource employees (through testimony) agreed that this MOU is "defunct." And, as already noted, this MOU was with *a different union*. Finally, as discussed in the preceding paragraph, witnesses did not always revert to a 5/8 schedule as a result of holidays.

Based on all the foregoing I find that the Agency did not establish convincingly that the relevant employees altered their CWS due to holidays. Consequently, there is an insufficient need for contractual language concerning holiday reversions and I reject the Agency's proposal. Although I do not find the Agency's presentation to be a convincing one, I am not compelled to impose the final offer that the Union presented at arbitration following the conclusion of mediation efforts. As already discussed, this proposal states:

During participation in in-person Annual Refresher Training (ART), and/or times of emergency as declared at the Regional or National level which require all staff to remain at the institution, all effected Trust Fund Specialist staff may be required to revert back

coverage. One exchange involved a Union witness who previously claimed they needed assistance due to staff shortages. As an initial matter, the Agency waited until *after* all Union witnesses testified to present these documents. The witnesses were never confronted with these statements and, as such, I find it difficult to credit those prior written statements. Even if I were to evaluate those statements on their merits, only one email tied staff shortages to employee time off and it was not clear from that email that the time off in question was due to CWS-holiday leave. See Agency Ex. 3 at 4. So, these documents were not overly helpful to the merits of the Agency's position.

⁹ I note that at no point has the Agency argued to me that bargaining in this matter is foreclosed because it is "covered by" the 2005 MOU. Indeed, it was the Agency who brought this dispute to the Panel for resolution on the merits.

to a standard work week as described in 5 USC 6101(a)(3)(B).

This proposal differs from the one offered by the Union during negotiations dated September 13, 2021, which the Agency included in its initial FSIP filing. That proposal stated:

During participation in Annual refresher Training (ART), performing custody reliefs, and/or departmental reliefs, all effected Trust Fund Specialist staff may be required to revert back to the standard Monday thru Friday schedule, 7:30am-4:00pm for that particular pay period.

Both proposals allow for modification during training, but that is where the similarities end. To wit:

- The prior proposal allows reversions for "custody" and "departmental" reliefs. The arbitration proposal omits these concessions.
- The arbitration proposal permits reversion for emergency situations but those situations can only be declared at the regional or national level. The prior proposal is silent on this topic.
- The arbitration proposal states reversion will occur in accordance with 5 USC §6101(a)(3)(B). The prior proposal states reversion to a standard Monday through Friday 7:30 a.m.-4:30 p.m. may be required.

As the Union's case was focused largely on rebutting the Agency's proposed language, the Union offered little explanation or justification for its departure from the language it presented during negotiations. The arbitration proposal jettisons the Agency's ability to alter schedules as a result of multiple relief situations. Indeed, other than training situations, the Union's arbitration proposal appears to allow the Agency to alter schedules only during emergency situations as determined at the regional or national level. Thus, under this language, it is unclear how much autonomy the Agency has to assess whether situations arise to an emergency level. The Union did not explain why this limitation should exist or why it felt the need to include it within the new language. Indeed, the Union did not offer much explanation for any of its changes. On

balance, then, I believe it is appropriate to impose the language from the Union's prior offer to resolve this dispute.¹⁰

ORDER

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Section 7119 of the Statute, I will impose the following language to resolve this dispute:

During participation in Annual refresher Training (ART), performing custody reliefs, and/or departmental reliefs, all effected Trust Fund Specialist staff may be required to revert back to the standard Monday thru Friday schedule, 7:30am-4:00pm for that particular pay period.

During participation in Annual refresher Training (ART), performing custody reliefs, and/or departmental reliefs, all effected Material Handler Supervisor staff may be required to revert back to the standard Monday thru Friday schedule, 7:30am-4:00pm for that particular pay period.

/Howard Friedman/
Howard Friedman
Arbitrator

March 9, 2022
Washington, D.C.

¹⁰ Finally, I note that both parties at one point raised issues and arguments concerning "adverse impact." Adverse impact arises under the Federal Employees and Compressed Work Schedule Act, in part, when an agency alleges that an existing CWS must be terminated because it is allegedly creating an adverse impact. See 5 U.S.C. §6131(c)(3). As this dispute arose under the Statute, the legal issue of adverse impact had no bearing on my decision. But, nothing in this decision should be read as constricting either party's ability to address future issues involving adverse impact as appropriate and in accordance with law.