

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
LA TUNA
ANTHONY, TX

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 83

Case No. 2022 FSIP 009

DECISION AND ORDER

In this request under 5 U.S.C. § 6131 of the Federal Employees Flexible and Compressed Work Schedules Act (Act), the Federal Service Impasses Panel (Panel) asserted jurisdiction over the impasse resulting from a determination by the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution La Tuna, Anthony, Texas (Agency) that a proposed Compressed Work Schedule (CWS) would likely have an adverse agency impact. The Panel ordered the parties to concentrated mediation with the Federal Mediation and Conciliation Services (FMCS), but the parties were unable to resolve the dispute. In accordance with the Panel's procedural order, upon being released from mediation, the parties engaged in a written submission procedure. For the reasons outlined below, the Panel now finds that the Agency has not met its statutory burden of demonstrating that the proposed CWS would likely cause an adverse agency impact within the meaning of the Act.

BACKGROUND

The American Federation of Government Employees, Local 83 (Union) filed this case under 5 U.S.C. § 6131(c)(2)(A) of the Act. The Agency is a low-security Federal Correctional Institute with a satellite minimum-security prison camp for

male inmates in Anthony, Texas. The facility is located near the Texas-New Mexico border and houses approximately 1,000 inmates. The Union represents a bargaining unit of approximately eighty-nine Correctional Services Officers assigned to the Agency's facility.

The Union is part of a nationwide consolidated bargaining unit represented by the Council of Prison Locals and the American Federation of Government Employees (AFGE Council). The AFGE Council and the Department of Justice, Federal Bureau of Prisons (BOP) are parties to a Master Collective Bargaining Agreement (CBA). The Master CBA, Article 18 permits local negotiation over requests for a CWS in accordance with the Act.

On September 22, 2021, the Union proposed a CWS for the bargaining unit employees (BUEs) of the Correctional Services (CS) Department. The CS Department consists of ten BUEs working in the Agency's Records Office, Receiving and Discharge, and Mailroom. The Union proposed a CWS in which each BUE would work four ten-hour days per week, commonly referred to as a "4-10." The parties negotiated and then sought mediation assistance from FMCS.

On November 18, 2021, the Union filed the request for assistance in this case with the Panel. Then, in a letter dated December 10, 2021, the Agency's CEO/Warden, Sandra Hajar, provided the Agency's declaration of adverse impact. Warden Hajar specifically identified that the Union's proposed 4-10 CWS would likely cause the Agency increased overtime costs and decreased efficiency. The Agency, through Warden Hajar's letter, argued that as a CWS is a fixed schedule, the Agency would not be able to make necessary employee schedule adjustments to ensure coverage for inmate arrivals. The Agency asserted that without being able to adjust schedules, it would incur the increased costs of overtime required to cover inmate arrival screenings.

On February 9, 2022, the Panel asserted jurisdiction over the impasse and ordered the parties to engage in concentrated mediation with the assistance of FMCS for a period of no longer than thirty days from the commencement of negotiations. The parties engaged in several sessions with the FMCS Mediator but were unable to reach an agreement. According to the Panel's procedural order, the parties engaged in a written submission procedure to resolve whether the Agency had met its burden under the Act in declaring the Union's proposed 4-10 CWS would likely have an adverse agency impact.

Specifically, the Panel's procedural order required the parties to submit their statement of positions (SOP) and any evidence by 5:00 p.m. (EST) on March 31, 2022, to the Panel's Staff and opposing party via email. While the Union fully complied with the Panel's order, the Agency did not. The Panel found the Agency's failure to comply with its procedural order to be telling of the Agency's lack of

comprehension of the Panel process, but none of the Agency's errors rose to the level of warranting the Agency's SOP to be stricken from the record. On April 5, 2022, both parties submitted timely rebuttals consistent with the Panel's order.

ISSUE AT IMPASSE

As the Agency has made a declaration that the Union's proposed 4-10 CWS would likely have an adverse agency impact, under § 6131(c)(2)(B) of the Act, there is just one issue for the Panel to decide. The Panel must decide whether the Agency's evidence shows that the Union's proposed 4-10 CWS for CS Department BUEs is likely to cause an adverse agency impact within the meaning of § 6131(b) of the Act.¹

POSITIONS OF THE PARTIES

- The Agency's Position

In the Agency's original declaration of adverse agency impact, the Agency claimed the Union's proposed 4-10 CWS would likely cause an increase in the agency's operating costs and decrease its efficiency. However, the Agency's SOP and rebuttal make neither of those arguments, instead arguing that the Agency must be able to adjust rosters under a CWS. In its SOP, the Agency repeated similar claims included in its original declaration that it would incur an increase in overtime costs. But, the Agency's SOP claims that such overtime would be due to not being able to adjust rosters under the Union's proposed implementation of the CWS (i.e., proposed rotation schedule). This is a departure from the Agency's original claim that the proposed 4-10 CWS, itself, would cause these additional costs. Overall, the Agency provided no evidence with its SOP supporting any of its claims.

The Agency's rebuttal also did not claim that the Union's proposed 4-10 CWS would likely have an adverse agency impact. Rather, the Agency's rebuttal included the Agency's last best offer for a 4-10 CWS. It appears to the Panel that the Agency has seemingly replaced its adverse agency impact argument with an argument over the merits of their proposed implementation of the Union's proposed 4-10 CWS.

- The Union's Position

The Union disagrees with the Agency's assessment that their proposed 4-10 CWS would likely have an adverse impact on the Agency. The Union maintains that the Agency has failed to prove that the proposed 4-10 CWS would likely have an adverse impact on the Agency's operations. The Union's SOP and rebuttal both claim the Agency has failed to provide any evidence to support its claim that the Union's proposed 4-10 CWS would have an adverse agency impact. Additionally, the Union refutes the Agency's claim that overtime incurred while processing

inmates is sourced from the Agency's local budgetary allocation. Rather, the Union argues, such overtime is charged to a national budget and, therefore, would not cause an increase in the Agency's operational costs.

ORDER

Under § 6131(c)(2)(B) of the Act, the Panel is required to take final action in favor of an agency head's determination not to establish a CWS if the findings on which it is based, are supported by evidence that the schedule is likely to cause an "adverse agency impact." Determinations under the Act are concerned solely with whether an employer has met its statutory burden. The Panel need not apply "an overly rigorous evidentiary standard but must determine whether an agency has met its statutory burden based on "the totality of the evidence presented."²

Here, based on the totality of the evidence, or lack thereof, the Panel finds that the Agency has not met its statutory burden. Instead of arguing that the Union's proposed 4-10 CWS would likely have an adverse agency impact, the Agency argues it has a legitimate need for a CWS with roster adjustments. That is, the Agency argues that it could implement the Union's proposed 4-10 CWS and specifies how it would go about doing so. The Agency's rebuttal makes clear that the Agency has not made a claim, let alone provided evidence to support, that the Union's proposed 4-10 CWS would likely have an adverse agency impact within the meaning of the Act.

Pursuant to the authority vested in the Panel under 5 U.S.C. § 6131(c) of the Act and § 2472.11(b) of the Panel's regulations, the Panel hereby orders the Agency to rescind its determination that the Union's proposed 4-10 CWS would likely have an adverse agency impact and bargain with the Union over the 4-10 CWS.



Martin H. Malin
FSIP Chairman

April 21, 2022

¹ 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 the implementation of a proposed CWS is likely to cause 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).

² 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).